

Professional Perspective

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Lessons Learned From Virtual ADR During a Pandemic

Contributed by *Elliot K. Gordon, JAMS*

The Covid-19 pandemic has transformed the way that many businesses operate. The world of alternative dispute resolution is no exception. Arbitrators and mediators quickly pivoted from asking “What’s Zoom?” to developing an expertise in managing virtual sessions. Much like some of the famed stages of grief, attorneys accustomed to in-person hearings and mediations went from denial, to anger, to bargaining, to acceptance—and, in some cases, even appreciation.

While in-person hearings and mediations will be the norm after the pandemic is in the rear-view mirror, virtual proceedings, including hybrid in-person/videoconference sessions, will be an enduring feature of the ADR landscape. Based on the substantial experience gained during the pandemic, the following tips can guide both neutrals and advocates as virtual ADR is transformed from a necessity to a choice.

What Carnegie Hall and Zoom Have in Common

The idea behind the old joke about practice being the way to get to Carnegie Hall can be applied to virtual proceedings. Attorneys have the right to expect that their arbitrators or mediators are comfortable with managing virtual proceedings—such as moving people in and out of breakout rooms—and that the ADR providers can offer technical support on a variety of platforms.

Parties should strive to reach agreement on which platform to use and satisfy themselves that it meets their cybersecurity requirements. Not only should advocates be well-versed in using the chosen platform themselves, but they should ensure that their clients and, in particular, their witnesses, know how to access the platform and are comfortable testifying and participating in an online format.

Even if attorneys are meeting in person with witnesses to prepare them to testify, it is useful to conduct practice examinations using the platform that will be used for the hearing. This is also the time to ensure everyone has appropriate lighting and that their video and audio are working properly. Similarly, attorneys—especially those who may not know their clients very well—can use these practice sessions to get to know their clients better.

Finally, the parties and the arbitrator should participate in a trial run in advance of the arbitration hearing. This can be done in conjunction with a final status conference, or as a stand-alone event shortly before the hearing.

Handling Exhibits in an Online Hearing

Perhaps the most important prerequisite to ensuring an efficient virtual hearing is determining how exhibits will be handled. This requires dialogue between the parties and with the arbitrator that will lead to a consistent approach that enhances the efficiency of a hearing and works well for the witnesses.

As with in-person hearings, exhibit lists and exhibits should be exchanged a reasonable time in advance of the hearing, and the parties should develop a joint exhibit list to avoid duplicate exhibits. Ideally, participants should have two screens—one to see other participants and one to see exhibits—but a split screen can be used as well, especially for witnesses who may not have access to two screens. In some cases, a third device or screen may be desirable in order to follow the real-time stenographic transcript or to take notes.

A number of options are available for handling exhibits during the hearing itself. The simplest and perhaps least expensive method is for the arbitrator and witnesses to be provided with either hard or electronic copies of exhibits in advance, which they can then access during the hearing. While this works well for direct testimony, the parties must still come up with a solution for exhibits to be introduced during cross-examination.

Some court reporting services and other companies offer online exhibit management systems that can provide witnesses temporary access to exhibits during their testimony. In addition to the jointly marked exhibits, each party can have its own folder for holding impeachment exhibits, which can then be made accessible to a witness during cross-examination.

While the screen-share function of an online platform can also be used, this has the disadvantage of not allowing witnesses to review various pages of a multi-page document before answering questions. Another more cumbersome but workable alternative, particularly for impeachment exhibits, is for parties seeking to introduce those exhibits to email them to the

arbitrator and opposing counsel and, if permitted to present them, to then email them to the witness as well. Alternatively, impeachment exhibits can be sent in sealed envelopes to witnesses, to be opened only at the hearing in front of the arbitrator.

In larger cases, where enough is at stake, one or both parties may also employ trial technologists, just as they would at an in-person hearing, to assist with the exhibit management process. Where technologists are not being used, attorneys should rely upon another lawyer or paralegal to assist with exhibit management to enhance the flow of an examination.

As with preparing generally for testimony, attorneys should also practice accessing and viewing exhibits with their witnesses in advance of the hearing, and attorneys should ensure their witnesses have downloaded any necessary apps or programs for accessing document exhibit systems, and that their witnesses have any passwords and any other necessary login information.

Virtually Evaluating a Witness's Credibility

Some attorneys have expressed skepticism that a witness's credibility can be adequately assessed in a virtual proceeding. But the reality is that credibility is judged mainly by the internal coherence of a witness's testimony, how that testimony matches up to that of other witnesses and how it compares to the documentary record and an assessment of the witness's motives.

In addition, research has demonstrated that judging credibility primarily by assessing body language is fraught with risk, especially if an arbitrator is not familiar with the baseline body language of a witness—which is almost always the case. And finally, to the extent that facial expressions, the avoidance of eye contact, and squirming are reliable indicators of prevarication, arbitrators have a very good view of a witness during the hearing, especially if using speaker view during the witness's examination.

Technical Glitches Are Inevitable

Just as attorneys' computers crash, power blackouts occur, and hearings are delayed because three lanes are closed on the San Diego freeway or a flight has been canceled due to a snowstorm, glitches can occur with virtual hearings. That is why the parties should be working with an ADR provider that furnishes a moderator for the hearing or mediation, and someone, or a team of people, who can troubleshoot when problems do arise. The risk of technical problems can be minimized through practice sessions designed to test audio and video functioning, ideally using the same physical setting, networks, devices, and platform that will be used during the hearing or mediation.

