



NATIONAL ACADEMY OF ARBITRATORS
VIDEOCONFERENCING TASK FORCE

BEST PRACTICES GUIDE FOR CONDUCTING VIDEO HEARINGS¹

By Pilar Vaile and Brian Clauss - Last updated 2/23/21

¹ A special thanks from all of the members of the National Academy of Arbitrators goes out to the Videoconferencing Task Force leaders - VTF Chair Jeanne Charles and NAA VP and VTF Vice Chair Homer La Rue – without whose vision we could not have come as far and fast as we have.

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1/11/21 NAA Letter to FMCS regarding ordering video hearings over objection

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I. INTRODUCTION

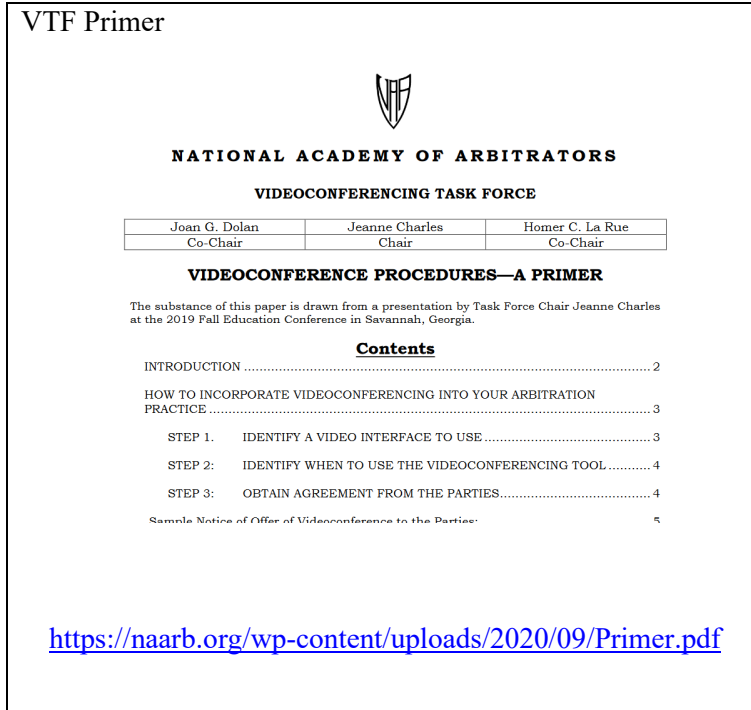
A. The Purpose of This “Best Practices Guide” is to Assist Labor Arbitrators in Providing Video Hearings²

1. An arbitrator is always under the duty to provide due process and effective hearings. The video hearing format requires alteration of our practices in order to recreate the feel and features of an in-person hearing.
2. This guidance builds upon the VTF’s initial video hearing webinar; the VTF Primer; and subsequent VTF “Office Hours.”

	<p>Video:</p> <p>https://naarb.org/videoconferencing/</p> <p>PowerPoint Slides:</p> <p>https://naarb.org/wp-content/uploads/2020/11/NAA-FMCS-4-2-2020-Videoconferencing-Presentation-PwrPt-PDF-FOR-DISTRIBUTION-kg.pdf</p>
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² These best practices are advisory only, and they are neither comprehensive nor intended to be binding. A wealth of practical advice and recommendations have developed during the pandemic. Many examples are found on the NAA website, the websites of various labor and employment agencies, and are available from your colleagues. At this writing, it appears some definitive norms and expectations have emerged (such as the frequent need for a pre-hearing conference, and the prohibition on private chat during hearings). On many more issues, there may not be one clear answer. Arbitrators and parties, conferring together, can and should continue to show flexibility and creativity in developing a process for their unique needs.

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3. These efforts, and all of the work of the VTF, in turn built upon the Fall Education Conference Concurrent Session “Video Hearings: A New Option for your Practice?” (Sep. 21, 2019), Moderated by Jeanne Charles and where VTF Co-Chair and now NAA Vice-President Homer La Rue presented a paper on the subject. *See* La Rue, *A Short Paper on the Existing and Future Use of Videoconferencing in Labor-Management and Employment Arbitration*. A link to the full paper is available [here](https://naarb.org/wp-content/uploads/2020/09/Primer.pdf), on the University of Missouri School of Law’s Arbitration Info website.
4. This Guide largely does not address the issue of whether a video hearing is appropriate under the facts of a particular case, including any party objection. The NAA and the VTF have separately addressed that issue elsewhere, and that decision will be governed by the facts of the given case. Note: President Dan Nielsen has recently emphasized concerns of advocates/counsel, relayed by FMCS, that arbitrators are failing to make decisions on parties’ objections on the use of video hearings, and are instead simply withdrawing.
 - a. NAA, Advisory Opinion No. 26, 4/1/20, <https://naarb.org/wp-content/uploads/2020/09/Advisory-Opinion-No.-26-Video-Hearings.pdf>.
 - b. NAA VTF, Is Arbitration by Videoconference Right for this Dispute?, 9/6/20, <https://naarb.org/wp-content/uploads/2020/09/6-VTF-Is-Arbitration-by-Videoconference-Right-for-This-Dispute-Final.pdf>.

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NAA Advisory Op. No. 26

National Academy of Arbitrators

Formal Advisory Opinion

Issued by

Committee on Professional Responsibility and Grievances
(1975 -)

Committee on Ethics and Grievance
(1965 - 1975)

Committee on Ethics
(1947 - 1965)

OPINION NO. 26

April 1, 2020
Subject: Video Hearing

Issue:

Can an arbitrator order that a matter proceed by way of a video hearing at the request of one party over the objection of the other party to the arbitration?

Opinion:

This advisory opinion is provided in the context of the world-wide COVID-19 pandemic of 2019-20. However, this opinion's analysis of video hearings may have broader application in other circumstances. The reader also is referred to Advisory Opinion No. 13 on the subject of *ex parte*

VTF Guidance



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IS ARBITRATION BY VIDEOCONFERENCE RIGHT FOR THIS DISPUTE? A CHECKLIST FOR ARBITRATORS AND ADVOCATES

Many in the labor and employment community are considering the use of an videoconference to accomplish fair and effective resolution of labor-management disputes. This checklist is provided as a resource for arbitrators and parties to decide whether videoconferencing is an appropriate tool for a particular dispute.

It is not intended to be exhaustive: Each labor-management relationship is unique, and each dispute has its own characteristics, and the decision should reflect the nature of the specific dispute.

5. An arbitrator can provide a fair hearing and ensure due process only if they determine whether the hearing can be effectively held via video platform. A video hearing may improve the hearing process because:
 - a. the parties want to minimize travel expenses;
 - b. delay would be prejudicial;
 - c. travel limitations and/or local health conditions prohibit in-person appearances;
 - d. it is a document only dispute, and/or witness credibility not at issue.³
 - e. witness health and safety
 - f. to expand the choice of arbitrators, given that many are not currently providing in-person hearing services; and/or

³ As will be discussed below, the consensus among NAA and VTF Members appears to be that there are no inherent limitations on assessing credibility via video testimony, but this is frequently raised as a concern by parties. Accordingly, arbitrators proposing a video hearing should be prepared to discuss these concerns.

