



SPECIAL ISSUE

PRACTICING IN A PANDEMIC

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VIDEO ARBITRATION OF LABOR OR EMPLOYMENT ISSUES

How to Have Meaningful Arbitration Proceedings in the Era of COVID-19 and Social Distancing

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Traditional, face-to-face mediation conferences and arbitration hearings are, at least for now it would seem, a thing of the past. At the very least, they are few and far between. A quick Internet search of articles on “mediation” versus “arbitration” recently produced a ratio of 7:5 (meaning for every 7 mentions of mediation, there were approximately 5 mentions of arbitration)—almost equal frequency. However, when searching “video mediation” versus “video arbitration,” the ratio shifted closer to 2 to 1, with “video arbitration” occasioning fewer than half the mentions. It appears the option of utilizing a video platform to arbitrate is simply not being discussed nor promoted at a rate similar to that of other ADR processes.

Anecdotally, I have noticed a similar pattern: cases originally scheduled for in-person mediation have converted to video mediation, but no labor or employment arbitrations of which I am aware have, so far, converted to video arbitration. Instead, these matters are being placed on hold for months, pending abatement of the current public health concerns. The reasons for these continuances may vary, but the postponements may also boil down

to counsels’ (and arbitrators’) unfamiliarity with video arbitration, leading to a rejection of the process. Unfortunately, as William E. Gladstone noted, “Justice delayed is justice denied.” These lengthy stays—frequently of several months’ duration—have (unintentionally) denied arbitral litigants the right to a prompt resolution of their disputes. And it doesn’t have to be that way.

Video arbitration provides parties and counsel with an experience very similar to a traditional, face-to-face arbitration hearing while mitigating against the public health risks of COVID-19. Further, it can decrease the cost of arbitration, since there are no travel fees or expenses incurred by the parties, counsel, or the arbitrator.

The courts have recognized that such delays are to be avoided, even in civil matters, if possible. To this end, state and federal courts, both here in Florida and around the country, are shifting hearings and trials to online video conferencing platforms¹ in response to COVID-19. If the courts can do it, there is no reason counsel and arbitrators cannot likewise move arbitration online. Indeed, video arbitration provides parties and counsel with an experience very similar to a traditional, face-to-face arbitration hearing (live argument, live witnesses, live cross-examination, live objections, presentation of exhibits, and the like) while mitigating against essentially all the public health risks associated with COVID-19. Further, video conferencing decreases the cost of arbitration since there are no travel fees or

expenses incurred by the parties, counsel, or the arbitrator.

With only a few additional steps and a bit of planning, your clients can have prompt resolution of matters in arbitration, notwithstanding the federal, state, and local government orders and guidelines that prevent in-person arbitration.² To that end, with an eye toward providing counsel and arbitrators the familiarity needed to embrace the process, this article outlines the keys to a successful video arbitration.

Initial Steps

The following keys to a successful video arbitration can be addressed by counsel and the arbitrator at an initial prehearing conference/initial arbitration management conference, which should perhaps be by videoconference as well.

1. *Agreement as to the videoconference platform.* Counsel and the arbitrator should research and discuss which platform(s) provide the best combination of features, ease of use, and security. Three of the most popular platforms are Zoom, Google Meet, and Microsoft Teams.³ A key feature to help the video arbitration run more like an in-person arbitration is the ability to have “breakout rooms” on the video platform. The hearing itself occurs in the main room (where, as has been popularly noted, everyone appears in a *Brady Bunch* grid), but the platform allows for separate rooms in which each party and their counsel may meet in private and/or in which the arbitrator may have sidebars. Another useful feature is screensharing, which is discussed under *Exhibit Considerations*, below.
2. *Technology considerations.*
 - a. All participants will need access to a webcam and microphone (usually integrated into smartphones, laptops, and tablets); a secure Internet connection (NO PUBLIC WIFI); and a suitably quiet/private location to take part in the videoconference.
 - b. To increase confidence and address technical issues that may arise, all participants will need to determine beforehand when participants will log in to the video platform. This can be done either by counsel scheduling meetings with their client(s) and witnesses or by having designated individuals log in to the final prehearing conference.
 - c. The participants will also need to come to

agreement on who will serve as meeting “host,” controlling access to the meeting, setting up breakout rooms, etc. Normally the arbitrator (or the arbitrator’s staff) would control these functions; however, if all agree, it could be anyone, from a member of a counsel’s staff to a hired third-party service.

