



CONSTRUCTION
SUPERCONFERENCE
2021

www.constructionsuperconference.com

Remote Dispute Resolution: Temporary Band-aid or Long-Term Solution?

Stephen Hilger
Deborah Mastin
Michael Sterling

Remote Dispute Resolution: Will you use it after the pandemic?

Goals:

- Discuss pros, cons, strengths and weaknesses of remote dispute resolution
- Learn from our mistakes
- Create a powerful tool
- Create an economic incentive

Part 1: Utilizing Remote Technology to Streamline Arbitration

Michael Sterling

Arbitration Rules

- Most rules do not cover special remote proceedings
- Rules... *presentation by any means*
- Conducting hearing telephonically

- Make sure you have selected the
appropriate arbitrator
- Familiar with technology
 - Willing to utilize technology

Swearing in the Witness remotely

- Relative importance of witness
- Witness access to smartphones and computers
- Reliability of testimony
- Allow vs disallow electronic swearing
- Camera angle/multiple cameras
- Effective cross examination
- Preventing witness coaching

What electronic format to use

- Zoom
- Other programs
- Limitations
- Security and privacy issues
- Company vs court reporter account
- Recording capability
- Interoperability with transcript

How will the court reporting work?

- Separate vs connected with Zoom
- Video vs Zoom
- Live feed vs daily transcript

What is the exhibit use protocol?

- Exchange in advance – physical hard copies
- Exchange in advance - electronic
- Live attendance vs Zoom participants
- Marking exhibits
- Who has control over scrolling?

Part 2: Effectively using remote technology for successful facilitative mediation

Deborah Mastin

Maintain the Mediation Decorum

Process is the same

Advantages:

- Effectively eliminates travel time
- Reduces costs
- No borders
- Works well for people with mobility or accessibility issues
- Lowers intimidation levels
- Mute button
- Camera on/off

Disadvantages:

- The video barrier
- Keeping attention of decision makers
- Different dynamics
- Available distractions
- Crossing time zones
- Miss the body language and emotional issues
- Mute button
- Technology failures
- Internet connections

Challenging Technical needs

- Zoom conferencing
- Private rooms
- Who to admit
- Maintaining privacy and confidentiality

Tips for Success

- Choose a mediator who is familiar with technology
- Learn how to have private communications between lawyer and client
- Minimize distractions
- Stay on camera
- Maintain confidentiality and privacy
- Maintain privilege
- Screenshare with caution
- Minimize downtime

Tips for Success Continued...

- Distracting backgrounds
- No windows behind you
- Disclose participants ahead of time
- No other phone calls, etc.
- Practice with the technology in advance

Part 3: Utilizing remote technology in discovery

Stephen Hilger

Remote Technology in Discovery: Is it New?

Biggest Issue: Discovery Depositions

- Setting the deposition
- Pros
 - Easy to Schedule
 - Convenience
 - Less travel
 - Less Cost
- Cons
 - Problematic audio
 - Problematic video
 - Slow internet

- Cons continued...
 - Hard to visually scan documents flashed up on screen
 - Hard to review documents not provided in advance
 - Adding exhibits at last minute
 - Computer notices (“dings”)
 - Phones ringing
 - Miscellaneous people entering/exiting room

- Technology issues
 - Zoom vs Microsoft Teams
 - Adequate internet connections
 - Adequate full range microphone
 - 2 cameras: one close on witness, one on room
 - Court reporter back-up recordings (non-video)
 - Allow Zoom recordings
 - Prior agreement on dropped internet connection
 - Avoid gamesmanship with drop-offs

- Video the Witness
 - Link video to documents presented
- Swearing in the witness
 - Get stipulation in advance to swear in over the phone
- Realtime Screens
 - Very valuable with remote discovery
 - Separate feed: not on video screen
- Marking Exhibits
 - Pre-mark exhibits
 - Emailed documents during depo
 - Use consecutively numbered exhibits throughout
 - Circulate all PDFs with depo sticker – use these in subsequent depositions

- Check telephone numbers of all call-ins
- Go over 3 rules
- Talking over each other
- Make sure court reporter has clear audio
- Log in with cellphone as back-up (mute – no camera)
- Document sharing: put on record when exhibits are shared then removed

- Presenting Exhibits to Witnesses
 - Use of the videographer
 - Use of a shared screen function

- Preventing gamesmanship
 - Court reporter: confirm no one in room
 - Laptop in plain view
 - Prevent coaching

Interrogatory Answers

- Difficulty in getting notarized signatures
- Video notarization: not stored forever

Document Production

- Not new: Electronic discovery
- ESI protocol

Site Inspections

- Use of drones

E-filing

- Not all courts
- Difficulty filing
- Difficulty getting copies
- Easy service of discovery notices and requests

Questions?



How was our session?

**Please complete the session
evaluation in the CSC
mobile app**