

## EXCERPTS FROM APPLICABLE ARBITRATION CODES AND OPINIONS

### NATIONAL ACCADEMY OF ARBITRATORS CODE OF PROFESSIONAL RESPONSIBILITY

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#### HEARING CONDUCT

##### A. General Principles

**1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.**

*a. Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.*

#### OPINION NO. 26

April 1, 2020

**Subject: Video Hearing**

**Issue:**

Can an arbitrator order that a matter proceed by way of a video hearing at the request of one party over the objection of the other party to the arbitration?

**Opinion:**

This advisory opinion is provided in the context of the world-wide COVID-19 pandemic of 2019-20. However, this opinion's analysis of video hearings may have broader application in other circumstances. The reader also is referred to Advisory Opinion No. 13 on the subject of *ex parte* hearings for helpful insights relevant to the question considered in this opinion.

The Code, in its preamble, states that, "Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations." The principle of mutual consent is of fundamental importance to the Academy, and is reflected in the Code, in advisory opinions, and in arbitrator practice. This opinion concerns a possible exception to the principle of mutual consent.

In **Section 5.A, the Code offers general guidance regarding hearing conduct:** "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." In addition to this obligation, an arbitrator has an obligation pursuant to Section 1.C of the Code to "endeavor to provide effective service to the parties."

In the absence of a collective bargaining agreement or an ad hoc agreement of the parties prohibiting such an arrangement, an arbitrator in exceptional circumstances, without violating the Code, may order that a matter proceed by way of video hearing in whole or in part without mutual consent and over the objection of a party. In doing so, the arbitrator must determine that a video hearing is necessary in order to provide a fair and effective hearing. In making that determination, the arbitrator must weigh the obligation to "conscientiously endeavor to understand and observe, to the extent

consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves” under Section 2.A of the Code, and to “conform to the various types of hearing procedures desired by the parties” under Section 5.A(a) of the Code.

When the issue arises, the arbitrator’s first recourse should be to assist the parties in reaching a mutually acceptable resolution in the prehearing process. As noted in Section 4.A of the Code: “The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing.”

If agreement is not reached and it is necessary for the arbitrator to decide the issue of whether a matter will proceed by way of a video hearing over an objection, the arbitrator must consider the applicable circumstances and context of the request. Where, for example, a global pandemic makes it virtually impossible for an in-person hearing to be safely conducted, that factor may weigh in favor of the video hearing option, particularly if the hearing has been postponed previously, a party in opposition is non-responsive or declines to provide a reasonable explanation, and/or the case involves continuing liability or time sensitive matters, such as an emergency health and safety issue. Government travel restrictions and family and health considerations of counsel or witnesses may also weigh in the arbitrator’s decision to order or not order a video hearing. The factors favoring a video hearing may, in the arbitrator’s judgment, be offset by countervailing factors, such as a party’s lack of necessary equipment, difficulty in preparing and marshaling witnesses, or other limiting considerations. Further, the substance of the grievance might suggest to the arbitrator that a delay to allow for an in-person hearing does not seriously prejudice the rights of the parties.

As with all procedural issues that an arbitrator must decide, this issue will need to be addressed in a prehearing process that gives the parties an opportunity to make submissions and/or arguments. The arbitrator will decide whether the matter will proceed by video hearing based upon the arbitrator’s judgment on whether the circumstances are so compelling as to override the usual presumption in favor of consensual scheduling practices. (An arbitrator also might consider a telephone conference hearing, applying factors addressed in this opinion if the arbitrator views that as a more workable or acceptable alternative.) Nothing in this opinion imposes an affirmative obligation to order a video hearing absent the agreement of the parties.

In order to provide an “adequate hearing” by way of video, the arbitrator must be familiar with the platform offered to the parties, and must be confident that the parties have such familiarity as well, or have reasonable access to an effective alternative platform.<sup>[1]</sup> As well, the arbitrator will be required to address prehearing matters such as the delivery of documents and how evidence is to be offered and admitted at the hearing, including restrictions on remote witnesses to ensure the reliability of the witness’s testimony. A prehearing conference also can anticipate how to proceed, if at all, if there are interruptions in the effective use of video technology.

Adherence to the foregoing will allow an arbitrator to provide “effective service” in “a fair and adequate hearing” when proceeding by way of a video hearing.

1. Section 1.B of the Code requires that “When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator’s competence, the arbitrator must decline appointment, withdraw, or request technical assistance.” In the context of a video hearing, this would obligate the arbitrator to ensure that he or she is sufficiently familiar with the operation of the platform to be able to conduct and control the hearing, and advise the parties how to effectively make use of the process. Technical assistance may be obtained through a video conference service provider. The corollary point is that if the parties have requested a video hearing, and the arbitrator does not wish to undertake such a proceeding or does not feel competent to proceed in that manner, the arbitrator must so advise the parties. If the parties still wish to proceed by way of a video hearing rather than in an alternative manner, the arbitrator will withdraw from the matter.

#### AMERICAN ARBITRATION ASSOCIATION

##### EMPLOYMENT ARBITRATION RULE 11.

11. Date, Time and Place (the physical site of the hearing within the designated locale) of Hearing The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in 20 RULES AND MEDIATION PROCEDURES American Arbitration Association scheduling the earliest practicable date and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

##### LABOR ARBITRATION RULE 17.

##### 17. Date, Time, and Place of Hearing

The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to established deadlines and hearing schedules. Upon the request of either party or the AAA, the arbitrator shall have the authority to convene a scheduling conference call and/or issue a Notice of Hearing setting the date, time and place for each hearing.