



**NATIONAL ACADEMY OF ARBITRATORS (NAA)
FALL EDUCATION CONFERENCE**

Savannah, GA
September 20-22, 2019

August 9, 2019

**A SHORT PAPER ON THE EXISTING AND FUTURE USE
OF VIDEOCONFERENCING IN LABOR-MANAGEMENT
AND EMPLOYMENT ARBITRATION**

Homer C. La Rue, NAA[†]

**CONCURRENT SESSION: VIDEO HEARINGS: A NEW OPTION
FOR YOUR PRACTICE?**

SESSION DATE: Saturday, September 21, 2019

SESSION TIME: 1:15-2:30 PM

DURATION: 1 Hour 15 Minutes

PANELISTS: Homer La Rue, NAA; Scott Miller, Labor Counsel, AFSMCE Council 31 (Chicago); Arthur Pearlstein, FMCS Director of Arbitration; M. Michal Rollins, Acting Director of Labor & Employee Relations, MARTA; Jeanne Charles Wood, Moderator

Workshop Description:

Administrative law forums and some courts have established telephonic and videoconferencing options for conducting hearings. With the need to reduce costs and get to resolution of disputes more efficiently, parties are considering options outside of the traditional hearing forum for labor arbitration. This panel will discuss the viability for conducting full arbitration hearings with the parties and the arbitrator in remote locations. The panel which will include the FMCS will explore opportunities and challenges associated with adopting this as an option to your practice. A "how to" demonstration will be included.

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My thanks to Jack Clarke for providing me an interview pertaining to his experience with videoconferencing in the interest arbitration in which he served as Chair of the Board of Arbitration. I also thank all those persons who provided feedback to me to make this a better product in the short time in which it was produced. Any shortcomings or mistakes are mine alone.

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I. PREFACE

The objective of this paper is to provide basic knowledge for the workshop participants about videoconferencing and its current state of use. The paper does not attempt to offer a critique—good or bad—as to the applicability of videoconferencing for labor-management and employment arbitrators who are members of the Academy and who are governed by the *CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES* (the *Code*)¹. The efficacy of the use of videoconferencing is left to the discussion and debate that is expected to take place in the workshop.

II. SAMPLING OF CURRENT USES OF VIDEOCONFERENCING

Perhaps the term, *videoconferencing*, used to describe this workshop are too narrow to describe what we are exploring. What we may be talking about is *online dispute resolution* (“ODR”). The videoconferencing of arbitration hearings includes holding the entire hearing through video/online applications. Hence, the scope of this paper, and that of this workshop discussion, goes beyond the consideration of video conference for the occasional scheduling meeting, or a pre-hearing conference, or situations where a witness is unable to travel.

¹ Code of Professional Responsibility For Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service, *as amended and in effect September 2007*.

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" supersedes the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

Code at 1.

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It is not an exaggeration to note that the *Godfather* of ODR is Colin Rule², probably the world's leading expert in ODR. Mr. Rule began with the creation of eBay's user dispute resolution in the 1990s. He then moved on to create the eBay Community Court which was the first attempt to build a crowdsourced online dispute resolution system consistent with the scope of the eBay enterprise.

² Mr. Colin Rule founded Modria, Inc. in 2011 and serves as its Chief Operating Officer. Mr. Rule has worked in the dispute resolution field for more than two decades as a mediator, trainer and consultant. From 2003 to 2011, he served as the first Director of Online Dispute Resolution for eBay and PayPal. He serves as Director of Modria, Inc. Before eBay, he co-founded and ran Online Resolution, one of the first online dispute resolution (ODR) providers. He has worked at Mediate.com, the National Institute for Dispute Resolution (now ACR) in Washington, D.C., and the Consensus Building Institute in Cambridge, MA. He is Co-Chair of the Advisory Board of the National Center for Technology and Dispute Resolution at UMass-Amherst and a Non-Resident Fellow at the Center for Internet and Society at Stanford Law School. He blogs at Novojustice.com and serves on the boards of RESOLVE and the Peninsula Conflict Resolution Center. He has contributed more than 50 articles to prestigious ADR publications such as Consensus, The Fourth R, ACResolution Magazine and Peace Review. Mr. Rule holds a Master's degree from Harvard University's Kennedy School of Government, a graduate certificate in dispute resolution from UMass-Boston, a B.A. from Haverford College. *Colin Rule: Executive Profile & Biography* – Bloomberg, Software Company Overview of Modria, Inc., <https://www.bloomberg.com/research/stocks/private/person.asp?personId=224450565&privcapId=182420297&%20Inc>.

See, Amy J. Schmitz and Colin Rule, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION*, American Bar Association (2017). The use of the word "handshake" in the title of the book is a metaphor for how consumers and merchants once did business:

There was a time when merchants and consumers would meet in person to do business. They would discuss the terms, assess the trustworthiness and character of their contracting partners, and conclude the deal with a *handshake* [emphasis added]. This handshake was more than a kind gesture. It helped to reassure both parties that the other side was committed to the deal and would ensure correction of any problem that might arise. Reputations and respect mattered most because individuals worked in the same community and knew each other's friends and business partners. That handshake sealed the deal. It was a personal trustmark.

