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# FINRA's Dispute Resolution Pandemic Response

by

Kristen M. Blankley\*

On March 13, 2020, the United States declared a national emergency due to the coronavirus pandemic.<sup>1</sup> Every industry has been forced to adapt, and the financial services industry has been no exception. This article considers the pandemic response by the Financial Industry Regulatory Authority (“FINRA”)<sup>2</sup> as it relates to dispute resolution, notably in its arbitration and mediation programs.

FINRA was created in 2007 as a result of the merger of the New York Stock Exchange and the National Association of Securities Dealers.<sup>3</sup> Today, “FINRA operates the largest securities dispute resolution forum in the United States.”<sup>4</sup> Nearly all brokerage firms include pre-dispute arbitration agreements in their customer contracts, and FINRA rules require arbitration at a customer’s request.<sup>5</sup> In addition, employment agreements in the securities industry often include arbitration agreements requiring arbitration under FINRA rules.<sup>6</sup>

To facilitate its nationwide program, FINRA maintains and staffs four regional offices, in New York City, Boca Raton, Los Angeles, and Chicago.<sup>7</sup> Those four regional offices oversee the sixty-nine hearing locations across the country – most of which have no on-site staff or physical

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1 Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (new website)

2 FINRA is a self-regulated organization subject to oversight by the Securities and Exchange Commission. Cory Alpert, *Financial Services in the United States and the United Kingdom: Comparative Approaches to the Securities Regulation and Dispute Resolution*, 5 B.Y.U. INT’L L. & MGMT. REV. 75, 77 (2007) (“FINRA is the largest non-government regulator for all securities firms doing business in the United States. Like its predecessors, FINRA is an SRO subject to SEC oversight.”).

3 Adam Weinstein & Bette Shifman, *FINRA’s Arbitration Agreement: Second Class Status?*, 32 ALT. HIGH COST LITIG. 87, 87 (2014) (“FINRA was created in 2007 with the merger of the NASD and NYSE.”).

4 FINRA, *FINRA Dispute Resolution Services*, at <https://www.finra.org/arbitration-mediation> (last visited Dec. 30, 2020); see also Note, Alina Gatskova, *Mend It, Don’t End It: How to Improve Securities Arbitration in the United States by Adopting Best Practices from the United Kingdom and Australia*, 41 FORDHAM INT’L L. REV. 1043, 1052 (2017) (noting that upwards of 99% of all securities disputes are managed through FINRA).

5 See Jill Gross, *FINRA Issues Regulatory Notice on Customers’ and Employees’ Right to Choose Securities Arbitration*, 34 ALT. HIGH COST LITIG. 113, 113 (2016) (describing FINRA rules surrounding arbitration and brokerage practice).

6 See David B. Lipsky, et al., *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986-2008*, 65 DISP. RESOL. J. 12, 54 (2010) (describing FINRA’s employment arbitration docket).

7 FINRA, *Dispute Resolution Regional Offices and Hearing Locations*, at <https://www.finra.org/arbitration-mediation/dispute-resolution-regional-offices-and-hearing-locations> (last visited January 3, 2021).

office. Instead, these hearing locations ease any travel burden for investors by designating a site within state for arbitrations. Each arbitration case is assigned a Case Administrator from one of these four regions. Mediation services are consolidated in two mediation programs, one in New York City and one in Boca Raton.<sup>8</sup>

Since the beginning of the pandemic, FINRA made a series of temporary rule changes to continue operations in light of the circumstances. The most apparent consequence of the pandemic on securities' dispute resolution is the postponement of all in-person arbitration and mediation proceedings scheduled through August 2, 2021, at which point in time FINRA opened all of its hearing locations for in-person hearings.<sup>9</sup> The suspension of in-person hearings for over a year will be discussed in more detail below. In addition, FINRA asked nearly all of its staff to work remotely,<sup>10</sup> potentially impacting its dispute resolution programs.

The purpose of this Article is to outline FINRA's response to the pandemic and provide critiques to its course of action. This Article proceed in three parts. The first part considers arbitration practices during the pandemic from filing to award. The second part discusses mediation options during the pandemic. Finally, the third part evaluates the arbitration and mediation practices, giving recommendations on practices to maintain as well as those that need improvement or additional study. In all, with the exception of remote hearing practices, FINRA was well prepared for a move to online dispute resolution.

## **I. Arbitration Procedures During the Pandemic**

This section discusses online and in-person services available through FINRA to resolve customer and employment disputes. This section considers FINRA's online docketing system, i.e., the Party Portal, as well as its remote and in-person hearing procedures. Prior to the pandemic, FINRA's case progression involved a combination of online, telephonic, and in-person elements. This section discusses how each of these evolved since March 2020.

### **A. Online Case Docketing**

In some respects, FINRA's arbitration rules were well-suited for remote work, particularly the online docketing rules,<sup>11</sup> which have been mandatory in consumer and industry arbitrations

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<sup>8</sup> *Id.* (identifying the mediation locations for the four different regions).

<sup>9</sup> FINRA, Coronavirus Impact on Arbitration Hearings, at [https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation?utm\\_source=MM&utm\\_medium=email&utm\\_campaign=O%5FDR%5FMonthly%5F061021%5FFINAL](https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation?utm_source=MM&utm_medium=email&utm_campaign=O%5FDR%5FMonthly%5F061021%5FFINAL) (last visited October 1, 2021).

<sup>10</sup> FINRA, *COVID-19/Coronavirus*, at <https://www.finra.org/rules-guidance/key-topics/covid-19> (last visited December 28, 2020) (“Due to the COVID-19 outbreak, most FINRA staff are working remotely. FINRA remains fully operational through the support of our robust remote work capabilities and continues to carry out all of our regulatory responsibilities, protecting investors and market integrity.”); FINRA, *Regulatory Operations Update*, at <https://www.finra.org/rules-guidance/key-topics/covid-19/regulatory-operations-update> (last visited December 30, 2020) (discussing changes made to operations due to coronavirus including, but not limited to, shifting to remote work for employees).

<sup>11</sup> *See, e.g.*, FINRA Rule 12300(a)(1) (2020) (requiring for industry disputes that parties “must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other

since 2017.<sup>12</sup> Mediation only cases have the option of using the portal.<sup>13</sup> Other FINRA programs (i.e., non-dispute-resolution processes) needed emergency, temporary rules to initiate and facilitate processing certain claims online.<sup>14</sup>

FINRA maintains a comprehensive online portal. Arbitrators and mediators use the “Neutral Portal” and parties use the “Party Portal.”<sup>15</sup> Parties use their portal to initiate claims, submit documents to FINRA administrators and arbitrators, schedule hearings, select arbitrators, and review the case documents.<sup>16</sup> Arbitrators and mediators use their portal to update disclosure information, view case documents, schedule hearings, submit orders, and view their own historical case information.<sup>17</sup> Each case has its own page, and access is restricted to the case’s administrators, parties, and attorneys.

FINRA trains attorneys and neutrals how to use their portal and provides information to answer questions about how to use the system. FINRA created extensive user guides for neutrals and participants,<sup>18</sup> complete with step-by-step instructions for all people associated with a case.

