



NATIONAL ACADEMY OF ARBITRATORS  
VIDEOCONFERENCING TASK FORCE

## Year in Review

### Lessons Learned: A Preliminary Review of the Experience with Video Conferencing Hearings during the Pandemic

#### I. Introduction

After a year of programming directed at helping neutrals and advocates transition to the use of video conferencing as a means of conducting arbitration hearings, the Videoconferencing Task Force (VTF) held a “Year in Review” program on April 1, 2021. The program was conducted in a “focus group” format, where participants were divided into small groups. Each group was led by a facilitator who was assisted by a student from the University of Missouri School of Law.<sup>1</sup> The assistants recorded the answers to each question.

The VTF developed and tested a survey instrument and facilitators were asked to follow the instrument to allow for the comparison of answers among groups. The survey instrument consisted of 17 questions, including a mix of open and close ended questions. The questions were designed to explore the experiences of neutrals and advocates in conducting videoconferencing hearings between March 2020 (the onset of the pandemic) and April 2021. The participants were advised that the VTF was seeking group data only and their names would not be used in any way.

Of the 221 individuals who registered for the event, 107 attended. The vast majority of participants were neutrals (104 neutrals and 3 advocates). Participants included neutrals from both the United States and Canada.

Following the focus group discussions, we collected, tallied, and reviewed the information gathered from all of the groups. This document reports on the responses, discusses the implications of the responses, and suggests areas for future research.

#### II. Limitations

We add three points of caution as we share the results of the focus group discussions. First, although we tried to maintain consistency and neutrality across the focus groups, the program was not organized with the sole intent of gathering data for a formal empirical project. The goal was to start a conversation about the collective experiences of arbitrators and advocates with Video

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<sup>1</sup> The VTF thanks the NAA’s Research and Education Foundation for their financial support, which allowed us to provide a small stipend to the assistants.

Conferencing (VC) and to identify areas of future and more rigorous analysis. Second, we recognize that the population of respondents was not a randomly selected group. Participants self-selected to participate by registering and attending the event. Even though we invited both individuals who have and who have not conducted VC hearings, the questions we asked were primarily designed for individuals who had conducted VC hearings. While some of the participants who have not participated in VC hearings might have responded to some of the questions (e.g., “In the future, would you use video conferencing as a means of conducting an arbitration hearing?”), we did not ask them questions specifically directed to explain the reasons why they did not conduct VC hearings. Third, while the focus-group format allows for a more interactive session and it likely generates a good amount of discussion, it is sometimes difficult to record every response. Thus, while we believe the summary of the responses is accurate, it is possible that not every response was collected as it was intended by the respondents.

### **III. Results of the Focus Groups Involving Neutrals**

#### ***A. Numbers and Types of VC Hearings***

10% of the participants reported not to have participated in any VC hearings, while 56% of the participants reported having conducted between 1 to 10 VC hearings since the start of the pandemic in March 2020. 30% of participants reported having conducted between 11 to 39 VC hearings in that same period. 4% reported 40 or more VC hearings. While it is unknown how these numbers compare to a non-pandemic year these results suggest that during the pandemic, VC hearings became an accepted means for arbitrators to conduct their hearings.

The shift to VC hearings took place very soon after the start of the pandemic indicating that the profession adapted quickly to the new circumstances. Close to two-thirds of participants (63.7%) stated that their first VC hearing occurred between April and July of 2020, with close to another third (28.6%) having their first VC hearing between August and November 2020.

As one might expect from a process that is designed to adapt to the needs and preferences of the parties, the participants reported that their hearings followed a variety of formats. 57% of the participants reported conducting VC hearings in which every participant joined from a different location. 43% of participants reported conducting hybrid hearings in which some of the parties joined remotely and others were in person. They identified a variety of formats for a hybrid hearing:

- Hybrid—witnesses were the only ones remote
- Union attorneys with witnesses and Management attorneys with witnesses separate
- Arbitrator was remote, some parties were remote, some parties were together, and some subset of the parties were together
- Arbitrator was the only person remote. Everyone else together
- Counsel and witness being in same room
- Some hearings where most of union individuals were in a room together, but not the union attorney...a similar scenario for management, all individuals together but not the management attorney.