The New Handshake at ix.

The discussion about the videoconferencing of arbitration hearings should be seen in the larger context of the evolution of a system of justice in the workplace that also is evolving. The discussion of videoconferencing should be viewed in answer to the question: "How do we deliver a private system of justice efficiently and fairly."

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Mr. Rule's statement in an interview that he gave on October 22, 2018 is relevant to the discussion in the instant workshop about ODR in labor-management and employment arbitration. Mr. Rule, quoting Gandhi, said about Mr. Rule's promotion of ODR: "*First they ignore you, then they laugh at you, then they fight you, and then you win.*"³ If Mr. Rule, via Gandhi, is correct then we in the labor-management dispute resolution community may need to stop *ignoring, laughing and fighting* the impact of technology on how we do business as advocates and arbitrators.

It is beyond the scope of this "short paper" to survey the complete history and landscape of the evolution of ODR or videoconferencing⁴. The paper is intended to provide a brief survey of the status of videoconferencing today in forums other than labor-management and employment disputes. Based on that survey, it is hoped that a robust discussion will focus on the opportunities and the challenges posed by using videoconferencing⁵. It is helpful, therefore, to take a quick look at the various settings in which videoconferencing is presently being used.⁶

³ Frederico Ast, *Colin Rue—The Godfather of Online Dispute Resolution Speaks to Kleros* (2018), <https://godfather-of-online-dispute-resolution-speaks-with-kleros>, 1/11 to 2/11.

⁴ See *History of Video Conferencing—1970 to 2019*, Vyopta (Oct. 15, 2018), <https://www.vyopta.com/blog/videoconferencing/brief-history-videoconferencing/>; David Levy, *A History of Video Conferencing According to Sci Fi*, Akkadian Labs, <https://www.akkadianlabs.com/a-history-of-videoconferencing-according-to-sci-fi/> (Aug. 11, 2015).

⁵ Petr Slovák, *Effect of Videoconferencing Environments on Perception of Communication*. 1 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*, No. 1, article 8 (2007), <https://cyberpsychology.eu/article/view/4205/3246>.

⁶ This short paper has focused only on the use of videoconferencing in civil matters which is not to suggest that videoconferencing has not come to be used by many federal and state courts in the United States. In a more thorough discussion of the topic of ODR and/or videoconferencing, it would be useful to look at the uses of video technology in the criminal justice system and the issues that it may raise for access to justice, particularly access to counsel that must be guaranteed to be confidential.

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A. Videoconferencing in Social Security Disability Hearings

One of the most important settings is that concerning the application for Social Security Administration (“SSA”) disability benefits. The following chart is extracted from public data maintained by the SSA showing the total number of hearings held, the number of in-person hearings held and the number of video hearings held. The statistics are somewhat startling.

**Hearings Held In-Person or Via Video Conferencing Report
FY 2019 (For Reporting Purposes:
09/29/2018 through 06/28/2019)**

A listing by hearing office of the number of hearings held either in-person or by videoconferencing.

Office	In-Person Hearings	Video Hearings	Total Hearings
NHC ⁷ ST LOUIS	0	4188	4188
NHC ALBUQUERQUE	4	2363	2367
NHC FALLS CHURCH	21	5611	5632
NHC BALTIMORE	25	4400	4425
NHC CHICAGO	28	3567	3595

Hearings Held In-Person or Via Video Conferencing | Public Data Files, Social Security Hearings and Appeals, FY 2019,
https://www.ssa.gov/appeals/DataSets/06_Hearings_Held_InPerson_Video_Report.html.

B. Videoconferencing in the Financial Industry Regulatory Authority

Videoconferencing is now available for hearings under the auspices of the Financial Industry Regulatory Authority (“FIRA”). The mission of FINRA is:

Our mission is clear—to provide investor protection and promote market integrity— and our effectiveness is crucial to the health of the capital

⁷ “NHC” means National Hearing Center (Social Security Administration).

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markets. FINRA touches virtually every aspect of the U.S. securities business, including:

- writing rules, examining securities firms to ensure that they're adhering to those rules and, when necessary, taking action against brokers or firms that don't comply;
- registering securities firms, brokers and mutual fund corporations;
- informing and educating the investing public;
- providing real-time transaction and price data for corporate bond trades—thus bringing transparency to the market; and
- administering the largest forum specifically designed to resolve securities related disputes.

* * *

Our Mission, FINRA, <https://www.finra.org/about/our-mission>.

FINRA holds adversarial proceedings before neutral arbitrators to resolve issues brought before it. FINRA also offers mediation services. Both arbitrations and mediations can be done via videoconferencing.

All four of FINRA's regional office locations (Boca Raton, Chicago, Los Angeles, and New York City) now have videoconferencing capabilities. With the consent of all parties or with the permission of the arbitration panel, parties or witnesses may appear at hearings by videoconferencing for hearings held in one of the regional office locations. There is no additional cost to use the videoconferencing equipment at FINRA. Please notify your case administrator at least 30 days prior to the hearing to request videoconferencing services. All videoconferencing requests are honored in the order they are received.