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party except as provided in paragraphs (a)(2) and (a)(3).”); FINRA Rule 13000(a)(1) (2020) (requiring for parties in customer disputes that parties “must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other party except as provided in paragraph (a)(2).”).

12 Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Amending the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes to Require All Parties Other Than Pro Se Customers To File and Serve Pleadings and Documents Through the FINRA Office of Dispute Resolution’s Party Portal and To Permit Mediation Parties To Use the Portal, 81 Fed. Reg. 54858 (Aug. 17, 2016) (providing notice of rule change requiring mandatory use of party portal in the arbitration cases).

13 *Id.*

14 *See, e.g.*, Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Temporarily Amend FINRA Rules 1015, 9261, 9524 and 9830 To Permit Hearings Under Those Rules To Be Conducted by Video Conference, 85 Fed. Reg. 55712 (Sept. 9, 2020) (allowing for certain hearings to proceed by videoconference); Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Temporarily Amend Certain Timing, Method of Service and Other Procedural Requirements in FINRA Rules During the Outbreak of the Coronavirus Disease (COVID–19), 85 Fed. Reg. 31832 (May 27, 2020) (temporarily changing rules to allow for online service for certain proceedings).

15 FINRA, *DR Portal*, at <https://www.finra.org/arbitration-mediation/dr-portal> (last visited January 2, 2021). Noam Ebner & Elayne E. Greenburg, *Strengthening Online Dispute Resolution Justice*, 63 WASH. U. J. L & POL’Y 65, 72 (2019) (Professors Noam Ebner and Elayne E. Greenburg describe online filing systems as an important feature of online dispute resolution. “*E-filing*: An online case filing and response system allowing parties to log in to the court’s system, be identified, and file or respond to a claim.”).

16 FINRA, *DR Portal*. (describing functionality for parties).

17 *Id.* (describing functionality for neutrals); *see also* Miki Someya, *Resolving Data Breach Dispute: Automated Negotiation, E-Mediation, and Arbitration Assisted by Technology*, 24 OHIO ST. J. DISP. RESOL. 393, 414-15 (2019) (discussing American Arbitration Association web filing and docketing).

18 FINRA, *FINRA DR Portal: User Guide for Arbitration and Mediation Case Participants*, available at <https://www.finra.org/sites/default/files/dr-portal-user-guide-parties.pdf> (Sept. 2021) (last visited Oct. 2, 2021) (providing information for participants); FINRA, *FINRA DR Portal: User Guide for Arbitrators and Mediators*, available at <https://www.finra.org/sites/default/files/dr-portal-user-guide.pdf> (Sept. 2021) (last visited Oct. 2, 2021) (providing information for participants).

The table of contents for each user guide is computer-friendly and involves useful hyperlinks and screen shots to accompany text-based instructions.<sup>19</sup> FINRA also maintains a series of videos on how to use its portal on the FINRA website<sup>20</sup> and provides separate pages of Frequently Asked Questions (“FAQ”) for neutrals and participants.<sup>21</sup> The FAQ’s include similar information as the user guides, but in a different format. For example, one FAQ breaks down the process of initiating a claim into four steps, indicating what actions are required of the parties and what actions will be undertaken by FINRA staff.<sup>22</sup> At each step, the FAQ walks the user through how to use its portal system. For those with additional difficulties, FINRA maintains help lines for technical support, including dedicated lines for those having difficulty logging in.<sup>23</sup>

Within the Portal, FINRA provides a series of fillable forms for neutrals. The Neutral Portal includes easy-to-use forms for routine submissions and orders, including, but not limited to, the Oath of Arbitrator, Initial Prehearing Conference Order, Motion to Dismiss Order, Postponement Order, and Award Information Sheet.<sup>24</sup> For parties, the arbitration process begins with an online fillable claim form that includes separate tabs to provide information such as the identity of the parties, the nature of the dispute, and relief requested.<sup>25</sup> Once initiated, the Party Portal relies heavily on document uploads from the attorneys and pro se parties, rather than providing a fillable forms.<sup>26</sup> In other words, FINRA relies on attorneys and parties to use their own forms for answers, motions, and briefs.

As a FINRA arbitrator, I strongly rely on the Neutral Portal for all of my cases. At the beginning of a case, I review my disclosures and submit my Oath of Arbitrator electronically. I receive an email each time a new document is posted to portal, and the portal maintains an online docket for each case. When I serve as Chair, I find the fillable orders to be user-friendly, and they cover all the information necessary for a complete order or award.

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19 *Id.* (both user guides provide these same types of information).

20 FINRA, *DR Portal Videos*, <https://www.finra.org/arbitration-mediation/dr-portal-videos> (last visited Jan. 2, 2021).

21 FINRA, *Frequently Asked Questions about the DR Portal for Arbitrators and Mediators*, at <https://www.finra.org/arbitration-mediation/dr-portal-faq-arbitrators-and-mediators> (last visited Jan. 2, 2021) (providing answers to twelve frequently asked questions relating to the Neutral Portal); FINRA, *Frequently Asked Questions about the DR Portal for Arbitration and Mediation Case Participants*, at <https://www.finra.org/arbitration-mediation/dr-portal-faq-arbitration-and-mediation-case-participants> (last visited Jan. 2, 2021) (providing answers to thirty-seven frequently asked questions relating to the Party Portal).

22 *Frequently Asked Questions about the DR Portal for Arbitration and Mediation Case Participants*, *supra* note 21 (outlining the claim process in answer one).

23 FINRA, *Dispute Resolution Portal User Guides*, at <https://www.finra.org/arbitration-mediation/dispute-resolution-portal-user-guides> (providing two different telephone numbers for help with various aspects of the Portal experience).

24 *FINRA DR Portal: User Guide for Arbitrators and Mediators*, *supra* note 18, at 15-18 (walking a neutral through the various submission forms).

25 *FINRA DR Portal: User Guide for Arbitration and Mediation Case Participants*, *supra* note 18, at 12-14 (providing information on filing a new case).

26 *Id.* at 23-24 (providing information to arbitration users on how to submit information).

FINRA's online case docketing system has been particularly effective during the pandemic. Given the completeness of the system, parties and neutrals can simply upload forms and documents to the portal without needing to provide any hard copies. These types of actions can be easily accomplished from home or an office, if the neutrals and lawyers have access. The portal also benefits FINRA staff. Because the docketing system is entirely electronic, FINRA staff do not need to monitor the mail for case documents or use the mail to distribute pleadings. Provided that a limited number of FINRA staff can monitor the mail at the regional offices for stray filings, working from home should not hinder most routine docketing issues. Case administrators can have their officer phones routed to home or cellular numbers to attend to phone calls, further alleviating the need to work in person at the regional offices.

## **B. Remote and Document Hearings**

In addition to remote capabilities for case docketing, FINRA also has long instituted procedures for holding telephonic conferences and other types of remote hearings. In particular, pre-hearing conferences nearly always occur by telephone. In addition, some cases proceed to award on the merits on the papers. Both of these procedures should continue throughout the pandemic with few changes. On the other hand, FINRA also began to expand videoconferencing hearings to accommodate stay-at-home orders and other concerns. Both the old and the new practices are discussed in this section.

