

## Handling Arbitrations During a Pandemic: A Path to Success

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by **Scott J. Silverman**

The world has changed. More than a hundred years have passed since the United States experienced its last pandemic, with its accompanied broad economic disruption and human mortality. The 1918 influenza pandemic outbreak slowed the world, but it didn't stop it. The same will be true of the 2020 coronavirus pandemic.

Many litigators' practices are on hold. Some are keeping busy by drafting discovery requests, scheduling depositions for indeterminate dates, seeking continuances of trials, or incorporating technology to keep client work moving forward. However, many have not considered that they are still capable of engaging in substantive scheduled work albeit with some modifications. This is especially true for arbitrations.

### **Arbitration Scheduling Orders**

Arbitrations commence when a demand for arbitration is filed.

Thereafter, the arbitration panel holds a preliminary conference that usually results in "Scheduling Order No. 1." The scheduling order is similar to a pretrial order. Among other things, it sets forth the dates, times and venue for the final hearing. It also memorializes the procedural rules that apply to the arbitration.

During my nearly eight years of arbitrating disputes, none of my scheduling orders has ever mentioned anything other than a physical location for the final hearing of the arbitration. For example, an order might state the following:

**Time and Place:** The arbitrator shall set aside three days in which to conduct the final hearing, including summations and arguments. The final hearing shall take place on:

Oct. 7-9, 2019 (Monday-Wednesday)

All proceedings during the final hearing shall commence each day



**Scott Silverman Mediator and Arbitrator,  
JAMS Mediation, Arbitration & ADR Services**

at 9:30 a.m. and continue until determined by the arbitrator. The arbitration will take place in the JAMS Resolution Center, 600 Brickell Avenue, Suite 2600, Miami, Florida.

My orders never envisioned that a final hearing occurring at a place other than at a physical venue. Of course, prior to January 2020, I did not foresee a

global pandemic that would alter everyone's lives.

### **Continuing the Arbitration's Final Hearing**

During the pandemic, it is expected that one, if not all, of the parties scheduled for a final hearing might seek a continuance. After all, most state governors have already issued "safer-at-home" executive orders that would likely conflict with an arbitration panel's scheduling order requiring the final hearing to be held at a specific location, such as a JAMS Resolution Center.

If a dispute were in litigation, as opposed to arbitration, a continuance would likely be mandated. In my opinion, to deny a request for a continuance of a trial during a pandemic, should be viewed as heartless and an abuse of discretion. The other reason for granting a continuance is more pragmatic. The courts will be challenged to find jurors who are willing to sit next to strangers without first knowing whether anyone in the jury pool has tested positive for the coronavirus. After all, who would want to be in close proximity to someone without this knowledge? My former courtroom on the eighth floor of the Miami-Dade County Courthouse has a jury room that is so small that I often joked there wasn't even enough room for the jurors to change their minds. My assessment does not even take into account the willingness of judges, clerks, bailiffs and judicial

assistants to put themselves at risk during a trial.

However, an arbitration is not the same as traditional litigation. Proceedings in arbitrations are far less formalistic, and the procedural rules imbue the arbitrator with tremendous discretion regarding the conduct of the proceedings.

While arbitrators generally have the power to grant continuances, continuances are not necessarily mandated, even in the midst of a pandemic.

### **A Party Wants to Proceed to Final Hearing During a Pandemic**

One of the hallmarks of arbitration is the speed at which disputes are resolved. On average, it takes more than three years to get a case tried in Miami-Dade County—from file to trial. However, it is quite common for disputes in arbitration to be resolved in less than a year. This is largely due to the arbitrator being able to resolve issues as they arise.

Even though we are in a pandemic, some parties still want to avail themselves of the rapid resolution of their issues that arbitration promises. They will oppose any request for a continuance, even if it means putting the opposing party or counsel in harm's way or violating a governor's order.

The arbitrator, of course, can grant the requested continuance, but is not obligated to do so. In the event the arbitrator denies such a request, under the applicable

JAMS Comprehensive Arbitration Rules and Procedures (JAMS rules), it should neither be viewed as heartless nor an abuse of discretion. Instead, it might be viewed as ingenious, enlightened and technologically adept.

### **The Virtual Arbitration Final Hearing**

Normally, the concept of conducting a final hearing in an arbitration via videoconferencing is something that most attorneys (much less the arbitrator) do not consider during their preliminary hearing. However, these are not normal times, and innovation can benefit all the parties without creating any adverse consequences. It takes a willingness to try something new. (Remember the first time you tried ice cream?) The adage, "Justice delayed is justice denied," continues to ring true.

A party that objects to the use of a final hearing via videoconferencing under the JAMS rules will likely have that objection overruled. That is because the JAMS rules specifically contemplate the use of technology during a final hearing. In particular, JAMS Rule 22 (a) acknowledges that an arbitrator may vary procedures so long as they are reasonable and appropriate. Rule 22 (g) is more on point, because it authorizes an arbitrator, at his or her discretion, or upon the parties' agreement, to conduct the hearing through virtual platforms. Rule 22 provides, in apposite part, the following:

(a) The arbitrator will ordinarily conduct the arbitration hearing in the manner set forth in these rules. The arbitrator may vary these procedures if it is determined to be reasonable and appropriate to do so.

(g) The hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the arbitrator.

Like JAMS, the American Arbitration Association is mindful of maintaining the efficiency of arbitrations while securing the parties' rights to be heard and to present their cases (See, R-32(a), AAA Commercial Arbitration Rules and Mediation Procedures). The American Arbitration Association's Commercial Arbitration Rules and Mediation Procedures also contemplate the use of video and the internet for conducting hearings. (See, R-32(c), AAA Commercial Arbitration Rules and Mediation Procedures). R-32(c) provides the following:

When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses,

provide an opportunity for cross-examination.

The arguments against conducting an arbitration's final hearing via videoconferencing or other means are virtually (pardon the pun) foreseeable. "How can you judge the demeanor of a witness?" (How about the playing of video depositions before juries in open court, a process that has been used for more than 50 years. Jurors are capable of doing it and so are arbitrators); "How can I communicate with my client privately? (Zoom allows for the creation of virtual private rooms that enable the parties and their respective counsel/witnesses to have private conversations); "How can I share documents with the panel, or what if I need to highlight something? (GoToMeeting allows for all of that. Besides, the parties should have already Bates-stamped their documents and emailed them to the panel beforehand). Sure, logistical problems will arise, but these are easily addressed.

#### **Making the Best of a Horrible Situation**

The coronavirus pandemic will alter the lives of many people. For some, it may prove to be a mere inconvenience. For others, it will be devastating and cause great damage, perhaps, even death. However, we can make the most of a horrible situation. In the legal profession, we aim to resolve disputes in a civil manner according to the law. Sometimes we have to adapt to the circumstances. Over-

all, the concept of conducting an arbitration via videoconferencing is new to many people, but it's one that the parties contemplated when they agreed to the JAMS or AAA rules. This option should not be disregarded. Using these rules allows everyone to move forward with life.

*Scott J. Silverman (retired judge, Eleventh Judicial Circuit) is a JAMS panelist based in Miami. He served for nearly 22 years on the bench and distinguished himself as one of South Florida's highest-rated circuit court judges. He can be reached at [ssilverman@jamsadr.com](mailto:ssilverman@jamsadr.com).*

