

## Considerations & Tips for Online Arbitration – Inside an Arbitrator’s Order

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Many parties, contractually bound to arbitrate, have turned to online arbitration rather than wait out the global pandemic to resolve their matters. Cheaper and faster than litigation and even traditional arbitration, online arbitration also protects participants through built-in social distancing as they arbitrate from their individual locations via the internet. In fact, as the pandemic continues and courts remain closed or backlogged, more would-be litigants have also moved their disputes to remote arbitration. Many savvy parties realize the huge potential for savings in pre-judgment interest when they arbitrate rather than litigate their claims.

Take a Massachusetts court case as an example. With a 12% statutory pre-judgment interest rate and an average five-year time to trial, even before the coronavirus, a million-dollar judgment easily becomes a \$1.6 million hit, without including the five years of attorneys’ fees and costs. That same case would likely get to arbitration in less a year or sooner if the parties expedite it. Do the math!

Ok, so you are convinced to arbitrate your dispute online. Now what do you do? If the parties already have an arbitration clause in which they have selected the arbitral forum, simply e-file the claim with that forum, request online resolution, and follow the forum’s online protocols. Both the American Arbitration Association and CPR, the International Institute for Conflict Prevention & Resolution, have superb online dispute resolution guidelines and protocols available on their websites.

But what if the parties have not already selected their forum or they simply want to customize their own online process to suit the specifics of their dispute. What should they consider? This article, crafted as a typical arbitrator’s order for online dispute resolution, provides a handy checklist of issues for parties to consider as they create their own or modify their forum’s online arbitration procedure.

### Platform

- The arbitrator(s), after consultation with the parties and any arbitral forum, will select an appropriate platform for the online hearing.
- The platform must protect the confidentiality of the hearing.
- The platform should also allow the participants to meet separately by subgroup as appropriate and as needed.
- The platform must permit participants to view exhibits and other documents remotely while still viewing the witness and examiner.
- The platform must provide high visual and audio quality.

### Host

- The host will arrange and run the platform for the hearing sessions.

- The arbitrator(s), after consultation with the parties and any arbitral forum, shall determine if a nonparty host should provide the technical support needed to run the hearing online or if the arbitrator, parties, or other participant should function as hearing host.
- The host will confirm before each session that their own and the platform’s settings are compatible with a participatory and confidential hearing.
- Any additional, reasonable costs incurred in hosting an online hearing shall be shared by the parties subject to the arbitrator(s)’ award, if any, shifting those costs in the prevailing party’s favor.

### Preparation Session

- No later than one week before the hearing, all parties, counsel, arbitrators, and the host shall hold an online non-substantive preparation session designed to ensure fair, full, and functioning access to the designated platform.
- Tip: Counsel new to the online arbitration format may wish to schedule a preliminary hearing or preparation session with the arbitrator(s) and host before the formal preparation session so they will be equipped to assist their clients.
- The parties may include their IT personnel and experts in the preparation session at their option.
- The session will review all the logistical and technological issues surrounding the remote hearing including
  - Visual quality
  - Audio quality
  - Display
  - Control panel features
  - Anticipated participant list
  - Muting
  - Unmuting
  - Screen sharing
  - Passing controls
  - Inviting a nonparty
  - Waiting rooms
  - Breakout rooms
  - Entering the hearing with full names
  - Locking the meeting
- All participants must have their video and audio enabled during the preparation session to test sound and visual quality.
- The parties shall meet and confer before the preparation session and submit any platform use and/or procedural agreements to the arbitrator(s) at least 24 hours before the preparation session.
- During their meet and confer, the parties should discuss and prepare a “backup plan” in the event one or more parties lose connectivity during the hearing.
- The parties should also discuss and prepare technical troubleshooting support for the hearing.