All of the responses that were reported to this open-ended question filled close to two pages and are best summed up by the comment from one arbitrator: “I’ve had 75-80 video hearings and have had every possible combination.”

### ***B. The Use of Pre-Hearing Conferences***

One of the suggestions that was made early in the transition to VC hearings, was to conduct pre-hearing conferences before a VC hearing. It is unknown whether pre-hearing conferences have been regularly used in labor arbitration pre-pandemic, however there was a common belief that the pre-hearing conference was necessary during a pandemic to deal with the challenges presented by the technology. Participants were asked about their experience with pre-hearing conferences during the pandemic and their responses suggest that pre-hearing conferences became a common staple of arbitrations conducted via video conferencing.

76.5% of the participants indicated that they conducted pre-hearing conferences at the start of the pandemic (Spring 2020) and 78% during November 2020 through April 1, 2021. Whether or not pre-hearing conferences have been regularly used pre-pandemic these responses suggest that they have become an established feature of the VC process.

When asked about their experience with conducting pre-hearing conferences a large majority of participants found the pre-hearing conference of value. In particular, respondents found that

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| <b>a) The pre-hearing conference helped to familiarize participants with technology</b>          | (32.9%) |
| <b>b) The pre-hearing conference helped identify possible technical issues</b>                   | (25.7%) |
| <b>c) The pre-hearing conference helped identify substantive issues related to the grievance</b> | (13.8%) |
| <b>d) The pre-hearing conference facilitated the exchange of exhibits</b>                        | (26.2%) |

Only about 1% of participants found the pre-hearing conference not useful either because not all of the hearing participants were able or willing to join or there was not sufficient technical assistance.

When asked for specifics the participants cited:

- Helps clients understand how exhibits were going to be sent and distributed
- ...highlighted technical problems and deficiencies among counsel
- How do the parties know what is going on without pre-trial hearing conference?
- Would not discuss substantive issues, only technical issues and exhibits display
- Prehearing conferences are helpful for organizational purposes. They also help “avoid surprises.”
- It helps give all parties the chance to meet one another.

The responses to the use of pre-hearing conferences raise at least two questions regarding the continuing use of such practice. First, to the extent that the pre-hearing conference was primarily convened to deal with technical issues and to familiarize participants, would the parties continue

to use it once the technology becomes ubiquitous? Second, to the extent that the pre-hearing conference identified substantive issues and facilitated the exchange of exhibits, would that become a more common practice in labor arbitration whether a hearing is in-person or via VC?

### *C. Experience with VC Hearings*

We asked several questions regarding the experiences of participants with the VC hearing process. We note that while we asked participants for their own views, it is possible that some respondents might have answered the questions in terms of what they perceived the view of the parties to be. That is, the neutrals might have indicated to be satisfied with a particular aspect of the VC format not because they were personally satisfied, but because the parties expressed being satisfied.

Interestingly, only about 10% of participants indicated having major technical difficulties early on (i.e., during the first few video conferencing). That figured dropped to about three percent in the most recent VC hearings. The number of respondents to have little or no difficulty managing the technical aspects of the hearing went from about 69% at the start of the pandemic to about 90% in the most recent hearings. These results suggest that in general, arbitrators experienced little difficulty in making the change to the VC format and that, not-surprisingly, as they became more familiar with the format, technological difficulties became less of a problem. A few of the participants stated that they had used a technical assistant to host or manage the hearing which made it very easy.

