

Understanding the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties

By Karen Jalkut, Luis Martinez, Charlie Moxley and Jeffrey Zaino

On May 11, 2020, the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section put on a program by videoconference entitled, "Understanding the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties." The featured speakers were Karen Jalkut, Vice President of the AAA-ICDR Commercial Division, and Luis Martinez, Vice President of the ICDR. Charlie Moxley and Jeffrey Zaino, the Co-Chairs of the Committee, put together this program and served as moderators. The following is a transcript of the discussion they had.

Jeffrey Zaino: *The AAA-ICDR a few weeks ago issued some pretty extensive procedures and guidelines for virtual hearings. Prior to the pandemic, were there other guidelines in place and how often did the AAA-ICDR conduct virtual hearings?*

Karen Jalkut: *In the past the AAA-ICDR used video conferencing for witnesses, be it for location, health, or weather issues. Prior to the pandemic, Rule 32C on conducting hearings was not utilized that often. Since the pandemic, it is now being invoked and arbitrators are opting into virtual hearings, and the practice is far more acceptable now. As of today, approximately 150 AAA-ICDR cases have gone virtual and the number is growing.*

Zaino: *Have you seen improvements in virtual technology over the last few years?*

Jalkut: *Yes, most definitely. There is no lag time, and a lot of the past technology issues have disappeared. There are*

many setting options, breakout rooms and safeguards in place. It seems like the technology improves daily.

Charlie Moxley: *I agree entirely with Karen. Technology today is immeasurably better. In the past a lot of issues occurred with virtual platforms, mostly with connectivity, where the technology often did not work to any reliable extent. Since the pandemic, with the widespread move to Zoom, it is working quite well. The technology is better and there are virtually no issues of connectivity. There are things to be aware of and look out for. We will get into that later in this program. We need to get the word out about the intuitiveness and effectiveness of this technology. It can be counted on as an efficient way to conduct hearings, but there is a learning curve. It takes a couple days of practice to get comfortable with the technology and then one needs a lot of practice.*

Zaino: *Are you comfortable with the fact that the platforms were not specifically designed for arbitration and mediation hearings?*

Luis Martinez: *Prior to the pandemic, we only used virtual platforms occasionally for witness testimony. Functionality and security had been a concern in the past. These issues are being addressed as we are seeing greater usage of these platforms. While these platforms generally work well, we are at this stage seeing 50% of ICDR clients opting in and 50% opting to postpone. Some of our U.S. offices will take longer to open up for in-person hearings and virtual-hearing platforms will offer possible options,*

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especially now with many improved and useful features. These virtual hearings can be used successfully in place of the in-person hearings to a degree if we have prior testing, training and an understanding of the virtual platform, its proper settings and limitations.

Zaino: I find myself using Zoom even in place of what could be a phone call. It now seems to be the preferred platform now for meetings, etc.

Audience: *Does having arbitrations and mediations conducted virtually expand the selection of neutrals to those outside the area of the particular proceeding?*

Zaino: Yes, it does. AAA-ICDR has an arbitration search link that offers a selection of neutrals from anywhere worldwide.

Martinez: I note that some arbitrators are becoming proficient with Zoom and adding it to their CVs.

Zaino: *If you could design the perfect virtual platform, what would it contain?*

Jalkut: What I would like to see is a locked screen view to make it similar to an actual physical hearing room. Claimants on the left side, respondents on the right side, and the arbitrators at the top of the screen. It is important to be able to lock that view because now when others come in and out of the virtual rooms they get moved around and all participant views are different. It would be better with a locked gallery and speaker view.

Zaino: That is a good idea. The technology is certainly evolving.

Moxley: Functionally what Karen mentioned is something we're going to need to develop—getting the screen to look like the rooms in which we conduct live proceedings, with people sitting around a conference table. It's also important in conducting virtual hearings and mediations to have multiple screens, including one for the proceeding itself, one for taking notes, one for pulling up documents from the pre-arranged data base of exhibits that we'll have in most cases, and perhaps one for LiveNote in what may be the much smaller percent of cases in which we'll have that at a hearing. We also need to develop a surround-view camera setup so at all times everyone in the proceeding can see who is in all of the "rooms" of the various participants, all generally with real-world, not virtual backgrounds. I know such technology exists in the automotive area as a parking aid, but I haven't seen it offered yet for our purposes.