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- g. the parties and/or arbitrator work with each other frequently and there is a high degree of existing trust.
- 6. This new technology can serve long standing principles – the legal maxim “justice delayed is justice denied” is no less true today, during the rise of a pandemic, than when it was first articulated in the 17th century:
 - a. delay undermines the parties’ confidence in the system;
 - b. witnesses’ memories may fade;
 - c. evidence may become unavailable;
 - d. under Armstrong v. Manzano, 380 U.S. 545, 552 (1965), fundamental due process requires an opportunity to be heard “at a meaningful time and in a meaningful manner” – in a pandemic, the question thus becomes “how to provide a meaningful opportunity to be heard without jeopardizing anyone’s health;”
 - e. properly done, video hearings can meet due process requirements and our ethical obligation to provide effective services; and
 - f. use of video hearings has been increasing over the years, and video arbitration hearings build upon that experience.⁴

FMCS News release



FMCS
FEDERAL MEDIATION &
CONCILIATION SERVICE

NEWS RELEASE

Tuesday, Apr. 7, 2020
For Immediate Release
Website: www.fmcs.gov

Contact: Greg Raelson
Office of Congressional & Public
Phone: (202) 606-8081

FMCS Promotes Use of Video Arbitration

WASHINGTON, D.C. — To better align with the current needs necessitated by the ongoing Emergency, the Federal Mediation and Conciliation Service (FMCS) has launched a major e

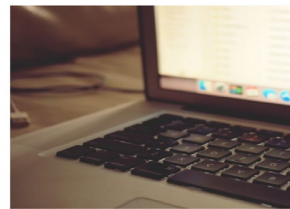
“The FMCS Promotes Use of Video Arbitration” where appropriate,
<https://www.fmcs.gov/wp-content/uploads/2020/04/FMCS-Promotes-Use-of-Video-Arbitration.pdf>

Arbitration Info blog post



ARBITRATION INFO
Neutral, non-commercial and comprehensive
information about workplace arbitration

ARBITRATION BASICS NEWS FOR THE PUBLIC



**LABOR ARBITRATION IN THE
CORONAVIRUS: WHO'S READY
FOR VIDEO HEARINGS?**
STAFF3 • MAY 12, 2020

“Labor Arbitration in the Time of Coronavirus: Who’s Ready for Video Hearings?”,
<https://law.missouri.edu/arbitrationinfo/2020/05/12/labor-arbitration-in-the-time-of-coronavirus-whos-ready-for-video-hearings/>

⁴ For instance, many SSA disability hearings are now conducted by video; surveys show that courts’ use of video hearings has been increasing for several decades; and video hearings have even been used successfully by NAA Member Jack Clarke as far back as 2012, and by Arbitrator La Rue for the past six years or so. See La Rue’s Short Paper, at 9-15, 22-26

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B. The Arbitrator's Responsibilities to The Process Do Not Change in Video Hearings – Only the Method for Conducting the Hearing has Changed

1. Provide a hearing that affords due and effective process, including sufficient opportunity to present evidence, argument, and objection.
 - a. Ability of the parties to access the platform and process is key.
 - b. Also, maintain confidentiality, privacy, and ensure the overall integrity of the process:
 - i. use of passwords, waiting room, other provisions to screen participants;
 - ii. witness sequestration when requested or appropriate;
 - iii. disabling recording features unless agreed upon and, if agreed upon, considering the manner of storage, dissemination, and use; and
 - iv. using additional oaths/instructions related to the integrity of the process if needed or desired.
2. Have the necessary technical competence to conduct a video hearing.
 - a. Be able to navigate the video format if you purport to be able to provide video hearing services.
 - b. An arbitrator's competency requirements in a video hearing may be met by using a facilitator to manage the platform controls (subject to disclosure of any costs the arbitrator may charge for that). See 8/26/20 Office Hours, [Using an Assistant to Facilitate a Web-Based Hearing](#).
 - c. Practice video hearings. Many arbitrators and many NAA Regions instituted practice groups, to study and hone our use of various video platforms. Arbitrators are strongly encouraged to participate in a practice group to enhance confidence and competence!
3. Provide adequate notice of proceedings – this involves both how and when to access the hearing itself, and also any ground rules, protocols and/or expectations that will govern the proceedings.
 - a. Notice of hearing
 - i. Start time of the hearing.
 - NOTE: the parties and arbitrator may choose to loosely schedule appearances, given the inherent flexibility of video hearings
 - ii. The meeting ID and password.
 - iii. A functioning link to access the meeting.
 - b. Other notice or information on the proceedings
 - i. General information on how to join the video hearing.⁵

⁵ For instance, using Zoom or WebEx as examples, you could indicate something like this:

When you click on the link provided, you will be prompted to download the application if you have not yet done so or to join via the web. You may also need to enter the meeting ID and/or password. You will not have to download the Application, but it may improve your access to the video hearing. You may also dial in with the provided phone numbers for non-video, telephonic appearance.

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- ii. A prohibition against sharing the sign-in link/information with any individuals who are not legitimately expected to attend the hearing.
- iii. For any in-person component(s), ensure that all witnesses are afforded an opportunity to appear by telephone or video.
- iv. Remind all participants to be mindful of their physical background and environment to avoid causing distractions and potential embarrassment to themselves or others.
- v. The arbitrator's and/or parties' various other agreed procedural protocols, ground rules or expectations, discussed in greater length below.⁶

C. Parties' Responsibilities

- 1. Ensure their and their witnesses' computers allow access to the platform and is not blocked with a firewall, net nanny, or other restrictive program.
- 2. Ensure their clients, witnesses and any observers can access the hearing.
- 3. Ensure their clients, witnesses and any observers follow any governing ground rules or expectations.⁷

D. The Days of Arbitration by Ambush Are Over, At Least For Now ...

Also, with WebEx, you may want to let participants know they will only be able to rename themselves at the initial prompt to do so, prior to joining the meeting.

⁶ Some arbitrators follow a more formal practice similar to that of courts, and they recite all of their general ground rules in a formal Notice of Hearing. See, e.g., Ontario LMAA Guidelines. The more common practice, however, appears to be for arbitrators to send out general protocols in an early, initial document as part of the opening dialogue upon assignment; next, to finalize logistical agreements in a pre-hearing scheduling order; and, finally, to issue the notice of time, place and Zoom link via email to the advocates/counsel for them to disseminate to their respective parties and witnesses. (Time, place, and video format of the hearing will obviously be provided in any subpoena, but many arbitrations do not involve subpoenas.)

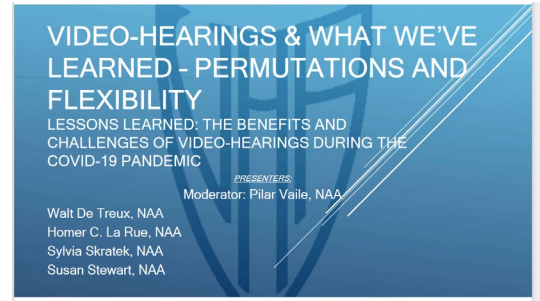
⁷ As the Ontario Labour-Management Arbitrators' Association puts it in their guidelines: "Each Party shall ensure that their respective participants (including their witnesses and any individual appearing under summons or subpoena) are given advance notice of the need to have access to: the videoconferencing platform; to an internet connection with sufficient capacity to connect to the hearing; camera; a quiet location; and if possible, use of a desktop or laptop."

See <https://www.labourarbitrators.org/resources/guidelines> ("OLMAA Guidelines").

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1. Video hearings during the Covid-19 pandemic may often require an pre-hearing conference – see below; see also 11/30/20 VTF Office Hours, Homer La Rue Presentation, <https://naarb.org/wp-content/uploads/2020/12/Video-Hearings-What-Weve-Learned-Handout.pdf>

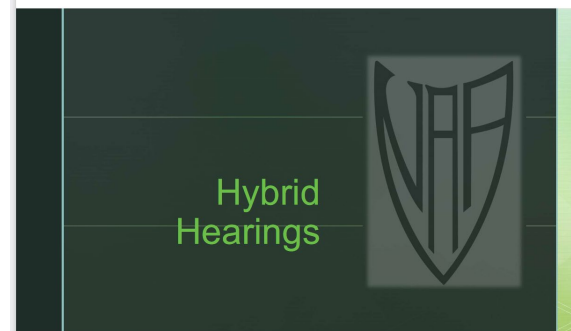
VTF 11/30/20 PowerPoint



2. Hybrid in-person and video hearings will require appropriate protocols.

See 11/30/20 VTF Office Hours, Sylvia Skratek Presentation, [Hybrid Hearings](#).


