

## ARBITRATION ZOOMING

By

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*“I was skeptical of the process at first but found that it went better than anticipated. Examinations were fairly smooth.”* This was a comment from an attorney following my first Zoom arbitration hearing.

During these challenging and uncertain times as we are confronted with stay-at-home orders and social distancing mandates, we all need to embrace the practice of law with flexibility. Videoconferencing for arbitrations and mediations is fast becoming an acceptable practice. It may actually be easier than you think.

I like to use Zoom because it is a secure platform that is easy to maneuver and seems to be comfortable for all participants. There are certain precautions that ADR specialists should grasp so that they can ensure a confidential, secure environment and keep the online proceeding running smoothly. The purpose of this short essay is to delineate special procedures that I used for a Zoom arbitration. Much of this information also applies to online mediations.

Once counsel and their clients agreed to using Zoom, I sent them a special stipulation created for online dispute resolution (ODR) proceedings. All counsel, parties, and witnesses must read the stipulation and sign it, agreeing to its terms. Some of the provisions include:

- The need for good Wi-Fi, which requires limiting the demand for other high-demand Internet use such as video streaming or music;
- The removal of all distractions. In particular, no unauthorized persons should be able to overhear the session; and
- The requirement of a webcam, whether installed on a computer or peripheral.

It is critical to take extra precautions, planning in advance for unforeseen challenges. I collect email addresses and cell phone numbers from all participants; it is important not to use office telephones with message trees and the interaction of assistants. As arbitrator, I want direct and immediate access to a person that I may need to reach. With a cell phone, I can call or text the person directly. This was particularly helpful during my Zoom arbitration because one witness left the Zoom meeting as soon as her attorney completed his direct examination; the witness did not realize she would be cross-examined by opposing counsel. Using her cell phone number, I quickly reached her to rejoin the arbitration.

This situation led to another measure that online arbitrators should use—provide detailed and specific instructions throughout the procedure. Thus, for all subsequent witnesses, I provided extra instructions informing them what to expect from examinations by the two attorneys.

To help the attorneys understand the Zoom platform, I had a pre-hearing Zoom meeting with them so that they could learn all of the features that I was going to use. I emphasized that I wanted them to look like experts in front of their clients during the hearing. In particular, I enabled all parties to share documents as they had close to 40 exhibits. During that pre-hearing Zoom meeting, both attorneys were happy to “practice” the share function, which resulted in a great job of maneuvering all of the exhibits as their witnesses testified during the arbitration hearing. Once the attorneys felt comfortable using the Zoom platform, I asked them to work with their respective clients and witnesses in advance of the arbitration so that the hearing would run smoothly.

In the future, I may want to personally contact parties and witnesses prior to the arbitration hearing to ensure that their

communication channels are working appropriately. This would have helped in my Zoom arbitration because one witness could not access her video feed. If I had worked with her prior to the arbitration hearing, perhaps I could have prevented the situation. In the end, the attorneys agreed to allow that one witness to testify solely by audio.

Another function that worked quite well was my Zoom waiting room. I customized it specifically for that arbitration and told the attorneys in advance what I was going to do so that they could forewarn their witnesses. Since witnesses would be joining at different times throughout the day, my waiting room message stated that if they were waiting, it was because another witness was testifying and requested their patience. Also, I required the attorneys to submit their witness lists with the order of the witnesses and the expected amount of time testifying. That made it easy for me to see that a permissible person was in my waiting room so that I admitted only those that were allowed to be in the arbitration hearing at a particular time.

One of the attorneys felt that a negative aspect of the Zoom arbitration was the need to ensure that everyone had access to the same set of exhibits prior to the hearing. In hindsight, however, he realized that submitting exhibits in advance of the arbitration “assisted with pre-arbitration organization and was mitigated by being able to view and share the exhibits on Zoom during the hearing.” Indeed, as arbitrator, I normally request that exhibits be submitted prior to the arbitration hearing, knowing that such a procedure helps the attorneys prepare for the hearing, resulting in a streamlined process.

Zoom has a recording feature. I obtained permission from each attorney prior to the hearing to allow me to record the hearing in case I needed to refer to evidence as I wrote my arbitration award. Because I was recording the hearing, I announced that fact to each witness prior to his or her testimony.

All in all, the Zoom arbitration was a huge success. As one of the attorneys said, “*I was also very comfortable with how the process was going to play out due to [the arbitrator’s] advanced detailed preparation and explanations. . . . I would not hesitate to participate in arbitration via Zoom again.*”

Based on the foregoing information, my Arbitration Zooming Checklist is:

- Have all counsel, parties, and witnesses review and sign my ODR Stipulation;
- Collect email addresses and cell phone numbers of all participants in advance of the arbitration hearing;
- Have attorneys submit a witness list with anticipated times for testifying so that I may monitor and allow only certain people to be admitted to the Zoom hearing;
- Customize my Zoom waiting room since witnesses will join the arbitration hearing at different times;
- Have attorneys submit exhibits in advance of the arbitration hearing;
- Enable the share function so that attorneys are able to upload documents as their witnesses are testifying;
- Run practice sessions for counsel, parties, and witnesses prior to the arbitration hearing so that they feel comfortable with the online platform;
- Get prehearing approval to record the hearing.

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