Respondents indicated that the major challenge that they continue to experience with VC hearings related to poor internet connectivity (53%), continuing difficulty with some participants' ability to use the technology (29%), and their own difficulty concentrating while watching a screen for long periods of time. Specific comments include:

- Problem if not using one microphone or one laptop where there are multiple people in the same room
- The barking dogs, children, and doorbells sometimes interrupt
- An advocate had an antique clock that chimed every 15 minutes. It wasn't too terrible.
- ...injured parties seem uncomfortable with Zoom sometimes because they feel like they did not "get their day in court," and the use of translators was more distracting on Zoom.
- ...sometimes the parties have paper documents in their physical space. It is very difficult to know what document they are looking at to make sure everyone is looking at same thing.
- There is sometimes a lag when someone says something, or a momentary freeze. This makes it especially difficult when you have a court reporter.
- ...one party's computer kept freezing. That's happened often where there isn't the bandwidth to handle the number of people using the internet.
- ... the lack of paper meant the parties had less of a disincentive to limit the records or the number of pages in the exhibit. Less editing in terms of how big of a volume of exhibits to have because there were no physical copies.
- Party did not prepare witness and it took a long time to get them set up.

- Location of the Zoom call was distracting (Zooming from an airport)
- ...the attendees were planning to attend without video.
- Need to build in breaks so that everyone can have the right stamina. It is hard for people to stay focused for long periods of time.

Overall, however, respondents indicated high levels of satisfaction with VC hearings:

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| <b>a) Very satisfied</b>        | (58.1%) |
| <b>b) Somewhat satisfied</b>    | (27.9%) |
| <b>c) Somewhat dissatisfied</b> | (14%)   |
| <b>d) Very dissatisfied</b>     | (0%)    |

When asked what they like about the video conferencing process, convenience appears to be a major reason for the arbitrators' positive view of the use of VC hearings.

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| <b>a) Eliminate the need for, and cost associated with traveling</b> | (36.5%) |
| <b>b) Facilitate the scheduling of hearings</b>                      | (34%)   |
| <b>c) Easier to concentrate for long periods of time</b>             | (3%)    |
| <b>d) Easier to conduct the hearing</b>                              | (8%)    |
| <b>e) Parties tend to be less contentious</b>                        | (19.5%) |

In addition, to the factors listed above, some respondents indicated that they believe that advocates are better prepared for VC hearings as compared to in-person hearings, perhaps due to the fact that some of the work has to be done in advance with regard to the collecting and sharing of documents. Furthermore, in VC one can see the witness closeup and you can see the witness's facial expressions better "...makes it easier to notice things that I have never noticed before. I can see everyone's face on one screen and see how the witness reacts to every question".

Some respondents indicated that in the context of the pandemic, where any in-person hearing would have to be conducted following physical distancing guidelines (e.g., wearing masks and staying several feet apart), virtual hearings provide a better alternative. Health is a primary consideration.

At the other end, respondents identified several aspects of VC hearings that they did not like:

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| <b>a) Makes it difficult to control the hearing</b>  | (16.1%) |
| <b>b) Makes it difficult to assess credibility</b>   | (19.4%) |
| <b>c) Parties tend to be more contentious</b>  | (4.8%)  |
| <b>d) Too many technical interruptions/distractions</b>                                    | (32.2%) |
| <b>e) Makes it difficult to control witnesses (e.g. materials they might have in hand)</b> | (27.4%) |

The responses regarding the assessment of credibility are particularly interesting. The problem of assessing credibility has been historically one of the major concerns regarding the efficacy of VC hearings. Arbitrators and Hearing Officers with experience conducting video

hearings largely reject this common objection as overstated or even unfounded.<sup>2</sup> The results of the focus group discussion suggests that while this continues to be an important concern (1 in 5 participants was concerned about this), it did not seem to be a major driving force in the decision of arbitrators whether to conduct VC hearings.

When asked if there was anything else that they did not like there were two pages of comments in which six common themes arose:

- (1) loss of what was described as the **“human contact”**  
*“loss of contact between arbitrators and ‘hallway chats’”*  
*“don’t have the visual cues or the memory cues that you would have in a physical hearing”*
- (2) difficult to concentrate while watching a screen for long times-**“Zoom fatigue”**
- (3) very difficult to control a hearing online (how long breaks last, making sure no one talks over one another)
- (4) fatigue during the hearing and to the extent that more hearings can be scheduled during a week, **overall fatigue**
- (5) **unprofessional behaviors**--increased aggressive/uncivil behavior by the parties;  
*“people’s filters are less available”--would not have behaved that way in-person*
- (6) **possibility of abuse** such as witness being coached or other “shenanigans.” There is an issue of trust when it comes to the witness. We cannot see if someone is in the room coaching them.