Videoconferencing Available in FINRA Regional Offices, FINRA.org., <https://www.finra.org/arbitration-and-mediation/videoconferencing-available-finra-regional-offices>.

C. *Videoconferencing in State Courts*

Through a study funded by the State Justice Institute, the National Center for State Courts, in 2007, surveyed the use of videoconferencing in state courts in the

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United States. The survey included information pertaining to the sources of funding for videoconferencing systems, the extent of video for various types of proceedings, and statutes and court rules governing the use of videoconferencing. The survey results were published in September 2010.⁸

The survey results, although dated, are worth summarizing:

About the Survey

- There were 164 respondents to the survey, of whom twenty-five (25) were answering for their entire state or territory. [*Survey* at 3].

* * *

Videoconferencing Use

- Seven (7) courts had been using videoconferencing for more than 20 years. [*Id.* at 5].
- Impediments noted:
 - More than 40% listed funding as an issue
 - Judicial and attorney buy-in/objections
 - Nearly 20% said there were no objections [*Id.*].

Videoconferencing Operations

- Supported by IT staff
 - State funded VC used for criminal proceedings –others 50/50
- * * *
- Approximately half are using VC for civil case matters
 - Only a few appellate court [*Id.* at 6].

Potential Use

- Only a few allow for attorney use of videoconferencing (and all those are free)
- Only a couple support document signing
- Only a few use fax or e-mail for documents
- Almost none of the videoconferences are recorded [*Id.* at 7].

Reliability & Technology

- VC is very reliable technology
- Downtime is in minutes/hours not days
- Fail-over is not a teleconference

⁸ Jim McMillan, *Videoconferencing Survey 2010 Results* (“*Survey*”), National Center for State Courts (Sept. 2010), <http://www.ncsc.org/>.

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- Digital IP is becoming the dominant connection protocol
- Wiring is a challenge (maybe 802.11n WiFi conversion in the near future?) [*Id.* at 8].

Benefits

- Time, staff, and fuel savings were cited as VC technology benefits
- 80% report that VC helps administer justice
- Most have not quantified but those who have report savings of:
 - \$31 million since inception (PA), 30% of travel expenses (UT), 600,000 per year, \$50,000 per year, \$7,500, \$500 per hearing were noted by different courts
 - Easier to get meeting quorum when VC used
 - 24/7 magistrate coverage (VA) [*Id.* at 9].

Jim McMillan, *Videoconferencing Survey 2010 Results* (“*Survey*”), National Center for State Courts 1-9 (Sept. 2010), <http://www.ncsc.org/>.

D. Videoconferencing in Federal Courts

The Federal Judicial Center⁹ undertook a survey¹⁰ of the use of videoconferencing in the courts of appeals. The study took place in 2006. While dated, the *Survey Report* offers insights and attitudes concerning videoconferencing of a segment of the federal judiciary—i.e. appellate court judges.

Several courts of appeals have established programs by which oral arguments are heard via videoconferencing. Fourteen federal appellate judges with varying degrees of experience with videoconferencing were interviewed for this project. The judges spoke about advantages and disadvantages of using videoconferencing for oral arguments and other court business, the extent to which videoconferencing altered the dynamic between judges and attorney during oral arguments, and any problems they had encountered in using the technology.

Survey Report at 1.

⁹ “The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. § § 620-629), on the recommendation of the Judicial Conference of the United States. See Meghan Dunn and Rebecca Norwick, *Report of a Survey of Videoconferencing in the Courts of Appeals* (the “*Survey Report*”), 1, 20, Federal Judicial Center (2006).

¹⁰ *Id.*

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The conclusions of the *Survey Report* are worth noting:

The fourteen appellate judges interviewed had positive experiences with videoconferencing. All greatly appreciated the way in which videoconferencing saved them both travel time and money and named those savings as the technology's primary advantages. Other benefits included increased flexibility, the capacity to conduct hearings in a more timely manner, and the ability to accommodate judges with special needs. Overall, for the judges interviewed, the benefits of videoconferencing outweighed its disadvantages.

The quality of the technology involved is a critical factor and clearly shaped the judges' evaluations of their experiences. As one judge noted, "It is so dependent on the technology; if the equipment is bad, the experience is bad." However, most judges were pleased with their court's technology and had very few technical problems to report. Additionally, judges who had had experiences with earlier incarnations of videoconferencing technology reported that problems had significantly decreased as the technology improved. This was especially true of the audio delay, which was not a salient hindrance for most judges.

Hearing oral arguments via videoconference also did not appear to significantly hinder the judges' abilities to understand the case at hand. Although some judges believed they asked fewer questions and were less likely to interrupt when the argument took place via videoconference, no judge reported being left with incomplete information or unanswered questions after a videoconferenced [sic] oral argument.

The extent to which judges had experience with videoconferencing was also a factor in their perceptions of the technology. Judges with more videoconferencing experience noted that the decreased personal interactions were less of a problem, suggesting that at some point judges become accustomed to this mode of interaction. The more experienced judges also encountered more technical problems than did judges with less experience, perhaps due to the fact that those judges have had more opportunities for things to go wrong.

