

Arbitration Hearings: Conducting Virtual Hearings

A Practical Guidance® Practice Note by
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This practice note provides an overview of the process and procedure associated with arbitration proceedings conducted in the virtual world. Specifically, this practice note discusses various models of virtual arbitration proceedings and provides practical suggestions for representing clients in virtual arbitration hearings, as attorneys who represent parties in arbitration proceedings must become familiar and comfortable with conducting these types of proceedings in our new normal.

In 2020, the novel coronavirus (COVID-19) pandemic dramatically changed the way we practice law in the United States. The country—and our courthouses—promptly shut

down in March 2020. States and state courthouses started opening up over the summer of 2020, but some then reversed course and shut down after various surges and waves of infection. With the development and deployment of the vaccine late in the year, many courthouses began reopening yet again, some more rapidly than others.

While the pace of litigation slowed since the onset of the pandemic, the primary vehicle for proceedings migrated from the conference room and the courthouse to the virtual world. Videoconferencing platforms, such as WebEx, Zoom, and Microsoft Teams, to name a few, became the dominant vehicle for many proceedings, including client conferences, depositions, court appearances, and arbitrations.

Arbitration proceedings, in particular, seem well suited to the platform. Advocates and arbitrators who were sheltering in place found that virtual hearings could, with relative ease, take the place of in-person arbitration proceedings, which are traditionally less formal than courthouse proceedings.

While it appears as though the pandemic may eventually be tamed, it also is evident that virtual arbitration proceedings are here to stay. The advantages of virtual proceedings, discussed in more detail below, will not disappear just because people again feel comfortable meeting indoors, in person. Virtual arbitration proceedings are here to stay because they are more efficient and deliver results equal to in-person meetings, often at significant cost savings to the parties.

For more information on domestic arbitration proceedings, see [Arbitration in the United States Resource Kit \(Federal\)](#), [JAMS Arbitration Resource Kit](#), [AAA Arbitration Resource Kit](#), and [CPR Arbitration Resource Kit](#).

Arbitrations during the Pandemic – Three Paths

In the past several months, practitioners have litigated over the internet—taking and defending depositions, conducting mediations, and even trying cases. But much of the focus recently has been on virtual arbitrations proceedings.

During the pandemic, parties have conducted arbitration proceedings in one of three ways:

- In-person
- Virtual –and–
- Hybrid (partially in-person, partially virtual)

Even during the height of the pandemic, some arbitration proceedings were still held in person. All of the participants were in the same room, but certain additional precautions were taken, such as:

- Prehearing health screenings
- Agreed cleaning and safety protocols, such as regular handwashing and no documents exchanged
- Limits on the number of people in the room
- Safe distances between all participants
- Face coverings –and–
- Plexiglas partitions

Other arbitration hearings were strictly virtual. None of the participants were in the same room. Rather, the participants all were logged in to a videoconference platform such as WebEx or Zoom. The parties agreed to protocols in advance regarding the introduction of exhibits, sequestration of witnesses, witness coaching, and so on.

Finally, some proceedings were hybrid, where some of the participants were in the same room, but others participated by videoconference. For example, the arbitrator, the court reporter, and the attorneys for both parties might be in a conference room, but all of the witnesses and client representatives were logged in to a Zoom meeting. For those participating in the conference room, the participants employed the safety protocols described above for in-person arbitrations. For those participating remotely, they utilized the virtual protocols.

Which Path to Take?

In deciding whether to conduct an arbitration hearing in-person, virtually, or using a hybrid model, several considerations come into play. However, you must understand at the outset of your matter that you will not

have sole control over which path to take. Often, you will need to negotiate with opposing counsel and the arbitrator to develop an agreed-upon hearing platform.

Some questions you should address at the outset include the following:

- Who are you considering as your arbitrator? What are their preferences regarding virtual vs. in-person hearings?
- What about your client—do they have a strong preference for a particular approach?
- Where is the arbitrator located or where is the hearing supposed to take place?
- Will be it held in a location that has had a high number of recent COVID-19 cases?
- Where are your fact and expert witnesses located?
- Where are counsel and the parties located?
- Is yours the type of case in which you believe it is important to test the credibility of the parties and witnesses in person instead of over a video screen?
- How comfortable are the attorneys and witnesses with wearing masks for extended periods?

Considering and answering these questions can help you identify which arbitration model makes the most sense for your specific arbitration hearing.