Zaino: I have heard that some don't like that a mediator can just pop up in a breakout room without notice.

Moxley: There is a problem that we might hear things a party would have preferred we not hear. I've developed the practice of texting or calling counsel in advance when I'm ready to change rooms to see if they're ready to have me come into their breakout room.

Zaino: *There are many virtual hearing guidelines out there—JAMS, CPR, ICC, ABA, to name a few. What distinguishes the AAA-ICDR guidelines, if anything, from the others?*

Jalkut: A few things. First, we already discussed pre-determined settings. Second, we have a trained staff, the most strategic factor, to help the parties optimize their experience, with security considerations, with test runs, and to set the ground rules for the actual virtual hearing. There are a host of benefits we can contribute to the virtual hearing process.

Zaino: *The AAA-ICDR also included a proposed Model Order and Procedures for a Virtual Hearing via Video Conference. How is that being approached and implemented, and what are some of the key issues and the considerations for the arbitrators and the process?*

Martinez: This is an important document to review. It provides a range of issues arbitrators and parties should consider while setting the ground rules for the hearing, and it includes sample language to memorialize the outcome of those discussions. All parties need to be clear on how the virtual hearing will occur. The order should cover all logistics. It is important to consider the examples set forth in this document, offering options as early as the AAA-ICDR's administrative conference call. We inform the parties that Zoom is not the only platform they can use and that they will need to conduct their own due diligence as to the selected platform's suitability and security. It is a party decision. The Model Order goes through a number of important points to consider.

Audience: *What is the AAA's position when one party objects to the use of a videoconference platform?*

Martinez: The issue is raised in the Model Order's first section and Article 20 of the ICDR's International Arbitration Rules (IAR), which provides the arbitrators with additional guidance. If the parties have not agreed to the use of virtual hearings the arbitrator should consider reasons as to whether they should proceed or not. Factors to consider include the impact of COVID-19, stay-at-home orders and travel limitations. Is it a reasonable alternative? Will delay be prejudicial? International arbitrators have a duty to conduct the proceedings with a view to expediting the resolution of the dispute and may consider how technology could be used to increase the efficiency and economy of the proceedings, see Article 20 (1), (2) of the ICDR's IAR.

Other factors raised for discussion in the proposed Model Order include: Will the use of a court reporter be necessary? How will the recording feature be used?

Technical aspects to consider: Who sends the invitation? Who gets invited? Password protections and authorizing attendees are also discussed. Advance testing is raised and should be conducted one week before and earlier if possible. The Model Order deals with technical

issues and covers witness and exhibit testimony. Virtual backgrounds should be avoided so everyone can see the actual room being used for the testimony and the parties should discuss the document repository for these virtual hearings in advance. The goal is to limit any surprises.

Audience: *What if both parties disagree to a virtual hearing? Can an arbitrator then compel a virtual hearing?*

Jalkut: Under Rule 32 of the Commercial Rules, the arbitrator sets the time and place. The arbitrator can schedule the in-person hearing, but if that cannot be met, the automatic default is a virtual hearing. It is the ruling of the arbitrator; we have had a cases where the arbitrator listened to both sides objecting and determined a virtual hearing will take place.

Moxley: If both sides want to put it off, I would agree to wait. I would respect the wishes of the parties. Arbitrators do have the discretion, but it is a hard judgement call. I agree that in-person hearings are not going away. It also seems likely that, where virtual hearings are held, there may thereafter be vacatur applications by losing parties challenging awards on the ground of the virtual nature of the hearing. This makes it important, as the Model Order provides for arbitrators to be attentive to the need to provide their reasons for ordering a virtual hearing when one side has objected to proceeding that way.

Audience: *If both sides object, won't they just find another arbitrator?*

Zaino: That could happen, and they have the right to do that.

Audience: *Where can we find the model order?*

Zaino: It is on our AAA-ICDR web page.

Zaino: *Luis, you oversee international cases; are there additional issues that concern parties in an international arbitration?*

Martinez: On the international front, there are a few additional things to consider. Time difference—different time zones are important. How do you schedule a time that works for everyone? Access to technology and Wi-Fi speeds are not universal and in certain countries, the Wi-Fi capabilities may be limited. The arbitrators are required to treat the parties with equality (see Article 20 (1) of the ICDR's International Arbitration Rules.) The language of the arbitration may pose additional issues. Do you need a translator to join the virtual hearing? Is the translation being considered sequential or simultaneous and how will that be incorporated in the virtual hearing platform? That can be a challenge.