### **1. Telephonic Hearings**

FINRA has a long history of using teleconference technology for pre-hearing conferences and discovery disputes. After the parties file their pleadings and choose their arbitration panel, the pre-hearing conference is generally the first contact that the arbitrators have with the parties. The pre-hearing conferences cover several matters, including the parties' acceptance of the panel, the creation of a discovery schedule, setting deadlines for motion practice, and determining whether (and when) the parties will submit briefs to the panel.<sup>27</sup>

Under FINRA rules, the pre-hearing conference is "generally held by telephone."<sup>28</sup> Although FINRA has used different call-in protocols over time, FINRA hosts the call, and a FINRA employee ensures that the appropriate people are on the call. Following the call, FINRA staff disconnect the parties so the arbitrators can deliberate in private. Thereafter, the Chair completes the fillable form reflecting the decisions regarding the case progression decided upon at the conference (such as the scheduling deadlines) or determined by the panel (such as allocation of costs).

In addition, motion practice often occurs during telephonic hearings, which are called "other prehearing conferences" under FINRA rules.<sup>29</sup> "Other prehearing conferences" can resolve matters such as discovery disputes, motion practice, stipulations, subpoenas, witness issues,

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<sup>27</sup> FINRA Rule 12500(c) (setting forth the agenda for the pre-hearing conferences in customer cases); FINRA Rule 13500 (same rule for industry disputes).

<sup>28</sup> FINRA Rule 12500(b) (customer rule); FINRA Rule 13500 (b) (same rule for industry disputes).

<sup>29</sup> FINRA Rule 12501 (customer rule); FINRA Rule 13501 (same rule for industry disputes).

unresolved scheduling and briefing issues, and other similar issues.<sup>30</sup> In addition, FINRA rules provide that motions to dismiss require a hearing, either in person or telephonic, unless waived by the parties.<sup>31</sup> Expungement hearings may also proceed by telephone.<sup>32</sup> Given the routine use of telephone hearings, claim initiation, and pre-hearing practice had the ability to proceed as normal during the pandemic.

As an arbitrator, I find these teleconferences to be routine and efficient. These conferences occur with regularity, so parties know what to expect. The technology is sufficient to do the type of work necessary for these hearings, and the FINRA staff ensures that all of the right participants are present for each of the phases of the call. Of course, telephone calls have limitations. The participants cannot see each other, and valuable non-verbal communication may be lost. As discussed in more detail below, this paper recommends moving as many of these telephone calls to video calls as possible – especially if the final hearing will be conducted through a videoconference.

## 2. Remote Hearings for Small Arbitration Claims

FINRA provides options for alternative hearings for claims with low dollar amounts. Under the Customer Code, “Simplified Arbitration” rules apply to claims of \$50,000 or less.<sup>33</sup> For these cases, the default rule is that a single arbitrator will determine the cases based on the pleadings and other documents, without a live hearing.<sup>34</sup> If, however, the *customer* requests a hearing (there is no rule allowing the industry party to request a hearing in these cases), the customer can opt for a full hearing or a special telephonic hearing, provided that the customer also agrees to pay fees according to the normal fee schedule.<sup>35</sup>

The availability of a hearing on the papers or by telephone may be an affordable option that increases access to justice whether or not a global pandemic is underway. Cases involving less than \$50,000 are particularly well suited to simplified procedures given that legal fees and arbitrator fees could easily dwarf any recovery. Going forward, FINRA may wish to consider

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30 FINRA Rule 12501 (customer rule); FINRA Rule 13501 (same rule for industry disputes).

31 *See* FINRA Rule 12000(b)(4) (requiring a hearing before dismissing a case as time barred under the customer code); *see also* FINRA Rule 12504(a)(5) (requiring a hearing before ruling on a motion to dismiss in customer cases); FINRA Rule 13206 (b) (4) (same rule for industry disputes); FINRA Rule 13504 (same rule for industry disputes).

32 FINRA Rule 12805(a) (providing for telephonic hearing of a motion to expunge customer dispute information from a broker/dealer’s record); FINRA Rule 13805 (similar rule for expungement in industry code).

33 FINRA Rule 12800 (Simplified Arbitration in customer cases); FINRA Rule 138000 (Simplified Arbitration in industry cases).

34 FINRA Rule 12800 (a) & (b) (providing for a document hearing and a single arbitrator in customer disputes); FINRA 13800 (a) & (b) (same rule in industry disputes). Scholars have advocated similar “document only” procedures for other types of arbitration, such as crowdfunding disputes in the area of securities. *See* C. Steven Bradford, *Online Arbitration as a Remedy for Crowdfunding Fraud*, 45 FLA. ST. U. L. REV. 1165, 1192-95 (2018) (describing an online only document-based arbitration for crowdfunding disputes).

35 FINRA Rule 12800 (c) (setting forth simplified procedure); FINRA Rule 13800 (c) (setting forth simplified procedure in industry disputes at the request of the claimant).

giving parties the option of a video hearing in place of a telephone hearing. Arbitrators are becoming more adept at using video conferencing software, and because FINRA already has access to the technology, the cost of moving certain hearings from telephone to video should be negligible. The consumer should be responsible for the cost of such hearings, but fees could be cabined by limiting the available time for a video arbitration to one session of four hours or less.

### **3. Remote Hearings for Traditional Arbitration Claims**

The most notable change to FINRA's arbitration proceedings is a postponement of all in-person hearings until August 2, 2021. The FINRA website prominently stated:

In response to the evolving coronavirus disease 2019 (COVID-19), FINRA has decided to administratively postpone all in-person arbitration and mediation proceedings *scheduled through February 28, 2021, unless the parties stipulate to proceed telephonically or by Zoom or the panel orders that the hearings will take place telephonically or by Zoom*. Note that if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, the case may proceed provided that the in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic.<sup>36</sup>

During the pandemic, the default was to *postpone* hearings, rather than provide an alternate type of forum. Hearings by telephonic or video conferencing means are available, but not mandatory.<sup>37</sup> Further, this policy allows for in-person hearings, provided that state and local laws relating to the pandemic are followed. This Section considers arbitrator training for remote hearings, the practice of postponements of hearings, and the ability for arbitrators to order remote hearings.

#### **a. Arbitrator Training**

FINRA provided training to arbitrators to assist in moving to the virtual format. FINRA's trainings are free and publicly available on their website. In September 2020, FINRA moderated a panel of attorneys and clients for arbitrators to understand the needs of the clients in virtual hearings.<sup>38</sup> In addition, FINRA makes publicly available a series of smaller videos on concrete

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<sup>36</sup> FINRA, *Coronavirus Impact on Arbitration Hearings*, at <https://www.finra.org/rules-guidance/key-topics/covid-19/arb-hearings> (last visited December 28, 2020) (emphasis added). (This link doesn't work anymore. I do not know how to cite it at this point).