VTF 11/30/20 PowerPoint



3. The Parties may also benefit from a technical session or “dry run.” See below.
4. Because of the relative newness of video hearings, and the level of detail to be considered in planning for a video hearing, written protocols, checklists and scripts may be valuable.

See https://naarb.org/wp-content/uploads/2020/09/5-VTF-VC-Hearing-Preparation-Checklist_F.pdf

VTF Pre-Hearing Checklist

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Case: _____ Meeting ID: _____
Employer Counsel # _____ Password: _____
Union Counsel# _____ Date: _____
Meeting Telephone # _____

TASK	NOTES
PRE-HEARING	
<input type="checkbox"/> VC INSTRUCTION SENT TO PARTIES	
<input type="checkbox"/> VC MEETING SET UP	
<input type="checkbox"/> INVITATION SHARED	
<input type="checkbox"/> JOINT EXHIBITS/STIPULATIONS RECEIVED	
<input type="checkbox"/> PARTY EXHIBITS RECEIVED	
<input type="checkbox"/> COMPLETE EXHIBIT SHEETS	
<input type="checkbox"/> APPEARANCE SHEETS	
<input type="checkbox"/> CHECK MEETING SETTINGS	
<input type="checkbox"/> IDENTIFICATION OF PARTICIPANTS	
<input type="checkbox"/> BREAKOUT ROOMS SETUP	

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5. Because of advance preparation and disclosures involved with a video hearing, parties may know more about the issues and general evidence going into a video hearing than they normally do for in-person hearings.
 - a. This may be disconcerting to some advocates/counsel or arbitrators because it is novel.
 - b. However, parties have come to appreciate how this advance planning can assist tremendously in narrowing issues, eliminating or reducing “down time” during a hearing, or even promoting settlement.

II. NECESSARY OR SUGGESTED EQUIPMENT

❖ *The basic equipment needed is not complicated:*

- a video conferencing platform;
- a computer or similar device with reliable Internet access;
- audio and video capabilities; and
- a quiet space.

See [4/2/20 VTF Webinar](#)

VTF Suggested Equipment/Services for Major Participants



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SUGGESTED EQUIPMENT/SERVICES FOR MAJOR PARTICIPANTS

- A computer (desktop, laptop, or tablet) with a camera, speaker, and microphone is the equipment minimally necessary to participate in a videoconference. Consider ensuring access to a backup computer in case of technical difficulties.

PRACTICE TIP: Avoid participation by mobile phone for video purposes. It is practically impossible to view documents or screen-share via phone while trying to testify.

- A large display or multiple displays will improve your experience, so that you can view the video feed and documents at the same time.
- A dedicated high-quality noise-canceling headset is recommended, particularly if participating in an area with background noise.

https://naarb.org/wp-content/uploads/2020/09/2-VTF-Technical-Equipment-Suggestions_F.pdf

A. A Videoconferencing Platform

❖ *E.g., Zoom, WebEx, MS Teams, Skype/Skype for Business, Legaler, BlueJeans, GoToMeeting.*

1. Zoom, WebEx and Microsoft Teams are the most widely used as of this writing. But, there is a lot of competition and emerging platforms.⁸
2. VTF training has predominantly focused on Zoom because it is user friendly, feature-rich, and was the first platform to be learned by its members.

VTF 8/3/20 PowerPoint

⁸ The NAA does not endorse a specific video hearing platform.

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- See 8/3/20 VTF Office Hours on WebEx and Microsoft Teams ([the PowerPoint slides are available and the recording will be soon](#)).



3. General platform information.
 - a. All major platforms addressed by the VTF so far (Zoom, WebEx, and Microsoft Teams) permit “file transfers”, screen or content “sharing”, and recording.
 - b. Zoom, WebEx, and Microsoft Teams also permit “breakout” rooms or sessions, which are private and secure virtual rooms for caucusing.
 - c. Government agencies may require or prohibit some platforms.
 - d. Basic paid plans for either Zoom or WebEx cost \$12.00-\$15.00/month and have more than enough functionality to accommodate your video hearing needs.

B. Computer or Device

1. Platforms generally work on either Microsoft, Apple or Chrome/Google operating systems but there will be minimum requirements and functionality may vary depending on type and version of the device and/or operating system.
2. Desktops and laptops will provide the best functionality and access.
3. Tablets are next best choice for functionality.
4. “Smart” phones provide the least effective access and are not recommended, particularly for significant witnesses or participants.
 - a. For instance, smart phone users may not be able to use the “breakout” or “share” features.
 - b. Additionally, due to screen size limitations, controls will not be visible unless you double tap on the device.
 - c. VTF Member Lisa Kohn has a set of helpful instructions for witnesses appearing by telephone, which are available upon request.
5. Systems requirements of the most popular platforms can be found here:
 - a. Zoom: <https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux>
 - b. WebEx: <https://help.webex.com/en-us/nki3xrq/Webex-Meetings-Suite-System-Requirements>

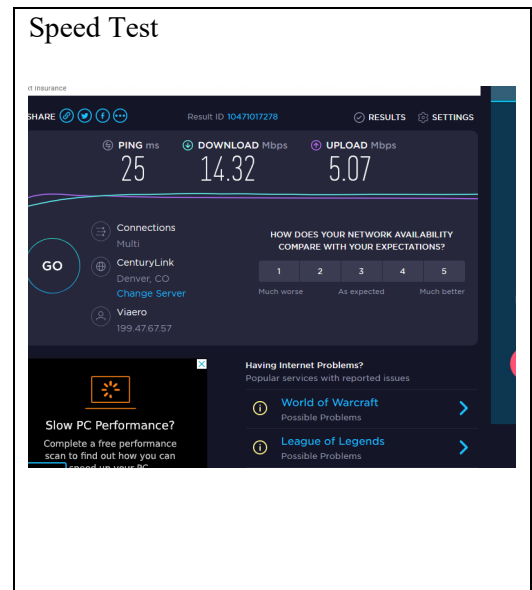
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- c. Microsoft Teams: <https://docs.microsoft.com/en-us/microsoftteams/hardware-requirements-for-the-teams-app> \
- d. Skype: <https://support.skype.com/en/faq/fal0328/what-are-the-system-requirements-for-skype>

C. Reliable Internet Connection

- 1. Most platforms will work best (or at all) only with a certain Mbps.

- a. Zoom requires 2.5 Mbps to send documents, and 3 Mbps to receive documents, <https://www.reviews.org/internet-service/zoom-technical-requirements/>
- b. WebEx requires about the same for HD, <https://help.webex.com/en-us/WBX22158/What-are-the-Minimum-Bandwidth-Requirements-for-Sending-and-Receiving-Video-in-Cisco-Webex-Meetings>
- c. Check your computer's speed test at <https://www.speedtest.net/result/10471017278>



- 2. Ethernet cable – run it between your computer and your modem.
- 3. Business level internet and/or a wi-fi “booster.”
- 4. If connectivity is a problem, here are some tips or suggestions:
 - a. make sure all other users of your local internet and/or wi-fi have been turned off, such as tablets you are not using in the hearing, or any children’s video games;
 - b. close any unneeded applications on your system;
 - c. discard your virtual background, if using one; or
 - d. exit your computer audio, and dial in by telephone for audio to reserve your bandwidth for streaming video.