3. *Document Sharing.* Agreement should be reached on the method of sharing documents. Someone, typically the arbitrator, will set up a secure shared folder dedicated to the arbitration, to which only the arbitrator and counsel shall have access.⁴ Email may suffice for prehearing exchange between the parties, but it will be useful to have any arbitrator orders and the parties’ final documents aggregated in one location. Bates stamping documents in video arbitration is crucial.
4. *Prehearing Discovery.* Discuss all the typical prehearing discovery matters, and, if depositions are allowed, it seems appropriate to allow them to be taken by videoconference.
5. *Nonparty production (in discovery) and attendance at final evidentiary hearing.* Most arbitration in Florida comes under either the Federal Arbitration Act (Title 9, U.S.C.) (FAA), the Revised Florida Arbitration Code (Chapter 682, Fla. Stat.) (RFAC), or both.⁵ Both FAA and RFAC provide that an arbitrator may summon a nonparty to attend a hearing before the arbitrator, but the Eleventh Circuit has recently held that, if the arbitration is convened under FAA (only), arbitrators do not have inherent authority to compel prehearing discovery from nonparties or to require such nonparties to appear at arbitration (*duces tecum* or not) by videoconference, because the nonparties are not physically appearing before the arbitrator.⁶ However, if the arbitration is convened under RFAC, the arbitrator does appear to have the authority to compel prehearing discovery (including, presumably, video deposition) and appearance at final hearing by videoconference, subsumed within the arbitrator’s authority in Fla. Stat. §§ 682.06(1), 682.08(2)–(4). So, counsel and the arbitrator will need to discuss how they wish to handle such nonparty production and attendance if RFAC does not apply.⁷

Conduct of the Hearing

1. *Witness considerations.*
 - a. Administration of the testimonial oath (RFAC vs. FAA) should be addressed before the hearing.⁸
 - b. Sequestration can be relatively easy to handle, though functionality varies by platform. The arbitrator (or other host) keeps all witnesses—other than the party representatives—in a videoconference breakout room⁹ or places the witnesses on hold or mute, so they are unable to hear or see the other participants.
 - c. Method of presentation of exhibits should be determined (e.g., whether through a shared screen on the video platform, by email in advance of or during the testimony, or by hard copy delivery to the witness in advance of the hearing).
 - d. Finally, to limit the possibility of interference with the witness' testimony by offscreen persons, the arbitrator should order that no one else be present with the witness.
2. Exhibit considerations.
 - a. Discuss exchange of final exhibits (placing them on the secured shared folder in advance of the hearing and/or sending them through email at the time of the hearing).
 - b. Decide how, at the hearing, exhibits will be placed before a witness, whether by screen-sharing, email, or hard copy:
 - i. Screensharing is a feature of many videoconference platforms, enabling participants to project their desktop (or a "window") for all on the call to see. This approach comes closest to the witness seeing the exhibit at an in-person hearing and can, depending on the platform, allow for witness mark-up (as, for example, when showing a diagram or map).
 - ii. Email would require an exhibit be emailed to the witness (with a copy to opposing counsel, the arbitrator, the parties, and the court reporter, if any) during the witness' testimony. There is always the possibility of emails getting lost, and counsel and the arbitrator can never truly be certain exactly what document the witness is looking at unless the witness shows it through the webcam. This process can be