Many of the judges we interviewed had used videoconferencing for more

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than oral arguments and, again, felt positively towards the technology, largely due to the reduction in travel time that resulted. Judges in the Ninth Circuit who used videoconferencing for motions and screening panels and certificate of appealability hearings appreciated not having to travel, and judges in other circuits who used the technology to attend meetings felt similarly. The Fifth Circuit experiment with using videoconferencing to decide cases not orally argued was discontinued, due to the increased burdens it placed on judges' schedules.

The fourteen judges interviewed for this project are just a small piece of the appellate court system, and their views should not be assumed to represent the experiences that all appellate judges have had with videoconferencing technology. However, the positive response toward videoconferencing voiced in these interviews suggests that the technology can be beneficial, when used correctly, in the courts of appeals. In the words of one judge, "Videoconferencing is the wave of the future."

Survey Report at 16-17.

E. Videoconferencing of Arbitrations and Mediations in Private Commercial Disputes

Perhaps, one of the more important reasons for arbitrators and mediators in the Academy to be interested in videoconferencing is one of plain self-interest in the more efficient conduct of the practice of arbitration and mediation. This account of one neutral's epiphany is illustrative:

As someone who has a primary residence in Michigan and a second home in Arizona, I have been struggling with scheduling mediations and arbitrations for the blocks of time I spend at my second home. In the past I would jam all my in-person ADR sessions in the months before leaving for Arizona and when I returned to Michigan. I have always conducted my pre-hearing telephone conferences while I was in Arizona without any problems, but I would schedule a short return trip to Michigan scheduling several successive days of mediation or an arbitration. However, two things occurred which have changed that progression.

I returned to Michigan this past February to conduct a couple of mediations and a short arbitration. One of the mediations did not result in a settlement, but counsel and their clients agreed to arbitrate the case

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and chose me to continue and conduct the arbitration, i.e. a med/arb process. I then proceeded to discuss the schedule, since I was not planning on returning to Michigan until the beginning of May, I offered several early May dates for the in-person hearings. Counsel and their clients did not want to wait that long, but still wanted me to conduct the arbitration. This was only a 3-day hearing, and I was not going to fly back to conduct it.

Because this matter was one in which very experienced experts were involved, I suggested that perhaps we could take advantage of the expert's facilities and utilize modern technology to conduct the hearing in March. The parties agreed. So, it was decided that counsel and their clients would convene at the offices of one of the expert witnesses, which also had in-house camera capability in their conference room, and I would attend remotely utilizing Zoom as the medium. This was the first time I have done this, although, I previously utilized this technology attending several *de bene esse* [A phrase applied to proceedings which are taken *ex parte* or provisionally, and are allowed to stand as well done for the present, but which may be subject to future exception or challenge, and must then stand or fall according to their intrinsic merit and regularity.] depositions in a large three-person multi-state arbitration case in order to rule on objections that arose during the depositions.

All exhibits and pre-hearing briefs were sent to me in Arizona in advance of the hearing. Counsel were experienced advocates and conducted themselves professionally throughout. It was not any different than if they were sitting face to face in my conference room. I was able to see the whole conference room and monitor their behavior. We agreed to put the witnesses in a chair close to the camera, and the attorney doing the examination opposite the witness. Counsel switched chairs as necessary. It was no different than if I was in the room and not nearly 3,000 miles away. I was able to hear everything perfectly and ruled on evidentiary issues and had a chance to question the witnesses and counsel when and if I desired.

I was very surprised as to how well this went. I was also able to determine that even if the parties did not have a facility as this expert had, video graphic court reporters have the capability of utilizing anyone's conference

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room as long as there is Wi-Fi capabilities for accessing the various software like Zoom or Conference. Com. I know that this arrangement also works ...

* * *

Martin C. Weisman, *Alternative Dispute Resolution in a Virtual World*, www.premiadr.com. (June 28, 2019).

**III. ADVANTAGES AND DISADVANTAGES
OF VIDEOCONFERENCING**

A. Why Videoconferencing is Being Considered Today

Narrowing our focus from the grand question related to ODR, we need to ask specifically what are the advantages and disadvantages of videoconferencing arbitration hearings? It seems clear that the cost of traveling to the arbitration site is increasing with little indication that those costs will reduce in the future. For those employers who have many branch offices or facilities across the country and even outside the country, and for the unions that must represent the employees in those far-flung operations, travel cost is a huge burden for both labor and management. There is the cost of having counsel travel to the operation. There also is the cost of the arbitrator's travel-time and other expenses associated with getting to the arbitration site.

With the rapid development of technology, especially with the maturing of videoconferencing, it is feasible for labor and management to select videoconferencing as the means to hold arbitration hearings. Videoconferencing connects people in real-time through audio and video communication over the Internet. This connection enables virtual meetings, the exchange of documents digitally, and the sharing of presentations.