Duration of Online Hearings Versus In-Person Hearings

As arbitrators become more comfortable in managing these hearings and attorneys gain more experience in participating, any meaningful differences in duration are unlikely to remain over time. In addition, parties, with guidance from and agreement by the arbitrator, should consider various time-saving devices, such as using declarations in lieu of live examination for direct testimony—long a feature of international arbitration—and allowing an expert's written report to serve as their direct testimony. While it may be appropriate to permit a brief period of direct testimony just to get a witness comfortable "in the chair" before proceeding to cross examination and redirect testimony, this approach can save many hours over the course of a hearing.

Alternatively, attorneys can designate deposition testimony in lieu of live cross-examination, especially when the testimony has been videotaped and the arbitrator can therefore observe the witness's testimony and body language. Finally, in appropriate cases parties should be encouraged to enter into stipulations to minimize time spent during the hearing establishing uncontroverted facts.

Can I Be in the Same Room as My Client and Witnesses?

There is no "one size fits all" way of conducting a virtual hearing or mediation. Some sessions will be fully remote, but sometimes counsel will prefer to be in the same room with clients and/or witnesses. In such cases, the parties and arbitrator will have to agree on whether each participant should still sign in on their own device. In that case, advance testing should be done to ensure there are not audio problems arising from multiple devices in the same room and that there is sufficient internet bandwidth.

While having more than one person using a single device might avoid some technical challenges, it can be more difficult for the arbitrator to get a good view of a witness since the camera will have to be farther away in order to ensure that all persons using the device are visible. That will be less of a concern for virtual mediations.

Preventing Surreptitious Communication to Witnesses

As in life generally, those fully committed to cheating may succeed in doing so. However, having all participants visible to the arbitrator should severely limit the ability of counsel and their witnesses to engage in surreptitious communications. Pre-hearing orders should expressly prohibit any type of communications with witnesses during their examinations, thereby creating the foundation for an award of sanctions if such conduct occurs.

In addition, arbitrators should admonish witnesses before they begin their testimony that such communications are prohibited and confirm that they are alone in the room. Witnesses should also be prohibited from using virtual backgrounds and, where appropriate, can be asked to scan the room with their camera. Attorneys should feel free to ask witnesses what documents they have before them when commencing a cross examination, and confirm that they have no notes or annotated exhibits. If improper communication is suspected, attorneys should raise the issue with the arbitrator promptly so that the issue can be addressed immediately.

Other Ways to Maximize the Efficiency of a Hearing or Mediation

There are many steps attorneys and neutrals can take to enhance the efficiency of a virtual proceeding. Here are a few:

- Arbitrators should issue an order well in advance of the hearing setting forth the agreed-upon protocols for a virtual hearing.
- Ensure a participant's name is on their Zoom or other platform's profile to ease admission into the hearing and breakout rooms
- Make sure that the moderator has all participants' contact information, and that all of the participants know how to reach the moderator or neutral.
- Have backup witnesses ready in case a witness is having technical problems that cannot be resolved quickly.
- Participants other than the arbitrator, witness, examining attorney, and defending attorney should mute their audio.
- Disable private chat features and prohibit recording or taking screenshots of the hearing or mediation.
- Have all participants sign in at least 15 minutes early to ensure that the proceedings can start on time.
- Have a backup plan for exhibit sharing.
- Ensure participants are not on a public internet connection or in public places, and that access to meetings is password-protected.
- Try to remain logged in to the meeting to avoid complications when logging back in. Where appropriate, such as during breaks, mute your audio and turn off your video if you are not going to a breakout room.
- Where possible, avoid having a participant join by both phone and video.
- Have the attorneys plan a schedule for each hearing day, with estimated examination and cross-examination times for each witness.
- For mediations, consider separate starting times for each party to avoid login congestion, and develop a schedule that accounts for different time zones.
- Build in breaks for "Covid-19 wipe-downs" between witnesses where multiple witnesses are testifying from the same location, and to minimize fatigue from being online all day.
- Where financially feasible for the parties, use a court reporter.
- For mediations, use an electronic signature program for executing settlement agreements, or ensure parties have access to devices that allow them to print, sign, and return agreements.

Advantages to Online Hearings and Mediations

While many attorneys and neutrals are yearning for the day they can return to in-person hearings and mediations, some have discovered that there is at least one distinct advantage to virtual dispute resolution: no travel. Virtual hearings can eliminate the time and expense associated with travel.

Because of these time and cost savings, even when we return to in-person proceedings, it is more likely than not that parties will sometimes opt for a hybrid model in which at least some participants join online, such as claims adjusters Advantages to Online Hearings and Mediations in mediations and expert witnesses in arbitrations. In such cases, it will be a great advantage to use facilities that have “Zoom rooms” or similar audiovisual functionality. The availability of joining online might encourage persons who might otherwise skip a mediation to participate, potentially enhancing the prospects of a successful resolution.

Finally, the growing use of virtual ADR also means that parties and their counsel may be more willing to expand their search for neutrals—especially those with particular subject matter expertise—beyond the geographic boundaries that might have traditionally been used in the selection process.