- both awkward and time consuming, as the questioning has to pause whenever counsel wishes to show an exhibit to the witness. Sending all the exhibits to the witness by email in advance may allow the witness an advantage of preparation not otherwise available at an in-person hearing—of especial concern on cross-examination.
- iii. Delivery of hard copies to the witness is a third option, suggested by the National Academy of Arbitrators.¹⁰ Prior to the hearing, the exhibits are forwarded to each remote witness in sealed envelopes clearly marked "Direct Examination" and "Cross-Examination." Neither the direct examination envelope nor the cross-examination envelope is to be opened by the witness until the day of testimony and at the direction of counsel conducting the examination. The witness shall open each envelope when directed, in full view of counsel and the arbitrator. This can ameliorate some of the concerns of emailing the exhibits but can also prove awkward and confusing for the witness and, therefore, the proceeding. Moreover, in the current coronavirus environment, some witnesses may be concerned about touching envelopes transmitted through U.S. mail.
3. The Hearing Record.
 - a. Every arbitration hearing has some form of record, whether it is comprised of just the exhibits, briefs (if any), and award, or whether the record is more extensive, as when a court reporter has transcribed the proceedings. With video arbitration, counsel and the arbitrator will need to include the court reporter in the discussion about how to handle exhibits, objections, and the like, assuming the parties or arbitrator opt for court reporter preparation of the record.
 - b. Another way to create the record is through use of the videoconference platform's recording tool, if it has one. If this option is selected, special attention should be paid to ensure all participants are aware of the recording at the time, so as to avoid recording without consent. Difficulties can arise if someone has

been compelled by subpoena to attend and testify but does not give consent to having his or her voice recorded.

- c. *A Back-Up Plan.* Anyone who has used the Internet knows that intermittent connectivity problems are all too frequent. Moreover, less tech-savvy participants may have difficulty connecting to the meeting. Sometimes, on the other hand, it's not lack of technological sophistication that presents a stumbling block to videoconferencing but, rather, advanced protocols such as those resulting from an aggressive IT security policy that bans use of the particular video conference platform that counsel and the arbitrator intended to use. So, counsel and the arbitrator should plan ahead of time how to address a witness' or other participant's inability to connect to, hear, or see the video arbitration hearing, such as having that person attend by telephone only or having that witness/person appear later, thereby allowing time to resolve the technical issue.

Considerations for Counsel

The first consideration for practitioners is selection of an arbitrator who is not only impartial and knowledgeable about the subject matter, but also sufficiently familiar with the videoconference platform and its various tools to successfully manage the proceeding. Such an arbitrator will not only have familiarized him/herself with the platform but will also have been thinking ahead to help you, your clients, and the witnesses have a smooth video arbitration hearing—one that is as much like an in-person hearing as possible.

Second, you will need to plan ahead (even more). The key to having a good video arbitration experience is to think about potential technical and other concerns specific to video arbitration and then to work in advance with opposing counsel and the arbitrator to come up with workable solutions. Better to brainstorm—and practice—such solutions in advance, work out the kinks (or determine that a solution does not fit), and be prepared to address the concern when it occurs, rather than to try to come up with a fix on the fly.

Third, you will need to prepare your client and your witnesses for what to expect at the video hearing. Explain the process and the “rules of the road” to them. In many cases, it can be helpful to do at least a partial dry run with them, using the same platform that will

be used for the final hearing itself. This will allow them to become more familiar with the process and, consequently, less nervous about the video component of the testimony.

Considerations for Arbitrators

As a starting point, research the various videoconferencing and document sharing platforms and learn how to use each one or identify third-party service providers who can work with you to provide a seamless arbitration experience. Flexibility may make you the better option for a broader array of attorneys and matters.

Second, planning and scheduling are crucial, so have a more extensive initial prehearing conference than usual.¹¹ Remember, you and counsel are not just talking about the typical scheduling details you would for an in-person hearing; you are also addressing all the additional pre-planning and advanced decision-making needed to make the video component work.

Third, put it in writing. Make sure to encapsulate the agreements of the initial conference into a comprehensive arbitration management order. That order will be longer than usual because there will be that much more detail concerning the items discussed above.¹²

Finally, whether or not you typically have a final prehearing conference with counsel in advance of the hearing (to address motions *in limine*, etc.), have a final prehearing conference using the same video conference platform you will use for the hearing.

Conclusion

Overall, video arbitration can be 85—90% equivalent to in-person arbitration, just as video mediation is to in-person mediation. The process will take a bit more planning than a traditional in-person hearing, but video arbitration will afford parties prompt resolution of arbitral disputes, at lower overall cost, and will perhaps become part of the new normal.



Chris Shulman is an attorney, mediator, and arbitrator based out of Tampa who has conducted almost 3500 mediations and more than 1500 arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues.