Audience: *The Zoom tutorials cover many areas. Are there videos or sources that can teach Zoom?*

Jalkut: You can find a number of options out there. Just Google Zoom tutorials. Live chat sessions work, too. The Zoom Help Center has both live and recorded training sessions. The AAA-ICDR also just put together a Zoom tutorial for arbitrators and mediators.

Zaino: *What are some of the key issues and the considerations for the arbitrators and the process?*

Martinez: Reminding the parties and arbitrators that the rules provide that the tribunal may conduct the proceedings in any manner deemed appropriate, provided the parties are treated with equality and each side is given a fair opportunity to present their case. Therefore, the challenge for the tribunal will be to consider not only whether the parties have relatively equal access to the proper technology, but also are both sides equally competent with the technology selected? Another factor to consider is how tiring these virtual hearings end up being. It takes a great deal of mental energy and focus to pay attention to body language, facial expressions (your own and the other participants) and any glitches that may cause a delay and which can impact the perception of the speaker's testimony. In addition, advocates must now test their advocacy skills, adapt to the virtual hearing environment and understand its limitations, thereby fine-tuning their presentations for the virtual hearing setting.

Zaino: *With fatigue in mind, how long do you think these virtual hearings should go?*

Martinez: There is not enough empirical data, but from personal experience, just doing two of these meetings a day is very exhausting. Maybe half the time of an in-person meeting should be the rule of thumb.

Moxley: My sense is that there will be a learning curve. Arbitrators should let the parties know it is okay to say a break is needed, as we would do in a live hearing anyhow. We should be open and communicative. And we should be attentive, as Luis suggested, to any inequalities in technical capability of the parties that have the potential to affect the fairness of the proceeding.

Martinez: Absolutely right. Three hours on Zoom arguably is equivalent to nine hours in person.

Jalkut: I haven't heard any complaints but agree with what is being said. More breaks need to be built in. Maybe two in the morning and two in the afternoon. However, I don't encourage people to sign out; let the system run. You don't want issues logging back in.

Zaino: *The AAA-ICDR, in addition to doing general guidelines for any platform, also did a specific one for Zoom. Why is that, and is Zoom the preferred platform of the AAA-ICDR? What are three useful Zoom tips?*

Jalkut: A few years ago, The AAA-ICDR instituted cybersecurity policies. When looking at other platforms, Zoom was way out ahead of everyone else. In December 2019, Zoom had 10 million meetings per day; in April 2020 this had increased to over 300 million per day. With this growth they have increased their security protocols. I like the password protection, waiting room and breakout rooms.

Also, check your version to make sure you have the most recent Zoom version so you will receive the security updates. Version 5.0 or above is what you should have, and with a paid subscription it automatically updates for you. This is a user-friendly platform; the more you use it the more comfortable you become.

Zaino: *The Zoom guidelines reference Zoom technical support. Have you been happy with the support? Are they easily available, notwithstanding the high demand worldwide for using this platform?*

Jalkut: Whenever I am helping clients during a session, I keep Zoom running so parties can reach me and get an immediate response.

Audience: *How do you know what version of Zoom you have?*

Jalkut: You should use 5.0 or above. This is listed in your account information (whether basic or pro); it is in your settings.

Audience: *When AAA sets up a virtual hearing, does the administrator stay on for the duration of the hearing or is it turned over the arbitrator? Is there some training provided to the arbitrator on how to operate the platform?*

Martinez: Internally we are looking at that. The AAA-ICDR will be driven by the wishes of the parties. Perhaps we can have the case managers on standby mode where they can be called or texted to rejoin the virtual hearing or stay on for the duration. The cost has to be evaluated. Arbitrators must act in some co-host capacity and will work with the case manager and have access to internal AAA-ICDR trainings that have been prepared.

Zaino to Moxley: *What are your thoughts on Zoom as an arbitrator? You have been using it a lot?*

Moxley: The AAA and ICDR require arbitrators to provide the parties with equality of treatment. That is a touchstone that will have to be central to our thinking and planning now. We will have to be alert to problems with Zoom, issues with different devices that don't have equal technical capabilities, and audio issues—perhaps the need to have some parties or witnesses dial in rather than proceed through the Zoom audio. We will also have to work on our comfort level working with documents

in conducting Zoom hearings and also on controlling any recording of the proceeding. Most importantly, we'll have to make sure parties and witnesses are brought up to speed as to the technology in advance of the hearing.