D. A Webcam For Real-time, Two-way Video Streaming:

- 1. Your Webcam should be HD or better.

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2. The lowest pixel rate or resolution of 720 will be adequate (1080 is considered mid-range and 4,000 is high; either would likely be a drain on your bandwidth).
3. A webcam may be built into the device or may be free standing – Logitech is a common, reliable mid-range brand.

E. Real-time, Two-way Audio:

1. Your built-in computer speakers will usually not be sufficient.
2. A wired headset with microphone is the very best option for clear and consistent audio, but these may also be sufficient:
 - a. use of a wired external speaker combined with a microphone built into that speaker or a wired web-camera; or
 - b. use of wireless headset or ear buds (note, however, that these may be the least effective due to distorted or glitchy sound quality and battery limitations).

F. A Quiet Space Without Distractions or Interruptions. ⁹

1. Some mechanisms to ensure a quiet space include the following:
 - a. posting signage;
 - b. noise cancelling speakers and/or headset for noise reduction;
 - c. a quiet keyboard, for typing while unmuted; and
 - d. muting those not speaking (most platforms have a “mute all” feature or setting option).

⁹ As noted in the OLMAA Guidelines note,

It is important to recognize that, at the present time hearing participants will generally be working from home and dealing with a myriad of ever evolving issues associated with COBID-19. Those issues include child and elder care, as well as the need to contribute to those in our communities who need assistance. These issues will require flexibility both in advance of and in the course of the hearing. It may [be] appropriate for a modification [of] the structure of the normal hearing day to be put in place. All usual accommodations will also need to be addressed as in the normal course.

...It is of fundamental importance for all of those involved in any aspect of this proves to be sensitive to and to respect all public health directives in relation to all participants and administrators of the process.

See <https://www.labourarbitrators.org/resources/guidelines>

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Dual Monitor(s) or Screens.

1. This is not, strictly speaking, a necessity.
2. However, if you do video hearings regularly, you may want to consider one or more additional screens, such as a separate screen for viewing exhibits; and another for taking notes.

III. FOUR (4) MAIN CRITERIA OF AN EFFECTIVE VIDEO HEARING

❖ The VTF has identified four criteria as essential to a successful hearing:¹⁰

A. Can the Participants See and Hear Everyone Effectively?

1. Do participants have adequate internet access, bandwidth, and technical competence.
2. Are there distractions?

B. Can the Platform Controls be Managed?

1. The host **MUST** know the basic controls, settings, features and limitations of the platform, and be able to effectively manage the participants and the technical aspects of the hearing, including movement of participants to and from any virtual lobby or waiting area, and “breakout rooms”; and “sharing” or “file transferring” electronic exhibits as needed.
2. The arbitrator (if different from the host) and the participants **MUST** know how to operate their audio, video and “view” selection; and possibly also how to “share” content or “transfer” files.
3. Settings vary widely by platform, but the essential feature of all platforms is that the “settings” or “preferences” available through the platform’s website and/or through the application while in-meeting will determine functionality.
 - a. For any video hearing that you are hosting and managing, you should know the general categories of settings available; if relevant, the difference between web-based and application-based settings; and how they operate together.

¹⁰ As observed by VFT Chair Jeanne Charles, “[a]s with anything else, the key to successfully running a video hearing is to prepare in advance; be proficient with the video conferencing tool used; and provide clear instructions to the parties well in advance of the hearing so that it will proceed with ease and minimum technical snafus due to operator or other errors.” See Jeanne Charles, “How to Incorporate Video Hearings into Your Arbitration Practice.”

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- b. If you find the platform is not allowing you to perform certain operations, it will usually be due to a problem in either your web-based or your application-based settings.
- 4. Helpful VTF Office Hours addressing settings, controls and troubleshooting can be found on the private side of the NAA website:
 - a. 5/1/20 VTF Office Hours, "Settings"; and
 - b. 5/15/20 VTF Office Hours, "How to Prepare for, and What To Do When, Things Go Wrong".

C. Do all Required Participants Have Effective Access?

- ❖ Due process requires that the parties be able to access all critical aspects of the hearing, as needed to have a full and fair hearing. Considerations under this criterion will include the following.
- 1. How will the advocates/counsel, parties, and witnesses participate, *e.g.*, by desktop, laptop, telephone, tablet, etc.?
 - a. Everyone should practice on the device he or she will be using during the hearing, to ascertain any quirks or limitations.
 - i. For example, a specific type of desktop may be required to transfer files or engage in screen sharing.
 - ii. You may be unable to perform certain functions on a mobile phone at all.
 - iii. The platform likely provides an international calling function and telephone numbers for foreign participants.
- 2. Do participants have to create an account or download a platform's application?
 - a. If all participants, have to download an application or create an account could be an unnecessary and potentially unnerving inconvenience.
 - b. Access through a web link (a "Click on This Link") is available for all platforms. Web links may afford more limited functionality, but this will not be a significant issue for non-advocate participants.
 - c. Make sure the host's settings do not require "authenticated users," or all participants will have to download the requisite software.
- 3. Do the participants have adequate reliable Internet access and bandwidth, and the requisite audio/video streaming equipment?
 - a. See above; 1.5 MBPS upstream minimum; wired ethernet cable and wired headsets are best.
- 4. Can witnesses access the exhibits?
- 5. Can witnesses contact their advocate/counsel if they lose a connection or are dropped.?

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6. Do any witnesses need closed captioning or translation services?
 - a. Most platforms have a closed caption option in the settings.
 - b. Higher level platform plans may also have translation services.
 - c. Like in-person hearings, these considerations should be handled by the parties.

D. Privacy and Security

- ❖ The critical questions here: is the platform secure; is there a private and secure way for the parties to caucus, is there a private and secure method for sidebars?¹¹
 - ❖ Most videoconferencing platforms (including Zoom and WebEx) are secure.¹²
1. Hearing security and confidentiality measures should include:
 - a. use of unique meeting IDs and meeting passwords – platforms can auto-generate passwords.
 - b. use of a virtual waiting room or “lobby” area, and/or disabling any ability to join before the host;¹³
 - c. screening of participants as you admit them;
 - d. disabling “private chat” features;
 - e. disabling the ability of the participants to record chats using the platform;
 - f. the ability to assign people to certain “breakout rooms”; and
 - g. the ability to permanently “remove” or “expel” participants or unauthorized intruders.
 2. Create and name private “breakout rooms” for caucusing, e.g.:
 - a. Union caucus room;
 - b. Management caucus room; and
 - c. Other, optional rooms:
 - i. Arbitrator and advocate/counsel sidebar room – NOTE, however, that if the host and co-hosts are in a breakout room, they may not see that someone is in the waiting room, depending on the platform.

¹¹ Remember, parties can always exit the video hearing (or turn their audio and video off) and caucus on a separate phone line; several arbitrators use this process, to simplify matters. In contrast, some arbitrators will use additional breakout rooms, such as sub-caucus rooms. Much of this will depend on the arbitrator's personal style and party preferences.

¹² “Zoom Bombing” has been alleviated through use of one-time passwords for hearings and by not publicly posting links to the hearing.

¹³ Many platforms enable you to lock the meeting once it has begun. However, that is not recommended because usually it prevents anyone from entering or re-entering the meeting.

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- ii. A separate breakout room for witnesses, if there is no concern of them chatting socially, with or without cautionary instructions.¹⁴
- iii. Additional breakout rooms as needed for anyone needing a private space to attend to something other than the hearing.
 - Breakout rooms were discussed at length in the 4/27/20 VTF Office Hours, the materials of which are available on the private side of the NAA website.
 - Most platforms permit you to create breakout rooms as needed, during the hearing; some platforms also enable you to create them before hand, such as when scheduling the hearing.