- All parties shall confirm during the preparation session that they have contacted all witnesses they intend to call and have confirmed that the witnesses have access to a functioning computer with a camera, microphone, and stable internet connection from which they can testify in private.
- Counsel are encouraged to hold an online preparation session with their clients in advance of and in addition to the preparation session.
- Participants should be prepared to replicate the hearing setting as much as possible. Therefore, they should strive to use the same equipment, camera angle, lighting, setting, background, devices, and location that they intend to use for the hearing itself.
- Counsel should be prepared to practice for a few minutes at the preparation session all the skills they will need to perform online during the hearing, including direct and cross examining a witness, objecting, sharing an exhibit and demonstrative, and examining a witness on an exhibit.
- The practice shall either be on a subject unrelated to the hearing or on a subject agreed to by the parties, using stipulated exhibits.
- The preparation session will test the breakout room – subgroup function.

### Equipment

- Participants must have functioning equipment at both the preparation session and the hearing.
- Participants must test compatibility of all their equipment with the platform well before the preparation session.
- Participants are encouraged to have access to a secondary device, microphone, and camera in the event that their primary equipment malfunctions.
- Participants must have secure and stable internet access through either a cable or strong wireless connection.
- Participants must ensure that their internet connection has sufficient bandwidth to use the platform without interruption.
- Participants may not use a public or nonprivate connection.
- Participants may wish to use two screens in document intensive cases so they may simultaneously see the witnesses and exhibits more easily.
- In less document intensive cases, participants need only have a monitor with a large screen. However, all participants are encouraged to have a second device available in the event of a failure of their primary device.
- Participants may not participate in the hearing by cellphone without arbitrator approval.
- Participants must have audio capability through either a built in or added microphone of sufficient quality to enable the arbitrator(s) to hear when they speak online.
- Participants must have video capability through either a built in or added camera of sufficient quality to enable the arbitrator(s) to see them on screen.
- Participants should avoid lighting behind or above them while onscreen. Back lighting and overhead lighting create shadows and can obscure other participants' view.
- Participants are encouraged to use a light source in front of them or to the side for optimal video quality.

- Tip: Participants will not be able to use the same screen for other purposes, such as notetaking, while they use it to participate in the hearing. Have another device available for other uses. Dual monitors or laptop screens with another monitor greatly enhance the online hearing experience.

### Final Pre-Hearing Conference

- The parties, arbitrator, and host, if different, shall hold a final pre-hearing conference one business day before the scheduled hearing. In the case of a tripartite panel, the Chair will attend on behalf of the panel.
- During the conference, the parties and arbitrator (or Chair) will
  - Reconfirm the number of days required for the full hearing
  - Reconfirm the projected number of attendees
  - Reconfirm any interpreter, accommodation, or other special needs
  - Discuss the anticipated length of the parties' respective cases
  - Set the time allocation for opening statements, if desired
  - Set the time allocation for closing statement, if desired
  - Set the order of and projected time allocation for witnesses
  - Resolve any objections to exhibits
  - Review any stipulations, undisputed facts, or other joint proposals
  - Reconfirm the remaining controverted issues to be decided at the hearing

### Hearing Sessions

- If the parties' arbitration agreement or other provision requires that the hearing take place in a particular venue, then the hearing shall be deemed to be occurring in that venue even though participants may be situated in different and remote locations.
- The arbitrator(s) shall decide the time zone for the hearing schedule, taking into consideration the time zones of the designated venue, if any, and participants.
- Parties should expect that the hearing day may be shorter than in the typical in person hearing day if participants are in significantly different time zones.
- Participants must be ready to proceed at the designated time.
- Participants are encouraged to log on to each session 10 minutes before its designated commencement and shall log on at least five minutes early to avoid tardiness.
- To combat online fatigue and ensure full attention span, participants should plan on a 5-10-minute break every hour during which they step away from the computer.
- During these breaks, participants should turn off their audio and visual but leave their platform running.
- Participants must return from break with their video and audio back on at the designated time.
- All participants should expect to schedule more hearing sessions than typically anticipated as online hearings tend to have shorter days and more frequent breaks than an in-person session and therefore may necessitate additional days.