<sup>37</sup> Prior to the pandemic, many scholars who wrote about online arbitration considered *computer* arbitrators, or artificial intelligence, but the reality of 2020 involved the legitimization of videoconferencing over AI. *See e.g.*, Ayelet Sela, *Can Computers be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. DISP. RESOL. 91, 115-18 (2018) (discussing technology-based mediation).

<sup>38</sup> FINRA, *COVID-19's Impact on Arbitration – Practical Tips & What's New in Arbitration Procedure*, <https://www.finra.org/events-training/virtual-conference-panels/covid-19-impact-on-arbitration> (last visited Feb. 20, 2021) (describing training program).

skills for arbitrators to increase their competency in the zoom platform,<sup>39</sup> and FINRA maintains a website with a useful outline of tips for running a zoom hearing.<sup>40</sup> The Neutral Corner, the quarterly newsletter for FINRA neutrals, updates arbitrators on training opportunities, including archived training. The newsletter also contains advice and tips regarding best practices for online hearings.

The training offered by FINRA is likely adequate if considered as stopgap measure. The total content available is less than two hours and gives arbitrators basic advice and tools. Arbitrators are not *required* by FINRA to attend any of these trainings, but they are highly encouraged. If FINRA desires to keep the availability of virtual hearings, the organization should substantially increase the amount and types of training available to arbitrators. In addition, FINRA should host small groups of arbitrators, such as “reflective practice groups,” to discuss confidentially issues arising in given cases and how the arbitrators handled any difficulties. FINRA should consider additional training so its arbitrators meet their ethical duty of competency.<sup>41</sup>

## **b. Postponements of Hearings**

Postponements quickly became the norm for arbitrations since the beginning of the pandemic. FINRA made this practice the default when it administratively postponed all of its hearing through August 2021. The trend to postpone hearings, rather than hold virtual hearings is not limited to FINRA; the American Arbitration Association (“AAA”) and JAMS also report a trend of postponements.<sup>42</sup>

Prior to the pandemic, arbitrators had already been quick to grant postponements due to the Federal Arbitration Act’s review provision. The law provides that an arbitration award can be vacated if an arbitrator is “guilty of misconduct in refusing to postpone the hearing.”<sup>43</sup> If an arbitration award may be subject to vacatur for *failing* to give a postponement, arbitrators are understandably liberal in granting postponements. The pandemic has simply provided another reason for postponement, and arbitrators appear particularly ready to grant the postponements under the circumstances.

FINRA tracked its overall number of motions for zoom hearings. By the end of August 2021, arbitrators across all cases received 841 motions relating to the availability of zoom

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39 FINRA, *Arbitrator Training Videos for Virtual Hearings*, <https://www.finra.org/arbitration-mediation/case-guidance-resources/virtual-hearings-videos> (last visited Feb. 20, 2021) (providing short training videos for arbitrators).

40 FINRA, *Arbitrator Resource Guide for Virtual Hearings*, <https://www.finra.org/arbitration-mediation/case-guidance-resources/arbitrator-resource-guide-virtual-hearings#host> (last visited Mar. 13, 2021) (providing outline of zoom issues for a virtual hearing).

41 American Bar Association/College of Commercial Arbitrators *Annotations to the Code of Ethics for Arbitrators in Commercial Disputes*, Canon I (b)(3), <https://www.finra.org/sites/default/files/ArbMed/p123778.pdf> (“One should accept appointment as arbitrator only if fully satisfied . . . that he or she is competent to serve.”).

42 See Robert B. Davidson & Cliff Bloomfield, *Remote Hearings and Depositions in Commercial Arbitration*, Bloomberg Law (July 2020), <https://www.jamsadr.com/files/uploads/documents/articles/davidson-bloomberg-remote-hearings-and-depositions-2020-07.pdf> (noting that “many arbitrators continue to grant adjournments upon the request of one or both parties”).

43 9 U.S.C. § 10 (a)(3) (2020).

hearings.<sup>44</sup> Of these, 374 involved joint requests for zoom hearings, 141 in customer cases and 233 in industry cases.<sup>45</sup> Of the 476 contested requests for zoom hearings in customer cases, the arbitrator granted 202 of the requests, denied 134, with the remaining open. Of the 125 contested requests in industry cases, the arbitrator granted 88, denied 31, and with the remaining.<sup>46</sup> These statistics show that virtual hearings are more common – and more accepted in industry disputes than consumer disputes. These numbers also indicate that, particularly in customer disputes, attorneys and their parties are far less willing to use a virtual forum. The data made available by FINRA to date does not disclose which party sought the zoom hearing (claimant or respondent; customer or industry member) for the contested motions. Knowing that information may shed additional light on the factors under which parties are interested in zoom hearings and factors the arbitrators determine salient in ruling on the petitions.

Although postponements should still be granted, no reason exists why the pandemic should provide *more* postponements than usual. While standard practice may allow one postponement per case, arbitrators should look carefully at multiple requests for postponement within a given case. FINRA’s statistics suggest that cases in 2020 took longer than in the recent past. For instance, in 2019, cases remained open for roughly 14 months between filing and disposition.<sup>47</sup> In 2020, that number grew to 15 months.<sup>48</sup> Through August of 2021, the time shrunk somewhat to 14.4 months to disposition.<sup>49</sup> Although the total number of open cases grew from 2019 to 2020, the open cases in August 2021 lower than those in August 2019.<sup>50</sup> The reason that open cases might also be higher in 2020 is due an increase in filings in 2020.<sup>51</sup> but comparable statistics for 2021 are not yet available.

As discussed below, the postponement practice deserves further study. Delays are troubling in and of themselves. As the adage goes – justice delayed is justice denied. On the one hand, a delay in hearings may delay needed remedies. On the other hand, if the parties do not have confidence in a virtual process, a delay may be a better option than a hearing the parties do not trust.

### **c. Virtual Hearings**

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44 See FINRA, *The Neutral Corner*, 10-11 (Sept. 20, 2021), <https://www.finra.org/sites/default/files/2021-09/neutral-corner-volume-3-2021-0930.pdf> (last visited Oct. 2, 2021) (providing updated information on postponement statistics).

45 See *id.*

46 See *id.*

47 See FINRA, *Dispute Resolution Statistics*, [https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm\\_source=MM&utm\\_medium=email&utm\\_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#virtual](https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm_source=MM&utm_medium=email&utm_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#virtual) (last visited Oct.. 2, 2021) (noting how long cases stayed open in 2019 and 2020).

48 See *id.*

<sup>49</sup> See *id.*

50 *Id.*

51 *Arbitration Case Filings and Trends*, THE NEUTRAL CORNER, vol. 4 (2020), available at <https://www.finra.org/sites/default/files/2020-12/neutral-corner-volume-4-2020-1222.pdf> (last visited Feb. 23, 2021) (noting increase in case filings around 5%).

Although postponements and delays of final hearings are on the rise, some FINRA cases have used zoom to conduct hearings. Generally speaking, arbitrators should have the power to order parties to proceed to a virtual hearing under their general flexibility to determine a case's procedure.<sup>52</sup> Although few court cases consider the authority of FINRA to move arbitration online, those cases have confirmed the arbitrator's power to order remote hearings.

