

Virtual Arbitration: 10 Tips for a Fair and Efficient Process

The coronavirus pandemic has affected alternative dispute resolution (ADR) efforts, and parties with pending arbitration have been considering using various videoconferencing platforms instead of waiting for in-person hearings.

By Zela G. Claiborne

The coronavirus pandemic has changed how we do everyday things like connecting with friends and buying groceries, and it has affected our alternative dispute resolution (ADR) efforts as well. Parties with pending arbitration hearings have been considering using various videoconferencing platforms instead. JAMS has been developing and promoting the use of remote technology for a number of years, and in recent weeks has increased its frequency of virtual trainings for its neutrals on various platforms such as Zoom. Of course, parties are free to choose any other platform that suits their needs.

Here are 10 tips for using videoconferencing platforms for arbitrations.

- **Procedures.** The parties and their attorneys must decide whether they want to submit their case on the papers, delay the hearing, or use Zoom or another virtual arbitration platform. During a recent status conference held via Zoom, counsel expressed their preference for an in-person hearing but agreed to use Zoom if our

Resolution Center is still closed by the scheduled hearing date. If Zoom is to be used, there will be another status conference to discuss the details and agree on procedures. Those details will be set forth by the arbitrators in a revised scheduling order so that all participants understand the process.

- **Virtual Depositions.** In arbitrations, depositions are usually limited. However, in preparation for the hearing, depositions may be taken virtually if the parties and their counsel agree. Care must be taken to ensure the attorneys have access to the necessary documents, either via a screen share or on a thumb drive. Thereafter, the witnesses may appear at the virtual hearing to be examined.
- **Written Testimony.** In order to save time during the hearing, counsel may agree to submit the direct testimony of some or all of the witnesses in writing in advance of the hearing, along with copies of the key documents related to that testimony.



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Then the witnesses must be available for cross-examination at the hearings. This approach is commonly used in international arbitrations, where depositions are rarely used.

- **Expert Witnesses.** The process for expert witnesses may be similar to that for percipient witnesses, with experts being required to provide reports that will be used as summaries of direct examination. Thereafter, the experts must be cross-examined at the hearing.
- **Privacy and Confidentiality.** There have been concerns about the reliability of Zoom's

recording feature, as well as how it ensures confidentiality. It is important to protect intellectual property or financial information that may be discussed in an arbitration from being obtained by a non-party. In a complex commercial case, it may be best to hire a court reporter to prepare a reliable transcript. It's also important to note that JAMS uses the Zoom HIPAA-compliant platform for all scheduled virtual proceedings, including mediations and arbitrations. This Zoom platform incorporates the necessary security features to satisfy the requirements of the Health Insurance Portability and Accountability Act (HIPAA).

- **Scheduling.** A virtual hearing may require more time than an in-person hearing, so having a schedule (and adhering to it) is important. Counsel should prepare a detailed schedule and submit it to the arbitrator a few days in advance of the hearing. Each side should estimate the time needed for its presentation. As is often done, counsel should discuss splitting the available time 50/50, as that will encourage efficiency and a focus on the most important issues.
- **24-Hour Notice of Witnesses.** In order to assure a fair process and deal with the unforeseen circumstances that may arise in any hearing, each side should notify the opposition at least 24 hours in advance of any witnesses it intends to call. This will allow everyone to be prepared and give
- counsel time to negotiate regarding any witness schedules that may need to be adjusted.
- **Technical Specialists.** Much of the evidence in any arbitration consists of documents. It is common in a big case for each side to enlist a technical assistant to present the documents onscreen and to troubleshoot any problems that arise. It is important to have at least one specialist present for a virtual arbitration if there will be numerous documents offered in evidence.
- **Necessary Equipment.** Much detailed information is available online about the equipment necessary to participate in a virtual hearing. However, the most important items are simply a laptop computer with a built-in webcam and a source of light so that each participant can be seen clearly. In a document-heavy case, participants should have all exhibits on a thumb drive. They may also want to use a second laptop just for reviewing the exhibits, perhaps using Zoom's dual-monitor feature. Some participants may wish to use an external microphone or a headset, but these are not necessary.
- Each participant should practice using the chosen platform ahead of time in order to work out any technical issues. The arbitrator will deactivate the recording function to maintain confidentiality. Further, some providers will furnish a moderator to greet the parties at the beginning of the hearing.

- **Contact Information.** The participants must plan for the possibility that someone will be disconnected at some point during the hearing. All participants should exchange email addresses and phone numbers. Additionally, JAMS assigns a highly skilled video conference moderator who can navigate the specific features and assist the arbitrator should any problems arise.

In order to help companies and others obtain prompt resolution of their disputes and move forward with business during this time of social distancing, parties with cases set for arbitration may find virtual arbitration to be an attractive option. Likewise, parties with cases set for civil trial might also consider using the arbitration process. Courts generally are not holding civil trials at this time. When the courts resume operation, there will be a huge backlog. Arbitration is a flexible process that can be tailored to each case. Businesspeople waiting for trial might consider entering into an arbitration submission agreement in order to achieve resolution of their international and domestic disputes.

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