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Endnotes

1. See, e.g., Admin. Orders of the Supreme Ct. of Fla. Nos. AOSC20-12, AOSC20-13, AOSC20-15, AOSC20-16, AOSC20-17, <https://www.flcourts.org/Resources-Services/EMERGENCY-Preparedness/Administrative-Orders> (last retrieved May 5, 2020).
2. Even when face-to-face meetings resume, some participants may still choose to wear masks, which can decrease the amount of information available from those speaking or testifying, given that some facial expressions or cues may be blocked. Thus, video arbitration, as an alternative to in-person hearings, may continue to be used as a cost-effective and risk-mitigating way to conduct hearings after the current public health crisis abates.
3. See Gadjó Sevilla, *Zoom vs. Microsoft Teams vs. Google Meet: which Top Videoconferencing App Is Best?* (Apr. 15, 2020), <http://www.pcmag.com/news/zoom-vs-microsoft-teams-vs-google-meet-a-videoconferencing-face-off>. While there have been some publicized concerns about Zoom's communications security, a number of commentators have suggested these concerns are present in essentially any Internet meeting platform (see, e.g., Darren A. Lee and Karl Bayer, *NADN Bulletin—Zoom Hype & Headlines* (Apr. 9, 2020), <https://www.disputingblog.com/nadn-bulletin-zoom-hype-headlines/>), and Zoom has taken steps to bolster the security of its platform (see Eric S. Yuan, *Update on Zoom's 90-Day Plan to Bolster Key Privacy and Security Initiatives* (Apr. 8, 2020), <https://blog.zoom.us/wordpress/2020/04/08/update-on-zoom-90-day-plan-to-bolster-key-privacy-and-security-initiatives/>). Further, there are tools the host of the meeting (typically, the arbitrator) may use within a Zoom conference to decrease the likelihood of an interloper "Zoom-bombing" the hearing (see *How to Keep Uninvited Guests Out of Your Zoom Event* (Mar. 20, 2020), <https://blog.zoom.us/wordpress/2020/03/20/keep-uninvited-guests-out-of-your-zoom-event/>).
4. Examples of such secured shared folders are Dropbox, Microsoft OneDrive, Box, ShareFile, Google Drive, etc. Many provide a decent amount of storage for free or at relatively little cost, especially as some of them are add-ons to software you may already be using.
5. Determining whether FAA (only) or RFAC (only) or both apply to any given arbitration can be a complicated, tricky process and is, in any event, beyond the scope of this article.
6. *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1161 (11th Cir. 2019).
7. One way to address this concern is to have the arbitrator summon the nonparty to appear at the arbitrator's location, maintaining social distance by having the witness at the end of a long conference table. This isn't ideal, especially if counsel and the parties are remote, but an arbitrator subpoena for such appearance would be enforceable in federal court.
8. For example, if the RFAC applies, the arbitrator has statutory authority to administer oaths, Fla. Stat. § 682.08(1). Also, "[a]ll laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this state." *Id.* § 682.08(6). During the present COVID-19 emergency at least, the Florida Supreme Court has ruled that "[n]otaries and other persons qualified to administer an oath in the State of Florida may swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness." Admin. Orders of the Supreme Ct. of Fla., Nos. AOSC20-16, AOSC20-17. If FAA applies, then either a commissioned Florida online notary must attend the proceedings and swear the witness in or the parties must agree as to some alternate means, such as a stipulation that the arbitrator "swearing in the witness" will suffice to provide "sworn" testimony for the arbitrator to consider within the confines of the arbitration record, though not sufficient to place a witness under peril for perjury.
9. Zoom's "waiting room" feature is very helpful for this, as persons in the waiting room cannot interact with anyone who has already been admitted into the videoconference (at least not through the video platform).
10. *Videoconference Procedures—A Primer* 8–9 (Nat'l Acad. of Arbs. Videoconferencing Task Force, Mar. 16, 2020), <https://law.missouri.edu/arbitrationinfo/wp-content/uploads/sites/2/2020/03/Videoconferencing-Procedures-A-Primer.pdf>.
11. For labor arbitrations, such initial arbitration management conferences are few and far between, whereas every employment arbitration with which I have been involved included one.
12. For samples and guidance, see American Arbitration Association, *COVID-19 Update* (updated May, 2020), <https://go.adr.org/covid19.html>.

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