

Arbitration

REMOTE LOCATION

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One of the advantages of arbitration is its flexibility. The parties can design their own process, which may contribute to a result that is better received by the clients. Importantly, the proceeding can be flexible for receiving evidence. Most providers have a rule similar to the American Arbitration Association's: "Conformity to legal rules of evidence shall not be necessary." Rule 31(a) AAA Commercial Rules. As a result, the parties in arbitrations frequently request the arbitrator to allow testimony of witnesses who cannot appear in person at the hearing.

In the past, we arbitrators have been used to receiving testimony offered in the form of a declaration or affidavit, though that makes cross-examination impossible. Rule 32, AAA Commercial Rules allows this practice, though it admonishes that "[the arbitrator] shall give it such weight as the arbitrator deems it entitled to after consideration of any objection made to its admissibility." See also JAMS Comprehensive Rules and Procedures, Rule 22(e).

Frequently, the party offers a deposition, which itself may be either in hard copy or by videotape. The problem with this is that no follow-up questions are possible. And sometimes, live testimony is taken by the telephone. In my experience as an arbitrator, not being able to see a witness testify in person is not a very satisfactory situation. It is also impossible to know whether others are in the room with the witness. Moreover, the court reporter may object, concerned that there is no way positively to identify the person testifying.

In the past, these unsatisfactory methods of taking testimony were endured, but fortunately forgoing live testimony is no longer necessary, even if the witness is at a very great distance, thanks to videoconferencing. Moreover, a party's representative may be unable to attend all or part of a hearing in person. That person, too, can participate instead from a remote location by videoconferencing. In fact, as happened in a recent case before me, parties located in two European cities were connected to our Los Angeles hearing site simultaneously. They were able not only to hear the proceedings but also to see everyone else involved, contributing to their satisfaction with the arbitration process.

Although surprisingly few parties suggest the use of videoconferencing, when I mention its use they are uniformly enthusiastic. I predict that videoconferencing will be used in arbitrations with increasing frequency very soon. The high cost of travel and the busy schedules of managers who are loath to take time away from the office make videoconferencing an ever more viable alternative to appearing at the hearing location, especially if the witness is not central to the case. In arbitrations over which I have presided, the parties have presented video testimony from many locations in both the United States and Europe, without significant interruption or problems. The low cost of the technology allows videoconferencing to be used in virtually every case.

Though the taking of testimony by videoconference vastly improves the quality of the evidence the arbitrator receives, many parties neglect to consider this technique in advance of the hearings. In my experience, it is precisely in advance of the hearings that the parties need to think about

employing videoconferencing and discussing it with the arbitrator. In the presentation of video testimony, advance preparation is crucial.

In preparing for the taking of video testimony, I recommend to the arbitrator and the parties that the subject be raised at the first management conference in the case. Once the idea is discussed, and the parties see how much they can accomplish in using it, they frequently decide to build the hearing schedule around the videoconference. In one case, the hours of the hearing were adjusted because the witnesses to be heard were located in several time zones. Because some witnesses testified from Belgrade, Serbia, we started the hearings early in the morning, Pacific time, in order to account for the eight-hour time difference. We also concluded our sessions earlier, when we noticed the witnesses were becoming tired. These witnesses, who were also claimants in the case, were able not only to testify but also to hear the testimony presented by other witnesses at our location.

Several items that the parties need to work out in advance can and should be handled by the arbitrator's scheduling orders: The parties need to agree on a schedule for creating a joint list of exhibits to be used at the hearing. If a hard copy of exhibits is going to be used, once the exhibit binders are assembled, the parties need to allow sufficient time to send a set of the exhibits to the location so that the witnesses located there have access to them while testifying.

Sometimes, a witness invokes a privilege, one of the evidentiary rules that is followed in arbitration. See, for example, Rule 31(c) AAA Commercial Rules. If it is obvious in advance that privilege may be invoked or if there is a need to prepare the witness or to explain questions, the smoothest way to handle the issue is to have a lawyer at the site of the witness. Either a lawyer may be dispatched there, or, as is the case with global law firms, the witness can travel to one of the firm's offices, where a firm attorney is present. With that arrangement, testimony can be taken from that remote location for the arbitration occurring elsewhere.

No system is perfect, and videoconferencing is not yet seamless. The television monitor sometimes shows faces moving but with annoying lags in verbal responses. The witness frequently appears to be looking off center, which can be distracting, as well. (The camera location can be fixed with a little adjustment most of the time.) Glare on the television monitor can make looking at it for long periods uncomfortable. Occasionally, those of us at the hearing site lost our connection with the remote location altogether; this technical glitch, however, was more distracting than really problematic. Redialing reconnected us in every case.

Sometimes, in addition to the distance, language issues need to be confronted. Arranging in advance for the services of an interpreter at the witness's location is necessary. Moreover, during the questioning, the arbitrator should be sensitive to allocating additional time for the interpreter to translate questions and answers.

I highly recommend that the court reporter retained for the hearings be experienced in the taking of testimony from a remote location. Because of the need to watch the television screen, located a distance from the reporter, and because of the speech time lag that sometimes occurs, court reporters have told me that they find taking the testimony somewhat more difficult. This is especially aggravated if there is a person simultaneously talking, either at the remote location or at the hearing site. I find that more-frequent breaks are necessary to allow the reporter to rest.

Finding locations at which videoconferencing is offered is not difficult. The American Arbitration Association offices in Los Angeles have the equipment, and many locations around the United

States are also available. FedEx Kinko's, for example, advertises that it has 120 locations at which videoconferencing facilities are available.

None of this, however, can be done on the fly. In the past, I have sat facing a black screen because the lawyers involved in the arbitration had not set up the videoconference properly, and curing the problem on the spot was impossible. Finally, I had to take the testimony by telephone. Now, my first order setting an agenda for the first teleconference in a case routinely asks the parties to consider whether they may wish to present some witnesses by videoconference. Uniformly, they are pleased to have the opportunity presented to them.

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