For example, in *Legaspy v. FINRA*,<sup>53</sup> the district court denied plaintiffs' request for a preliminary injunction to prevent an online FINRA hearing.<sup>54</sup> The court noted that procedural questions, such as this one, is "presumptively *not* for the judge" to decide.<sup>55</sup> Further, FINRA Rules, particularly Rule 12213(a), give the arbitrators the power to set the location of the hearing – here as a remote hearing.<sup>56</sup> Similarly, in *Sullivan v. Feldman*,<sup>57</sup> the district court denied a stay of an AAA case involving a question over a virtual hearing.<sup>58</sup> Specifically, the court found that the parties' venue provision requiring arbitration in Texas was met, when the parties could appear virtually from Texas, although the arbitrators were physically in Louisiana.<sup>59</sup> These recent cases are in line with older cases holding that arbitration awards would not be vacated when arbitrators ordered the use of telephone and other distance communication methods.<sup>60</sup> Given previous precedent, the use of technology for some or all of a hearing should be expected to be upheld. Additional comments regarding virtual hearings are discussed more below.

Legalities aside, FINRA has taken steps to ensure that online hearings be run competently and fairly. Prior to the actual hearing, FINRA staff conducts a "trial run" of the hearing to ensure that the arbitrators have the proper equipment and are capable of running a virtual hearing.<sup>61</sup> During the trial run, FINRA staff can provide support if the arbitrators need time to practice the software or get acquainted with zoom's functionality. FINRA provides parties and counsel the

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52 *See generally* *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) (holding that arbitrators have great flexibility to hear challenges to arbitration agreements and that procedural issues are generally within the authority of the arbitrator).

53 *Legaspy v. FINRA*, No. 20-C-4700, 2020 WL 4696818 (N.D. Ill. Aug. 13, 2020).

54 *Id.* at \*5 (denying temporary injunction and restraining order).

55 *Id.* at \*2 (citing *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476 (7th Cir. 2010)).

56 *Id.* at \*3.

57 *Sullivan v. Feldman*, No. H-20-2236, 2020 WL 7129879 (S.D. Tex. Dec. 4, 2020).

58 *Id.* at \*11.

59 *Id.* at \*10.

60 *See, e.g.*, *Johnson v. Pizza Hut*, 2019 WL 481178, \*4 (W.D. Ark. Feb. 7, 2019) (not disturbing an award when the arbitrator offered to hear a witness telephonically, but the plaintiff refused, and the plaintiff could not offer argument why in person testimony was necessary); *Al-Haddad Commodities Corp. v. Toepfer Intern. Asia Pte., Ltd.*, 485 F. Supp. 2d 677, 686 (E.D. Vir. 2007).

61 FINRA, *Arbitrator Resource Guide for Virtual Hearings*, at <https://www.finra.org/arbitration-mediation/case-guidance-resources/arbitrator-resource-guide-virtual-hearings#host> (last visited Mar. 13, 2021) (discussing the "trial run" of cases in advance of the hearing).

opportunity to do a trial run, as well.<sup>62</sup> This service may be particularly useful for counsel about to conduct their first zoom arbitration or for clients who might want reassurance about navigating the platform. Although zoom is now a well-understood technology for video conferencing, FINRA should be commended for taking the time to ensure competency and manage expectations.

FINRA also created protocols for the hearing. FINRA staff can “host” the zoom meeting if the Chair does not feel comfortable running the meeting.<sup>63</sup> The arbitration full video and audio of the hearing will be recorded on zoom,<sup>64</sup> which is arguably a better recording option compared to the default of audio-only recording at live hearings. Video recording is a standard zoom feature and does not require any additional equipment as it would for in-person hearings.

Once the hearing has begun, zoom protocols govern important aspects of the process. Participants must affirm that no unauthorized persons are watching the proceeding,<sup>65</sup> an important safeguard of privacy and confidentiality. Zoom screen sharing is the preferred method of using exhibits during the hearing, but counsel must also find a way for the panel to have their own copies (electronic or paper) of admitted exhibits.<sup>66</sup> Witnesses should know what time they are expected to testify, and the Zoom host must monitor the waiting room to admit the right people to the hearing at the right time.<sup>67</sup> The host of the meeting must also create breakout rooms for meetings between attorneys and clients, as well as be mindful of zoom fatigue by taking extra breaks.<sup>68</sup>

Despite the training and the technical support, many counsel and parties still resist the idea of virtual hearings, claiming insufficiencies with the forum. Of particular concern is whether arbitrators can make necessary credibility determinations.<sup>69</sup> If the parties participate by zoom, the attorneys and arbitrators usually only see the face of the witness – and not the greater body language outside of the camera view. Further, concerns arise whether the limited view of the witness would impede the ability for counsel to conduct an effective cross-examination, thus impeding counsel’s advocacy skills.<sup>70</sup>

Anecdotal information indicates that arbitrators have a more favorable impression of zoom hearings than counsel. On a March 19, 2021 webinar entitled, *1<sup>st</sup> Annual Hearing in Review: The New Age of Virtual Trials*, Richard Barry, Executive Vice President and Director of FINRA DRS, reported that the feedback received from FINRA neutrals on this topic has been generally positive.<sup>71</sup> The attorney participants, on the other hand, expressed great frustration at the

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62 *Id.* (offering the same assistance to parties and counsel, at their request).

63 *Id.* (discussing zoom hosting).

64 *Id.* (discussing recording).

65 *Id.* (discussing authorized access to proceedings).

66 *See* FINRA, *supra* note 60 (discussing exhibits).

67 *Id.* (discussing witnesses).

68 *Id.* (discussing breakout rooms and breaks).

69 Davidson & Bloomfield, *supra* note 42, at 2.

70 *Id.*

71 Webinar, *1st Annual Hearings in Review: The New Age of Virtual Trials* (Mar. 9, 2021).

challenges in making remote presentations.<sup>72</sup> This information is consistent with the statistics regarding granting requests for zoom hearings over the objection of one or more parties.

In sum, some – but certainly not all – arbitration hearings are moving to zoom or other remote communication methods. The larger number of open cases and longer time to completion compared to other years suggests panels are granting more postponements than in prior years. However, FINRA arbitrators are conducting virtual hearings, sometimes over the objection of one or both parties.

#### **d. In-Person Hearings**

FINRA conducts arbitration hearings at 69 locations across the United States. As part of its pandemic response, FINRA staff monitor each of those locations to determine whether in-person hearings may occur in a given jurisdiction.<sup>73</sup> For a short while, the cities of Pittsburgh and Syracuse met Center for Disease Control (“CDC”) guidelines for the possibility of in-person mediation and arbitration sessions.<sup>74</sup> The winter surge of coronavirus, however, led FINRA to state that in December 2020, “no hearing locations” had suitable conditions for in-person proceedings.<sup>75</sup> Starting in August 2021, FINRA re-opened all of its hearing locations.<sup>76</sup>

When hearing locations were closed, some in-person hearings may take place if all of the arbitrators and the parties agree to do so and comply with applicable state and local health orders.<sup>77</sup> When in-person hearings occur (either because conditions improve or on agreement of all parties), the location and participants must meet the following requirements: 1) large enough to socially distance, 2) adequate cleaning and sanitation, 3) mask wearing, 4) private rooms for clients and counsel large enough to socially distance, 5) availability of Plexiglas or face shields so witnesses can testify without wearing a mask, 6) and personal health screening in the weeks prior to a hearing to minimize the likelihood that any participants have COVID.<sup>78</sup> To date, none of the requirements appear to require testing in advance of a hearing.