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B. Videoconferencing in International Arbitration Proceedings

One example of the relatively more extensive use of videoconferencing is in international arbitration proceedings. The Chartered Institute of Arbitrators (“CIARB”) has issued *Guidelines for Witness Conferencing in International Arbitration with Explanatory Notes*¹¹. The *Guidelines* contain “[a] practical checklist of matters for

¹¹ See *Guidelines for Witness Conferencing in International Arbitration with Explanatory Notes*, (*Witness Conferencing Guidelines or Guidelines*) CHARTERED INSTITUTE FOR ARBITRATORS, 23 April 2019. One form of “sharing of presentations” is presented in the *Guidelines* and is termed “witness conferencing”.

1. Witness conferencing can be described as any evidence-taking process whereby two or more witnesses [fact or expert] give evidence concurrently before a tribunal ... [W]itness conferences may take many forms. They may concern the evidence of factual or expert witnesses, or both. They can be conducted by the tribunal, the witnesses or parties’ counsel, or any combination of them
2. Witness conferencing has in recent years become a popular means of taking evidence particularly — but not exclusively — from expert witnesses in international arbitration. The process is not, however, encountered only in arbitration. For example, the courts of Australia, England and Wales and Singapore have also explored or adopted the process to a greater or lesser degree. This popularity stems from a number of perceived advantages. First, a conference can be a more effective means of receiving evidence than consecutive examination of witnesses by parties’ counsel. The side-by-side presentation of evidence can make it easier to compare witnesses’ different views on an issue, and for the witnesses to challenge each other’s views with direct responses or rebuttals. Second, the quality of evidence may be improved. For example, expert witnesses may be less willing to make technically incorrect assertions in front of a peer who can supply an immediate rebuttal. Third, the process can promote efficiency at an evidentiary hearing, as the tribunal can hear evidence from all the witnesses on the issues at once, rather than at different stages of a hearing as the parties present their cases.
3. At the same time, witness conferencing gives rise to other considerations. For example, whilst taking evidence in conference may lead to shorter hearings than where evidence is taken consecutively, the time and costs for preparing a witness conference beforehand may be higher. The quality of evidence may also be affected, and proceedings disrupted, where witnesses in conference prove to be unfriendly, hostile or even rude to each other, or where one witness is more reticent giving evidence in the presence of another, for example due to differing levels of experience in giving evidence, cultural factors or some pre-existing professional or personal relationship between them.

Witness Conferencing Guidelines at 13-14.

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tribunals and parties to consider in determining whether to conduct a witness conference ... and, if so what form that conference may take” *Guidelines* at 16.

Witness conferencing, a process for taking evidence concurrently from multiple witnesses, has become increasingly popular in international arbitration, particularly in relation to expert evidence. The Guidelines provide arbitrators, parties and experts with a checklist of issues to consider when deciding whether to hold a witness conference, and standard and specific procedural directions to be adopted or tailored as appropriate to provide a framework for the process. They are accompanied by detailed explanatory notes.

CIARB’s New Guidelines for Witness Conferencing in International Arbitration, *CIARB News*, (29 April 2019), <https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/>.

The *Explanatory Notes of the Guidelines* explain the logistical considerations for the tribunal in setting up the witness conference. Regarding videoconferencing, the *Notes*, in pertinent part, read:

10 One or more witnesses is to give evidence by video conference

- a) There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.
- b) A tribunal should consider whether a witness conference can be held where all the witnesses are to give evidence from a location other than hearing venue. In such circumstances, the witnesses will not be physically dislocated from each other, but from the tribunal, counsel and others present at the hearing venue.
- c) Where a witness is to give evidence by video conference, the tribunal should consider issuing directions addressing the following matters:

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- i) provision by the party presenting such witness of details of the videoconferencing service to the tribunal and all parties in advance of the hearing to allow the other parties to observe tests of the service provider's videoconferencing capabilities between the venue of video conference and the venue of the hearing
- ii) details of the time and venue of the video conference
- iii) the presence of a duly empowered legal representative of the party presenting such witness at the venue of the video conference. The party presenting such witness shall inform the tribunal of the identity of such representative and provide his/her curriculum vitae prior to the hearing
- iv) the presence of a duly empowered legal or other representative of the other parties should they wish at the venue of the video conference. Where another party chooses to have such a representative present, it shall inform the tribunal and all other parties of the identity of such representative and provide his/her curriculum vitae prior to the hearing
- v) where such witness is to give evidence in a language other than the language of the arbitration, the party presenting the witness shall engage a qualified and experienced interpreter, who shall be present in person with the witness at the venue of the video conference
- vi) provision and access at the venue of the video conference to all documentation produced in the proceedings relevant to such witness's evidence

Guidelines at 41-42.

C. *Summary of the Advantages and Disadvantages of Videoconferencing*

It would be helpful at the outset of the discussion to enumerate the advantages and disadvantages associated with videoconferencing. The advantages and disadvantages are set forth in a recent blog pertaining the videoconferencing of meetings, generally, not addressing the subject of this workshop—the

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videoconferencing of arbitration hearings. Nonetheless, the listing is a useful starting point.