IV. PRE-HEARING INSTRUCTIONS AND CONFERENCES

A. Advance Planning and Conferral May be Needed

As noted above, the days of arbitration by ambush are likely over for now. Because of the necessary criteria to afford an effective video hearing, it quickly became a relatively well-established best practice that every video arbitration hearing would have “ground rules” or protocols, and a pre-hearing conference.

There are several caveats, however. The first is that there is still considerable variation among arbitrators regarding how far in advance and how formal or detailed their conferences are; what you choose to do will depend on your personal preference and also the particulars of case and parties. Second, after nearly a year of using videoconferencing, some arbitrators and parties may no longer require a pre-hearing conference as a hard and fast rule. Nonetheless, some level of advanced planning and conferral will still often be needed or appropriate.

1. Status conference and/or provision of protocols
 - a. If you provide both in-person and video hearings, determine the parties’ desires and/or agreement(s); any relevant contract provisions; and feasibility of either an in-person or video hearing:
 - i. Party agreement and relevant contract provisions will control.
 - ii. Agreements or limitations, however, may only address timing, and an arbitrator should not compel in-person testimony if it would be unsafe for the participant.
 - iii. Feasibility of in-person hearings MUST include a discussion of local health and travel conditions, and an exception for any party or witness to appear by video upon request, due to their situation.

¹⁴ Witnesses can be sequestered, if required, in a virtual waiting room or in one or more virtual breakout rooms.

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- In some cases, an arbitrator will need to conduct independent research into local conditions, travel restrictions; local positivity rates; and if the hearing involves is a high-risk community, industry, or facility.
 - b. Conferring on the status and party desires is a flexible component and may be done by email. If done by email, it should include exchange of the arbitrator's written in-person and/or video hearing protocols or ground rules, and a deadline for the parties to object or consent to such expectations. (An affirmative signature component may also be helpful.)
 - c. Early discussion of the video hearing option will likely address the parties' concerns about security, technological capacity, and/or credibility. Be prepared to discuss the technical aspects of videoconferencing.
 - d. You can also usually:
 - i. identify the type dispute;
 - ii. identify any unique concerns of the case or parties; and
 - iii. potentially narrow the issues and schedule any pre-hearing motions.
 - e. If you are not doing in-person hearings at all, of course, you will remind the parties of that and give them the option to delay the matter or have you withdraw so they can choose another arbitrator.
2. Pre-hearing planning and scheduling conference
- a. A pre-hearing conference will determine final logistics, responsibilities, and deadlines. It is discussed separately in the following section.
3. Technical pre-hearing session(s)
- a. The OLMAA Guidelines best describe the purpose: "to make sure a videoconference will work ..., and to familiarize counsel, ...[and] the parties or potential witnesses with the use and operation of the technology, and to review and assess the capabilities of the platform" See <https://www.labourarbitrators.org/resources/guidelines>.
 - b. The OLMAA Guidelines also state this should be offered free of charge and is related to the "expectat[ion] that the mediator/adjudicator will not charge additional costs for conducting hearings electronically, beyond those which the mediator/adjudicator reasonably incurs." [Id.](#)
 - i. As the parties increasingly use video hearings, this requirement is becoming unnecessary.

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B. When a Formal Pre-Hearing Conference Is Needed

- ❖ See VTF Office Hours from 4/7/20, 5/13/20 and 11/30/20, on the private side of the NAA website, <https://naarb.org/>.
- 1. The overriding purpose(s) of this pre-hearing conference hearing will be to ensure the upcoming hearing will be effective. In the case of a video hearing, this means it will focus on the four (4) essential criteria outlined above; address any preliminary matters not already covered, such as regarding ground rules, type of dispute or facility; and establish responsibilities and deadlines for various actions related to preparation.
- 2. Who should attend the pre-hearing conference?
 - a. advocates or counsel;
 - b. the court reporter,¹⁵ if any; and
 - c. any parties with decision making authority, if possible.
- 3. What are helpful discussion points of a pre-hearing conference?
 - a. How and where various participants and/or witnesses will be attending:
 - i. consider technical capacities, and if IT support is available;
 - ii. for hybrid hearings, consider the reverb and distortion effect of multiple devices in close proximity;¹⁶ and
 - iii. for hybrid hearings, assign responsibility for any necessary in-person health controls.
 - b. Witnesses information:
 - i. the identity of anticipated witness, and their general role and/or the general subject of their testimony; and
 - ii. whether special witness instructions or admonitions, described below, are needed.
 - c. Stipulate to as much as possible to minimize screen time (which tends to be exhausting):
 - ii. statement of the issue(s);
 - iii. jurisdiction:
 - (A) arbitrability objections; or
 - (B) remedy retention.
 - iv. undisputed facts such as:

¹⁵ The court reporter will need to advise on how the protocols or agreements meet their separate technical, contractual, or practical requirements.

¹⁶ The most common fix for this is to have all but one computer or device “leave computer audio” through the audio settings. Doing so may limit participants’ ability to see, be seen, or be identified as the speaker. the parties may benefit from special equipment such as separate speakers and mics; or casting to a larger video screen.

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- (A) background or core facts;
 - (B) chronology of events; and
 - (C) educational background, career or work history, etc. of witnesses; and
- iv. any duplicative or “will say” testimony.
- d. Stipulate to known or anticipated exhibits and the format of exchange.
 - i. Parties may still reserve any objections regarding authentication, relevancy, reliability, truth of the statements therein, weight, etc.
 - ii. Advance electronic copies are preferred.
 - (A) This allows parties to easily “share” exhibits during the hearing, and thereby ensure participants are looking at the same exhibits.
 - (B) If e-documents are very lengthy, consider having the parties bates-stamp and/or bookmark the items.
 - (C) If viewing electronic documents during the hearing, a separate screen is recommended: “dual” screen, split screen, or second device.
 - The dual screen function may need to be enabled in web and/or application settings.
 - iii. Will you also want hard copies in advance?
 - (A) Many arbitrators continue to prefer hard copies.
 - (B) Ensure the timing of document arrival during a pandemic.
- e. Establish deadlines to submit and/or exchange stipulated or agreed exhibits and witness lists, contact information if needed, etc.¹⁷
- f. Shall any exhibits be filed “under seal”?
 - i. If so, obtain a stipulation.
 - ii. Sometimes the parties may reasonably decide to hold back an exhibit until its relevance or reliability is put into the record:
 - (A) potential exhibits held in reserve can be filed electronically via a password protected Dropbox or other cloud storage; and/or
 - (B) hardcopies can be provided in a sealed envelope to be opened on camera, as many arbitrators and parties elect to do.
- g. Recordings.
 - i. Discuss whether to use local or cloud storage.

¹⁷ Depending on local applicable rules or norms, or your personal practice, you may need or want to note somewhere on the record (and preferably in any pre-hearing order) that the arbitrator has not or will not review any exhibits provided in advance except for the limited purpose of ensuring she has received all identified exhibits, and can access them if in electronic form. Note, however, that some arbitrators will review exhibits provided in advance if not prohibited by local rules or norms.