#### ***D. Changed Behavior as Result of VC Hearings***

We wanted to explore whether the shift towards VC hearings has altered the process itself or the behavior of the respondents. The results suggest that the format has had some effect on the behavior of the participants.

Consistent with some of the findings discussed earlier, participants indicated that the production of documents at the pre-hearing stage (28.6%) and the production of documents electronically (29.5%) have become more common in the context of VC hearings. As noted above, these trends may represent a major development in the practice of labor arbitration.

Although less commonly noted, the respondents indicated that the use of VC hearings has also resulted in the parties being willing to provide an advance stipulation of some facts (13.2%) and a prepared statement of the issue (12.3%). These findings suggest that by requiring the advocates to perhaps conduct more preparation in advance, the VC hearing format has the potential effect of making the hearing more efficient.

In addition to these responses, arbitrators offered additional input about the impact that VC hearings have had on the conduct of hearings. A few respondents indicated that settlement rates have increased during this period, although it was not clear what the reason might have been. Other respondents indicated that the hearings have become less contentious, which seems to

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<sup>2</sup> See *VTF Best Practices Guide*, pp. 28-29 at [www.naarb.org](http://www.naarb.org), VTF Reference Materials.



contradict some of the earlier responses which raised concerns about the parties increased hostility during the hearings.

We asked arbitrators whether their own behavior has changed during the hearing. Only 28 respondents indicated noticing some change in their own behavior. Of those, about 68% indicated that the VC hearing format has affected how they took notes during the hearings, and about a third indicated that the VC format affected how much flexibility they gave the parties during the hearing.

#### ***E. Future Expectations Regarding VC Hearings***

Given the responses discussed above, which indicate a fairly high level of satisfaction and comfort with the use of VC format, it is perhaps not surprising that 90 percent of respondents indicated that they intend to continue to use video conferencing as a means of conducting arbitration hearings. They cited three major reasons for such choice: (1) the parties will demand it; (2) the fact that it saves expenses to the parties; (3) convenience.

Most interestingly however, even though the arbitrators plan on continuing to use the VC format, a slight majority of respondents (51.9%) indicated that they preferred the in-person format. Only 11.4% of respondents indicated a preference for VC hearings. A few of the reasons offered for preferring the in-person format included: *the value added by human interaction, the belief that in-person hearings are subject to fewer distractions, the chemistry at the table, underlying problems become more clear in person, and in-person hearings were always more efficient.* One important consideration in the preference for VC hearings: *Virtual hearings democratizes the hearings in many respects for witnesses with issues with family or child care – it allows them the convenience they'd lack if it were in- person.*

Slightly more than a third of the respondents (36.7%) did not state a preference for either VC hearings or in-person hearings, stating instead that the choice will depend on other factors such as the type of dispute, the cost and ease of travel to the hearing location, and convenience in terms of scheduling.

#### **IV. Results of the Focus Group Involving Advocates**

As noted above, advocates' participation was limited. 10 advocates registered for the Year in Review session and of those only 3 participated. A significant outreach to advocates had been undertaken prior to the session however that outreach did not result in the anticipated or desired level of registration or participation by advocates. While we understand this is a very small sample, we report their responses as we believe they offer an interesting perspective which we believe should be subject to future inquiry.

The responses of the advocates to the close-ended questions closely paralleled the responses from the arbitrators. There were however several responses to the open-ended questions that are worth considering. First, one concern raised by the advocates involved concerns that the opposite side was "gaming" and "weaponizing" the VC hearing format. Among the concerns expressed were, blaming opposing counsel or the witness for technical issues and interrupting the flow of the presentation of one's case. Second, advocates lamented the loss of human contact, the opportunity to offer a "cathartic experience" to their clients, and the opportunity to bond with their

clients. Third, the advocates voiced concerns with getting all witnesses up to speed with the use of technology and with the interruptions caused by the use of the VC technology. Fourth, advocates also voiced concerns about use of the VC format when one of the participants is a differently-abled individual.

