

# Witnesses Via Videoconference

National Academy of Arbitrators

Videoconferencing Task Force

July 13, 2020

1

## Presenter Bio

Keith D. Greenberg, Esq. is a labor and employment arbitrator and mediator from North Bethesda, Maryland. He is a member of the National Academy of Arbitrators, and serves as the Academy's Technology Coordinator and as a member of its Videoconferencing Task Force. He is a graduate of the Cornell University School of Industrial and Labor Relations and of the University of Michigan Law School.



© 2020 NAA VTF and Keith Greenberg



2

## Our Goal Today

- Consider how to best emulate the experience of eliciting and receiving witness testimony in an in-person hearing
  - Preparation is key
  - Next week's session will address document and exhibit handling
- What we will cover:
  - Considerations for Promoting Unaided Remote Testimony
  - Preparations for Testimony at a Video Hearing
  - Witness Instructions and Preliminary Questions
  - Troubleshooting a Witness's Technological Problems

© 2020 NAA VTF and Keith Greenberg



3

## Baseline Terminology for Today

- Participant
- Host
- Waiting Room or Lobby
- Invitation
- “Pin” a video
- “Spotlight” a video

© 2020 NAA VTF and Keith Greenberg



4

## Potential Concerns with Remote Witness Testimony

- Connectivity
- Questioning
- Echo and Audio Feedback
- Distraction
- Fatigue
- Unclear Expectations
- Mistrust
- Juggling Chainsaws



© 2020 NAA VTF and Keith Greenberg



5

## Concerns About Remote Witness Testimony

- A Blunt Acknowledgment
  - It is more difficult, via video, to ascertain whether a witness is being coached or referring to out-of-view notes or materials
  - It can be unclear whether someone else is present with the witness during their testimony
- On the other hand . . .

© 2020 NAA VTF and Keith Greenberg



6

## Concerns About Remote Witness Testimony

- A Process Response
  - The collective bargaining process, at its best, engenders a certain amount of cross-table trust and respect
    - What goes around comes around
  - Attorneys involved in the process have ethical obligations that guard against abuse of the hearing process

© 2020 NAA VTF and Keith Greenberg



7

## Concerns About Remote Witness Testimony

- A Pragmatic Response
  - Telephonic testimony is not unusual and is often acceptable in labor arbitration hearings
    - Video testimony is generally an improvement, providing more information about a remote witness's surroundings and allows non-verbal cues to be seen
  - Testimony is often provided in the context of documentary or other evidence that may contradict false testimony
  - There are ways to address these concerns

© 2020 NAA VTF and Keith Greenberg



8

## Approaches to Promote Unaided Remote Testimony

- Advance discussion between the advocates, with or without the arbitrator about potential concerns
- Setting expectations for witnesses
- Have a trusted individual with the witness, if possible
- Keep an eye on what the witness is doing on-screen
  - But not every glance away from the camera is necessarily cause for concern
- Trust and respect among the advocates
- Reducing temptation for the witness to reach out

© 2020 NAA VTF and Keith Greenberg



9

## Reducing the Need for Witness Testimony

- Many witnesses do not relish the experience of testifying
  - Although others do
- Work to encourage/reach stipulations of fact, where possible
  - Fewer witnesses usually make for a shorter hearing
  - Shorten or eliminate witness testimony, to the extent possible and appropriate



© 2020 NAA VTF and Keith Greenberg



10

## Preparations for Witness Testimony

- Pre-hearing conference
- Where will each witness physically be?
  - At home?
  - Same room as advocates?
  - In a location with another party representative?
- What equipment will the witness have available?
  - A desktop or laptop?
  - A tablet?
  - A smartphone?
  - Something else?

© 2020 NAA VTF and Keith Greenberg



11

## Preparations for Witness Testimony

- Accessing exhibits
  - Hard copies
  - Electronic exhibit files (e.g., PDF and audio or video files)
  - Screensharing
- How is the witness's internet connection?
  - To the location and to the computer
- Party/client representatives and observers

© 2020 NAA VTF and Keith Greenberg



12

## Preparations for Witness Testimony

- For witnesses in the same location as an advocate:
  - The advocate can provide the witnesses with hard copy exhibits at the appropriate time and direct the witnesses to exhibits as requested by both advocates and the arbitrator
    - Electronic or screenshared exhibits may also be used
  - We will need reliable audio and video from that location
    - A single audio input and audio output for that room
      - A good speakerphone or conference microphone, or a laptop with an appropriate microphone
    - Video
      - Is there a camera well-positioned to capture the whole room at once, or should each participant in the room have their own device to see and be seen?
  - Overall connectivity considerations