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- (A) Cloud recording – it has previously been recommended by AAA due to storage limitations of local storage; but it has not been recommended by the NAA due to security risks associated with cloud storage.
 - NOTE: cloud recordings consist only of the main hearing room; they are usually deleted automatically but with notice after a certain amount of time – check your platform for details.
- (B) Local recording – requires adequate storage on the host's computer
 - NOTE: local recordings follow the host, so it must be turned off/on if the host enters a breakout room; it must also be manually deleted from the computer after a final decision is issued.
- ii. Discuss the purpose of and access to any recordings:
 - (A) Confirm who if any one besides the arbitrator will have access to the recording and, if so, for what purpose.
 - (B) Confirm that the record shall be the documentary evidence and the arbitrator's recollection of the testimony as aided by her notes or recording.
 - (C) Confirm that the recording will be destroyed after issuance of a final decision or award.
- h. Open Meetings Act considerations?
 - i. Many video conferencing platforms allow live streaming, such as through a Facebook, Twitter, YouTube, or agency/government webpage.
 - ii. The arbitrator MUST be alert to the issue. Assign responsibility to the employer to resolve any legal requirements.
- i. Have a backup plan!
 - ❖ Have contact information for the advocates/counsel, and they should have contact information for their participants in turn.
 - ❖ Cell phone and/or text are recommended for expeditious contact.¹⁸

¹⁸ As NAA VTF Member Chris Cameron cautions in his instructions to parties, “Glitches are going to happen: internet connections will drop, screens will freeze, audio will cut out. The arbitrator should as the parties to provide appropriate tech support for themselves, but will have to do the same for herself, or become savvy enough to trouble shoot her on issues. A “Plan B” for what to do if a glitch occurs should be considered. Switching to an old-fashioned telephone conference should not be ruled out.” As NAA VTF Member Pilar Vaile advises parties in her written pre-hearing scheduling order that, “Although the undersigned does not foresee any particular difficulties in this matter, the parties are advised that a virtual hearing may be continued at any time upon party agreement or at the discretion of the arbitrator, if it becomes apparent that the video hearing format is not sufficiently effective for some reason. In that case,

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V. IN-HEARING PROCEDURES

A. Making a Comfortable Virtual Space

1. Workday internet traffic is heavy at the hour and the half hour. Log in early as the host to ensure connectivity and a functioning link; and encourage participants to do the same.
2. Allow participants to enter the video hearing with audio and video turned off, to get situated before going "live." "Settings" controls these functions.
3. Explain what you are doing each step of the way, as host and/or arbitrator:
 - a. such as when muting participants because of background noise or reverb, or
 - b. when moving participants to breakout rooms.
4. Be aware of where and how each of the parties and witnesses are appearing.
 - a. Remember, special issues may be presented based on location and/or device(s), and participants may need assistance with their audio, video, etc.
5. Offer numerous breaks, as needed.
 - a. During a break, the arbitrator and participants can turn off their audio and/or video.
 - b. See Harvard Business Review, "How to Combat Zoom fatigue" (4/29/20, last accessed 11/23/20) <https://hbr.org/2020/04/how-to-combat-zoom-fatigue>
 - c. See also Psychiatric Times, "A Neuropsychological Exploration of Zoom Fatigue" (11/17/20; last accessed 11/23/20) <https://www.psychiatrytimes.com/view/psychological-exploration-zoom-fatigue>

B. Screen and Admit Participants

1. Admit the advocates/counsel:
 - a. confirm contact information of essential participants;
 - b. address any off-the-record matters;
 - c. consider making advocates/counsel co-hosts – they can assist in participant and room management, and one of them will become the host if you lose connectivity as the host; and
 - d. screen participants in the waiting room.

the record shall remain open and the arbitrator and parties may try again later that day or another; try a different platform; or agree or determine to resume the hearing in-person at a later date."

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- ❖ The advocate/counsel may need to confirm those persons identified only by a telephone number or by an unrecognized device name.
- 2. Open the meeting early for parties to caucus in a breakout room if desired.
- 3. Let in witnesses in as agreed and appropriate.¹⁹

C. Opening Instructions

1. Confirm the ability of all present to see and hear everyone and advise advocates/counsel and witnesses to slow down due to bandwidth lags.
2. Instruct parties that they can log back on using their original link, if they get accidentally disconnected from the meeting, or to contact their advocate/counsel if they are having other connectivity or technical difficulties.
3. Re-affirm the requirements/expectations laid out in the agreed ground rules.
4. Confirm the advocates/counsel and witnesses have a way to communicate directly and expeditiously if either encounters a connectivity or technical issue.
5. Remind everyone to slow down, be patient, and not talk over questions or objections.

VTF Sample Opening Instructions

¹⁹ Arbitrators' differing views on whether, when and how to sequester witnesses would be a monograph unto itself, based upon recent discussions in the NAA's private, collegial listserv, and even between these two authors. For instance, some arbitrators will prefer to let witnesses in one-by-one as called, particularly if they are to be sequestered. Many arbitrators appear to prefer to sequester witnesses in a virtual waiting area, where they will be unable to communicate with other waiting witnesses. But practices and preferences vary. Many other arbitrators prefer to let all witnesses in at the start, to make introductions and give uniform instructions one time. Additionally, it may often be a nice touch and not inappropriate to allow non-antagonistic witnesses to chat and catch up in a breakout room, as they would in an in-person hearing.

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https://naarb.org/wp-content/uploads/2020/09/3-VTF-Sample-Arbitrator-Opening-Instructions_F.pdf

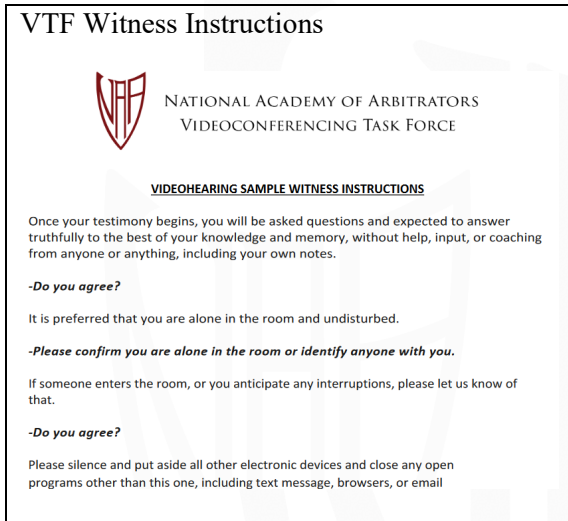
D. Calling Witnesses

1. Move witnesses into the main video hearing room as agreed and appropriate.
2. Make introductions, if you have not already done so.²⁰
3. Explain – individually or in one mass introduction or opening session – the various “view” options available.
4. Assure witness that you can see and hear them.
5. Swear in the witness using a special oath or instructions - these will include such things as confirming or affirming that the witness:
 - a. is alone in the room, and will disclose if anyone enters the room;
 - b. has not and will not review any documents or other information unless directed to do so by their advocate/counsel;
 - c. will not record any portion of the hearing, by any means;
 - d. will not engage in texting, Google search, or other digital communication or research;
 - e. may be asked to slow down or speak up, or reminded to please avoid speaking over the questioner;
 - f. can log back on using their original link, if they get accidentally disconnected from the meeting; and

²⁰ As VTF member Brian Clauss notes, orienting the participants and witnesses “is important. People are admitted and don’t know who anybody is – [this is] super disconcerting and not something that would happen at an in-person hearing, where the setup of the room explains most roles.”

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- g. can contact the advocate/counsel who called them to testify directly if they are having other technical problems but may not ask them about any pending question.



https://naarb.org/wp-content/uploads/2020/09/4-VTF-Sample-Witness-Instructions_F.pdf

6. Consider “pinning” or “spotlighting” the witness and both advocates/counsel, and/or instructing the participants to pin speakers as they desire.²¹
7. Release the witness from their oath if not subject to recall; but remind them not to discuss their testimony with anyone other than the advocate/counsel until after the hearing concludes.
8. If the witness is having trouble leaving the hearing and is not subject to recall, you may want to “remove” or “expel” them (Zoom’s and WebEx’s respective terms for permanent removal).