Advantages of videoconferencing

- 1. No time constraint:** Video conferencing can be conducted at any time of the day. Time differences between countries do not matter when people use this method of communication because they do not actually need to travel to attend meetings.
- 2. Dramatic travel saving:** Not only is videoconferencing a direct replacement for many in-person business trip, but also there is virtually no cost for people to be involved in a virtual meeting
- 3. Easy communication:** People can use videoconferencing to communicate with anyone with HD video and other collaboration tools such as whiteboard, text exchange, file sharing, media sharing, screen sharing, remote control, electronic voting, conference recording etc.
- 4. Increased productivity:** By eliminating time and district barriers, meetings can be held anytime, anywhere with anyone. In this way, meetings are shorter and more effective. And, with the rich collaboration tools, decisions can be made faster.

Disadvantages of videoconferencing

- 1. Lack of personal interaction:** Some meetings require a personal touch to be successful. Video conferencing can be less personal than meeting face to face, and it can be possible to miss out on vital body language when you're struggling with a pixelated image or stuttering video.
- 2. Technical problems:** The major disadvantages are the technical difficulties associated with smooth transmissions that could result from software, hardware or network failure. Remote connections are sometimes known to be hampered by environmental changes. On some occasions, the absence of technical support personnel creates difficulty for participants who are unfamiliar with the videoconferencing technological concepts.

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3. International time zones: One of the very real disadvantages of using videoconferencing is that if you communicate regularly with people in other countries you will be available at different times to them. Unfortunately, without the skills of a time lord there's not really a practical way to overcome this.

4. High cost of setup: Setting up videoconferencing in an office can be a bit expensive for small-sized companies. Simple features can fit into the budget, but if advanced features are required, then a substantial amount of expenditure must be done.

Chris Lee, *Advantages and Disadvantages of Video Conferencing*, ezTalks, 1, 2-3, (Mar. 31, 2017), <https://www.eztalks.com/video-conference/advantages-and-disadvantages-of-videoconferencing.html>.

IV. LESSONS LEARNED FROM THE VIDEOCONFERENCING OF A LABOR-MANAGEMENT INTEREST ARBITRATION

NAA member, Jack Clarke, was selected by the United States Postal Service and the National Rural Letter Carriers' Association to chair the interest arbitration panel (hereinafter the "Board of Arbitration") for the 2012 successor agreement between the parties.¹² The author of this paper interviewed Arbitrator Clarke¹³ for this workshop to discuss his experience with the videoconferencing of nearly all of the proceedings leading up to the award. (For the purposes of this discussion, the interview will be referred to as the *Clarke Interview* and Jack Clarke, a close friend and colleague of the author, will be referred to as Jack.)

¹² *United States Postal Service and National Rural Letter Carriers' Association (USPS & NRLCA)*, (Arb. Clarke, Chair, July 3, 2012).

¹³ *Jack Clarke, Video Conference of an Interest Arbitration*, Interviewer Homer C. La Rue, NAA, July 12, 2019. Notes from the interview are posted with the author. All information provided here is consistent with the provisions of the *Code of Professional Responsibility for Labor-Management Arbitrators* on confidentiality.

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It is worth noting that the primary focus of the instant workshop is the discussion of videoconferencing of grievance or rights arbitration. That said, there are some elements of Jack's experience that are applicable to this rights arbitration videoconference discussion.

A. How the Videoconference Came About

How the video conference of the arbitration in *USPS & NRLCA* came about can be told in Jack's own words in the arbitration award. In pertinent part, he wrote:

CHAIRPERSON CLARKE'S REMARKS

At the outset, I want to express my sincere gratitude to ... [Jack identified by name all the persons who participated in the arbitration] [all who appeared in and/or assisted with this interest arbitration; witnesses; and all others who were involved in this arbitration for their compassion, sympathy, grace, condolences and prayers during the illness and following the passing of Georgine R. Clarke, my wife of 46+ years. Their personal expressions of compassion and condolence were a true comfort to me. I also thank the representatives of the USPS and the NRLCA for the accommodations arranged for my benefit. Their agreement to radically adjust how the interest arbitration was conducted made possible not only my continuation as Chairperson but enabled me to remain with my wife throughout her illness. The members of the Board of Arbitration other than me, counsel, staff, witnesses and observers kindly sat by during unscheduled and sometimes unannounced breaks in order that I could attend to some need of hers from time to time. I thank each and every one of you!

USPS & NRLCA at 5.

There was a preliminary issue impacting the interest arbitration arising out of a grievance arbitration. The Board of Arbitration had to resolve the question of the impact, if any, of that rights arbitration award on the interest arbitration. Arguments on the issue were made by the parties "... via video conference on February 3, 2012" *Id.* at 2. The Board of Arbitration "... issued an Interim Award dated February 8,

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2012 ...” *Id.* Thereafter, the “... Board of Arbitration conducted further evidentiary hearings by videoconference.” *Id.* In all, there were eighteen (18) days of video conference hearings from February 2012 to April 2012.

During Jack’s interview, he stated that the parties readily agreed to conduct the interest arbitration via videoconference. According to Jack, one of the considerations was that the selection of a chair had been a challenging process, and the parties did not want to repeat another arbitrator-selection process.

