

MANAGING A BUILD FROM A DISTANCE

Hearings in a Remote Environment



Don't be afraid! Over the past several months, remote legal proceedings over Zoom have become the norm.

Arbitrations, agency trials, mediation, settlement conferences, judicial motion hearings, appellate argument, and even jury trials are being held remotely. And our attorneys have been involved in all of these.

Below are some considerations for coordinating a remote hearing, including prehearing logistics, technology, information related to witnesses, and others.

PREHEARING LOGISTICS

Hearings begin well before the first day of the hearing itself—they involve a myriad of decision points and significant preparation. Hearings in a remote environment require even more careful thought and attention, particularly when participants' health and safety concerns are involved.

- **Exhibits.** Consider whether to use digital or hard-copy exhibits. In-person hearings typically have binders of exhibits for the parties, witnesses, and arbitrator, whereas video platforms typically have screen-sharing capabilities, meaning that you could simply share exhibits for everyone to review together on their individual screens. Consider exhibit format well in advance. If you choose to use hard-copy exhibits, make sure to mail hard-copy binders well in advance of the hearing.
- **Staff assistance.** Remote hearings can sometimes involve unique technological issues and additional witness coordination. Make sure to have support on hearing days to assist with any unexpected problems.

- **Fully remote or partially remote.** Some remote hearings are fully remote with all witnesses and participants in separate locations. Other remote hearings are only partially remote, meaning that some groups of attendees are in a location together, such as one party and its witnesses. One benefit of being in person with witnesses is that the testimony will be more natural than trying to establish flow virtually, but being in the same room with others would require witnesses and lawyers to wear masks due to health concerns.
- **Prehearing order.** The hearing arbitrator or judge may issue a prehearing order to establish ground rules for remote hearings. Allow enough time to implement the rules and have a technology point-person to ensure that your setup complies.



WRITTEN BY:
Erin Burris
Jeffrey Chicoine

TECHNOLOGY

Technology is critical to the remote hearing environment. Here are some technological aspects that are worth considering:

- **Video platform.** Most remote hearings are done on a platform for video calls, and anyone with a laptop or even smartphone can join. Familiarize yourself with various platform options to ensure that the platform you select has the features that your hearing will require. For example, hearings require "break-out rooms" where parties, judge panels, juries, or others can gather privately to discuss issues,

so it is important that the platform you select can support multiple breakout rooms.

- **Technology manager.** Designate a point-person for managing technology on the hearing days. For example, someone must be available to set up breakout rooms when they are needed and coordinate witnesses. It is also useful to have someone on hand to deal with technical issues, should any arise. This might be a support staff member such as a paralegal from your office or from the client's staff.
- **Internet connection.** Identify and address any potential WiFi or Ethernet connection issues for the attorneys, client representative, and witnesses before the hearing, and make sure to have a backup plan. Potential backup plans could include arranging for WiFi hot spots, or arranging for witnesses to appear by telephone instead of by video.
- **Video for all attendees.** All attendees should have their own video camera and sound system, even if some witnesses or attendees are in the same location. Video calls work best when each screen has one face so that viewers can immediately discern who is speaking.
- **Lighting and camera angle.** Consider opportunities to display yourself in the best light possible—literally! Light and camera angle can play a big role in visibility, audio quality, and professional appearance. Take a few minutes to ensure that your laptop is propped up on a couple of books or your smartphone is safely balanced, and that your face will be well lit throughout the day.
- **Sound considerations.** Ensure that each attendee's audio and microphone works in advance. *Consider reverberation issues if multiple attendees will be in the same space.* Options for mitigating reverberation include using headphones or, for in-person groups, having one central sound source to "mute" each person's individual laptop. Be careful during breaks and always be aware if you have a "hot mic"—check that all microphones are muted before privileged or private discussions.

WITNESSES

Witness testimony is crucial to any successful hearing. Here are some considerations for witnesses in the remote environment:

- **Scheduling considerations.** Make sure witnesses are "on call" on the day that they

will testify. Typically, witnesses can wait in the building where the hearing is taking place, but in a remote hearing, your witnesses are probably at home. Ensure that they are ready and available to be called, with the understanding that remote hearings (not unlike live hearings) often have unexpected delays.

- **Discuss technical capabilities.** To avoid technology surprises on hearing day, evaluate each witness's capabilities to appear remotely.
- **Video appearances are ideal.** Whenever possible, witnesses should appear by video instead of by phone. Video testimony allows the hearing attendees, and most importantly, the arbitrator or judge, to observe the witness's facial expressions when providing testimony, which can be helpful in assessing credibility. If a witness does not have video capability (such as no web camera), it may be worth spending extra time and resources to arrange for them to have the equipment they need to appear by video. As a last resort (and for less critical witnesses), telephone testimony can also be an option.
- **Witness preparation.** Hold a preparation session with each of your witnesses in the manner in which they will testify. This will reduce anxieties and allow the parties to mitigate technology issues before the big day.

OTHER CONSIDERATIONS

- **Communications during hearing.** Discuss with the witnesses how to handle attorney-client communications, since you cannot discuss topics privately as you might be able to in person.
 - If the attorney and client are in the same place, simply request a break and step away (but ensure your microphones are muted).
 - If you are in separate locations, request a breakout room or speak by phone or use a different platform. For example, if the hearing is using Zoom, use Microsoft Teams for private communications (but make sure your cameras are off and your microphones are muted in the hearing platform).
- **Dry run.** If possible, the parties and the arbitrator should hold a brief practice session to ensure that the key players know where to be and what the setup should look like. Not only does it give time to work out any apparent issues in your technology or appearance, but it will provide reassurance that you are well prepared.