E. Handling Exhibits

- ❖ There are a variety of ways electronic exhibits can be shared and/or exchanged during a video hearing.

1. Screen sharing exhibits.

²¹ As the arbitrator and/or host, VTF Member Pilar Vaile typically pins all three main speakers and she will spotlight them upon request; she may also pin or spotlight herself. VTF Member Chris Albertyn prefers to instruct the witness in how to pin their primary questioner at the moment, as this “establishes the kind of connection and rapport that is more typical of the hearing room. For the witness to see the questioning counsel as a small box in a gallery detracts from their respect and attention to the person asking them the questions.”

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- a. It works as an electronic “white board” allowing people to post an exhibit for all to see.
2. Exchanging new exhibits – “file transfers” within the platform.
 - a. While most exhibits should have been exchanged in electronic and/or hard copy prior to the hearing, new documents may be needed for rebuttal. The offering party can provide the document by email, “screen share”, or email link to cloud storage.
 - b. Alternatively, the party can provide it through a “file transfer” within the video hearing platform, if allowed or enabled (both Zoom and WebEx offer this feature and other platforms likely do as well).

F. Allow Private Caucuses as Needed

1. Many platforms offer virtual private and secure breakout rooms or parties can use just use the telephone/cellphones.
2. Communicating with breakout rooms:
 - a. There is usually limited communication between the host and breakout rooms or waiting rooms.
 - b. For example, in Zoom, the host and co-hosts can send a broadcast message to all rooms, and regular participants can request a host or co-host join them by using the “ask for help” button (a question mark in a circle). In WebEx, you can send messages targeted to individuals in breakout rooms, and to separate breakout rooms; but participants are still limited to sending an “ask for help” request.
 - c. If you enter a private breakout room, be sure to let the parties know you are coming in and make sure to turn off any local recording.
 - d. If an arbitrator is not comfortable going alone into a party’s private caucus room, he or she can instruct the parties to use the “ask for help” alert, to serve as the prompt or signal to close the breakout room if needed.²²
3. Assignment to and returning from breakout rooms:
 - a. The settings should be adjusted as needed to require manual assignment to breakout rooms.

²² Some arbitrators may, depending on personal practices and the personalities or issues involved, prefer to limit the parties’ ability to return to the Main Room at any time on their own, to avoid *ex parte* issues. Other arbitrators – such as VTF Member Brian Clauss – may alert their parties that the arbitrator “may pop in to check progress or have a chat about a tech issue. They expect it. The attorneys also appreciate it when the folks in the breakout are stuck on something. This gives them an excuse to get back to the hearing.”

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- b. consider restricting returning to the main room on their own to avoid an *ex parte* moment.
 - i. If parties cannot return on their own, however, they will be ejected from the meeting if they accidentally select “leave meeting” instead of “leave breakout room.”
 - ii. As noted, you can use the “ask for help” button as a signal to close the breakout rooms.
 - iii. If you use a countdown function to end breakouts, the time can be adjusted.

G. Concluding the Hearing and/or Closing the Record

1. If the record is not closed at the conclusion of the hearing, state on the record the date or triggering event with which it will close.

VI. MAKING CREDIBILITY DETERMINATIONS

A. A Common Objection to Video Hearings

1. Although increasingly more comfortable with video hearings, some parties still object to video hearings on the basis that an in-person hearing is needed to make accurate credibility determinations.

B. Limitations on Personal Demeanor as Evidence of Credibility

1. Arbitrators and Hearing Officers with experience conducting video hearings large reject this common objection as overstated or even unfounded.
2. Many users of videoconferencing have noted the extreme clarity of good video. Good video allows for a clear, head-on, and uninterrupted view of the participant that may often be impossible at an in-person hearing. Additionally, many platforms allow one or more participants to be “pinned” or “spotlighted”, which enables a clear, head-on view of all of the primary speakers at one time.²³

²³ As a NLRB ALJ observed in 2014:

During the video transmission, which had been tested prior to the hearing, the audio and video quality was flawless, the witness’ demeanor, *i.e.*, his appearance, attitude, and manner, was easily observable. Certainly, *any hesitation, discomfort, arrogance, or defiance would have been easily discerned.* The entire proceeding was spontaneous as live testimony. There was little or no audio delay between the questions and answers.

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3. The idea of demeanor evidence is widely discredited owing to the work of psychology, education in cultural differences in communication, and implicit biases.
 - a. See, e.g., Jeremy A. Blumenthal, “*A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*,” 72 Nebraska Law Re. Issue 4, Article 8 1157, 1159 (1993), <https://digitalcommons.unl.edu/nlr/vol72/iss4/8/> (last accessed 12/7/20).
 - b. See, e.g., Gregory L. Ogden, “*The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJs*,” 20 J. of the Nat’l Ass’n of Admin. Law Judic. 1 (3/15/2000), <https://digitalcommons.pepperdine.edu/naalj/vol20/iss1/1/> (last accessed 12/7/20).

C. The Better Practice for Determining Credibility

1. The better, if not best, practice in determining credibility is to follow the factors noted by the Merit Systems Protection Board (MSPB) in Hillen v. Dept. of Army:
 - (1) The witness’s opportunity and capacity to observe the event or act in question; (2) The witness’s character for truthfulness; (3) any prior inconsistent statements by the witness; (4) a witness’s bias, or lack of bias; (5) the contradiction of the witness’s version of events by other evidence or its consistence with other evidence; (6) the inherent improbability of the witness’s version of events; and (7) the witness’s demeanor.²⁴

Id., 35 MSPR 453, 458 (1987).
2. Ultimately, however, if you cannot trust a party or if a party does not trust a witness to follow the protocols, the hearing may need to be postponed until it can be scheduled for in-person.

Thus, [the witness’s] testimony by video may be evaluated on an equal footing with the testimony of witnesses appearing in person at the hearing.

See EF Int’l Language School, Inc., 20-CA-12-999, at 2 (Sept. 15, 2014), available at <https://www.nlr.gov/case/20-CA-120999> (emphasis added) (last accessed 12/7/20).

²⁴ As Arbitrator La Rue notes, the MSPB “does not eliminate demeanor evidence as having no relevance to the consideration of credibility. ‘Demeanor’ evidence, however, is listed as the final consideration,” and Arbitrator La Rue submits that is because it is the least important of the various considerations. See La Rue’s Short Paper at 30.

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VII. CONSIDERING THE OPTICS

A. Participants Should Be Renamed

- a. Participants may be renamed by the host or instructed on how to rename themselves.
- b. The name should reflect their affiliation, role, and last name at a minimum.
- c. This will greatly aid the arbitrator in participant management and will also make for a more professional and reassuring presentment.

B. Have an Uncluttered, Non-distracting Workspace

1. In your physical location, remove or reduce any clutter or other distractions appearing in your background, and use a neutral, solid backdrop if possible.
2. Participants may benefit from virtual background.
 - a. They can be distracting and could potentially shield an unauthorized/undisclosed observer.
 - b. They can also make witness more comfortable while inviting strangers to peer into his or her home.
 - c. A green screen may be necessary or helpful.
 - d. Make sure your and advocates'/counsels' backdrops are professional, and that no one's backdrop is offensive; video backgrounds are also discouraged as too distracting.

C. Attire and Etiquette

1. Participants should observe the usual dress expectations of a labor arbitration.
2. Most arbitrators will elect to wear neutral, muted or solid colored business clothing.
3. Participants should avoid plaids, stripes, polka dots, very bright colors, and the colors white or red (and green, if using a virtual background).