### Cybersecurity

- All parties shall provide the host with the names, cellphone numbers, and emails of the participants who plan on regularly attending all sessions of the hearing by no later than 3 business days before the scheduled hearing.
- Counsel will provide the host with the name, email, and cellphone number of each additional attendee for a particular day, including witnesses, for each day of hearing by no later than 8 hours before the commencement of the scheduled hearing day.
- The host will send the platform’s online invitation to the known participants only.
- The host will password protect each session, distribute the password to known participants only, and change the password daily.
- The host will send the daily password to participants separately from the meeting invitation.
- The host will lock the meeting after all known attendees are present.
- The host will not admit anyone whose name does not appear on either the daily or fulltime attendee list.
- The host will check the platform’s settings before each session to ensure maximum cybersecurity as updates and automatic downloads can reset them remotely.
- The host shall not use a personal meeting ID number or the same ID number for more than one hearing session.
- These cybersecurity protocols shall be in addition to the forum’s cybersecurity rules and the parties’ agreed cybersecurity measures.

Privacy & Confidentiality

- All participants shall take all reasonable measures necessary to ensure all connections are encrypted at all times and to preserve the confidentiality of the proceeding.
- All participants shall not share or forward the email meeting invitation or password.
- All participants must be invited directly by the host.
- The host will use the platform’s security settings to prevent *ex parte* communication with the arbitrator(s).
- The host will give the hearing session invitation a meaningful title, such as “case number XX, Hearing session 1,” but will not disclose the parties’ names or other identifying names as part of the title.
- The host will create private breakout rooms as follows:
  - Arbitrator Panel
  - Claimant Team
  - Respondent Team
  - (Other Parties as Needed)
  - Attorneys Only – all attorneys for all parties
  - Breakout Room 1 – extra room as needed
  - Breakout Room 2 – extra room as needed
- No one, including the host, will be permitted to enter a breakout room to which they have not been assigned, except as herein provided. The host may enter a breakout room after a prior announcement and pause so that the members of the breakout room may cease any confidential or privileged communications. The host, if different from the arbitrator(s), may enter the arbitrators’ breakout room as needed after prior announcement.

- Nonparty witnesses will not be permitted into a breakout room except with arbitrator approval.
- Participants may use the screen share function in the breakout rooms as those screens will be shared only with others in the breakout room.
- Participants should close all documents and programs on their computers except those they plan to share during the hearing to avoid inadvertently sharing private or confidential information.
- If any party overhears another party conferring with counsel, they should immediately alert the host, the arbitrator(s) and counsel. Inadvertent disclosures, such as these, will not constitute a waiver of the attorney-client privilege.
- Participants may not attend the hearing from a public location.
- Participants are discouraged from using the chat function to send private communications. The chat function defaults to send the communication to “everyone” and therefore easily misdirects. Participants must mindfully and carefully select the recipient(s) of their communication if they elect to use the chat function.
- Parties may jointly elect to have the host disable the private chat function.

### Recording

- Unless the arbitrator(s), after consultation with the parties, determines otherwise, the host will record the arbitration hearing and post the recording to a secure drop box, portal, or cloud space after the conclusion of each session.
- No one else may record the hearing by any means.
- The host, after consultation with the parties and the arbitrators, will provide temporal limits on when the recordings will be available.

### Audio During Hearing

- All participants should mute themselves when not speaking in order to minimize extraneous noise.
- Tip: On Zoom, participants can use Alt A to mute or unmute quickly or hold down the spacebar.
- Tip: Some participants find audio quality enhanced with a good headset with built in microphone.
- Participants may not speak at the same time. Videoconferencing platforms generally cannot pick up simultaneous speakers. Participants should therefore avoid interruptions to the extent possible.
- If participants need to interrupt to state an objection, they should politely raise a large, red sheet of paper in front of their screen until acknowledged. All participants, including the witness, shall stop talking whenever they see a red objection flag.
- Participants must turn off all alerts, ringers, alarms, notifications, and other devices that emit sound while in session.
- If participants are attending the online hearing from a single location, all but one will need to mute their microphones to prevent an echo chamber effect.

