



AHLA Dispute Resolution Service

Guidance for Video Conferencing¹

Authority

Arbitration

Effective September 1, 2020, arbitration rule 5.7² was renamed Hearing Format and amended to permit an arbitrator to order videoconferencing over a party's objection. This new rule encourages arbitrators to strive for consensus on a hearing plan and to consider how the submission of evidence in writing, in person, and virtually may be combined to meet the unique needs of a particular claim.

Mediation

AHLA has no rules for mediation; the parties and mediator must agree on how to proceed.

Key Considerations

Effectiveness

- *Arbitration*

Generally, the biggest concern is whether key witnesses can be thoroughly examined or cross-examined from a remote location. Planning how documents will be distributed and displayed is critical. Concerns about witness coaching should also be addressed in advance of the hearing.

- *Mediation*

Some parties prefer video conferencing because their home or office feels safe and comfortable, whereas being in the same location as their adversary is stressful. In some situations, however, face-to-face interaction may be a necessary ingredient for success. So, it is best to consider the pluses and minuses of video conferencing on a case-by-case basis.

¹ This document provides non-binding suggestions for arbitrating or mediating via video-conferencing. It is not a set of rules or requirements.

² The language is identical in the Commercial, Consumer, and Employment rules.

Reliability

Video conferencing may be delayed or disrupted because of a bad internet connection, computer, camera, microphone, etc. But the grass is not necessarily greener on the other side: In person hearings are vulnerable to travel delays caused by bad weather, mechanical problems, traffic, and a host of other problems.

Over time, video conferencing technology is destined to improve, whereas climate change may increase the frequency of major weather events.

Cost

Video conferencing is generally going to be the clear winner in this category. A Zoom manager or comparable technical support is likely to cost far less than transportation, lodging, and meals for advocates, witnesses, or the neutral to travel from out of town to an in-person hearing.

Scheduling

Video conferencing eliminates the need for travel, so it less time-consuming and allows for greater flexibility in scheduling.

In-person hearings generally take place on consecutive dates to minimize the time participants are on travel and to avoid the need for multiple trips. Having to find consecutive open dates for the hearing--and possibly for travel at both ends--on the calendars of busy litigators and neutrals can push back the start of arbitrations and mediations for months, or years, and make rescheduling a nightmare.

Video conferenced arbitrations and mediations need not consume full days or occur on consecutive dates. This added flexibility should greatly reduce the time required to resolve claims and make hearings and mediations less exhausting.

Confidentiality

Zoom and many other online platforms are encrypted, and most of the security risks can be mitigated by following the guidance set forth below. But any form of electronic communication may be hacked or may generate data that ends up in the hands of unauthorized parties.

In-person hearings are not risk-free either. Documents may be misplaced or left in an unlocked room; computers may be inadvertently left on where unauthorized persons may access them; participants may surreptitiously record the session on their smartphone; or someone may listen in through an open window or thin wall.

Often the greatest security risk in arbitration or mediation is the transmission of documents as email attachments. This happens routinely whether the hearing is in-person or online. Uploading and downloading documents from the AHLA case management system may be somewhat more time consuming but it is much safer.

Logistics

AHLA strongly recommends investing in technical support to set up and manage video conferenced arbitrations and mediations. Presiding over an arbitration or mediation requires intense focus and concentration. Even neutrals who are adept with video conferencing technology should delegate administrative tasks to support personnel and devote their full attention to the substance of the dispute.

AHLA Contractor

Planet Depos has contracted with AHLA to offer its Zoom platform and experienced Zoom managers for an initial set up charge of \$95 and a fee of \$195 per hour, with a 2-hour minimum. Planet Depos will invoice AHLA, and AHLA will pay from funds deposited by the parties. This is straight pass-through cost; AHLA will not mark up the fee.

A session can be scheduled online at <https://planetdepos.com/schedule-now-remote/> or by phone (1-888-433-3767) or email (scheduling@planetdepos.com). Please list AHLA as the "Firm" and "Noticing Attorney Firm." Under special requests, you may ask for a HIPAA-compliant Zoom session. Alternatively, you may ask AHLA staff to schedule the session for you. They will need email addresses for any participants who are not listed on the case site.

Prior to the hearing or mediation date, Planet Depos will assist everyone who is expected to participate in preparing for the session. They have training videos and a help desk. Planet Depos will ask attorneys to upload all exhibits in advance.

The Zoom manager will begin the session one hour in advance to assist participants in joining and setting up their video and audio connections. During the session, the Zoom manager will display exhibits through the screen share feature and, upon request, electronically mark exhibits as they are admitted.

