

Virtual Arbitration Hearings Prompt Witness Coaching Fears

By **Caroline Simson**

Law360 (July 2, 2020, 3:55 PM EDT) -- The COVID-19 pandemic has forced the arbitration world to move hearings entirely online, prompting concerns that, unbeknownst to opposing counsel and arbitrators, witnesses could be getting subtle — or not-so-subtle — coaching from their attorneys.

Over the last few months, lawyers have had to adjust to conducting hearings remotely, and arbitral institutions have issued a deluge of protocols to avoid technological and practical glitches.

But one problem that doesn't seem to have an obvious answer is how to prevent witnesses from being able to covertly chat with counsel while a hearing is ongoing or during a break. A witness could place a phone directly in front of their screen, out of the camera's view, or use the chat function on Zoom. Or they might simply walk into another room and call their attorney while on a break.

If lawyers are guiding witnesses into providing the "correct" response or urging them to look at a particular document in response to a question, witnesses might not be doing what they've been summoned to do: present their own honest recollection of the events at issue.

"In a perfect world we would all be able to trust each other, but we're not living in a perfect world," said Morgan Lewis & Bockius LLP partner Sabine Konrad.

Much of the problem has to do with the atmosphere surrounding virtual hearings, which witnesses may perceive as more informal.

"When a witness attends physically, there is a certain amount of formality, if not intimidation, which is thought to encourage a witness to keep it honest," said Clyde & Co. LLP partner Ben Knowles, who chairs the firm's dispute resolutions practice group and co-chairs the firm's global arbitration group. "And of course the presence in the room means that if the witness resorts to notes or marked-up bundles, et cetera, that usually gets picked up right away."

Proposed solutions include having 360-degree cameras or a neutral third party in the same room as the witness, disabling the chat function in Zoom or sending the witness a preset laptop with functions like chat disabled. Lawyers may also request that the witness go to a hearing center so that administrators there can confirm there's no coaching going on.

But these solutions aren't perfect, especially as the pandemic rages on. Cameras that capture a 360-

degree view provide an awkward and disorienting perspective — especially for people who aren't used to using them — and ongoing travel restrictions, stay-at-home orders and general concerns about health and safety make it difficult for even one person to go to an alternative location for a hearing.

Moreover, these solutions don't address the problem of witnesses potentially speaking with their lawyers over a break. That's not a new issue, according to Meriam Nazih Al-Rashid of Eversheds Sutherland, the U.S. chair of the firm's public international law and international arbitration practice group.

She noted that the issue previously arose when fact witness' hearing testimony took place over multiple days and they would be sent home at night with orders not to discuss their testimony or the case with anyone else. At that point, neither the parties nor the tribunal could monitor a witness' compliance.

"All that said, we cannot deny that our old-time battle in safeguarding the veracity and credibility of witness testimony is facing new challenges with the pandemic," she said.

Without statistics, exactly how much more of a problem this has become over the last few months is unclear. Meg Kinnear, secretary general of the International Centre for Settlement of Investment Disputes, told Law360 that her organization is not aware of any instances of witness coaching or tampering so far. She noted that parties are always ethically obligated not to tamper with or coach witnesses — not just during remote hearings.

"Tribunals are the judges of the probative value of the evidence; if there is any concern about improper coaching, the tribunal can disregard the evidence and could allocate costs based on such misconduct," she said.

Still, the concern has been enough to deter some lawyers from wanting to hold virtual hearings.

In the litigation world, U.S. Bankruptcy Judge Elizabeth S. Stong of the Eastern District of New York issued an order containing a protocol for a virtual hearing she was scheduled to oversee back in April.

Judge Stong told Law360 that while she was concerned about bad behavior, she issued the order to make the rules crystal clear for witnesses who might not understand that they can't get any help from their lawyer during their testimony. The hearing was ultimately canceled because the parties settled.

"The role of the witness is so different and so special, it's important to be really clear about what's OK and what's not OK — that this testimony is under oath, and that, for example, all communications with the witness have to be on the record," she told Law360. "I think coaching is a risk, and it's something we have to be proactive about as courts and as lawyers."

In arbitration, the situation is made a bit more complicated in that oaths may not be administered in certain circumstances, or they may not have the same legal ramifications that they would in U.S. proceedings.

For example, witnesses testifying in ICSID proceedings must swear to tell the truth, and experts must swear that their statements "will be in accordance with my sincere belief," according to the ICSID arbitration rules.

But under the ICSID Convention, those same experts and witnesses "shall enjoy immunity from legal

process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity."

The United Nations Commission on International Trade Law's notes on organizing arbitral proceedings say that practices and laws differ as to whether arbitrators are empowered to put witnesses under oath. In some systems, "oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths," according to the notes.

Ultimately, the extent to which witness coaching becomes an issue in virtual hearings is likely to boil down to whether witnesses and their counsel are willing to knowingly engage in bad behavior.

Judge Stong pointed out that lawyers are required at hearings to make declarations that all of their communications with witnesses have been on the record.

"I have high expectations for lawyers, and nobody's perfect, but I don't think many lawyers — hopefully any lawyers — would lie to the court at the outset and lie again at the end," she said. "If a lawyer is prepared to misrepresent to the court, to lie to the court before and after the witness' testimony ... I guess there's not much I can do about that."

--Editing by Alanna Weissman.