On the other hand, the advocates indicated that the VC format has allowed them to use arbitrators who otherwise would not have been available during the pandemic.

The advocates preferred in-person hearings to VC...

- Always possible to meet in person with client and business agent before hearing
- Easy to handle documents back and forth
- Want to look witnesses in the eye and get a feel for them
- Human interaction is compelling
- Ability to get a better read on everything going on when in person vs. virtual

...with the caveat that they would consider a VC depending on:

- How quickly they need to schedule the case: can schedule case more quickly virtually
- Travel time/location
- Type of case
  - Simple, small cases vs. large cases with credibility issues and drama

All of the above does nothing more than lay the groundwork for what would be compelling research to obtain feedback from a larger group of advocates regarding the use of videoconferencing to convene an arbitration hearing.

## **V. Areas for Future Exploration**

To some extent, the results of our focus groups are not surprising. To a major extent, the pandemic forced many arbitrators to embrace the VC format. Particularly during the summer of 2020 travel was limited and many states issued orders limiting in-person gatherings. In light of those circumstances, arbitrators and advocates needed to adapt. The results suggest that they did, that they did so early, and that for the most part they are satisfied with the results.

The results also suggest possible areas in which research might be needed. Below we identify some questions that might be worth exploring.

First, while we gathered responses regarding practices during the pandemic, we did not ask respondents to describe the state of their practices before the pandemic. For example, while we asked for the number of VC hearings the arbitrators have held during the pandemic, we do not know whether this represents a change as compared to the total number of hearings before the pandemic. Similarly, while the results clearly show that pre-hearing conferences have become a fairly common practice, we do not know how prevalent pre-hearing conferences were before the pandemic. Research asking respondents questions about the state of their practices before, during, and after the pandemic will be helpful.



Second, the results suggest some conflicting views regarding what arbitrators identify to be some of the positive and negatives attributes of VC hearings. For instance, the respondents identify a variety of views regarding the effect of the VC format on the parties' behavior. About 20% of respondents thought that the VC format resulted in the parties being less contentious. However, one of the repeated themes in the narrative comments was some of the parties being more aggressive and the concern that some parties were abusing the VC format to gain an unfair advantage in the process. 20% of the respondents expressed concerns about being able to judge the witnesses' credibility in the VC format, and an equal number indicated concerns about controlling the witnesses. Further research exploring for instance what types of behaviors were exhibited by the parties and what were the difficulties in assessing credibility will be helpful.

Third, while the number of advocates who participated in the discussion was small, their responses suggest that a follow up survey might be helpful to better understand their views about the VC format. For instance, advocates raised concerns about the "gaming" and "weaponizing" of the format. An interesting research question might be whether this a concern unique to the VC format or is this a concern that advocates tend to express generally in all types of hearings.

Finally, the results suggest that the VC format has affected the process of arbitration itself. These changes include the use of pre-hearing conferences, the exchange of exhibits in advance of arbitration, the stipulation of some facts, and the use of prepared statements of the issue. Other changes suggested by the responses include the note taking process for arbitrators and the arbitrator's perception that settlement rates have increased. While the responses allowed us to highlight these changes, a more complete exploration of the extent of these changes and of other possible changes is warranted. For example, we were not able to explore the issue of whether these changes will be likely to outlive the pandemic and be transferred from VC hearings to in-person hearings. For example, will arbitrators continue to ask the parties to participate in pre-hearing conferences once they go back to conducting some in-person hearings? Will the parties be willing to participate in such hearings? Similarly, arbitrators report increased use of exchanging exhibits before the hearing. To some extent, the VC hearings make that exchange necessary when all the parties might be joining from different locations. While the parties may be willing to exchange exhibits in advance of the hearing due to the necessity imposed by the pandemic, they might be less willing to do so once in-person hearings become more routine.