

24TH ANNUAL URI / NAA LABOR ARBITRATION CONFERENCE

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SKILLS TRACK #1 - PREPARING YOUR CASE FOR ARBITRATION

I recently attended a similar program given by the NAA Northern California region, and the following materials were provided for attendees. I thought these materials would be of particular value to newer practitioners, and the checklist for virtual hearings is a valuable reminder for any neutral or advocate practicing by Zoom or similar video platform. Many thanks to NAA member Catherine Harris of Sacramento, California for agreeing to share these materials with our conference attendees. I have modified and adapted these materials in part for local practices.

As Arbitrator Harris notes: in the post-pandemic period, every case begins with the question of whether an in-person, virtual or hybrid gathering would best serve the interests of the parties. Even if the parties merely request dates from the arbitrator for an arbitration hearing (ignoring the menu of choices now available), the arbitrator is very likely to raise the issue (virtual or in-person) during the date selection process. In your material, you will find a list of factors that parties may wish to consider in making the threshold decision as to what type of hearing would be most appropriate.

You will also find a “Checklist for Arbitration” developed during the pre-pandemic era when remote hearings were extremely rare. The pre-pandemic checklist, standing alone, is still useful but a “Supplemental Checklist for Virtual Hearings” has been added.

Checklists are valuable tools for advocates who are often required to manage a large volume of cases. The checklists provided will have added value if frequently modified and updated by the advocate based on his or her experience in the arbitration setting.

Presented by:
Arbitrator Michael T. Loconto, Esq.
Loconto ADR
PO Box 320133
Boston, MA 02132-1901
(617) 331-2112
mtl@locontoadr.com

Prepared by:
Catherine Harris, Esq.
Arbitrator Mediator
5960 South Land Park Drive #255
Sacramento, CA 98822-3313
charrisdisputeresolutions@att.net

THE THRESHOLD QUESTION: IN- PERSON OR VIRTUAL HEARING?

1. Will the case likely turn on a determination of credibility issues, e.g., what actually happened that led to the dispute, or are you merely asking the arbitrator to interpret and apply contract language to a set of largely undisputed facts?
2. Does the arbitrator need to view a location, an industrial process, a specific machine, or a configuration of persons and/or equipment in order to better understand the dispute? Is there any aspect of the case that will be difficult to communicate to the arbitrator without a face-to-face meeting?
3. Parties should also weigh the delay more often associated with in-person hearings in making this choice. It is always easier to find days for virtual hearings because they do not involve round-trip travel to a hearing location.
4. Consider the added expense of an in-person hearing and decide whether the perceived advantages of getting together in the same physical location outweigh the savings associated with virtual hearings.
5. Consider whether you will be able to trust the fairness and integrity of the virtual hearing process by controlling such features as; 1) potential improper use of the chat function; 2) potential collaboration between and among witnesses who may be assembling at a common location; and 3) potential surreptitious recording of testimony by hearing participants. A virtual hearing should be a reasonable facsimile of an in-person hearing.
6. Consider whether or not you will be able to ensure that each of your hearing participants has an adequate internet connection.
7. Is segregation of witnesses necessary to a fair hearing process? Can this be achieved through the virtual hearing process by having witnesses at separate locations?
8. Consider the potential for conflict and dissension and whether or not the arbitrator will be better able to manage the hearing process in an in-person or virtual hearing setting.
9. Consider whether the hearing is likely to spill over into a second session, particularly where a single day is an obvious underestimate of the anticipated length of the hearing. In these cases, a virtual hearing may contribute to a more timely resolution.
10. Consider whether a hybrid hearing might meet the needs of both parties, particularly where a witness is remote and his/her testimony will likely be un rebutted.

These factors should be considered in choosing whether an in-person or a virtual hearing is more appropriate in any given case. Depending on the case, there may be other factors not listed.

CHECKLIST FOR ARBITRATION

This checklist, if followed, will save time on the day of hearing and help to avoid the delay and expense associated with additional days of hearing.

1. **Review the history of the grievance.**

- A. Consider whether the grievance is properly before the arbitrator and whether the parties intended that this dispute should go to arbitration.
- B. Assemble grievance, management responses and request for arbitration into a single exhibit (usually offered and accepted as a joint exhibit).
- C. Identify prior arbitration decisions involving same parties, same contract and same provisions-find out whether there are prior arbitral interpretations of disputed language.
- D. Identify and study relevant contract provisions including the grievance arbitration procedure. Assemble relevant documents into single exhibit (usually offered and accepted as a joint exhibit).

2 **Gather the relevant documents**

- A. Identify all pertinent documents including documents which may be needed during cross examination of opposing party's witnesses.
- B. Make sure all documents are legible before copying and that, to the extent possible, any notes made in anticipation of arbitration are redacted.
- C. Make sure that all pages of the documents are in the proper order and that each page is legible.
- D. Make sufficient copies for the opposing party, the arbitrator, and the witness.
HINT: Most arbitrators do not like to hand their copy of an exhibit to a witness as arbitrators prefer to follow along in the interest of learning the case.
- E. Make sure that all of the documents you plan to distribute at the hearing are identical in terms of content, number and order of pages, and legibility.
- F. Place documents you intend to present as part of your case in a tabbed binder with an index which will expedite the hearing and the arbitrator's deliberations. Keep documents which may or may not be used accessible.

3. **Identify and interview potential witnesses**

A. Make sure that witnesses are familiar with hearing protocols such as no talking about the case in front of the arbitrator during breaks in the hearing, no commenting on the evidence or arguments during the hearing, no requesting assistance in recalling events from others while testifying, no gum chewing etc.

B. Prepare witnesses to avoid delay at the hearing caused by witnesses who ask questions instead of answering questions and who volunteer unsolicited information.