Audience: *Have the panelists experienced problems with time zones? If the parties have a six-hour difference, does this require shorter hearing days, more hearing days?*

Martinez: I would think so. It depends on which side is taking advantage of morning testimony; they of course would have an advantage over the side joining in the evening hours and that would be exacerbated the longer the hearing runs. Perhaps one side has the morning one day and the other side gets the morning on another day. Same for witnesses.

Audience: *Have all case managers received Zoom training?*

Jalkut: No, they haven't. We have designated virtual champions across the country.

Audience: *It was mentioned that AAA offices are opening at different times. When has that been determined for N.Y.? Are the dates going to be reviewed again and updated?*

Zaino: New York hearing facilities are now set to open on October 1st. However, this could be reevaluated in a few months.

Zaino: *The guidelines specifically discuss the recording feature of the platforms. What are your thoughts on recording the proceeding?*

Martinez: Start looking at the Model Order early. Parties and arbitrators will have to decide what will be the official version—the Zoom recording or court reporter? You should not record without it being in compliance with the order. In addition, if using Zoom platforms, is the recording being downloaded to the parties or arbitrators' computers, or are you using the cloud? You must be sensitive to cybersecurity and to compliance with data protection laws. All should be discussed and agreed to in advance.

Audience: *What if halfway through a hearing the party that hasn't presented objects to switching to a virtual hearing, claiming inequality of treatment. What would you do?*

Moxley: That is very tough case. That would be fact specific. It would take a lot of thought and argument. It would be very dependent on the facts of the case.

Zaino: *The guidelines state that all participants should be "in view of the camera." Is that hard to enforce, especially with participants that do not have cameras? What about virtual backgrounds? Does the AAA-ICDR discourage that?*

Martinez: None of this would happen in an impromptu fashion. This is why we talked about advance testing and a well-drafted procedural order. What have the parties agreed to in advance of the virtual hearing? How will testimony be conducted and who will be speaking and in what order are important details that should not be left

for the day of the virtual hearing. Importantly, everyone will have to comply with the Procedural Order, which parties do not normally disregard. Virtual backgrounds are discouraged. There is a concern of possible coaching so the tribunal would want to see the actual room that is being used for the testimony and they may ask the speaker to pan the camera around the room to ensure that there is no one off camera providing any guidance.

Zaino: *How does sharing documents work? Does the host (tribunal) control that process? Should the host be the only person to share documents?*

Jalkut: Usually hard copies of exhibits are provided to the panel prior to the hearing. Documents are then screen shared for everyone. The benefits of screen share are, sections can be highlighted, the document can be drawn on, pointed to, or you can make comments to hit home what the document says.

Zaino: *So you have seen it used and the panelists are comfortable with it?*

Jalkut: Most definitely.

Zaino: *Charlie, do you have some experience with that? How has it been?*

Moxley: Eventually we may move to mostly electronic exhibits in hearings. However, today, many arbitrators and counsel still prefer to have hard copies to use at hearings. In such instances, exhibits need to be exchanged in advance in both hard copy and PDF or the like. Such documents should be available to the arbitrators and counsel by the time of the hearing both in hard copy and electronically. The challenge is with documents that an attorney wants to use on cross-examination, perhaps for credibility, that have not been produced in advance, and documents that otherwise first become important in the course of the hearing. We'll always need a process for that kind of thing. Some such documents can be provided in advance in sealed envelopes or through court reporters or the like. Others will have to be provided at the hearing, whether through being pulled up on the screen or being emailed to the participants—hence the need for multiple screens for arbitrators, counsel, and, at times, where possible, for witnesses.

Audience: *With virtual hearings, has there been a greater use of written direct witness testimony?*

Moxley: Sure, but we don't have enough experience yet to see how this will work out. There are all the same concerns as to witness statements, including that they are mostly written by the attorneys (the witnesses sometimes only barely know what they say), that something can be lost in assessing credibility issues, and that sometimes counsel want such extensive redirect that it's

not clear how much time is saved, if we end up permitting that to any significant degree. Witness statements are much more normal in international cases, although they can also be helpful and efficient in domestic cases, and, with more virtual hearings, we may see U.S. counsel more comfortable with them.