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<sup>72</sup> *Id.*

<sup>73</sup> FINRA, *Coronavirus Impact on Arbitration and Mediation Hearings*, at <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited December 28, 2020) (“In addition, [Dispute Resolution Services] is monitoring each of its 70 hearing locations across the United States to assess when public health conditions would permit a general resumption of in-person arbitration and mediation proceedings in the location.”). This language was on the website in December, but not any longer).

<sup>74</sup> FINRA, *Arbitration and Mediation Hearing Locations (with Scheduled Cases) That Met Public Health Conditions Consistent with CDC Guidance*, at <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation/hearing-locations-meet-cdc-guidance> (last visited December 28, 2020) (noting that Pittsburgh met requirements in October 2020 and Syracuse met the guidelines in October and November 2020).

<sup>75</sup> *Id.*

<sup>76</sup> *See supra* note 74.

<sup>77</sup> FINRA, *Coronavirus Impact on Arbitration and Mediation Hearings*, at <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited February 4, 2021) (discussing availability of in-person hearings).

<sup>78</sup> *Id.*

In 2020, FINRA conducted 34 in-person hearings, and the claimants won damages in half of those cases.<sup>79</sup> So far in 2021, FINRA administered one additional in-person hearing, in which the panel awarded damages.<sup>80</sup> It is unclear how many of the 34 in-person hearings from 2020 occurred after March, but these numbers are certainly well below the usual number of in-person hearings from the past five or ten years.

When FINRA re-opened the possibility of in-person hearings, it did so with a vaccination requirement. The vaccination requirement will be in place until July 1, 2022.<sup>81</sup> The requirement will be phased in, with the option of providing proof of a negative COVID-19 test in lieu of proof of vaccination through mid-November 2021.<sup>82</sup> Between mid-November 2021 and July 2022, proof of vaccination will be required until a participant has circumstances that prevent vaccination.<sup>83</sup> For hearings in Florida, testing is required of all participants unless those participants are fully vaccinated.<sup>84</sup> Anecdotally, these requirements were met with mixed reactions from the arbitrator community, and these requirements will be discussed more below.

## II. Mediation Procedures During a Pandemic

FINRA not only maintains a panel of arbitrators but also a panel of mediators. Mediation generally runs concurrently with arbitration and is an available option for all participants, but parties may mediate before filing a demand for arbitration.<sup>85</sup> Prior to the pandemic, FINRA rules require parties to pay the mediator's regular hourly rate, including travel and other expenses.<sup>86</sup>

During the pandemic, FINRA began offering no- and low-cost virtual mediations depending on the value of the claim. For claims involving less than \$25,000, FINRA would offer the service at no charge to the parties; for claims between \$25,00 and \$50,000, FINRA would provide virtual mediation services at a rate of \$50 per hour, split evenly; and for claims between \$50,000 and \$100,000, the mediation would cost \$100 per hour split evenly between the parties.<sup>87</sup>

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<sup>79</sup> FINRA, *Dispute Resolution Statistics*, at [https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm\\_source=MM&utm\\_medium=email&utm\\_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#mediationstats](https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm_source=MM&utm_medium=email&utm_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#mediationstats) (“Awards on the Merits of the Case with In-Person Evidentiary Hearings”).

<sup>80</sup> *Id.*

<sup>81</sup> See FINRA, *Coronavirus Impact on Arbitration & Mediation Hearings*, <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited Oct. 2, 2021) (describing vaccination requirements).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (non-vaccinated persons must still provide proof of a negative COVID-19 test prior to attending the in-person proceeding).

<sup>84</sup> *Id.* (not requiring proof of vaccination in Florida).

<sup>85</sup> FINRA, *Initiate a Mediation*, at <https://www.finra.org/arbitration-mediation/initiate-mediation-0> (last visited 3/6/2021) (“Parties may mediate a dispute before filing a formal claim in arbitration. Mediation can also be initiated at any stage of the arbitration process.”).

<sup>86</sup> FINRA Rule 14110 (c) (Mediation Fees) (2020).

<sup>87</sup> FINRA, *FINRA's Mediation Program for Small Arbitration Claims*, at [https://www.finra.org/arbitration-mediation/finras-mediation-program-small-arbitration-claims?utm\\_source=MM&utm\\_medium=email&utm\\_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL](https://www.finra.org/arbitration-mediation/finras-mediation-program-small-arbitration-claims?utm_source=MM&utm_medium=email&utm_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL) (setting forth virtual mediation program) (last visited 3/6/2021).

Although FINRA’s mediation statistics overall declined in 2020,<sup>88</sup> the mediation community moved online with relative ease compared to arbitration.

FINRA contemplates that mediation will occur on the zoom platform, which has been a popular choice for mediators. The zoom platform can mimic many of the characteristics of face-to-face mediation, including a waiting room to prohibit the parties from interacting prior to the mediation, breakout rooms for separate meetings, screen sharing to display documents, and a whiteboard for mediator charting.<sup>89</sup> Mediators providing these services should not only be competent mediators but also competent *online* mediators.<sup>90</sup>

In late 2020, FINRA reported that its mediation roster conducted 376 mediations, with an 85% settlement rate.<sup>91</sup> Compared to 2019, those 376 mediations represented a decrease of 31% compared to its mediations in 2019.<sup>92</sup> Presumably, most of those mediations occurred online, but FINRA does not provide publicly available information on the number of in-person mediations conducted since March 2020 compared to virtual mediations. However, compared to online arbitration, counsel have raised significantly fewer concerns about online mediation. Mediation does not usually require the same types of presentation by counsel – such as statements supported by trial presentation software, day-in-the-life and other videos or use of demonstrative evidence – so the transition to online mediation from in-person mediation appears to be much smoother. Further, because mediation parties always retain control over the outcome of their case, i.e., to settle or not settle,<sup>93</sup> online mediation theoretically poses significantly less risk than an arbitration process in which one side or the other wins the case. Despite the lower risk, the drastic drop of mediation cases between 2020 and 2019 suggests that counsel do have lingering concerns about using zoom for mediation.

### III. Lessons from a Pandemic – What to Keep and What to Improve

Discussions within the ADR community regarding online discussions regarding online dispute resolution began over two decades ago, yet providers and courts have been slow to move

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88 Neutral Corner, *Mediation Case Filings and Trends*, THE NEUTRAL CORNER, Vol. 4, 10 (2020), available at <https://www.finra.org/sites/default/files/2020-12/neutral-corner-volume-4-2020-1222.pdf> (reporting 31 percent decrease in mediations through November 2020).

