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Arbitration Tips-N-Tools (TNT): Round 9



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In this round of Arbitration Tips-N-Tools, Professor Amy Schmitz asks some of the leading arbitration practitioners about witness examinations during virtual hearings, especially in a digital world and faced with the complexities of the Covid-19 pandemic.

Round 9: What are your 3 top tips and/or tools with respect to witness examinations during virtual hearings – especially in the digital era and complexities of Covid?

Mar 2021

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Responses:

A) [Julie Hopkins](#) –

1. During cross-examination have someone other than the examiner (co-counsel or tech assistant) handle document presentation and navigation.

This frees up the examiner to concentrate on the questioning.

2. Consider using a second camera with the witness in addition to the computer camera. The second camera can be placed in the room to show the witness from the side and the computer screens to help ensure the witness is not communicating or accessing information inappropriately during questioning.
3. For the documents to be used during questioning, consider creating an electronic document bundle (the electronic equivalent to the tabbed binder of documents) to make accessing them quicker and easier. When including documents in the bundle err on the side of inclusion. If you only include a couple of pages out of an agreement and the witness wants to take you to a page you have not included any benefits of efficiency could be lost

B) Rachel J. Goedken –

1. In advance of the hearing, set ground rules for handling exhibits. Will paper copies be mailed in advance of the hearing? Will electronic documents be placed in a dropbox or shared via the chat function or screen share? Will witnesses be instructed to not open exhibits until they testify?
2. Advocates, practice using the virtual platform with your witness before the hearing to ensure the witness has sufficient internet connectivity, can use the platform, understands how to access exhibits during the hearing, how to join the hearing, and how to communicate with her advocate in the event the witness is disconnected from the hearing.
3. If witnesses are in the same room as counsel
 - They will be testifying while wearing a mask, which may make it more difficult to hear. Slow down and speak up.

- Encourage participants in the same room to use separate devices for better close-ups of each speaker and headphones to reduce feedback.
4. If witnesses are appearing from home, there may be concerns about using notes or communicating with others during their testimony. The witness oath/affirmation can address these concerns. Review applicable privacy law before insisting witnesses pan the room with their laptop/iPad to demonstrate that there is no one else in the room with them.
 5. To keep roles straight during a virtual hearing, it is helpful for participants to rename themselves, if possible, adding their role to their name – Arbitrator, Advocate, Witness, Court Reporter, etc.
 6. The internet connection or the platform's audio/video may fail during testimony. To successfully recover, advocates should have phone numbers for their witnesses. While the arbitrator may be hosting the virtual hearing, she may want to avoid ex parte communication with the witness. Witness attendance remains the responsibility of the advocate.
 7. In the event internet connection cannot be re-established, have a back-up plan for continuing – by phone, by using the same platform another day, by using a different platform another day, etc.

C) Linda A. Michler –

1. Exchange all docs before the first day of the hearing. Sending by email (and if parties or panel prefer, send by mail too.) The parties will be able to introduce an unexpected document on the day of the hearing. Zoom and any other virtual process (go to meeting etc) has a way to that, but for continuity and ease of the process requesting the documents, counsel plans to use before is needed.

2. Include requirement of the list of attendees to be disclosed a few days prior to the hearing. That way if someone is in the room that the arbitrator(s) cannot see, it is obviously a violation. Parties need to be told that no one is to be present unless announced to all and that texting for advice etc. is prohibited. Zoom can scan a room to some extent and that should be done. There is equipment available to scan rooms too and depending on the case, should be considered.
3. Review the rules of procedure for the arbitration. Sometimes it is better not to use strict court rules or evidence, and parties, counsel, and arbitrators can decide by conference of the parties and counsel. Keep in mind a party may not agree or the rules of the tribunal under which the arbitration is being conducted may not permit.
4. Consider simultaneous testimony of witnesses on the same subject matter (typically expert witnesses). There are advantages including less movement in and out of rooms and perhaps smoother and less time being used.

Sample clause: Counsel shall meet and confer in an effort to have experts on the same subjects testify at the same time at the hearing. If schedules permit, expert testimony shall be scheduled so that Claimant's expert will testify by direct examination on one subject, followed by Respondent's expert by direct examination on the same subject. This may be followed by questions from the Panel to clarify or narrow the issues. Respondent's counsel will then have an opportunity to cross examine Claimant's expert and Claimant's counsel will then have an opportunity to cross examine Respondent's expert. The process will then continue for the next subject of expert testimony. If the expert's schedules do not allow for this

procedure, counsel should inform the Panel no later than

-----.

5. Consider using expert reports as a substitute for extensive direct examination.

Sample clause: Disclosure of expert testimony: When selecting experts and preparing expert disclosures, counsel should be mindful that at the pre-hearing conference, the Panel will ask counsel to consider: 1) having experts on the same subject matter testify simultaneously, and 2) using expert reports as a substitute for extensive direct examination of experts.

6. Require the parties to provide stipulated joint exhibits to the extent possible.
7. Liberally use summary exhibits to summarize detailed facts. In addition to a stipulation of facts, require the parties to provide a stipulated chronology of events.

Stay tuned for more Arbitration TNT by Prof. Amy Schmitz coming your way next week.....



Julie Hopkins is counsel with **Borden Ladner Gervais LLP** and practised commercial litigation, arbitration and administrative law for more than 25 years. She advised and represented clients on complex and technical matters concerning oil and gas, insurance, labour and employment, estates and trusts, corporate, and constitutional law. As a result, she...



Rachel Goedken is on the Werner Institute at Creighton Law School, Professor Goedken focuses on nonlitigation dispute resolution – arbitration, mediation, and negotiation. Before joining the faculty, Professor Goedken earned her BS in Psychology and MS in Industrial Relations, then worked in labor relations and human resources for several years before...



Linda Michler is an arbitrator and mediator and may be reached at 412.854.4315/ 412. 480.1731 or on-line at www.nadn.org/linda-michler She is licensed in PA, NY and NC and is a member of the National Academy of Distinguished Neutrals and is on the roster of the American Health Law Association’s Dispute...



Amy Schmitz joined the University of Missouri School of Law and the Center for Dispute Resolution as the Elwood L. Thomas Missouri Endowed Professor of Law in 2016. Previously she was a Professor at the University of Colorado School of Law for over 16 years. Prior to teaching, Professor...

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