

ETHICAL ISSUES FOR ARBITRATORS IN THE AGE OF VIDEOCONFERENCING

**National Academy of Arbitrators
Videoconferencing Task Force
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VIDEOCONFERENCING
TASK FORCE

NOTE

These slides were prepared for discussion at an educational webinar.

In reviewing the hypotheticals and accompanying materials, one should not assume that all authorities cited provide accurate answers to the questions posed or that the listed responses to a question necessarily include a correct answer.



Initial Issues: In-Person or on Zoom?



1.

The parties advise the arbitrator that the pandemic has taken off in the area and that they want a remote hearing on Zoom, rather than risk gathering several people in a relatively small room. The arbitrator, a complete technophobe who knows nothing about Zoom, tells the parties the arbitrator is not capable of running a Zoom hearing. The arbitrator, also believing that Zoom hearings create an inferior record, initially insists on proceeding in person, or else postponing. The parties respond that the case is time critical, and really cannot be postponed.

What should the arbitrator do?

- (A) Get assistance to run the hearing via Zoom and proceed to handle the case remotely.**
- (B) Let the parties know the arbitrator will withdraw from the case if they cannot agree to an in-person hearing or a postponement.**
- (C) Order the parties to a scheduled date for an in-person hearing, reminding each that if one fails to appear, the arbitrator will conduct an ex parte hearing with the other.**

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 1.B. Qualifications for Special Cases

When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator's competence, the arbitrator must decline appointment, withdraw, or request technical assistance.

2.

After scheduling an in-person hearing, the arbitrator, seeing that the pandemic has taken off in the hearing location, contacts the parties and suggests postponing. The Union argues that the grievance involves COVID safety issues, and is therefore time critical. The Union proposes to set up a Zoom hearing, with a court reporting service hosting and providing technical assistance. The arbitrator is willing to hold a video hearing, but the Company vehemently objects, insisting that the arbitrator needs to see witnesses in person to assess credibility. The Employer also argues that both parties had originally scheduled the hearing as an in-person hearing, and the case should be postponed until it can be heard in person.

What should the arbitrator do?

- (A) Assess factors necessary to determine if conducting the arbitration by video is necessary for a fair, timely, and effective hearing and, if so, order a video hearing over the Company's objections.**
- (B) Determine that it would not be appropriate to conduct the hearing by video over the objections of one of the parties and proceed with an in-person hearing with some precautions, despite health hazards.**
- (C) Order the postponement of the hearing if both parties cannot agree to conducting it by video.**

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraph 6**

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.

(Continued)

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraph 6**

Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh 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.

(Continued)

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraph 6**

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.

(Continued)

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraph 6**

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.

3.

The arbitrator, seeing that the pandemic has taken off in the hearing location, contacts the parties and suggests postponing, but they say that the case is time critical and absolutely must go forward. The arbitrator proposes a Zoom hearing, and is willing to pay for a court reporting service's technical assistance. Both parties object, insisting that it is important for the arbitrator to see the witnesses in person to assess their credibility. They offer to meet whatever safety conditions the arbitrator requests, including a large well-ventilated room, social distancing, masks, and testing of participants before the hearing.

What should the arbitrator do?

- (A) Proceed with the in-person hearing with strict safety conditions.**
- (B) Assess factors necessary to determine if conducting the arbitration by video is necessary to provide a fair, timely, and effective hearing and, if so, order a video hearing over the objections of the parties.**
- (C) Offer to withdraw from the case if the parties will not postpone or agree to a video hearing.**

NAA, Committee on Professional Responsibility and Grievances, Advice Letter, June 26, 2020, Last Paragraph (Non-Binding)

Section 1.C of the Code requires the arbitrator to “endeavor to provide effective service to the parties.” Accordingly, after disclosing an inability to proceed in person, as the parties wish, the arbitrator should withdraw from the case. Withdrawing from the case under these circumstances does not violate the Code. This advice is consistent with the direction in Opinion No. 26 that, if an arbitrator is unwilling or unable to offer a video hearing, the arbitrator must so advise the parties and, if the parties wish to proceed by way of video hearing rather than an alternative process, the arbitrator must withdraw.

Hearing Procedures



Hard Copy Exhibits

4.

The arbitrator believes it is too difficult to watch hearing participants on Zoom, take notes of hearing testimony, and also view exhibits only on a monitor. The arbitrator would like the parties to send the arbitrator hard copies of exhibits a couple days before the hearing (with the understanding that circumstances may require receiving some late exhibits electronically), but the parties prefer to provide exhibits only electronically.

Which of these would be the arbitrator's best way to resolve this disagreement?