B. The Logistics of the Videoconference Set-Up

Because of the circumstances facing Jack at the time, the parties agreed that the video equipment necessary for the hearings would be installed in Jack’s office at his then home in Montgomery, AL.¹⁴ The parties and the witnesses were in a single site in Washington, D.C. Jack’s monitor in his office allowed him to see everyone in the hearing room. There was a dedicated monitor in the hearing room that permitted a clear view of Jack throughout the hearing. When he needed to have an executive session with the members of the Board of Arbitration, the hearing room was cleared; thus, permitting the members to confer with Jack in private session.

C. Summary of the Experience of Jack Clarke with Videoconferencing

Jack’s opinion, based on his experience with the 2012 interest arbitration, is that the videoconferencing of a hearing can and does work. To summarize Jack’s remarks about his experience, videoconferencing can work when at least three (3)

¹⁴ The parties agreed upon a vendor to provide the equipment that was set up in Jack’s office in his home. A technician was on-site at Jack’s office on each day of the hearings; thus, ensuring good audio and video connections. Jack also indicated that he had to upgrade his internet service. He had to obtain a dedicated internet access (DIA) from his internet service provider. DIA provides guaranteed high-speed and uninterrupted internet connectivity.

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elements are present. First, there must be an agreement among all parties to the arbitration to use videoconferencing. Second, the parties must be able to provide for good equipment and a sound internet connection (in some cases a DIA). Third, the parties must provide for effective IT support to ensure a continued good audio and video connection at all locations. With these basic elements in place, Jack could see no reason why the videoconferencing, that he experienced in his interest arbitration, would not be transferrable to grievance or rights arbitration.

V. OTHER VIDEOCONFERENCING EXPERIENCES

A. The Author's Personal Experience with Videoconferencing

In this section, I will write in the first-person because I will be describing my own experiences with videoconferencing. I have used videoconferencing most often in my role as the umpire under Article XX of the AFL-CIO Constitution which provides for the settlement of internal disputes among affiliates of the AFL-CIO. Such disputes are known as “no-raid” claims, and such purported “raids are in violation of the AFL-CIO Constitution. The hearings are held in Washington, D.C. and often require the testimony of persons from around the country. Traditionally, the parties were permitted by the umpire to have witnesses testify remotely via telephone.

The headquarters of the AFL-CIO has a modern and secure videoconferencing system. Current procedures require that the parties provide for the testimony of remote witnesses to be via video conference rather than by telephone conference. A party may obtain permission from the umpire for telephone conferencing upon a showing of good cause why a video conference is not feasible. Over the past five to six years, the number of telephonic conferences has reduced dramatically.

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Typically, the parties to the dispute, the international affiliates to the AFL-CIO, represented by their respective counsel are assembled in the hearing room at the AFL-CIO with the umpire. Some witnesses testify remotely via video conference, and other witnesses are present in the hearing room in Washington, D.C. and testify from the D.C. hearing room. The video conference permits those not in the hearing room to see and to hear the testimony of those in the hearing room, and vice-à-versa, the remote witnesses and interested parties are able to see and to hear the witnesses in the hearing room. Before describing, in more detail, the procedures used to set up the video conference, I will describe my other videoconferencing experiences.

I have routinely permitted videoconferencing where the entire arbitration is not being done via videoconferencing. There are one or more witnesses who must testify remotely. In such instances, I have developed a protocol that is a part of a document that I send to all parties in my arbitrations. That document puts the parties on notice as to those matters about which there will be, with few exceptions, no negotiation. The parties are on notice that certain matters concerning the management of the hearing have been pre-determined by me under my authority to manage the hearing for fairness and efficiency.

Regarding videoconferencing, my *Statement of Proceeding* provides:

9. WITNESS TESTIMONY NOT IN-PERSON AT THE HEARING

If counsel finds it necessary to have a witness to testify by a method other than in-person at the hearing, the counsel seeking to do so must contact opposing counsel as soon as the necessity is known to counsel and soon enough so as not to delay the hearing.

If there is agreement between counsel that a witness will testify by a method other than in-person at the hearing, counsel seeking the other-than-in-person testimony must follow the procedures set forth below. Counsel seeking the other-than-in-person testimony shall be responsible for the set-up and any costs involved. If both counsel will have a witness testify by a method other-

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than-in-person, both counsel shall bear equally the responsibility for the set-up and any costs involved.

If there is not an agreement between counsel that a witness may testify by a method other than in-person at the hearing, counsel and opposing counsel shall contact the Arbitrator for a conference call. Counsel and opposing counsel shall agree on three (3) alternate dates for a conference call, and the Arbitrator shall select from among the dates offered if there is one acceptable to the Arbitrator.