## Visuals During Hearing

- Participants should aim for professional or business casual attire and backgrounds.
- Participants are discouraged from using “busy” or distracting backgrounds. Neutral or professional backgrounds are optimal.
- Participants are discouraged from using virtual backgrounds unless necessary to block distracting backdrops.
- Tip: Participants can find free virtual backgrounds at [www.canva.com](http://www.canva.com).
- Tip: Disable any popups to prevent them from displaying during the hearing while presenting or screensharing.

## Exhibits

- The parties shall agree upon a joint set of exhibits.
- Any disputes as to an exhibit’s admissibility shall be resolved in advance of the hearing by the arbitrator.
- The parties, arbitrator(s), and host, if different, shall hold a final pre-hearing conference one business day before the scheduled hearing to resolve any evidentiary or other issues. In the case of a tripartite panel, the Chair may attend and decide these issues on behalf of the panel.
- Counsel shall email the disputed document to the arbitrator along with the stated objection and opposing response up to a maximum of 3 sentences per objection and response by no later than 24 hours before the scheduled final pre-hearing conference.
- If the document is confidential, counsel shall transmit it by password protected drop box or other secure method and not regular email.
- Formal written objections and motions *in limine* are discouraged and may not be filed without arbitrator approval.
- No objections to exhibits shall be raised during the hearing except as to unanticipated rebuttal or impeachment documents permitted by the arbitrator.
- The parties shall prepare and present the joint set of exhibits as a single continuously paginated pdf document. Any exhibits admitted by the arbitrator at the final pre-hearing conference may be submitted as a separate single continuously paginated pdf document or added to the joint set of exhibits whichever counsel prefer.
- The parties are encouraged to highlight the most relevant part(s) of lengthy documents and to focus the arbitrator’s attention to the portions of the joint exhibits most germane to each party’s proffer.
- Demonstratives may be screen shared separately and need not, but may, be included in the single joint exhibit pdf.
- Parties are encouraged to use summaries, charts, chronologies, and other demonstratives to collate and present information, especially if accessing the same information would require the review of numerous exhibits or documents. The parties shall email, or secure drop box, a set of its demonstratives to the arbitrator(s) any time before its use.
- Tip: Consider a joint stipulated chronology of emails. Parties often submit emails in reverse order with the last most recent email in a chain first because the system stores them that way. Instead, jointly present them in chronological order.

- If an arbitrator wishes a hard copy of the joint set of exhibits, the parties shall transmit a hard copy of the single continuously paginated pdf to the requesting arbitrator no later than 24 hours before the commencement of the hearing.
- Tip: Participants will want to have the exhibit document pdf and any other documents they plan to share with others already open on their desktop to ensure ease of the document sharing function.

### Witnesses

- Witnesses testifying remotely must have their video and audio enabled. All participants must be able to see and hear the witness without undue, extraneous noises.
- Witnesses should testify from a private room or space in which they will not be interrupted, disturbed, distracted, or overheard during their testimony.
- Witnesses should position themselves and their camera so that their face, head, and shoulder tops are visible.
- Witnesses should expect to swear an oath under penalty of perjury that they will
  - tell the truth
  - not review notes during their testimony
  - have no one else in the room with them (other than their attorney(s) if desired)
  - have no contact with any party, expert, or counsel for any party during the examination except during breaks in their testimony if appropriate
  - have their cellphones turned off or inaccessible except during breaks in their testimony
- Witnesses should also understand, expect, and agree that their testimony will be recorded. By testifying, the witnesses consent to having their testimony recorded.
- Except for the parties who may be present during other witnesses' testimony, witnesses shall testify from different locations and shall participate in the online hearing when they are not testifying.
- The parties may, and are encouraged, to submit nonparty witness direct testimony by sworn affidavit in lieu of lengthy direct examination when the witness' credibility is not at issue, as long as such witnesses remain available for cross examination.
- Tip: If the nonparty witness' testimony is uncontroverted, the parties may, and are encouraged to, submit a stipulation in lieu of testimony.
- Cross examiners may send impeachment documents to the witness in an envelope, which shall remain sealed until opened online during the witness' testimony.
- Tip: Counsel may wish to use a stand to hold their notes upright while examining a witness in order to look up at the camera and the witness during examination rather than down at their notes.