© 2020 NAA VTF and Keith Greenberg



13

## Preparations for Witness Testimony

- For witnesses in a location with a party representative:
  - For example, with a Union steward or a staff member from HR
  - The representative can provide the witnesses with hard copy exhibits at the appropriate time and direct the witness to exhibits as requested by both advocates and the arbitrator
    - Electronic or screenshared exhibits may also be used
  - The witness is likely the only person speaking in the room, so fewer audio and video issues
  - Overall connectivity considerations

© 2020 NAA VTF and Keith Greenberg



14

## Preparations for Witness Testimony

- For a witness located apart from all other participants or party representatives:
  - For example, a witness at home or in their office
    - Accessing exhibits
  - The witness is the only person speaking in the room
    - Keep a pair of earphones or headphones handy in case of feedback or echo
  - Overall connectivity considerations

© 2020 NAA VTF and Keith Greenberg



15

## Setting Expectations for Witness Testimony

- The arbitrator and the advocates should decide the following, for each anticipated or potential witness:
  - How and when should the witness access the exhibits?
  - Who should the witness contact if there is a technological problem?
  - What can and can't the witness do while actively testifying?
    - (e.g., no checking email or chatting even though using the computer)
  - What can and can't the witness do and expect during a break?
    - For example, consider using the waiting room or lobby feature to have witnesses leave the hearing room during objections, when necessary
- The party calling a witness to testify should provide the witness with answers to these questions in advance of the hearing

© 2020 NAA VTF and Keith Greenberg



16



## Suggested Preliminary Witness Questions

- Have the witness placed under oath or affirmation, if the Parties choose to have witnesses sworn
- Ask the witness who, if anyone, is with them
- Ask the witness what materials are currently in front of them (electronically or otherwise)
- Ask the witness to advise if someone enters the room or if they come to access additional materials

© 2020 NAA VTF and Keith Greenberg



17

## Suggested Preliminary Witness Instructions

- Instruct the witness that the arbitrator and the Parties expect to have the witness's full and undivided attention during their testimony.
- Instruct the witness that, while the witness is testifying, they are to communicate only through their testimony.
  - Reiterate that email, texting, or other forms of communication are not permitted. If the witness is disconnected during their testimony, they may contact the advocate who has called them as a witness solely to facilitate rejoining the hearing.
- Instruct the witness to put any materials away until directed to review them
- Instruct the witness, when testifying, to wait a moment before answering
- Direct the witness to stop answering if an objection is posed

© 2020 NAA VTF and Keith Greenberg



18

## Other Witness Topics to Discuss at a Pre-Hearing Conference

- Sequestration
- Witness availability
- Breaks
- Test run (including for witnesses)
- Accommodations for witnesses
- Recordings

© 2020 NAA VTF and Keith Greenberg



19

## The Hearing Day

- Make sure that witnesses have the conference information for the video hearing
  - Use a “clean” invitation that omits the prior correspondence between the arbitrator and the advocates
- Have the witnesses sign on early to verify a good connection

© 2020 NAA VTF and Keith Greenberg



20

## The Hearing Day

- Verify that there have been no changes in how the witnesses will access the hearing
- Follow the plan that the arbitrator and advocates developed in advance

© 2020 NAA VTF and Keith Greenberg



21

## Perceptions in a Video Hearing

- Generally, what you see is not quite what everyone else sees
- In a video hearing, as arbitrators managing a hearing and as advocates putting on a case, we have less control over certain aspects of the hearing, including the overall environment
  - We do not have control over how we are perceived
    - A large face in Speaker View
    - One of many small faces in Gallery View
  - Each participant can “pin” one video feed for themselves
  - The host can “spotlight” one video feed for everyone

© 2020 NAA VTF and Keith Greenberg



22

## Witness Examination

- Audio lag
  - The questioning advocate and the witness should be careful not to talk over each other
- Objections
  - While objections can muddle the sound, advocates seem to be able to break in effectively to object
- Cross-examination
  - Rapid-fire questions should be slowed down somewhat

© 2020 NAA VTF and Keith Greenberg



23

## Troubleshooting Witness Tech Issues

- Figure out who is having the problem, and have them sign out and back in
- For trouble with computer audio, use the telephone dial-in feature
  - Balancing security with accessibility
- Dealing with echo and audio feedback
  - There are three main causes of audio echo or feedback in a videoconference:
    - A participant has both the computer and telephone audio active
    - The speakers on participants' computers or telephones are too close to each other
    - There are multiple computers with active audio in the same conference room
- Use your backup plan

© 2020 NAA VTF and Keith Greenberg



24