- (A) The arbitrator should not require parties to provide hard copies of exhibits in advance because the Zoom share-screen option permits electronic introduction of exhibits.**
- (B) The arbitrator can order parties to provide hard copy exhibits in advance but the arbitrator must have included the requirement in the arbitrator's listing with the FMCS and other agencies.**
- (C) No listing notice is required. The arbitrator, however, can only order advance provision of hard copies if notice of the requirement was included in the arbitrator's confirmation letter responding to the initial case appointment.**
- (D) The arbitrator need not provide prior notice in a listing or a confirmation letter. It is sufficient if the arbitrator advises the parties of the requirement during a pre-hearing two weeks before the scheduled Zoom hearing.**

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraphs 7-8**

The Opinion addresses the utility of prehearing conferences for video hearings, and notes among issues that should be addressed in a prehearing “the delivery of documents and how evidence is to be offered and admitted at the hearing.”

Transcript

5.

The arbitrator never suggested use of transcripts for in-person hearings, but believes it too difficult to pay attention on Zoom to electronic exhibits and testifying witnesses, while also taking notes of hearing testimony and arguments.

Can the arbitrator maintain a policy that, whenever a Zoom hearing is used, the parties must assume the cost of a transcript?

(A) Yes, regardless of when the arbitrator informs the parties of the transcript requirement.

(B) No, regardless of when the arbitrator informs the parties of the transcript requirement.

(C) It depends on when the parties are informed of the transcript requirement.

Transcript

6.

Assuming that, with appropriate notice, the arbitrator can require that parties pay the cost of a transcript, what is the latest point in time that the arbitrator needs to inform the parties of the requirement?

- (A) In agency listings.**
- (B) In confirmation letters replying to appointment letters.**
- (C) During the pre-hearing held two weeks before the hearing.**

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.K.1., Responsibilities to the Parties, Fees and Expenses

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 5.B.1.b., Hearing Conduct, Transcripts or Recordings

An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. *However, if an arbitrator intends to make appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.*

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 5.B.1.a., Hearing Conduct, Transcripts or Recordings

Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator.

a. A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.

Technical Hearing Facilitator

7.

The arbitrator's agency listing says the arbitrator is willing to conduct hearings electronically. The arbitrator, however, does not feel comfortable handling technical management of an electronic hearing while attending to other arbitrator hearing duties. The arbitrator would like to hire a facilitator for technical management. The facilitator costs \$400 per day. The arbitrator informs the parties of the plan to use a facilitator. One party replies to say that the hearing concerns sensitive issues and no outside person should be present. The other party has no problem with a facilitator's presence.

If the arbitrator plans to hire and personally pay for the cost, can the arbitrator proceed with the plan to have a technical facilitator manage the hearing?

(A) Yes, regardless of when the arbitrator informed the parties of the plan for the facilitator.

(B) No, regardless of when the arbitrator informed the parties of the plan for the facilitator.

(C) It depends on when the parties are informed of the plan for the facilitator.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.C.1

Responsibilities to the Parties, Privacy of Arbitration

All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.

- a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits.**

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.H.1.a

Responsibilities to the Parties, Use of Assistants

Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.

From NAA Formal Advisory Opinion, No. 12, Arbitrator's Use of Assistants, May 29 1985

The Committee recognizes that there may be some longstanding arbitrator/assistant relationships in which less arbitrator direction is required. But as a matter of general practice, if an assistant is to be used for anything more than research, clerical duties, or preliminary drafting under the direction of the arbitrator . . . , the parties are entitled to be told and to be asked for their consent.

Technical Hearing Facilitator

8.

Another arbitrator wants to use a technical facilitator but wants the parties to assume the facilitator's cost. These parties have no objection to the presence of a facilitator, but object to paying the cost in addition to the arbitrator's per diem.

What is the best way for the arbitrator to resolve this dispute about payment of the facilitator?

- (A) The arbitrator may not impose the facilitator's cost on the parties because they object.**
- (B) The arbitrator may impose the facilitator's cost on the parties and need not inform the parties of their responsibility for payment of the facilitator's fee before sending the arbitrator's invoice at the end of the case.**
- (C) The arbitrator may impose the facilitator's cost on the parties but must have informed the parties of their responsibility for payment of the facilitator's fee in the arbitrator's agency listing.**
- (D) The arbitrator may impose the facilitator's cost on the parties but must have informed the parties of their responsibility for payment of the facilitator's fee no later than when the arbitrator first responded to the appointment notice.**
- (E) The arbitrator may impose the facilitator's cost on the parties but must have informed the parties of their responsibility for payment of the facilitator's fee no later than a pre-hearing conference held at least two weeks before the hearing.**

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.K.1., Responsibilities to the Parties, Fees and Expenses

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

Code of Responsibility for Arbitrators of Labor-Management Disputes

Section 2.K.1.b.(3), Responsibilities to the Parties, Fees and Expenses

An arbitrator on the active roster of an administrative agency must file with the agency the individual bases for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.

From NAA Formal Advisory Opinion, No. 1, Ethics of an Arbitrator's Conduct – Fees, Reissued July 12, 2019

An arbitrator may indicate in his or her fee schedule that the fee schedule is periodically reviewed and that while the fee schedule in force at the time of appointment will apply to the date or dates initially scheduled, upon reasonable written notice of an updated fee schedule, future dates may be charged at a higher rate. If there is no such indication in the fee schedule in effect at the time of the original appointment an arbitrator is restricted to the rates contained in that fee schedule.