89 See Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 198 (2006) (“Online mediation, in particular, involves the use of traditional mediation techniques in an online environment.”).

90 Model R. of Conduct for Mediators, St. IV (A) (2004) (“A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.”); see also Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. DISP. RESOL. 609, 645-47 (2017) (discussing ethics for online mediators).

91 *Mediation Case Filings and Trends*, THE NEUTRAL CORNER, vol. 4 (2020), available at <https://www.finra.org/sites/default/files/2020-12/neutral-corner-volume-4-2020-1222.pdf> (last visited Mar. 9, 2021) (providing mediation case statistics).

92 *Id.*

93 KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING DISPUTE RESOLUTION 51 (2017) (discussing party autonomy in decision-making).

online. The pandemic, of course, necessitated moving these processes online – and in a hurry, and FINRA has been no exception. This section provides commentary on “lessons learned” – the good and the bad of FINRA’s pandemic-era ODR practices.

## **A. Practices FINRA Should Keep**

FINRA’s online presence and move to online dispute resolution has been largely successful. FINRA was poised for success through its online docketing and remote hearings and adding virtual mediation and arbitration services now expands FINRA’s process choices for the future.

### **1. Online Docketing and Online Prehearing Conferences**

FINRA’s existing comprehensive online docketing and case management certainly smoothed the transition to full online dispute resolution services. These tools ensured that FINRA’s staff – as well as counsel, arbitrators, and parties – could work from home while still ensuring that basic case management would continue as normal. The electronic-only delivery of pleadings, motions, and other documents is efficient and not reliant on office equipment other than a computer. The online docketing and case management systems should remain a good practice going into the future, with periodic assessment.

In addition, pre-hearing conferences have a long history of occurring remotely – usually by telephone. These hearings allow staff, arbitrators, and counsel to participate from any location – home, office, or anywhere with a working telephone. As discussed below,<sup>94</sup> these hearings may proceed better via videoconference than telephone conference, but the concept of remote pre-hearing conferences should be one that continues well into the future.

### **2. Availability of Online Mediation and Online Arbitration**

FINRA should keep making online mediation and arbitration available to parties even after the pandemic is over. Online options have the promise of cost effectiveness, which theoretically increases access to justice.<sup>95</sup> Perhaps the biggest advantage to online processes is the ability to participate in a physical location convenient to each participant – lawyers and clients alike.<sup>96</sup> FINRA hearings often involve clients and lawyers from across the United States. Investors from small and rural communities in the Midwest may hire claimant-side lawyers who specialize in securities law from New York City or Chicago. Although FINRA maintains 69 hearing locations,

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94 See *infra* notes \_89 - 95\_ and accompanying text.

95 See Jean-Francois Roberge, Veronique Fraser, *Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMES) Disputes*, 35 OHIO ST. J. DISP. RESOL. 1, 13-15 (2019) (discussing access to justice and online dispute resolution for international business disputes); Shekhar Kumar, *Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation*, 27 J. Marshall J. Comp. & Info. L. 81, 85 (2009) (discussing access to justice implications for online dispute resolution).

96 See Elsbeth Magilton, *Ready Party One: The History and Developing Role of Online Dispute Resolution Technology from VOIP to Virtual Reality*, 10 PENN. ST. ARB. L. REV. 73, (2018) (discussing the convenience of online arbitration).

more than 35 states only have one hearing location within the state.<sup>97</sup> Online processes reduce or eliminate travel expenses, which may become substantial for clients if they must pay a panel of three arbitrators' out-of-pocket hotel, travel, and dining expenses on top of their own counsel's expenses. Online options provide these conveniences equally for mediation and arbitration.

For arbitration, the online platform may ease or eliminate the problems associated with witnesses' unavailability.<sup>98</sup> If witnesses do not need to travel, they may have wider availability to testify, and the hearing may not need to call witness out-of-order. In-person arbitrations may move to videoconferencing witnesses who cannot make the hearing, rather than taking testimony over a telephone. FINRA and arbitrators may consider greater use of "hybrid" processes involving both live, in-person participants as well as options for others to participate remotely.

As arbitration moves forward, FINRA and the arbitrators should assure that the online process meets industry ethics standards, such as accessibility, competency, and transparency.<sup>99</sup> Regarding accessibility, FINRA case managers and arbitrators should ensure that all of the participants have access to the technology needed for online arbitration. Although most scholars considering the "digital divide" have concerns about poverty and access to computers,<sup>100</sup> FINRA customers are often elderly and may need extra education or coaching regarding the use of zoom and expectations for online arbitration.<sup>101</sup> Although FINRA provides tech runs for its arbitrators and participants, older clients may still feel ill at ease with an online process.

FINRA may wish to consider maintaining a roster of arbitrators and mediators who *choose* or even prefer to hold online hearings and mediations. FINRA could ensure that those neutrals maintain the highest levels of proficiency with technology. Counsel, then, could rest assured that the process is in good hands if the neutral comes from this specialized roster. Further, the roster of online neutrals could greatly expand their geographic reach. Currently, FINRA maintains regional panels for the convenience of both parties and arbitrators. A national, online neutral list could expand the geographical boundaries for neutrals and give parties a greater selection from which to choose.

When the pandemic is over, many arbitrations and mediation will likely resume in-person sessions. That said, preserving the online option gives the parties more choices to meet their own needs. Online dispute resolution may be tailored in the future for those who choose it for its many benefits, while in-person options are also available.

## **B. Practices FINRA Should Improve Going Forward**

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<sup>97</sup> See Magilton *supra* notes 7 to 8 and accompanying text.

<sup>98</sup> See Magilton, *supra* note 96, at 82 (noting that "[o]nline arbitration frees parties from traditional time constraints").

<sup>99</sup> See Amy Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 Buff. L. Rev. 89, 142-43 (2019) (describing standards for online dispute resolution put forth by the International Center for Online Dispute Resolution).

<sup>100</sup> See Amy J. Schmitz, *There's an "App" for That: Developing Online Dispute Resolution to Empower Economic Development*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 1, 5 (2018) (discussing the "digital divide" as a barrier to access to justice").

<sup>101</sup> *Id.* ("That said, age remains a factor in the digital divide.").

All systems can be improved, and this is no exception. Given the speed with which FINRA (and other provider organizations) moved online, now may be a good time for reflection on how the system can be improved. This section considers issues relating to COVID testing, neutral training, the continued liberal use of postponements, and research regarding outcomes in online arbitration.

## 1. COVID Testing or Vaccine Requirement

Prior to summer 2021, FINRA hesitated on adopting any type of COVID-19 testing or vaccine requirement. In fact, in April 2021, FINRA instructed arbitrators to refrain from asking about vaccination status of arbitration participants.<sup>102</sup> FINRA noted that arbitrators appeared to be asking questions about vaccine status to hasten a return to in-person hearing, but FINRA told its arbitrators to neither inquire about vaccines nor require vaccines from participants. FINRA's instructions, however, do not address the question of how arbitrators should consider a *party* request for vaccination status or testing.