Advantages and Disadvantages of Each Path

Each of the three paths has certain advantages as well as disadvantages. Consider these before advocating for a particular approach.

In-Person Arbitration

For in-person hearings, advantages include familiarity with the process; the ability to develop a rapport with the arbitrator (in the hallway, on breaks, etc.); and the traditional, face-to-face evaluation of witness credibility. However, during the pandemic, the in-person model has obvious disadvantages as well. Witnesses and participants may be on edge, concerned about their health and safety. Extra steps are necessary to ensure the safety of all parties involved. In-person arbitrations also require travel time and sometimes require overnight stays in a hotel out of town. Any travel out of state may automatically trigger quarantine obligations, further complicating the feasibility of in-person hearings. These considerations not only make scheduling more of a challenge but also may increase the overall cost of your arbitration.

Virtual Arbitration

The advantages of a virtual arbitration hearing arise from cost and time savings attributed to the participants' ability to appear for the arbitration hearing from the comfort of their local or home offices, such as:

- Little to no travel costs for mileage, flights, hotels, meals, etc.
- No need to evaluate or worry about local safety standards regarding COVID-19 restrictions for travel or hearing attendance, including mandatory quarantine periods
- No costs for rented conference rooms or special equipment
- Easier scheduling as participants and the arbitrator do not have to travel to the hearing location
- Greater involvement of more participants (i.e., attorneys, witnesses, or client representatives)

Virtual arbitrations, however, are not without any disadvantages. For example, during a virtual arbitration, you may experience the following:

- Difficulties establishing a rapport with the arbitrator, witnesses, parties, and opposing counsel as everyone will be appearing remotely and, perhaps, all prehearing litigation also was conducted remotely (e.g., depositions, hearings, etc.)
- Diminished ability to evaluate and test the credibility of the witnesses
- Technology issues/failures of some or all of the participants regarding, for example, internet connectivity, audio/visual quality, and logging on to the hearing platform
- Challenges with witnesses who may not give their best testimony over video because they are distracted or not taking the proceeding as seriously as they would have had they been sworn in to testify in person before the arbitrator

Hybrid Arbitration

Hybrid hearings possess several advantages from both in-person and virtual arbitrations, including reduced travel costs and greater flexibility in presenting evidence and witnesses. Hybrid hearings also allow you to build a rapport with the arbitrator while ensuring that the witnesses can testify in a manner that best accommodates their health and safety concerns. Likewise, the arbitrator and witnesses are generally more engaged when participating in person, rather than via videoconference.

Disadvantages of hybrid proceedings include the technology challenges discussed above of having witnesses testify via video. However, the hybrid model mitigates the impact of these technology issues since the court reporter, arbitrator, and attorneys are typically together in the same room and simultaneously experience the same issues, thereby minimizing any confusion among those present as to what testimony was heard and recorded.

Hybrid hearings may present scheduling difficulties and uncertainty, as the availability of witnesses and the ability to proceed in person are subject to frequently changing local, state, and federal safety orders. Similarly, there is a risk that you may need to postpone the arbitration or switch to a virtual hearing if any of the participants are required to quarantine or obtain a positive test result due to COVID-19 exposure. Understand that participants who attend in person will need to comply with applicable safety protocols, including wearing masks for the duration of the hearing, which can be distracting and uncomfortable.

Virtual Hearing Logistics

As you prepare for your virtual arbitration hearing, be sure to assess how the virtual hearing will be held and who is going to be responsible to ensure things go smoothly. Consider the following hosting options:

- **Hosting the hearing yourself.** You may consider hosting the hearing yourself using your own virtual meeting platform account (e.g., Zoom, WebEx, Microsoft Teams, etc.). If you are the host, you must ensure participants have access to the main hearing room and any breakout rooms. While hosting the hearing may be cost-efficient, assuming this role may be more complicated than you expect and become an unnecessary distraction. For example, if the video platform fails during the hearing, you may become distracted trying to fix the technology issues when you instead should be focused on your next witness.
- **Hiring a third-party service provider.** Many, if not most, attorneys decide to use a third-party service provider to handle the logistics of a virtual arbitration. Most providers will act as the host and offer the following services:
 - Ensuring the participants have the appropriate technology to access and use the platform during the arbitration
 - Conducting practice runs with participants
 - Creating and monitoring breakout rooms
 - Troubleshooting technical problems in real time

- o Providing court reporters –and–
- o Assisting with displaying exhibits

If your arbitration is a hybrid proceeding, be sure to check with the arbitrator to determine what safety protocols will be in place for in-person participants, including whether participants will need to complete health surveys and submit to temperature checks before the hearing. You should also confirm that the arbitrator has set up the hearing so that participants can practice social distancing and sanitize their work areas.