Pre-Hearing Requirement

9.

The arbitrator's agency listing states that the arbitrator is willing to conduct electronic hearings, but makes no mention of requiring pre-hearings. The arbitrator's confirmation letter states that the arbitrator desires to schedule a pre-hearing to make the Zoom hearing more efficient. Both parties reply that they don't think a pre-hearing is necessary and don't want to have one.

Do the parties' objections preclude the arbitrator from ordering a pre-hearing?

(A) Yes

(B) No

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.A.1. Responsibilities to the Parties

An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 1.C.1. Responsibilities to the Profession

An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

Section 5.A.1. Hearing Conduct, General Principles

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

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

**From NAA Formal Advisory Opinion, No. 26,
Video Hearing, April 1, 2020, Paragraphs 7-8**

The Opinion indicates that certain procedural issues must be addressed in advance of video hearings to allow an arbitrator to provide “effective service” and a “fair and adequate hearing” and lists various procedural issues that will “need to be addressed in a prehearing process.”

Recording the Hearing

10.

The arbitrator never recorded in-person hearings, but thinks that the complexities of Zoom hearings will make it difficult to produce accurate and complete hearing notes. The arbitrator wishes to make a recording of the hearing for the arbitrator's use alone.

May the arbitrator make a recording for the arbitrator's own use without notifying the parties that the recording is being made?

(A) Yes

(B) No

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 5.B.1.d., Hearing Conduct, Transcripts or Recordings

Without prior approval, an arbitrator may seek to use a personal tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 1.A.1., General Qualifications

Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

Recording the Hearing

11.

Assume that the arbitrator decides to inform the parties of the arbitrator's intention to make a recording for the arbitrator's use alone.

What is the latest point at which notice must be given?

- (A) In the arbitrator's agency listing.**
- (B) In the arbitrator's confirmation letter replying to notice of appointment.**
- (C) During a pre-hearing conference held two weeks before the hearing.**

Recording the Hearing

12.

Assume that, regardless of when the arbitrator informs the parties of the intent to make an arbitrator-only recording, one or both parties object.

May the arbitrator nevertheless make a private recording of the hearing?

(A) Yes

(B) No

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 5.B.1.d., Hearing Conduct, Transcripts or Recordings

Without prior approval, an arbitrator may seek to use a personal tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

Hearing Room Health Safety Issues



Hearing Room Health Safety Issues

13.

The arbitrator agrees to hold a hearing on Zoom because of concerns about the pandemic in the area. The parties and their witnesses prefer to attend in person together in one large room. The parties frequently bring observers to hearings who are not involved as party representatives or witnesses. As the hearing begins, the arbitrator notices that witnesses and observers are sitting next to each other unmasked, even though the state requires masking if maintaining a distance of six feet or more is not possible.

What should the arbitrator do?

- (A) Require everyone to wear a mask throughout the hearing, even though the arbitrator is not attending in person.**
- (B) Request that everyone wear a mask throughout the hearing, and maintain social distancing if they remove their masks.**
- (C) State that anyone who wishes to wear a mask throughout the hearing may do so.**

**Would the answer be different if the arbitrator
had subpoenaed witnesses to appear?**

(A) Yes

(B) No

14.

Although the parties have a long-standing practice of bringing observers, only one party has brought observers to this hearing. The other party objects, claiming that the room is not large enough for everyone to be six feet apart.

What should the arbitrator do?

- (A) Limit the number of persons in the room to the witness, the advocates, and party representatives.
- (B) Require all attendees to sit six feet apart and, before proceeding, insist that one participant demonstrate by use of a cell phone video that everyone is six feet apart.
- (C) Rule in favor of the parties' regular practice of allowing observers, and request that they observe physical distancing.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 1.C.1. Responsibilities to the Profession

An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

Section 2.A.1. Responsibilities to the Parties

An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves.

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 5.A.1, Hearing Conduct, General Principles

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

Section 5.A.1.a., Hearing Conduct, General Principles

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

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes

Section 2.C.1

Responsibilities to the Parties, Privacy of Arbitration

All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.

- a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits.**

15.

The arbitrator is having difficulty hearing a masked witness testifying while seated right next to her advocate, also masked, in front of the same laptop. The arbitrator also would like to see the witness' face to make credibility determinations.

What should the arbitrator do?

- (A) Ask the witness to remove her mask to testify.**
- (B) Impose certain safety precautions before the witness removes her mask, including moving the advocate six feet away, outside of the view of the camera.**
- (C) Nothing**

16.

The arbitrator wishes to resume in-person hearings under appropriate public health conditions.

What should the arbitrator do?

- (A) Require a CDC vaccination card for all hearing attendees.**
- (B) Request the parties to advise the arbitrator in advance of the hearing of the number of hearing participants who have been vaccinated.**
- (C) Continue safety protocols, including masking, physical distancing, and providing information for contact tracing, even though the parties state that most of the participants have been vaccinated.**