

# CONSIDERATIONS FOR LABOR ARBITRATORS BEFORE UNDERTAKING VIRTUAL HEARINGS

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Virtual hearings are moving from occasional use to a more active stage. Throughout 2020 this format might be quickly adopted by unions and employers, but may have slower growth in 2021 in the absence of a second pandemic wave. Labor arbitrators are advised to make an initial assessment about whether now is the time to invest time and money to become adept with this new technology. Those with established practices who serve larger clients represented by major law firms may decide against the investment. Alternatively, neutrals at lower tiers of the profession may conclude that proficiency with virtual ADR may increase their market share.

In making this business decision, neutrals must bear in mind Advisory Opinion No. 26; promulgated by the National Academy of Arbitrators on April 1, 2020. In pertinent part the Opinion states:

Section 1.B of the Code requires that “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.” In the context of a video hearing, this would obligate the arbitrator to ensure that he or she is sufficiently familiar with the operation of the platform to be able to conduct and

control the hearing, and advise the parties how to effectively make use of the process. Technical assistance may be obtained through a video conference service provider. The corollary point is that if the parties have requested a video hearing, and the arbitrator does not wish to undertake such a proceeding or does not feel competent to proceed in that manner, the arbitrator must so advise the parties. If the parties still wish to proceed by way of a video hearing rather than in an alternative manner, the arbitrator will withdraw from the matter.

Whenever this decision is made, labor arbitrators are well-advised to be prepared for significant differences between traditional and virtual hearing rooms. After mastering the technology, and the skills to conduct hearings in a virtual environment, any arbitrator who is new to the process will want to consider:

A. Self-certifying on appointing agency bios, resumes, and professional websites that he/she is sufficiently knowledgeable and experienced with virtual platforms to conduct and control hearings;

B. Confirm the parties' mutual consent to this procedure. Labor and management will be curious about cost, convenience, security, and confidentiality;

C. Determine if a virtual hearing is appropriate for the grievance, e.g., need for an onsite visit; open meeting laws; confidentiality of issues;

D. Prepare a template for the format of virtual hearings. AAA has published a *Model Order and Procedures for a Virtual Hearing via Videoconference*;

E. Select the most appropriate video conference platform for the grievance, e.g., Cisco Webex, Microsoft Teams, Skype For Business, Zoom (with a “Pro” account);

F. Whatever the platform, participants will need robust wi-fi systems and high definition computers;

G. At minimum, in selecting a platform consider:

1. Ease of access;
2. Security of access;
3. Muting
4. Features-
  - Waiting rooms
  - Chat rooms
  - Audio recording
  - Video Recording

H. Hold a case management conference (for counsel and organizational representatives) to brief them about virtual ADR, and to draft a protocol for their case based on the template you previously provided;

I. Conduct training session(s) remembering, however, that each party is responsible for testing platform connectivity for its witnesses, and other participants; and

J. Dress for Success on Camera: Judge Dennis posted to the Weston Bar Association’s website recommendations for making a good impression at virtual hearings. He wrote, “We’ve seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. One male lawyer appeared shirtless...So, please, if you don’t mind, let’s treat court hearings as court hearings, whether Zooming or not.”