



NATIONAL ACADEMY OF ARBITRATORS

VIDEOCONFERENCING TASK FORCE

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VIDEOCONFERENCE PROCEDURES—A PRIMER

The substance of this paper is drawn from a presentation by Task Force Chair Jeanne Charles at the 2019 Fall Education Conference in Savannah, Georgia.

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INTRODUCTION

This *Primer* is intended to be the first step toward the creation of a more comprehensive guide to the use of videoconferencing. To be of the most use to our members and the parties, given the exigencies of the present circumstances, the Videoconferencing Task Force (VTF) thought it prudent to provide this preliminary guide. The VTF was established by the National Academy of Arbitrators (NAA) in March 2020.

In an effort to provide practical assistance to our members and the parties they serve, the Academy has charged the VTF to identify a set of best practices for conducting hearings and pre-hearing conferences remotely.¹ This may apply to a number of different settings:

- The arbitrator in one location and the parties and their witnesses together in another;
- The arbitrator and the parties together in a hearing room, but otherwise unavailable witnesses testifying remotely;
- The arbitrator in one location, the Union and its witnesses in another, and the Employer and its witnesses in yet another; or
- Any combinations of the above.

There will be slightly different issues to consider depending upon the specific configuration of the participants. Some things, however, will be fairly standard across all of these settings.

Three things should be stressed at the outset. First, this paper assumes that the arbitrator is managing the arrangements. In fact, however, in most instances, it is up to the parties to make arrangements for video or other technologies. Most large entities, including law firms, have sophisticated technologies and tech support in house. That should be your first recourse when circumstances dictate the use of videoconferencing procedures.

Second, notwithstanding your reliance on the parties to arrange for the technology, it remains your obligation to manage the hearing, including setting the rules for the use of videoconferencing technologies. Early notice, in writing, to the parties as to those rules is highly advisable.

Third, while this paper discusses the available platforms and software, the Academy and this Task Force do not endorse any of these platforms. It is up to you to find one that is comfortable and meets your needs.

**HOW TO INCORPORATE VIDEOCONFERENCING
INTO YOUR ARBITRATION PRACTICE**

STEP 1. IDENTIFY A VIDEO INTERFACE TO USE

Listed, in no particular order and not exhaustive, are videoconferencing services/applications that can provide a platform for conducting the video hearing. Some are free and others offer a variety of subscription plans.

- Zoom
- Go To Meeting
- WebEx
- FreeConferenceCall.com
- Skype/Skype For Business
- Government Facilities

See the following article for a general discussion on options and security concerns:

Nicole Black, *It's Now a Trekkie World: Top Videoconferencing Tools for Lawyers*, **ABA J.** (July 26, 2019),

http://www.abajournal.com/web/article/top-video-conferencing-tools-for-lawyers?utm_source=salesforce_93557&utm_medium=email&utm_campaign=tech_monthly&utm_medium=email&utm_source=salesforce_93557&sc_sid=01132420&utm_campaign=&promo=&utm_content=&additional4=&additional5=&sfmc_j=93557&sfmc_s=45223219&sfmc_l=1528&sfmc_jb=112&sfmc_mid=100027443&sfmc_u=3779893.

You will find that many of these platforms have free versions and subscription versions. Some of the free versions can be quite limited and are probably not appropriate for a hearing. Zoom, for example, limits the number of participants and the length of sessions in its free version. Pay attention to the capacity of the platform and other features that you may need in selecting the version that will meet your needs. Others, such as Skype and Facetime, may have noticeable lags in transmission times which can complicate the question-and-answer format of the typical hearing.

Whatever platform you think will work for you, it is absolutely important to do several dry runs with family or colleagues before trying to use it for a hearing. The hearing or the pre-hearing conference is no time for learning on the fly.

You also will want to ensure that your computer is equipped with a webcam and an adequate audio system. If your computer is not equipped with an internal webcam, it will be necessary for you to purchase an external one. They run in price from \$25 to \$150. Some connect via a USB cable while others connect via USB and wireless. Others have a combination of camera and a built-in speaker. All webcams

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are plug-n-play; and therefore, are relatively simple to install.

Your computer may have an audio system built in. For a hearing, this may be inadequate. Some computer audio systems require that you be quite close to the computer to be heard. You may wish to purchase an external audio system. There are a variety of such systems. Like the webcam, some are USB connected and others are wireless as well as USB connected. The speakers run in price from about \$130 to \$150. All speakers are plug-n-play; and therefore, are relatively simple to install.

Finally, if you do not wish to make additional hardware purchases, and you have a tablet (e.g., an iPad), it can also be used to connect to web-based videoconferencing applications. Tablets typically have cameras and microphones integrated into the unit.

STEP 2: IDENTIFY WHEN TO USE THE VIDEOCONFERENCING TOOL

While the following is not an all-encompassing list of scenarios, there are a few circumstances to consider for determining if videoconferencing will serve the process.