AHLA Zoom Account

If the parties do not agree to pay for a Zoom manager, AHLA can schedule a Zoom session on one of its own accounts free of charge. Please provide Dispute Resolution Service staff with the dates and starting and ending times for a rehearsal (see below) and for session(s). Hold counsel responsible for conveying the Zoom link to client representatives, witnesses, and anyone else who may be involved.

Other Options

Other video conferencing platforms are suitable for legal proceedings and there is no shortage of firms that can provide technical support. Neutrals and parties are under no obligation to use Planet Depos or AHLA's Zoom account.

Tools for Success

What may work just fine for a Zoom chat with your best buddy, such as using an i-Phone in a coffee shop, is dangerously inadequate for a legal proceeding. A public WIFI connection is neither secure nor reliable, a stranger may overhear the conversation, and the screen is too small to view documents or multiple participants.

Every participant must have the following technology in a room which only authorized participants can access:

- A computer with a large enough screen to display multiple images in a viewable size
- A built-in or external camera
- A built-in or external microphone
- A private internet connection with sufficient bandwidth for high quality video and audio
- A recent version of Zoom (or other conferencing platform)³

In addition, every participant should take the following steps prior to the session:

- Turn off high-bandwidth applications on the same internet connection such as:
 - WIFI on a cellphone
 - Netflix on a television
 - You Tube on an I-Pad
- Turn on adequate lighting in front of the camera
- Remove inappropriate or distracting items in view of the camera (or select a virtual background⁴)

Conducting a Mediation

Develop a Protocol for Settling

Sealing the deal before the session ends is just as important online as it is in person but requires more advance planning. Possibilities for drafting include the Screen Share feature in Zoom or document sharing software such as Google Docs or One Drive. Documents can be rapidly signed electronically through software such as DocuSign or Adobe. Ensure the participants agree in advance on how to draft and sign an agreement, have ready access to the chosen technology, and know how to use it.

Recording

Disable this Zoom feature prior to the session and secure everyone's agreement not to record the session through other means.

Waiting Room

³ <https://zoom.us/download>

⁴ Instead of displaying what is behind a participant, Zoom will display a picture.

Enable this feature to ensure that only authorized people join the session, and that they cannot begin communicating with each other until the mediator is ready to preside. When people join, ask them whether anyone else is nearby and able to hear or view the session.

Mute

This feature can be used to control who is speaking and minimize interruptions. Muting lines has the added benefit of reducing background noise.

Screen Share

This feature allows participants to display documents. Zoom has a whiteboard that can be used like a flip chart to keep track of outstanding issues and/or proposed settlement terms.

Breakout Rooms

This feature enables caucuses. If attorney Smith is representing Dr. Jones, you can assign them to Room 1. If attorney Morales is representing Dr. Wang, you can assign them to Room 2. While in Room 1, Smith and Jones can communicate without being seen or heard by Morales and Wang. Ditto for Morales and Wang in Room 2. As the host (mediator), you can move from room to room. To reconvene a joint session, move participants out of the breakout rooms.⁵

Conducting an Arbitration

Plan Where Participants Will be Physically Located

Video conferencing can either be fully remote (everyone is in a different location) or partially remote (some participants are in the same location). Ensure everyone is comfortable with the configuration. Having lawyers who represent the same client participate together should not be a problem. However, an absent party may object to having an arbitrator or witness join in from the same location as its adversary. It is best to have the parties on an equal footing.

To ensure confidentiality, and to minimize opportunities for witness coaching, participants should not be within the same four walls as non-participants.

Develop a Protocol for Distributing and Displaying Documents

If a witness will be testifying about documents, Zoom will allow the arbitrator and the other participants to see the witness or the document, but not both at the same time.⁶ If this arrangement seems inadequate, select one of the following options:

⁵ While breakout rooms are not hard to master, if you are dealing with a small number of participants, you can accomplish the same result by having people leave and rejoin the meeting when you want to speak with them. You would just need to have a separate form of communication, such as phone or email, to let them know when it is time to rejoin.

⁶ If the document is on the witness's screen, Zoom can display a thumbnail (small) view of the witness in a corner of the document. However, you may want a larger image of the witness, and the examining attorney may not want to cede control of displaying documents to the witness.

