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Using COVID-Era Remote Arbitrations to Your Advantage

SEPTEMBER 8, 2020 | BY ANGELA ZAMBRANO & YOLANDA GARCIA

While the pandemic caused the initial phases of many court proceedings to be postponed, many arbitrators elected to move ahead remotely. Now, six months into the COVID-19 crisis, experience shows that not only is it possible to largely replicate a traditional arbitral hearing remotely, the remote platform offers some unique advantages in resolving disputes efficiently in terms of costs and time.

Still, traditional trial practices and techniques do not automatically lend themselves to a remote environment. Ensuring a seamless transition requires both practice and thoughtful planning. This article highlights a collection of practical considerations that can help ensure that contemplated remote arbitration proceedings move forward smoothly.

Choose an appropriate hearing platform

While the ability to conduct an arbitration remotely is a relatively novel procedure, numerous vendors have extensive experience in preparing for and conducting such hearings. Typically, these vendors will be able to provide remote hearing platforms that incorporate video conferencing, screen sharing and court reporting functionalities.

As soon as it is clear that the scheduled arbitration will be proceeding remotely, participants should begin interviewing vendors to get a feel for the capabilities of various available software platforms. These platforms typically have slight differences in pricing and availability of various features, so make sure to ask for demonstrations if needed.

Both before and after the hearing, the vendor will be an important resource in anticipating and addressing technical concerns and related issues. Certain vendors are even able to supply hardware directly to participants and to guide them through the setup process. Accordingly, it is important to communicate clearly and frequently with the vendor to ensure that potential problems are addressed in advance of the hearing and that contemplated remote hearing protocols are sufficiently robust to address all participant needs.

Spend time preparing a remote hearing protocol

The mechanics of conducting a remote arbitration are unlikely to be addressed in a prior scheduling order. To minimize disputes, the parties should seek to negotiate a detailed

protocol in advance of the hearing covering matters related to scheduling, questioning procedures, exchanging exhibits and oral argument. The protocol should also make sure to cover potential logistical issues including, among other considerations, online security and privacy measures, necessary equipment for participation in the hearing and agreed procedures for dealing with potential technical problems.

While several arbitration organizations have recently published model protocols that can serve as useful starting points, parties should discuss the hearing protocol as soon as possible given the unique technical and logistical problems that may potentially arise during a remote proceeding.

Test the technology in advance

Prior to the hearing, participants should be sure that they have the necessary equipment in place. At minimum, all participants will need a second computer monitor, a high-definition webcam and a high-quality headset. In particular, consider using an external webcam rather than one built into a laptop. External webcams generally offer better image quality and can be repositioned more easily to adjust viewing angles.

Perhaps even more important than the audio-visual equipment, participants need access to a reliable, high-speed internet connection. Make sure to have sufficient bandwidth available during hearing hours and consider having a hot spot ready in case the primary internet connection is lost.

In all events, make sure to test the equipment (and internet connection) in advance of the hearing to make sure that technical issues are spotted and resolved.

Preparation is key

The remote format is typically an unfamiliar one for participants. Accordingly, counsel should plan to spend significant additional time preparing witnesses and their team for the arbitration proceeding. The more comfortable you and your team are with the remote format, the more effective you will be during the arbitral proceeding.

In particular, the experience of giving opening and closing arguments remotely is distinct from what advocates accustomed to arguing in open

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court may anticipate. The remote nature of the hearing and absence of an audience can be distracting. Accordingly, consideration should be given to whether to focus the arbitrator on the advocate or on a visual aid such as a PowerPoint presentation. Because the advocate will likely remain seated during argument instead of standing or moving around, camera angles are a surprisingly important consideration in order to maximize persuasiveness. By understanding and preparing for these differences, counsel can obtain a head start in adapting their style into one more suitable for remote proceedings.

Preparing a witness over videoconference is also a potentially more difficult prospect than meeting in person to prepare. Conducting full-day sessions over videoconferencing software is exhausting and may pose a barrier to building rapport with the witness. While counsel should take advantage of potential opportunities to meet with witnesses personally, it is important to keep in mind that the witness will eventually need to be prepared to testify remotely. To the extent that remote preparation meetings are necessary, consider more frequent but shorter sessions focused on specific topics. In all events, practice makes perfect, and counsel should understand the need for greater preparation and budget her time, accordingly. Counsel should also consider whether the witness should (or must) be remote from the questioner. Adding this additional layer of complexity multiplies the challenges associated with remote witness examinations.

Don't overlook the power of presentation

Virtually all remote hearing platforms incorporate the ability to directly share documents and other images with hearing participants. Unlike in an in-person hearing, these visual aids will be easily accessible via each participant's monitor. The ease of sharing and viewing documents provides a unique opportunity to incorporate demonstratives, PowerPoint slides and other images into your presentation. By focusing on these visual elements, an advocate can uniquely take advantage of the remote hearing platform to build a more persuasive argument.

With proper preparation, it is also possible to highlight keywords or circle important concepts in documents during a presentation in real time, as if using an old school projector. This type of reactivity enables the advocate to drill down on critical parts of a document, ensuring that the arbitrator remains hyperfocused on those issues, while also creating the potential for a more interactive presentation.

Advocates should also be aware that they will be on video for extended periods during

the arbitration. To that end, it is important to make sure that adequate space and lighting is available and that backgrounds are free of clutter and other distractions. It is advisable to think through these concerns in advance of the hearing and to take appropriate steps to ensure a professional presentation.

Keep your audience in mind

Many remote platforms allow users to "pin" the video feed from particular participants so that they are constantly visible. This unique feature enables lawyers and witnesses to garner feedback from opposing counsel and from the arbitrator(s) as evidence and argument are presented. With careful attention, it is possible to make real-time adjustments to emphasize particularly effective arguments based on the facial expressions and body language of the audience.

Moreover, it is important for participants to be aware that they are being observed at all times during the hearing. To that end, hearing participants should always be aware of whether audio-visual equipment is on and transmitting during any breaks in the proceeding and to maintain a professional demeanor at all times.

Given COVID-19's enduring effects and the growing recognition of the cost effectiveness of conducting remote hearings, it is likely that remote arbitration proceedings are here to stay. While proceeding remotely undoubtedly introduces various technical and stylistic wrinkles, it also offers enterprising counsel increased control over the proceedings and opportunities to enhance the persuasiveness of their arguments.

Through careful preparation and by keeping the above principles in mind, counsel will be well prepared to successfully navigate the challenges and to capitalize on the unique opportunities afforded by the remote arbitration process.

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