Consider video hearings for the following cases/circumstances:

- Parties looking to minimize expense of travel
- Need to schedule a date in the near future
- Run out of time at the hearing and additional hearing date(s) need to be scheduled sooner rather than later
- Remote hearing sites with travel accessibility
- Document-only dispute
- To take the testimony of witnesses who cannot appear in person
- Expand choice of arbitrators (e.g., East coast dispute, newer arbitrator from the Mid-west)
- Arbitrator works frequently with the same parties

There is no evidence to suggest that videoconferencing will work for contract cases but not for discipline cases or *vice versa*. For a discussion of credibility concerns, see the discussion in Homer C. La Rue, *A Short Paper on the Existing and Future Use of Videoconferencing in Labor-Management and Employment Arbitration*, *infra* at 7.

STEP 3: OBTAIN AGREEMENT FROM THE PARTIES

The parties might not think of videoconferencing as an option. The arbitrator can suggest it by including boiler plate language in his or her biography listed with appointing agencies or in direct communication with the parties. Here is sample language inviting parties to consider videoconferencing for a hearing:

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Sample Notice of Offer of Videoconference to the Parties:

Please be advised that my office also offers videoconference hearings as an alternate to me traveling to the parties' location. The videoconference is conducted via a web-based software that comes at no cost to the parties. The parties simply need to have a desktop or laptop computer with a webcam. All parties and witnesses can be in the same location, just as if the arbitrator were there in person OR each party can be in its own location. The arbitrator will be able to see all attendees at the hearing, and the parties will be able to see the arbitrator. This option is encouraged when earlier hearing dates are needed or there is an interest in minimizing travel expenditures. Advise if the parties mutually agree to use this option, and more details will be provided on how to access this videoconferencing tool.

If everyone is in agreement that videoconferencing is desirable, you should, as part of your responsibility for managing the hearing, set clear rules as to how it will proceed. This will include agreement on how documents are to be shared and identified, and how remote witnesses are to be managed.

Arbitrators also should keep in mind their obligations under the *CODE OF PROFESSIONAL RESPONSIBILITY FOR LABOR MANAGEMENT DISPUTES* (Code) (National Academy of Arbitrators, American Arbitration Association and the Federal Mediation and Conciliation Service *as amended and in effect since Sept. 2007*). This reference to the Code is not to suggest that videoconferencing poses any special issues under the Code.²

STEP 4: SET HEARING DATE AND COMMUNICATE CONNECTION INSTRUCTIONS

- Schedule the hearing date as with any other hearing.
- If the parties will be hosting the videoconference, ensure that instructions are provided by a date certain and communicated to all involved.
- If you will be hosting the videoconference, set it up in whichever conferencing tool is being used and send notice to the parties with the instructions based on the video platform being used.

Here is a sample notice, using Zoom, where all the parties and witnesses are in one location with the arbitrator appearing by videoconference:

Sample Notice to the Parties of Videoconference—Arbitrator Appearing Via Videoconference

Videoconference Hearing on December __, 20__ 10:00 a.m. Central Time, 11:00 a.m. Eastern Time Union and Employer (Grievant Name and/or Case #) Meeting ID: 311 778 252.

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The videoconference hearing is conducted via Zoom’s web-based software that comes at no cost to the parties. The parties simply need to have a desktop or laptop computer with a webcam. All parties and witnesses should be in the same location, just as if the arbitrator were there in person. The arbitrator will be able to see all attendees at the hearing, and the parties will be able to see the arbitrator.

Join from PC, Mac, Linux, iOS or Android:

<https://zoom.us/j/311778252>

Click the link or copy/paste to your browser. The download process should start automatically in a few seconds. Then click the download to join the hearing.

**It is recommended that you try to access the Zoom site 30-60 minutes before the hearing start time to ensure your organization does not have a firewall prohibiting access to the site. If it does, please contact your IT department and request the firewall to be suspended for the duration of the hearing.*

If you have any problems, do not hesitate to contact my office.

STEP 5: TIPS FOR CONDUCTING THE HEARING

Thought should be given to how the hearing will flow. Here are some items to consider:

- Will it be recorded using the video tool? If so, advise the parties and obtain necessary permission.
- How will exhibits be handled? Should there be a due date for their submission?
- Will there be a need for screen sharing? This could be useful if a video needs to be played during the hearing.
- Will a court reporter be present? If so, he or she should be positioned near the speaker to minimize any sound issues.
- How will breaks or caucuses be handled?
- Instruct parties to speak toward the computer speaker to reduce the possibility of missed words.

As with anything else, the key to successfully running a videoconference hearing is to prepare in advance; be proficient with the videoconferencing tool used; and provide clear instructions to the parties well in advance of the hearing, so that the videoconference hearing will proceed with ease and minimum technical snafus

due to operator or other errors.