### Expert Witnesses

- Parties may, and are encouraged to, submit expert reports to the arbitrator(s) a week before the hearing and to reply upon them in lieu of extensive direct testimony.
- Parties may, and are encouraged to, present all parties' experts' testimony at the same hearing session one after another rather than in order of their respective cases.

- Tip: In expert heavy cases, arbitrator(s) appreciate receiving all expert testimony at one time rather than first in claimant's case, second in respondent's case, and then later again in the rebuttal phase of the case. Parties also achieve efficiency and cost savings when experts testify sequentially.
- Parties may also use this sequential testimony method for fact witnesses who will testify on discrete issues.
- For highly technical cases, the parties may, and are encouraged to, provide a joint glossary of key terms.

### Admissibility of Testimonial Evidence & Objections

- Unless the arbitration agreement provides otherwise, participants should expect that the formal rules of evidence will not apply.
- Most evidentiary rules are designed to prevent prejudice and bias in jury trials, whereas arbitrations are more akin to bench trials in which the arbitrator(s) can weigh and assess the probative value of the evidence.
- As a general rule, testimonial evidence will be received if it is material, relevant, and nonduplicative.
- Counsel may choose, however, to object succinctly to evidence as it comes in order to alert the arbitrator(s) that the party questions the evidence's probative value.

### Technical Difficulties

- Participants who lose connection should first try to log back in. If necessary, reboot your device and then log back in.
- Text the host, arbitrator, and/or counsel as appropriate to alert them of the difficulty.
- Participants should follow the backup plan established in the preparation session.
- The parties are encouraged to use a live transcript feature. A live transcript feature permits participants who lose connectivity to immediately read what they missed.

### Counsel Team, Expert, & Party Participants

- Counsel teams, parties, and/or their experts may be located in the same room if they choose and may safely do so.
- Counsel teams, parties, and/or their experts may also participate remotely.
- Counsel teams, parties, and their experts participating remotely may communicate with each other during another witness' examination by text, group chat, interoffice instant messaging, WhatsApp chat group, or any other private medium. However, no one may communicate privately with witnesses, experts, or counsel while they are testifying.
- Counsel teams may use, but are discouraged from using, the platform's online private chat function for their private communications. Private chats can very easily be inadvertently shared with everyone or saved. Therefore, parties and counsel teams should use the private chat function only with extreme caution.

### Modification

- The arbitrator(s) may modify the hearing protocols upon their own initiative after consultation with the parties or upon arbitrator approval of the agreement of the parties.

### Fundamental Fairness

- The arbitrator(s) may terminate the videoconference hearing before its conclusion if they determine that the format, as working or implemented, is prejudicial to any party or otherwise not serving fundamental fairness.
- In such an event, the arbitrator(s) will determine if, how, and when the hearing shall resume.

Janice Sperow is a full-time arbitrator and mediator. She serves as a neutral for the San Diego Superior Court (where she also sits as a Judge *Pro Tem*), the American Arbitration Association, the International Institute for Conflict Prevention & Resolution, the Financial Industry Neutral Regulatory Authority, the World Intellectual Property Organization, the FORUM, the National Futures Association, and the Better Business Bureau. She was also inducted into the National Academy of Distinguished Neutrals.

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