As with virtual hearings, you also must confirm for hybrid proceedings:

- How remote witnesses will appear at the hearing –and–
- If you need to obtain a third-party service provider to facilitate the hearing –or–
- If the arbitrator’s office will host the hearings

Most arbitrators who host the hearing will provide the necessary virtual meeting platform information (e.g., Zoom, WebEx, etc.); conduct practice runs with participants; and provide on-site tech support. If possible, you should arrange with the arbitrator to have a screen set up so that the arbitrator, attorneys, and court reporter can view remote witnesses on a large screen rather than on a laptop or computer. This makes it easier for the arbitrator to focus on the witness and his or her testimony, rather than on other items on the computer screen.

Arbitrators will likely have limits on the number of people who can be in the room at one time, such that client representatives, support staff, and witnesses will likely need to be in a separate room during the hearing. You should take this into account when deciding who should attend the arbitration hearing in-person and whether you should reserve additional office space or conference rooms. Be sure your clients can observe the entire arbitration hearing, even if they cannot physically be in the room where the hearing is taking place.

Handling Evidence in Virtual and Hybrid Hearings

In hybrid arbitrations, the attorneys, arbitrator, court reporter, and some witnesses are in the same room so the parties can use hard copy exhibits as they would in a regular hearing. However, in virtual arbitrations, everyone attends remotely so you will be unable to bring physical

evidence binders and other materials with you to the hearing. Accordingly, you should confer with opposing counsel and the arbitrator before the hearing about how they would like to receive copies of evidence. Consider the following strategies for handling evidence:

- Ask the arbitrator if their preference is to receive binders with hard copies of all the exhibits mailed before the hearing.
 - o Some arbitrators may be comfortable with electronic copies sent via a secured document transfer system before the hearing, perhaps followed up after the hearing with a set of hard copies of the admitted evidence.
 - o Other arbitrators may prefer to have binders with hard copies of the documents so they can review the evidence in real time.
- Be mindful that the arbitrator’s attention will be drawn to the exhibit (whether in hard copy or on a computer screen) instead of your witness.
 - o Although this happens during in-person hearings, the fact that the arbitrator must look at their computer screen to see the witness (which is already less than ideal), means that the arbitrator’s attention to the witness is limited.

In both hybrid and virtual hearings, witnesses testify remotely so you need to determine how to best present documents to your witnesses, paying particular attention to how to maintain the element of surprise. Consider the following:

- **Screen sharing.** If the parties agree to show exhibits electronically during the hearing, you can use the screen sharing function on your videoconferencing platform to either handle the exhibits yourself or have a colleague assist in displaying the exhibits. Screen sharing makes it easier for all participants to see the exhibits and track the questioning.
- **Naming conventions.** Be aware of how the exhibits appear on screen. For example, if you open up multiple Adobe Acrobat PDF files and each tab has the document’s name versus the exhibit number, participants may be able to read the names of the tabs of the other PDF files when you share your screen.
- **Exhibit delivery.** If witnesses are to review exhibits via hard copy, you may consider sending the exhibits to the witnesses in a sealed envelope ahead of time and ask the witnesses to open the envelope during their testimony.

Preparing Your Witnesses

In both virtual and hybrid hearings, you must prepare your fact and expert witnesses to ensure that they have the technology and environment required to testify at the hearing. To that end, consider taking the following actions in preparation:

- Schedule your hearing preparation session over video to evaluate, among other things, the witness's:
 - Technology
 - Appearance on video
 - Lighting
 - Background
- Confirm that the witness has reliable internet access.
 - If not, ask if they can use their mobile phone as a hotspot or consider sending them a MiFi for the hearing.
- Confirm that the witness will have privacy while testifying and will not be interrupted by coworkers, family, children, pets, or other outside distractions.
- If the witness is testifying from home, ask the witness whether any activities could affect the witness's audio, such as construction, landscaping, gardening, etc.
- Explain how exhibits will be shown to the witness and confirm their ability to view the exhibits.
- Consider who will question each witness at the hearing and, if possible, have that attorney take the witness's deposition during discovery.
 - Even if that attorney is unable to meet the witness in person before the hearing, at least the attorney has had the experience of deposing the witness.
 - This strategy will help the questioning attorney:
 - Develop a rapport with the witness
 - Put the witness at ease during the hearing
 - Gain a better understanding of the witness's personality