For further information about the Academy's work in the area of videoconferencing, see: Homer C. La Rue, *A Short Paper on the Existing and Future Use of Videoconferencing in Labor-Management and Employment Arbitration*, National Academy of Arbitrators, Fall Education Conference (Sept. 22, 2019), <https://law.missouri.edu/arbitrationinfo/?s=La+Rue>.

DOCUMENTS, WITNESSES AND RECORDING THE HEARING

Documents:

Document management will be critical to the success of videoconferencing procedures. You should obtain clear agreement as to advance sharing of all proposed exhibits. You may wish to designate a Dropbox (One-Drive or some other file-sharing application) for the hearing, so that all documents can be available to all parties. Ideally, the parties should use a Bates style numbering system for the documents, so that there is a clear reference number for everyone to rely on when documents are being reviewed.

Witnesses:

Remote witnesses are subject to the same limitations as live witnesses in the hearing room. They may not consult with anyone during testimony, and they may not consult documents that are not in the record, or about which they are not being questioned irrespective that the document may be in the record. The parties must agree to advise their witnesses of these limitations. The arbitrator should confirm those limitations with the witness before swearing in the witness. The arbitrator should ask the witness to confirm that there is no one else present in the room, and that they are not consulting any documents not provided by counsel during direct and cross examination. It goes without saying that any documents the witness will be questioned about should be available to the witness.

Recording:

Many videoconferencing platforms allow for the recording of the video sessions. If the video is going to be recorded, you should obtain the consent of the parties and of every witness to the recording. During breaks, remember to pause the recording. Even if you have paused the recording, you may wish to advise the parties to take all discussions outside of the hearing room. This will ensure that the arbitrator is not inadvertently privy to any ex parte discussions.

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Sample Instructions to the Parties for Not-in-Person Witness Testimony³:

If counsel finds it necessary to have a witness testify by a method other than in-person at the hearing, the counsel seeking to do so must contact opposing counsel as soon as the necessity is known to counsel and soon enough so as not to delay the hearing.

If there is agreement between counsel that a witness will testify by a method other than in-person at the hearing, counsel seeking the other-than-in-person testimony must follow the procedures set forth below. Counsel seeking the other-than-in-person testimony shall be responsible for the set-up and any costs involved. If both counsel will have a witness testify by a method other-than-in-person, both counsel shall bear equally the responsibility for the set-up and any costs involved.

If there is not an agreement between counsel that a witness may testify by a method other than in-person at the hearing, counsel and opposing counsel shall contact the Arbitrator for a conference call. Counsel and opposing counsel shall agree on three (3) alternate dates for a conference call, and the Arbitrator shall select from among the dates offered if there is one acceptable to the Arbitrator.

If there is an agreement that a witness shall testify by a method other-than-in-person, or if the Arbitrator has ordered that a witness may testify by a method other-than-in-person, the following procedures shall be followed for the other-than-in-person testimony:

- a. The method selected for the other-than-in-person testimony shall be via videoconference.
- b. An audio-only conference (i.e., via telephone only without video) may be done only with permission of the Arbitrator and for good cause shown why a videoconference is not feasible.
- c. On the day of the testimony, the witness shall be in a place that is private. That is:
 - i. There shall be no one present in the space with the witness during the testimony given by the witness;
 - ii. There shall be no one capable of overhearing the testimony of the witness.
- d. Documents necessary for direct and cross-examination shall be transmitted to the witness (if the witness is at a remote location from the hearing site) prior to the date of the testimony by the witness, and in a sealed envelope clearly marked as “Direct Examination” and “Cross-Examination.”

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- i. Neither the *direct examination* envelope nor the *cross-examination* envelope shall be opened by the witness until the day of testimony and at the direction of counsel conducting the examination.
 - ii. The witness shall open each envelope, when directed, in full view of counsel and the Arbitrator.
- e. Prior to examination, the witness shall be asked to take an oath or affirmation.

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ENDNOTES

¹ The Task Force's production of a more comprehensive report will contain more detail about best practices and other topics of interest to those who choose to use videoconferencing for arbitration hearings.

² Pre-hearing conduct is addressed in the *Code*. In pertinent part, it reads:

PREHEARING CONDUCT

1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.

a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

b. *Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.*

Code, Art. 4, Section 1 at 18.

The *Code* also addresses considerations for the arbitrator at the hearing. These general principles should also guide the arbitrator when using videoconferencing to conduct the hearing. In pertinent part, the *Code* provides:

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HEARING CONDUCT

A. General Principles

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.

a. Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.

b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

c. An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

Code, Art. 5, Section 1 at 19.

³ This sample is from Arbitrator Homer C. La Rue's *Statement of Proceeding*. The full document is not attached to this **Primer** because the *Statement* goes beyond the scope of videoconferencing—the focus of this **Primer**. The use of the sample in this **Primer** is not to suggest that there are not other valid options for the handling of witness testimony at a site remote from the hearing site.