



# AHLA Dispute Resolution Service

## Guidance for Video Conferencing<sup>1</sup>

### Introduction

Planning for a successful video conference may require a considerable amount of time and effort. And, even with the best of planning, something may go wrong. But in person hearings can be disrupted by a host of factors including travel delays, power failures, construction noise and are generally far more expensive. Travel, lodging, and room rental costs are likely to be far greater than any investment in technology needed to participate remotely.

Technology is changing rapidly so the Dispute Resolution Service will update this document when it becomes aware of significant new developments regarding video conferencing in general or Zoom in particular.

### Video Conferencing is Voluntary

Under arbitration rule 5.7,<sup>2</sup> the default method of conducting a hearing is in person but the parties “may authorize the arbitrator to conduct the hearing by telephone or video conference.” AHLA has no rules for mediation; the parties and mediator must agree on how to proceed.

Primary considerations should be whether the hearing or mediation will be sufficiently fair and confidential.

#### **Fairness**

All participants must have access to appropriate technology in an appropriate location (see below), know how to use the technology properly, and be comfortable with engaging remotely. It is worth noting that some people prefer video conferencing because it cuts down on travel and is less intimidating than being in close proximity to adversaries in an unfamiliar location.

#### **Confidentiality**

All participants must be comfortable with the risks associated with online communication. Zoom and many other online platforms are encrypted, and most of the security risks can be mitigated by following the guidance set forth below. Nevertheless, any form of electronic

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

<sup>2</sup> The language is identical in the Commercial, Consumer, and Employment rules.

communication may be hacked and may generate data that ends up in the hands of unauthorized parties.

Some perspective is in order: 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 occurs when attorneys send documents as email attachments, and this happens routinely whether the hearing is in person or online.

## Preparation

The guidance in this section applies equally to arbitration and mediation. Specific suggestions for arbitration hearing and mediation sessions are set forth below.

### 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)<sup>3</sup>

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 background<sup>4</sup>)

### Scheduling

Provide Dispute Resolution Service staff with the dates and starting and ending times for your rehearsal (see below) and session(s). We will provide a link to the conference. Hold counsel responsible for conveying the link to client representatives, witnesses, and anyone else who may be involved.

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<sup>3</sup> <https://zoom.us/download>

<sup>4</sup> Instead of displaying what is behind a participant, Zoom will display a picture.

In your scheduling order or notice, provide at least one backup form of communication in case someone is unable to access the video-conference. This could be your cell phone number or an assistant's email address. No matter how well equipped and prepared everyone is, technology sometimes fails. Participants must have another way to reach you.

## **Practicing**

Learning how to use the following features in advance of your session is essential:

- Attendance
  - Starting a session
  - Moving participants from the waiting room to the session
  - Viewing the attendee list
  - Removing a participant from a session<sup>5</sup>
  - 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 messages
- Caucusing
  - Creating breakout rooms
  - Assigning participants to rooms
  - Moving from room to 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.

## **Rehearsing**

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).

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<sup>5</sup> 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.

- 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.

As people gain more experience with video conferencing, rehearsals may become unnecessary. For now, please regard them as critical.

## 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**

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

### **Mute**

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 Share**

Use this feature to allow 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

Use this feature for 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.

## 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.

### Develop a Protocol for Distributing and Displaying Documents

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

- 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.<sup>7</sup>
  - 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.

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<sup>6</sup> 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.

<sup>7</sup> 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.

## **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.

## **Waiting Room**

Inform representatives in advance that: (a) when they join the meeting, they will remain in the Waiting Room until you admit them; and (b) you will not admit anyone until all parties are represented. Requiring admission ensures only authorized people participate. Admitting everyone at once avoids *ex parte* contact.

Begin the session by asking all participants to state whether anyone else at their physical location is able to hear or view the session.

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)
- 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.