For witnesses who are appearing in person, make sure that the witnesses are comfortable testifying while wearing a mask. Even though masks are now required in most public places and work environments, many people are still not used to wearing a mask for extended periods. Likewise, many people only wear masks while performing errands and are not accustomed to wearing masks at work or in high-stress situations. Accordingly, check the witness's experience and comfort level with wearing a mask. Also, as part of your witness preparations, have the witness

wear a mask while responding to mock direct and cross-examination questions.

In hybrid hearings, you will have more flexibility and can make strategic decisions about whether to have a witness appear in person or via video. When making this decision, consider the following:

- Will the witness be testifying about numerous documents?
- What is the expected length of his or her testimony?
- Is the witness's credibility or emotional state at issue?
- Will the arbitrator be able to better assess the witness's emotional state or credibility in person while wearing a mask or on a screen with no mask?
- Are there significant additional costs associated with having the witness appear in person?
- Will the witness need to travel and, if so, require a hotel?
- Is the witness an expert who will charge the client for travel time?
- Does the witness have the requisite technology and setup to testify remotely?
- Do you want the witness to interact with the arbitrator, understanding that arbitration is generally informal and arbitrators often have informal discussions with the attorneys and witnesses?

Additional Strategic Considerations

As you prepare for your virtual arbitration hearing, keep the following strategic considerations in mind:

- Develop a system by which your team (including your client) will be communicating with each other during the hearing (e.g., text messages).
 - Note that utilizing the chat function of the videoconferencing platform may lead to unintended disclosures and communications to all hearing participants (including your opponent).
- Review your background and work area to ensure it is not distracting and is at least neutral.
 - Do not rely on fake backgrounds as the quality of your appearance may deteriorate if you wander too far from your camera.
- For hearings that will last more than one week, try to schedule hearings for three or four days in a week (if possible), as sitting for hours in a virtual arbitration is tiring.

- Provide the names of everyone “appearing” on behalf of your client to the third-party service provider so the vendor can invite the witnesses to conduct a test run of the technology (e.g., ensuring witnesses can seamlessly join the “main room” and “breakout rooms”).
- Consider how you want to view the hearing (e.g., gallery view or speaker view).
 - To help visually streamline the hearing and to minimize distractions, consider agreeing to have only the arbitrator, witness, and one attorney for each party on video and have everyone else turn their cameras off.
- Ask the host to allow the parties to access the breakout rooms after the day’s hearing to discuss strategy and debrief.
- Be sure to stand up and walk around.
- Silence all electronics and put others on notice to not disturb you.
- Consider using PowerPoint for your closing (including deposition video clips), which you can easily share on the platform, as it provides:
 - A visually easy-to-digest road map for the arbitrator to follow your arguments
 - May present the opposing party in a much less favorable light than they came across during arbitration –and–
 - Would be interesting and engaging for everyone to watch

As you prepare for your hybrid arbitration hearing, keep the following strategic considerations in mind:

- Continue to follow the safety protocols and monitor local health and safety orders.
- Bring extra masks so that you can change masks throughout the day.
- If multiple witnesses are testifying in person, make sure that they can wait in an area where they can socially distanced.
- Build into your daily schedule breaks where in-person hearing participants can take off their masks.
- Maintain communication with witnesses to ensure they are still able to testify in person.
- Routinely check video and audio connections to ensure that clients can still view and hear the arbitration.