D. Positioning Yourself in Relation to the Camera

1. Sit close enough to the camera that your face appears clearly.
2. Do not make sudden movements towards or away from the video screen.

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3. Adjust your camera and/or chair level so that your eyes are level with the webcam.
4. If you use a dual screen, your camera should be installed on the screen with the video feed.

E. Lighting

1. Participants should be lit from the front, rather than from behind, to avoid excessive shadows.
2. Participants should limit natural sunlight to minimize glare.
3. Ring and Ott lights are affordable and helpful if frequent videoconferencing is anticipated. They recreate the benefits of natural lighting without its drawback of dark or harsh shadowing.

F. Individual Points of View

1. How the hearing “looks” to participants will depend on their individual “view” unless the “view” is set by the arbitrator.
2. Basic views are “speaker” or “gallery” (the latter of which some refer to as the “Hollywood Squares view”).
3. With most platforms, you can “pin” or “spotlight” particular participants – such as the witness.
 - a. Pinning is when you fix one or more participants’ videos for uninterrupted viewing.
 - b. Spotlighting refers to when the same is done by the host to dictate everyone’s view.
 - c. In Zoom, you can pin or spotlight up to nine (9) participants at a time, such as the witness, advocates/counsel, and/or the arbitrator.
4. In Zoom’s gallery view, a participant may adjust ordering, such as to have all union participants on one side and all company participants on another.
 - a. Additionally, the host can set their view order view to apply to everyone.
5. Depending on the platform, a participant may be able to hide their own image from themselves while in a gallery-type mode, which may make some witnesses less nervous. Using the “hide self view” is also hypothesized to reduce “Zoom fatigue.”²⁵

²⁵ VTF Member Chris Albertyn reports that, “Watching oneself all the time apparently contributes disproportionately to videoconference fatigue. We don’t typically see ourselves. Having to do so in a videoconference apparently tires us.” He also notes that it can be more helpful or impactful to “hide self

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6. Usually, participants can also hide non-video participants to clear up their screen (although this will affect the participants ability to order the view, in Zoom).

G. Try to Maintain Eye Contact with the Camera – But This Can be Overemphasized

1. If you are looking at the witness or documents, it may look like you are not paying attention. However, if you look at camera, you may not see the witness very well, depending on where her video is placed on your screen.
2. At the same time, it is quite common in in-person hearings to look at documents during testimony, or even to focus away from the witness as you process what is being said.
3. The best way to handle these issues is to explain at the beginning of the hearing that you are paying attention even if it may occasionally seem otherwise, due to the vagaries of camera angles and/or the video “view” used, and/or if you are also looking at exhibits.

view” in Zoom if there is an uneven number of people present, because having an uneven number of tiles can apparently cause some visual distortion of the other videos.

NAA Member Barry Goldman
sums it up best:²⁶



FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

DO NOT BE AFRAID OF ZOOM

by
Dr. Schmeuss

Do not be afraid of Zoom
You can do it in your room
You can do it if you choose
You can do it without shoes
You can use it for a dep
You can save yourself a schlep
You don't have to wear a mask
You can do it if you ask
Arbitrators will all tell you
We don't have to touch or smell you
Zoom is safer, Zoom is cleaner
We can judge your guy's demeanor
You can confidently hire us
And we will not get the virus
You will save a ton of bread
And we will not end up dead

Editor's Note. The above poem was submitted by *Lawnotes* columnist, Barry Goldman, as a "guest column," written by Goldman's "friend and colleague" Dr. Schmeuss, who is perhaps best known for his recent collection *Poetry, Shmoetry—The Best of Rhymes, The Worst of Rhymes* (Lower Peninsula Online State College Press 2020).

²⁶ Reprinted from Labor and Employment Law Notes (Fall 2020), with Arbitrator Goldman's permission.

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APPENDIX A

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APPENDIX B NAA LETTER TO FMCS



National Academy of Arbitrators

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January 11, 2021

Arthur Pearlstein
Director of Arbitration Services
Federal Mediation and Conciliation Service

Dear Director Pearlstein:

This letter is a follow-up to the conversation we had on Friday with Barry Simon, the Academy's Designating Agency Liaison Coordinator, and Jeanne Vonhof, the Chair of the Committee on Professional Responsibility and Grievances. In that conversation, you raised the increasing problem of arbitrators withdrawing from cases rather than deciding whether a hearing should proceed in person or virtually, where the parties could not agree.

The Academy has previously provided guidance on an arbitrator's authority to order participation in a virtual hearing over one party's objection (Advisory Opinion No. 26 (April 1, 2020)). The necessary implication of that Opinion is that an arbitrator also has the authority to order participation in an in-person hearing over one party's objection. The CPRG Chair has also provided guidance on the appropriate course of action when an arbitrator has a good faith belief that a previously agreed upon in-person hearing is dangerous to the arbitrator's health, but the parties insist on proceeding in-person (Advice Letter, June 26, 2020).

The underpinning of these opinions is the arbitrator's obligation to provide "a fair and adequate hearing," and to "endeavor to provide effective service to the parties." An arbitrator faced with this dispute must first seek to assist the parties in coming to a voluntary resolution. It may be, for example, that an in-person hearing can be held if the parties are willing to wait until the vaccines are widely administered or the pandemic wanes. Or the parties may agree to have some participants attend in person and others attend virtually. There is an endless array of options available. Such discussions are usually effective. If, however, no agreement can be reached, it falls to the arbitrator to decide.

Opinion No. 26 discusses the factors that an arbitrator should consider in deciding whether to proceed in-person or virtually:

If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh

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Director Arthur Pearlstein
Re: Withdrawal of Arbitrators
January 11, 2021 – page two

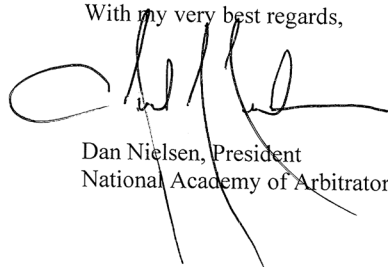
in favor of the video hearing option, particularly if the hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator's decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator's judgment, be offset by countervailing factors, such as a party's lack of necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

All of this, of course, takes place in the context of a world-wide pandemic with a very contagious, mutating virus, and that may be a strong factor in favor of a virtual hearing. The history of the parties or the nature of the grievance may argue strongly in favor of an in-person hearing. That is for the arbitrator to decide. *But it should be decided.* Neither Advisory Opinion No. 26 nor the Advice Letter contemplates that the arbitrator should simply withdraw from the case in order to avoid making a decision on a disputed procedural matter. Withdrawal is only contemplated where the arbitrator finds a virtual hearing is appropriate, but lacks the technical competence to conduct a virtual hearing, or where the arbitrator concludes that participation in an in-person hearing, where both parties want an in-person hearing, is unreasonably dangerous.

You mentioned that some concerns have been raised, particularly among less experienced arbitrators, that deciding a novel and controversial issue may be costly in terms of acceptability. That is an understandable concern, but it ignores the very negative consequences for the arbitrator of sending the parties back to square one, and the danger of being known as an arbitrator who is afraid to make a controversial decision. A well-reasoned ruling may disappoint one of the parties in that moment, but it is also likely to enhance the arbitrator's standing with both parties, and in the field.

In sharing these observations, I do not purport to be making a statement of Academy policy or offering an interpretation of the Code of Professional Responsibility. Each case has its nuances, and each arbitrator must make his or her own judgments. My only advice, based on nearly 40 years as an arbitrator, is that we should always be mindful of our duty to provide fair and effective service in the resolution of our parties' disputes.

With my very best regards,



Dan Nielsen, President
National Academy of Arbitrators