

Professional Perspective

Tips for Conducting a Virtual Arbitration Hearing

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Tips for Conducting a Virtual Arbitration Hearing

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In spring 2020, the legal system faced the unprecedented task of operating entirely remotely following the nationwide shutdown caused by the coronavirus pandemic. For months now, in-person court hearings have been suspended, and judges and lawyers, as well as their staff members, have been working from inside their homes versus a courthouse or office building. Still, members of the legal system have done their part to keep the wheels of justice spinning.

This article provides tips for conducting a virtual arbitration hearing, based on the experience of attorneys who litigated a 10-count arbitration demand arising out of a \$2.3 million stock purchase agreement in June 2020. The only live task in this expedited matter, filed in late February with the American Arbitration Association, was the initial interview of potential expert witnesses. The sophisticated financials at issue made expert witnesses necessary on both sides.

The defense team prepared for and conducted the entire hearing without ever meeting with each other, the client, the witnesses, opposing counsel, or the arbitrator in person. Witnesses were prepared remotely. Expert reports were developed via Zoom through screen sharing. Document production, production review, exhibit preparation, and outline drafting were all done without printing a single piece of paper.

The entirety of the preparation process and hearing was conducted from inside each of the team member's respective homes, via Zoom. This seemed impossible a mere six months ago. Indeed, when the realities of the shelter in place orders set in, the initial reaction was to seek an indefinite continuance.

The task of trying this case virtually taught the team many lessons worth sharing. Although the team was prepared for a number of the challenges presented, some of these lessons were learned the hard way. Here are the top takeaways.

Be Prepared

The logistical challenges of a virtual arbitration require you to be more prepared than you think you need to be. Assemble a team that can work well together and can serve in multiple roles—everyone needs to be prepared to address technology issues, at a minimum. There are multiple challenges that arise simply as a result of attempting to effectively communicate over a computer. The following tips will help you face such challenges:

- Be prepared for your cross examinations to be more challenging. It may take longer to achieve the desired answer from a witness in a virtual form. Be prepared to be flexible.
- Connectivity issues are bound to arise. Copy all exhibits, your outlines, your notes, and other documents to be used during the hearing onto a laptop or portable media device. This will ensure network-connection issues do not cause any delays during the hearing.
- Plan an alternative platform to chat with your team during the hearing. Here, the arbitration was done via Zoom, so the team utilized breakout rooms to talk with the client on breaks, and “passed notes” to team members through Microsoft Teams. This actually proved to be far more effective than the standard passing of notes during an in-person hearing. Note: Ensure all team members are cognizant to not reveal the alternative communication platform to the arbitrator or opposing counsel (such as via a screen-sharing mishap).
- Spend time before the hearing with any vendors, ensuring they have reached the necessary level of technological mastery needed to smoothly do their part in your case. Remember they are there to help you, so make sure they can do so.
- Coordinate alternative forms of communication with the client.

Be Informed

Proceeding virtually requires you to reach beyond the comfort zone of the courtroom you undoubtedly grew accustomed to throughout your career. Being informed of the capabilities and limitations of the technology involved will go a long way to a smooth virtual arbitration. The following tips are key to creating your new comfort zone:

- Understand the technology forum and do not be afraid of it.
- Educate the client on what to expect, but do not be afraid to admit, “This is new to me, too.”
- Make sure all team members understand how to use the virtual platform. More than one team member should be able to share documents on the screen. Indeed, it's much better to have a lawyer other than the lawyer conducting the questioning move through documents on a screen share. Your team's understanding of the platform and its tools may benefit the proceedings for all parties involved, including the Arbitrator. For instance, an understanding of the use of “break out” rooms can enable seamless “bench conferences” solely with counsel and the Arbitrator as well as facilitating conferences between counsel without the ears of the client or the Arbitrator. At times, the clients were pushed into separate break rooms so the attorneys could conduct such conferences.
- Make sure your client is comfortable with technology. Learn how your client will be connecting, and be prepared to help them through any issues during the hearing.
- Take advantage of training sessions offered by host—it will likely benefit both the lawyer and the client.
- Test video, lighting, and audio in advance of the hearing. This may include using ear phones or calling in via phone.
- Remember the virtual setting is new to all parties. To ensure the new setting has not caused the witnesses (or their counsel) to forget or disregard the rules governing the proceedings, incorporate into the introduction and conclusion of examinations a stipulation from the witness that they were not communicating with anyone electronically during their testimony or using unidentified documents to assist in their testimony.

Be Organized

Organization is critical to any arbitration preparation, but it's even more critical in the virtual setting. Being organized throughout—from the preliminary hearing until the final hearing—will minimize the logistical issues associated with remote exchanges between the parties. The following organizational techniques will be useful:

- Coordinate with opposing counsel for the entry of an agreed to scheduling order providing firm and early due dates (e.g., exhibit exchange, witness lists, and deposition designations). Early deadlines are essential given the logistical difficulties of being presented with a new exhibit or witness virtually. We crafted a scheduling order which included agreements to create a streamlined process for introduction of evidence—this avoided the need to authenticate and introduce exhibits at the hearing unless an exhibit was explicitly objected to in advance—and time limitations for each party to put forth its case in chief.
- Utilize joint stipulations as much as possible—“telling the story” and providing details is more difficult in a virtual forum. The less you have to present, the better.
- Coordinate exhibit numbers and exhibit books with opposing counsel. This is more important in a virtual hearing than when in person. One congruent set of documents for the arbitrator and witnesses will make the entire process smoother and less stressful.
- Ask witnesses and the arbitrator, in advance of the hearing, whether they prefer the exhibits in electronic and paper format. Everyone has a different preference.
- Provide witnesses and the arbitrator the exhibits well in advance of the hearing. Because this task may take coordination with office staff and sending items via mail, it must be done days before the hearing date to allow time for follow-up documents.

Be Comfortable

Much like your comfort level in a courtroom or before an arbitrator in-person, your comfort level in the virtual setting will most certainly impact the case you present. The more comfortable you are, the cleaner your case will appear. The following are tips helpful in maximizing your comfort level:

- Be open to the idea the virtual form may, in fact, be better in some ways.
- A definite advantage is possible with a virtual examinations—the witnesses can be made full screen and facial cues, while slightly delayed, are more pronounced and easier to read. However, remember your facial expressions are also easily observable by all participants. Remind your client of this, too.
- Use the “hide self view” option on your virtual form—seeing yourself talk is unnatural and can be quite distracting. Similarly, when questioning a witness, it may be helpful to pin the video of the witness so you can focus only on the witness. Advise witnesses of these options as well.
- Do not hesitate to address audio/video issues. This includes asking others to reconnect, if needed.
- Embrace the fact that all it takes to look professional virtually is wear suitable business attire from the waist up, but, if doing so, always remember to turn your video off before standing up.
- Properly equip everyone on your team. As a firm, we allowed everyone to safely return to our offices to take technology home, including docking stations and multiple wide screen monitors thereby replicating our work setups. This allowed all team members to have multiple screens, avoiding having to run separate laptops during the hearing.