Related Content

Practice Notes

- [Federal Arbitration Act Fundamentals](#)
- [Revised Uniform Arbitration Act Fundamentals](#)
- [Ad Hoc Arbitration \(U.S.\)](#)
- [Discovery in Arbitration: Limiting Discovery \(U.S.\)](#)
- [Arbitrability in U.S. Arbitration](#)
- [Arbitration vs. Litigation \(Federal\)](#)
- [Mediation-Arbitration Considerations](#)
- [Seat of Arbitration](#)
- [Transparency in Arbitration \(U.S.\)](#)
- [Preliminary Hearings and Procedural Orders in Arbitration \(U.S.\)](#)
- [Arbitrators: Becoming an Arbitrator \(U.S.\)](#)
- [Confidentiality in Arbitration \(U.S.\)](#)
- [Arbitrators: Finding, Vetting, and Selecting an Arbitrator \(U.S.\)](#)
- [JAMS Arbitration Resource Kit](#)
- [AAA Arbitration Resource Kit](#)
- [CPR Arbitration Resource Kit](#)

Annotated Forms

- [JAMS Demand for Arbitration](#)
- [AAA Demand for Arbitration](#)
- [CPR Notice of Arbitration](#)
- [Mediation and Arbitration Agreement](#)
- [Notice of Appointment for a Party-Nominated Arbitrator in Ad Hoc Arbitration](#)
- [Preliminary Hearing Report and Scheduling Order for Arbitration \(U.S.\)](#)

Checklists

- [Delay and Excessive Cost in Arbitration Checklist \(U.S.\)](#)
- [Arbitration Organizations: Choosing an Organization Checklist \(U.S.\)](#)
- [AAA, JAMS, and CPR Comparison Chart](#)
- [Arbitrators: Finding, Vetting, and Selecting an Arbitrator Checklist \(U.S.\)](#)

Bruce Sarchet, Shareholder, Littler Mendelson

Bruce J. Sarchet has focused his entire legal career on the representation of management in labor and employment law matters. Most recently, Bruce has provided advice and counsel to businesses in addressing the complex employment law issues presented by the COVID-19 coronavirus pandemic.

Bruce serves as the California coordinator and liaison for Littler's Workplace Policy Institute (WPI). He focuses on California state legislative and regulatory developments in employment and labor law, as well as municipal ordinances and regulation of the workplace. He assists the employer community in understanding and impacting California legislation before it becomes law. As a member of WPI, Bruce has recently represented in federal court several trade associations in bringing constitutional law challenges to overbroad state laws, including a challenge to AB 51 which limits the use of employment arbitration agreements, and a challenge to AB 2455, which provides labor unions access to contact information for home care workers.

Bruce also has a wide-ranging practice representing private, public and nonprofit entities in all aspects of labor and employment law, including claims under the Private Attorney General Act (PAGA), wage and hour compliance, employment discrimination claims, and the National Labor Relations Act.

For unionized employers, Bruce frequently serves as chief spokesperson in collective bargaining negotiations and provides representation in grievances and arbitration hearings. He also represents employers during union organizing drives and unfair labor practice charges under the National Labor Relations Act.

Judy Iriye, Shareholder, Littler Mendelson

Judy M. Iriye divides her practice between California and Hawaii and represents private companies in many facets of labor and employment law. She regularly counsels clients and offers practical advice to ensure compliance with various areas of labor and employment law, including the defense of:

- Class action claims in wage and hour matters
- Wrongful discharge actions
- Claims of sexual harassment
- Employment discrimination

During law school, Judy was a judicial extern to the Hon. Kimberly McLane Wardlaw and the Hon. John G. Davies of the U. S. District Court for the Central District of California.

Judy is the Los Angeles office's pro bono liaison and regularly provides legal services to her many pro bono clients, including Nā Pu'uwai and Upward Bound House.

Jannine Kranz, Associate, Littler Mendelson

Jannine E. Kranz represents and counsels employers in all matters of labor and employment law.

Prior to joining Littler, Jannine worked at a large full service law firm where she practiced labor and employment law. She represented employers in a broad range of employment litigation matters, including defending against discrimination, harassment, wrongful termination, breach of contract, defamation, whistleblower retaliation, and wage and hour claims. Jannine also defended PAGA claims and wage and hour class action cases. During her tenure, she drafted a successful motion for summary judgment on a whistleblower retaliation case and drafted and argued a successful motion for summary adjudication in a disability discrimination case which resulted in the dismissal of all of plaintiff's employment claims. Jannine also provided advice and counsel to clients on various personnel issues, including payroll, termination, medical leave, and employee handbooks.

Jannine previously worked at a medical malpractice defense firm, where she served as the second chair attorney in two trials, gaining valuable experience as she prepared and argued the motions in limine and other pretrial motions in addition to preparing all of the exhibits and trial documents. Both cases resulted in defense verdicts.

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