- Separate screen: All participants have another screen (either a second monitor for one computer or a second computer or tablet) for displaying documents.
 - Since the documents will be displayed offline (not through Zoom), they must be distributed in advance of the hearing and be well indexed.⁷
 - Incorporate a dry run of displaying documents into your hearing rehearsal.
 - If the examining attorney is concerned about witness coaching, he or she can password protect key documents and not reveal the password until it is time to question the witness about them.
- Hard copy: All participants receive well-indexed printouts of the documents in advance of the hearing. If the examining attorney has concerns about witness coaching, he or she can send the documents in advance in an envelope clearly marked: "Do not open until instructed to do so." When the witness is called, the examining attorney can instruct the witness to place the envelope in front of the camera and open it on camera.

Plan Whether and How to Record the Hearing

Discuss in advance whether the parties want to have the session recorded. If so, they need to agree on how it will be recorded, where the recording will be stored, and who will have access to it. If they do not want it recorded or are contracting with a court reporting service, disable Zoom recording in advance.

If Zoom recording is used, delegate responsibility to a trusted assistant who can remember to turn recording on when the session starts; turn it off when there is a break or you or the attorneys want to go off record; and then turn recording back on each time the session resumes. Your attention should be on the substance of a hearing.

If you want to take a break during the session without having participants leave the meeting and rejoin, you can move them back into the Waiting Room until the break is over.

Muting

You can control who is speaking by muting everyone's line when you are speaking and then unmuting someone's line only when it is their turn to speak. This feature has the added benefit of reducing background noise.

Screen Sharing

Participants can display documents on their computer. If no witnesses are being called (e.g., the parties are arguing a motion for summary judgment), screen sharing may be adequate for the hearing.

Breakout Rooms

You can use this feature in several different ways including:

- Discussions between arbitrators (if this is a panel case)

⁷ One simple tool for indexing is to compile all the documents into a single PDF document and then book mark the page numbers of each document or key page.

- Attorney side bars with their clients
- Discussions between you and the attorneys out of the earshot of witnesses.

If just one witness is in the session, moving him or her temporarily back into the Waiting Room is much easier than setting up a Breakout Room.

Chat

By default, the chat feature (which allows participants to send text messages during the session) permits participants to send messages to individual participants during the session. Either disable this feature or instruct participants not to send individual messages to you or to a witness.

Practicing and Rehearsing

For many neutrals and advocates, the features on Zoom and other video conferencing platforms are rapidly becoming second nature. This section is for anyone who remains unfamiliar with these technologies and wants to get up to speed.

Practicing

Key features to master include the following:

- Attendance
 - Starting a session
 - Moving participants from the waiting room to the session
 - Viewing the attendee list
 - Removing a participant from a session⁸
 - Ending a session
- Communication
 - Turning your camera and audio off and on
 - Turning on (unmuting) and off (muting) the audio of other participants
 - Sharing your screen (allowing participants to see a document on your computer)
 - Allowing participants to share their screen
 - Prohibiting participants from sharing their screen
 - Sending and viewing chat messages⁹
- Caucusing
 - Creating breakout rooms
 - Assigning participants to rooms
 - Moving from room to room

⁸ Situations where you would need to remove a disruptive person against their will should be rare, but people may inadvertently forget to sign off (leave the meeting) when their participation is no longer needed.

⁹ If you are in a breakout room, the chat feature will send messages only to participants who are in the same room.

- Recording
 - Recording
 - Stopping recording
 - Preventing attendees from recording

Zoom has numerous training videos and you can find guides to every feature online. Ask colleagues, friends, or relatives to participate in a practice session, or ask someone on the Dispute Resolution Service staff for training.

The default in Zoom is for everyone to see an image of themselves. If this is distracting, click on your image and then on Hide Myself. Others will still be able to see you if your camera is on.

Rehearsing

If participants are unfamiliar with video conferencing, schedule a dry run at least 48 hours in advance of the hearing or mediation. Require everyone who is going to participate (including witnesses) to join with the same equipment at the same location they will be use for the real event. During the dry run:

- Ask whether participants have chosen a location where only authorized people can hear or view the session (some participants, especially witnesses, may not have considered the need for privacy).
- Check whether everyone can perform all of the functions required for a successful session such as sharing documents and communicating in breakout rooms.
- Ask everyone to practice leaving the meeting and rejoining.
 - Interruptions in Internet service are common and you do not want anyone to panic if they get logged off inadvertently.
 - In addition, if a session goes on for hours participants will want to take breaks. To keep the session secure, participants should sign off (leave the meeting) when they are away from their computer for any length of time and log back in when they return.
 - If you are in a breakout room, you must return to the main room in order to readmit someone to the meeting.