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The Future is Here: FINRA Arbitrations in the Age of COVID-19 and Making the Most of Virtual Hearings

Many federal and state courts have ceased in-person hearings and trials in favor of remote courtrooms and virtual trials in the face of this unprecedented pandemic. Likewise, the Financial Industry Regulatory Authority (FINRA) is also encouraging parties to consider virtual arbitration hearings in light of its [decision](#) to cancel in-person hearings through the end of July. Even as stay at home orders lift, however, it is unclear what the “new normal” will be and if FINRA or the parties will immediately resume in-person hearings. While videoconferencing platforms have proven to be useful tools, especially during COVID-19, we have had a real-time experiment in what can go wrong. These experiences should inform decisions about whether to participate in a full-blown hearing by video and, if so, what to do to avoid pitfalls and risks associated with virtual hearings.

One significant risk of remote hearings is the distraction of the arbitrators, parties, and witnesses. As a result of COVID-19, most remote hearing participants will be at home where there are often many diversions and interruptions. We have seen this with news anchors, TV hosts and business Zoom calls where kids, pets and unwanted visitors unexpectedly appear in the video feed. Even U.S. Supreme Court Justices are not immune – listeners recently heard a [toilet flush](#) during one of the first-ever teleconference oral arguments before the Court.

The risks of virtual hearings are already being litigated. Wunderlich Securities, Inc. recently [asked a federal judge to vacate a FINRA arbitration award](#), contending (in part) that the arbitrators were inattentive during the Zoom presentation on the final day of a multi-day hearing. The petitioners claimed that the panelists were “looking at other screens, typing, and eating during the course of the presentation. [One panelist] even blocked her screen during the hearing, preventing the parties from confirming that she was even participating. And at one point during closing arguments . . . , [the Chairman] walked away from his screen.”

Although virtual hearings present challenges, as the COVID-19 closures and social distancing measures continue, they are likely here to stay for some period of time. In fact, on May 8, FINRA issued an [initial proposal](#) to amend Rule 9341 to permit oral argument by videoconference, which will formalize and expand its ability to hold hearings in disciplinary proceedings remotely. On the dispute resolution side, FINRA’s regional offices also have [videoconferencing capabilities](#) and have identified two court reporting companies with videoconferencing services compatible with FINRA’s.

Virtual hearings require attorneys and clients to think differently about preparing and presenting their arguments. Attorneys and clients alike would do well to consider the

following measures to ensure that the quality of the presentation of the case does not suffer or get lost in transmission.

PREPARE BEFORE THE VIRTUAL HEARING

- ***Negotiate the terms of the hearing.*** Try to negotiate with opposing counsel and draft an agreement that sets basic guidelines for the hearing (i.e., all participants on camera, no additional persons in the room, videoconference platform, forced mute capabilities). Use this agreement to set the tone for the hearing and to hold the participants accountable for any deviations. Consider having the arbitration panel approve the virtual hearing agreement in advance of the hearing, so everyone is working from the same set of expectations.
- ***Review and select videoconference software.*** There are many different platforms that offer video conferencing with various features, such as breakout rooms, cybersecurity, password protection, recording, etc. Research the platforms and identify one that best suits the needs of the case. Advocate with opposing counsel (or even the panelists) to use the preferred platform for the hearing.
- ***Have documents ready for electronic transmission.*** All documents should be labeled and accessible remotely. Research and identify the document display technology that best suits the needs of the case. For example, some vendors offer services that permit parties to upload documents to the vendor before the hearing. On the day of the hearing, the vendor projects the documents at the attorney's direction. If this technology is not available, consider designating a person on the team to project exhibits and have that person practice doing so. Delays in presenting exhibits slow down the flow of the case and increase the likelihood of boredom or distraction. The panel may insist on the receipt of hard copies of all documents in advance and distribution of exhibits to opposing counsel or perhaps the witnesses as well in advance. Think through how this will impact your case.
- ***Check equipment.*** Make sure that all attorney and witness equipment works properly before the hearing. If possible, do a test run before the hearing to ensure that technology is working and eliminate any connectivity issues.
- ***Pick a location and consider the video framing.*** While doing the test run, pick a location for each videoconference camera to identify any distractions and eliminate them. The video background should be clean and professional looking. Ideally, the camera should be placed slightly above the subject, and there should be diffuse lights or natural light hitting the subject in the foreground and there should be minimal, if any, backlighting. Avoid wearing bright white or vertical stripes, as they respectively can interfere with the

camera's color balance and frame rate and cause distracting visual noise interference.

- ***Develop a plan for children and pets.*** Homes can be full of distractions. While they are often cute, children and pets walking across the screen can distract the participants from the salient points of the case. Make sure that participants have a plan to keep children and pets occupied to minimize the risk that they will cause an interruption.
- ***Be concise and engaging.*** Brevity and energy are key to keeping participants' attention over video. In preparing for a virtual hearing, think about ways to shorten the presentation of the case. Try to add humor or varied word choice to command attention. To bridge the digital divide, the presentation must be engaging and dynamic.

DURING THE HEARING

- ***Try to use visual aids.*** One benefit of virtual hearings is the ability to screen share and to use more engaging visuals. Explore what options are available and consider how to leverage them during the presentation.
- ***Use grid view to see all participants.*** Some software defaults to switching the video to the person speaking. This does not permit viewers to see all participants on the videoconference. Try to use the setting to see a grid view, so that the body language of all the participants is visible and use that knowledge to tailor the presentation and shape the case.
- ***Identify parties in screennames.*** Parties randomly appear on the video conference grid, which makes it hard to identify which person is associated with each party. Consider identifying the party in the screenname. For example, my screenname would be "Paula Shaffner – Counsel for Respondent" if the platform's character limit allows it. Or it might be "Paula Shaffner – R" for platforms with shorter character limits.
- ***Close all windows.*** On the day of the hearing, the only windows open on any computers should be the video and documents related to the hearing. This avoids accidentally sharing unintended views.
- ***Be diligent with the mute button.*** Advise everyone on the team to use the mute button when not talking.
- ***Plan to take notes by hand.*** Consider taking notes by hand to avoid appearing distracted by typing during the hearing.
- ***Take breaks.*** A benefit of a virtual hearing is that participants do not have to lose time traveling and taking long lunch breaks. Understand that it can be more taxing to stare at

a computer screen for long periods of time, so breaks are more critical to refresh participants. If panelists appear to be getting distracted, be proactive and ask for a break.

- ***Avoid using the chat feature privately.*** Using the chat feature on videoconference platforms for private chats creates an unnecessary risk that privileged communications may be accidentally disseminated to the wrong person. Plan to call attorneys and witnesses outside of the videoconference platform.
- ***Have a clear view of the witness.*** When conducting the hearing, the attorneys should make sure that they have a clear view of the witness. At all times, the witness's hands, eyes and face should be visible. This lessens any concern that the witness may be communicating with another person or distracted during the questioning.

COVID-19 will require everyone in the legal profession to be more flexible in terms of how hearings are conducted when parties, witnesses and even arbitrators may not be able to be physically present. The ability of the fact finder to watch, listen to and judge the credibility of each witness will be impeded by the interposition of a cold screen, unnatural acoustics and physical distance. To overcome the challenges of a remote hearing, attorneys need to master new technology and videoconferencing platforms and coordinate far more closely with clients and witnesses. It is entirely possible that we won't completely return to traditional in-person hearings and certainly not soon. In the meantime, with proper planning and facility with the technology, one can maximize effectiveness during a virtual hearing. The future may well be upon us, and we need to ensure that our clients' interests are protected during a virtual arbitration hearing.

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