Audience: *Given that we are expecting another wave in the fall, is there a date when the opening of AAA-ICDR hearing facilities will be reviewed again?*

Zaino: I cannot answer right now; not sure. We will re-evaluate things in a couple months, but right now we have no in-person hearings until September 1st, and for the hotspots, October 1st.

Zaino: *The guidelines state that "[a]ll counsel shall endeavor to speak one at a time and not while another is speaking, other than as may be required to interpose an objection to a question asked or to alert other participants of technical difficulties." How would you recommend an arbitrator control this? Must counsel use a raise hand feature or chat feature to ask to speak?*

Moxley: It depends on the size of the group. If it is just two primary parties, we would allow counsel to just speak up as we would in a live hearing.

Zaino: *Will that be challenging?*

Moxley: I don't think so. We will adapt. I don't think most of us will have a problem maintaining the order of proceedings.

Zaino: *Do you think people should use the raise hand feature or just go through the chat?*

Martinez: That is a point to be identified beforehand. Witnesses not giving testimony should be sequestered. You must decide how testimony will be given and by whom. The arbitrators who are co-hosts have the ability to mute everyone including speakers. You can limit this to the particular witness that is giving testimony, like the raise hand feature. You should identify this beforehand. You limit it while testimony is being given to not interrupt. The best practice is to avoid surprises and apply the rules and procedures equally to the participants.

Audience: *Should the arbitrator always be the host so s/he is in control of all the features, breakout rooms, and muting?*

Jalkut: Yes, I make it a point to have the arbitrator be the host or co-host.

Zaino: *What are the top takeaways for parties and arbitrators contained in the guidelines?*

Jalkut: A lot of headaches come from connectivity [issues], especially internet speeds. If you have the option to plug your device directly to the Wi-Fi router, then you should do so.

Jalkut: Power: Make sure laptop is plugged in and powered up.

Etiquette: Speaking on top of each other and hearing shuffling of papers is very distracting. You should always mute when not speaking.

Having a chime when someone is entering the waiting room is of tremendous benefit.

When starting a virtual hearing, I always post my direct AAA number and cell phone number in the chat box, so if there is a technological issue, I can be reached.

Audience: *Is the AAA exploring alternate locations outside of hotspots?*

Zaino: No, but [we] may re-evaluate that later this year.

Zaino: *What is the future of virtual hearings post pandemic? Will this be the norm? Are you seeing any trends regarding the use of virtual hearings in your international cases?*

Martinez: It makes sense in certain circumstances. We still have to recognize the importance of the in-person meeting and that human contact is essential. This will not in my opinion replace in-person hearings as there are still too many variables; however, virtual hearings will be in our toolbox and an option that may be more readily acceptable in the future, as we have all been forced to become more proficient in its usage as a consequence of the pandemic.

Jalkut: Yes, [virtual hearings] will be part of our ADR toolbox. A lot will depend on the complexity, dollar amount, number of parties. Not one size fits all. Depends on the situations.

Moxley: You need to make a distinction between the final evidentiary hearing and the pre-hearing phases of cases. Post-pandemic, I anticipate that counsel will still largely want to conduct evidentiary hearings in person, when possible. However, as parties get more comfortable with the technology and see how well it works, I think considerations of time and cost and convenience will lead to virtual hearings in many cases, including cases below certain monetary thresholds and cases where expedition is particularly important to the parties. At the same time, something is lost with the loss of the in-person element, so it'll be a balancing of pluses and minuses. As to the pre-hearing phases of cases, it is just the opposite. Parties and arbitrators are discovering that virtual preliminary hearings and oral arguments are a real value-added, as compared to the old-fashioned telephonic conducting of such proceedings. This will be transformative, but it will be important for case managers to raise the possibility of Zoom preliminary hearings and oral arguments and the like early in cases during their administrative phases.

Martinez: One of the limitations I have found in my personal experience is that when you are doing a live presentation you can gauge how it is going by seeing the audience reaction and adjust accordingly. You just cannot seem to get that type of feedback during a Zoom conference and perhaps a Zoom virtual hearing.

Audience: *Do you think that the in-person is more even important for Latin American or Asian jurisdictions?*

Martinez: Differences in culture is an important issue that we may encounter, and again the ability to gauge these differences is certainly easier when you are conducting an in-person meeting or hearing.