If there is an agreement that a witness shall testify by a method other-than-in-person, or if the Arbitrator has ordered that a witness may testify by a method other-than-in-person, the following procedures shall be followed for the other-than-in-person testimony:

- a. The method selected for the other-than-in-person testimony shall be via video conference.
- b. An audio-only conference (i.e., via telephone only without video) may be done only with permission of the Arbitrator and for good cause shown why a video conference is not feasible.
- c. On the day of the testimony, the witness shall be in a place that is private, that is:
 - i. There shall be no one present in the space with the witness during the testimony given by the witness;
 - ii. There shall be no one capable of overhearing the testimony of the witness.
- d. Documents necessary for direct and cross-examination shall be transmitted to the witness prior to the date of the testimony by the witness, and in a sealed envelope clearly marked as “Direct Examination” and “Cross-Examination”.
 - i. Neither the *direct examination* envelope nor the *cross-examination* envelope shall be opened by the witness until the day of testimony and at the direction of counsel conducting the examination.
 - ii. The witness shall open each envelope, when directed, in full view of counsel and the Arbitrator.

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- e. Prior to examination, the witness shall be asked to take an oath or affirmation as set forth below.

Homer C. La Rue, *Statement of Proceeding*¹⁵, 2019 at 6-7.

I have generally applied these procedures in the Article XX cases, as well as, in my regular rights arbitration cases in which one or more witnesses will testify remotely. I have found that counsel appreciate the guidance as to how I prefer to conduct the videoconferencing¹⁶. By transmitting my *Statement of Proceeding* at the time that I confirm the hearing date, counsel has ample time to know how to arrange for the video conference.

B. Credibility Findings and Videoconferencing

Perhaps, something should be said about the question of the arbitrator's ability to assess credibility and the degree to which videoconferencing impedes that important aspect of witness assessment; or on the other hand, has little or no impact on the assessment of credibility. My view is that witness credibility should depend very little, if at all, on demeanor evidence. There is a growing body of empirical research to support the proposition that "... the long-standing confidence in the principle of demeanor evidence is unfounded"¹⁷

A better approach to the resolution of credibility issues was stated by the Merit Systems Protection Board in a case in which the agency, the Department of the Army, removed a senior management official of the Military Traffic Management Command (MTMC), for sexual harassment of five female employees at the command. In that

¹⁵ The *Statement of Proceeding* is available from the author.

¹⁶ I discourage the use of "Skype" or "Facetime". I have found that the quality of the audio and video is often problematic.

¹⁷ Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Nebraska Law Review Issue 4, Article 8 1157, 1159 (1993).

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decision, the ALJ "... held that the agency failed to prove its charge that the appellant had sexually harassed female employees of the ... [MTMC]. The ... [ALJ] granted the appellant's motion for summary judgment. *Hillen v. Dept. of Army*, 29 M.S.P.R. 690, 691 (1986) [hereinafter referred to as *Hillen I*]. The grant of appellant's motion for summary judgment was vacated, and the case was remanded to the Washington Regional Field Office.

Hillen I resulted in another appeal. On appeal, the Board again reversed the ALJ who found that the agency had not proven that the appellant's conduct constituted sexual harassment. The Board held, among other things, that the ALJ had failed to meet the "... administrative judge's responsibility to resolve credibility issues." *Hillen v. Dept. of Army*, 35 M.S.P.R. 453, 458 (1987) [hereinafter referred to as *Hillen II*]. That responsibility was defined by the Board:

To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination.

Hillen II at 458.

The Board identified the elements to be considered in making a credibility determination. Those elements are equally applicable to arbitrators. The elements or factors include:

(1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

Id.

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After remand to the ALJ, he made credibility findings consistent with the instructions of the Board. The Board, nevertheless, reversed the ALJ's ruling upon appeal, but on grounds unrelated to the ALJ's credibility findings. The Board noted:

... that the administrative judge's failure to apply the appropriate standard ... [pertaining to sexual harassment and a hostile work environment] does not affect his credibility findings with regard to the alleged conduct towards ... [the complainants].

Hillen v. Dept. of the Army, et al., 50 M.S.P.R. 293, 298 (1991).

It may be noted that the Merit Systems Protection Board does not eliminate demeanor evidence as having no relevance to the consideration of credibility. "Demeanor" evidence, however, is listed as the final consideration. While the Board does not indicate that it has listed the considerations in order of importance, I would argue that demeanor evidence is the least important of the considerations. If that is so, the videoconferencing of the arbitration hearing would seem to have no negative impact on the ability of the arbitrator to make credibility determinations.

VI. CONCLUSION

Perhaps, the use of videoconferencing is a technology that has "won" a place in the toolbox of fair and efficient means to resolve disputes. If so the labor-management community—neutrals and advocates—might very well begin to think about the creation of protocols and guidelines for the use of videoconferencing. See *CIARB Guidelines. Ibid* p. 14.

One way to approach the question of the videoconferencing of labor-management and employment arbitration and mediation proceedings would be to assemble a national task force. The charge to the task force would be to suggest guidelines and best practices when videoconferencing is being considered. Such a task force would

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consider the use of videoconferencing from the perspective of fairness of the proceeding, as well as, efficiency.

It is logical that such a task force would include: (a) the National Academy of Arbitrators; (b) the Federal Mediation and Conciliation Service (c) the American Arbitration Association; (d) representatives from Labor, (e) representatives from Management; (f) representatives from the Employment Plaintiffs' bar, (g) and representatives from the Employment Defendant's bar. An agenda for such a task force might arise out of the workshop discussion.

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