C. Prepare your questions for witnesses who will be called by the opposing party. A good cross-examination is a planned cross-examination which has specific objectives such as bringing out previously undisclosed facts or information which contradicts other evidence. If you have no particular objective in mind, a good cross-examination is no cross examination.

D. Consider the true value of hearsay and relevancy objections. Explain to witnesses that it is not their job to make objections (Do I have to answer that? Does this have anything to do with the case? I have already answered that.) Proper preparation of witnesses to understand the limits of their role and thoughtful use of objections will help to streamline the process.

E. Consider the appropriateness of telephone or video testimony for witnesses who reside at a distant location from the hearing. Most arbitrators allow telephone testimony when the parties have agreed to it.

4. **Prepare a short and concise opening statement in advance of the hearing.**

A. Even if you are not the moving party, do not pass up the chance to provide an outline of the case from your point of view at the commencement of the hearing.

B. Opening statements help the arbitrator to understand the scope and nature of the case and make it easier to absorb the evidence as presented.

C. Do not read your opening statement as this will cause delay when you are interrupted by a court reporter or note-taking arbitrator who is unable to keep pace with you.

D. Avoid making closing argument during your opening statement.

5. **Prepare a chronology of relevant dates.**

A. A chronology is helpful in orienting the arbitrator to the sequence of events especially

where the case is presented out of order.

B. A chronology is also useful in arriving at stipulations which will help the arbitrator to focus on the real issues in the case without being distracted by discrepancies in dates provided by witnesses.

C. A chronology reduces the number of clarifying questions by the arbitrator.

6. Prepare a handy guide to the terminology of the case.

A. A mutually agreed upon list of names, places, acronyms, and unusual or technical terms will help to expedite the hearing. This will help to quickly educate the arbitrator about the language of the shop and will also be of assistance to the court reporter.

B. Don't assume that the arbitrator will be able to decipher shorthand expressions, abbreviations, and acronyms which employees take for granted.

7. Confirm the arrangements.

A. Confirm the location of the hearing and any special arrangements for accessing the site.

B. Tell participants in the hearing where to park, how to clear security, and how to find the hearing room.

C. Give all participants a phone number of someone at the site.

D. If each side has more than three witnesses and the parties have agreed to argue the case orally, you may want to have a sign-in sheet circulated first thing in the morning.

8. Talk to your opponent before the hearing.

A. A meeting, telephone call, or e-mail exchange is useful in exploring potential stipulations.

B. Always attempt to provide the arbitrator with a joint stipulation of the issues. If you are unable to achieve such a stipulation, formulate your own issue statement in writing.

C. Cooperate in scheduling witnesses in order to ensure that the hearing is completed in the time allotted.

D. Consider whether exchanging witness lists and documents in advance of the hearing is in the best interest of both parties. If the same witness is being called by both parties, stipulate that the witness may be examined by both parties for all purposes in an effort to streamline the process.

***Loconto's rule:** A list of joint exhibits is always appreciated to begin the proceedings. Additionally, I mark and admit exhibits using one uniform numbering system (e.g., X2, X3.... X23 etc.) and attach no probative value to the party that has offered the exhibit - once it is in, it's in.

9. **Consider whether the case is appropriate for oral argument.**

A. Cases involving complex credibility battles are less suited to oral argument.

B. Where parties agree as to what happened but disagree as to the ramifications of what happened, oral argument may be a preferred alternative. In such a case, prepare an outline of your oral argument in advance of the hearing and, as the hearing progresses, fill in your outline with specific citations to documentary and testimonial evidence.

10. **Most arbitrators will make themselves available for a conference all at the joint request of the parties.**

A. A telephonic pre-hearing conference may be appropriate to resolve issues regarding large volumes of documentary evidence. Avoid situations where the arbitrator must stand by while representatives of parties examine boxfuls of documents on the morning of the hearing.

B. Invoke the arbitrator's jurisdiction, if necessary, to resolve issues pertaining to special needs of witnesses and parties, security issues, or requests to narrow the scope of the hearing.

SUPPLEMENTAL CHECKLIST FOR VIRTUAL HEARINGS

1. Obtain correct e-mail addresses and cell phone numbers of all of your hearing participants, as well as a general description of the physical location from which they will be connecting.
2. Create your invite list with the name, title, capacity in which attending, general description of physical location, and correct email address for the arbitrator (to be used in the same way that an arbitrator uses a sign-up sheet at an in-person hearing).
3. Create an electronic document package that will be a useful tool for the parties and the arbitrator at the time of briefing. The package should include an index providing an accurate description of each document and which allows single-click access to each of the documents contained in the package. Lengthy documents should be paginated and exhibits attached to documents should also be tabbed. It is in the best interests of everyone to organize the record so that a specific item can be found easily.
4. Reach a common understanding with opposing party as to whether invite lists and document packages will be shared in advance of the hearing. Avoid a situation where one party gets an unfair advantage.
5. Make sure that all of your hearing participants have an adequate internet connection.
6. Make sure that your hearing participants are informed that they will likely be placed in a waiting room and that they will be admitted to the main hearing room by the arbitrator at the appropriate time.
7. Make sure that you are comfortable with screen sharing or that you have someone with you who will share your documents at your direction.
8. Depending on the volume of documents, consider whether to also provide the documents to the arbitrator in hard copy.
9. Make sure that you correctly identify your video likeness on the screen, especially if you are using your teenage son's home computer. (No cats!)
10. In order to have the best opportunity to finish the case in the time that the parties and the arbitrator have reserved, figure out a way that you do not have to leave the location from which you are connecting.
11. Do not forget to hit the mute button if you are engaged in a confidential conversation, or a conversation that does not relate to the hearing.