As noted above,<sup>103</sup> FINRA changed its policy in summer 2021. Now, FINRA has a vaccination requirement with limited options for testing as an alternative.<sup>104</sup> FINRA announced these protocols with little explanation. In its email communications with the arbitrator pool, FINRA did not provide information regarding *how* the decision was made and who was consulted as it changed its policy.

Throughout the pandemic, FINRA has never provided for either voluntary disclosure or vaccine decisions on a case-by-case basis. For many reasons, voluntary disclosure of COVID-related information could make good sense for willing parties, counsel, and arbitrators. COVID testing is currently widely available, and many industries have mandatory testing for its employees. The COVID vaccine is widely available in the United States. Whether an arbitrator would have the power to order COVID testing, or proof of vaccination remains an open question. The power of arbitrators is generally limited to power over the process – and unwilling parties may argue that medical testing prior to attending at a hearing is an excessive bodily intrusion. If other industries begin requiring “vaccine passports,” such as hotels and airlines, arbitrators may be on firmer ground to require testing or vaccines. Of course, if everyone agrees, such requirements might give everyone peace of mind regarding health interests.

## 2. Training for Online Neutrals

Currently, FINRA provides its arbitrators less than two hours of training on the zoom platform, and no training for online mediation. Although neutrals may be expected to obtain zoom training elsewhere, FINRA should consider developing more training and deploying it systematically to its rosters of arbitrators and mediators.

Training on the platform is critical to providing a quality experience. The neutral must know not only how to navigate the platform but also how to answer questions the parties may have as they go through the process.<sup>105</sup> “Online neutrals need to have online skills and qualifications to

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102 *COVID-19 Vaccine Information for Hearing Purposes*, THE NEUTRAL CORNER, vol. 1 (2021), available at <https://www.finra.org/sites/default/files/2021-03/neutral-corner-volume-1-2021-0331.pdf> (last visited May 7, 2021).

<sup>103</sup> See *supra* notes 82-85.

<sup>104</sup> *Id.*

work on online systems.”<sup>106</sup> Provided that FINRA decides to continue using zoom, initial training on the platform is relatively simple. Key areas of competency on the platform include initializing and using the waiting room, initializing and functioning breakout rooms, enabling screen share, and enabling recording. Initial training should also cover ethical issues, such as host competency, participant competency, data security (and data storage), and confidentiality issues.

The biggest downside of zoom training to date is the content delivery. So far, much of the available training involves video or teleconferencing (i.e., webinar) delivery. Gaining zoom proficiency takes practice. Unfortunately, practicing these necessary skills cannot be done alone. Effective zoom training usually requires at least one other participant, if not a small group. Since the pandemic began, I have trained dozens of mediators (new mediators, as well as existing mediators) on how to use the platform for dispute resolution. The most effective part of the training is walking the students through the functionality on their own. This type of training takes time and coordination. While FINRA should be praised for its practice of “tech runs” before hearings, this type of training is reactive and case-specific – rather than pro-active readiness. A better training model would include individual or small-group trainings to ensure competency within the rosters. If FINRA were maintain a roster of national, online neutrals, the program could dedicate its limited training resources to those on the list.

In addition, advanced training should be made available in key areas. Additional training could be developed on how arbitrators can assess non-verbal communication over technology,<sup>107</sup> which may decrease attorney reluctance to arbitrate online. Presumably, the last year has sparked additional research in the areas of communication, psychology, neuroscience, and other fields that can be applied to arbitrators and lawyers to increase effectiveness, fairness, and accuracy over technology.

Reflective practitioner groups may be particularly well suited for online neutrals – both mediators and arbitrators. In reflective practitioner groups, individuals gather to describe professional situations in a generic way as to not breach confidentiality and the group can provide feedback on ways to handle the problem. For instance, a group of online arbitrators could discuss what one arbitrator considers to be an unreasonable amount breaks requested by a claimant’s counsel. After the problem is described, the other neutrals in the group can provide insight on their practices regarding the frequency and duration of breaks, and everyone learns from the practical experience of one another. These types of sessions work particularly well when led by a trained facilitator and involve between 12 and 24 participants. Because the neutrals are all online and discussing issues related to the online experience, the neutrals could meet online at a time convenient to the group.

Because this is a rapidly changing area, FINRA should keep abreast of the issues arising in online dispute resolution and offer timely training to its roster. FINRA could offer training to all neutrals, as well as specialized training for arbitrators and mediators separately. The training

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105 See Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes – the Reality and the Desirable*, 16 CARDOZO J. CONFLICT. RESOL. 479, 522-25 (2015) (discussing areas of training valuable for neutrals using electronic platforms).

106 Fahimeh Abedi, et al., *Universal Standards for the Concept of Fairness in Online Dispute Resolution in B2C E-Disputes*, 34 OHIO ST. J. DISP. RESOL. 357, 387 (2019).

107 See Lavi, *supra* note 97, at 523 (discussing the need for training online mediators in techniques related to questioning and non-verbal communication).

could be put on by a combination of FINRA staff to address FINRA-specific issues, as well as speakers from other areas who can contribute complimentary expertise. Increased training can increase confidence by neutrals for their cases as well as confidence in the process by the participants.

### **3. Administrative Postponements**

Theoretically, the administrative postponements through July 2021 raises issues sounding in “justice delayed” as “justice denied.” Speed might seem particularly important for securities arbitration, given the age of many claimants and the possibility of significant financial impact for those who are already retired. Parties have the ability to request “expedited” proceedings for proceedings involving “senior” or “seriously ill” parties.<sup>108</sup> With these ideas in mind, one might expect that the default position of postponing hearings, rather than holding them virtually, might be met with resistance.

To the contrary, anecdotal evidence suggests that claimants’ counsel is less hospitable to virtual hearings than respondents’ counsel. As discussed more in the next section, claimants worry that the online forum may be biased in favor of industry participants. Arbitrators may be granting more postponements based on these concerns. Further, arbitrators may be granting more postponements when *claimants* request them on the theory that the claimants should have control over their own process.

Timely dispute resolution is important, but so is fairness. I struggle to recommend expediency in claim resolution while serious allegations relating to justice and fairness remain outstanding. Hopefully, now that in-person hearings are available again, attention may be given to any backlog of cases. This particular area deserves further monitoring and study by FINRA, with reporting back to its rosters of neutrals and the public.

### **4. Study of Awards and Trends**

Although nearly all of FINRA’s practices up to the final hearing proceed as they had prior to the pandemic, the move to online processes was new. As with any new process, it should be evaluated to determine what is working and what it not. FINRA should receive and compile feedback on a number of topics, including satisfaction with the process, ease of use, preparedness, and ultimate outcomes.

Some evidence suggests that claimants fare worse in zoom arbitrations than in-person arbitrations, which is a conclusion that should be studied in more detail. In early 2021, the securities litigation and consulting firm SLCG made available a report detailing a perceived decrease in damages awarded to claimants since the beginning of the pandemic based on an

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<sup>108</sup> FINRA, *Expedited Proceedings for Seniors or Seriously Ill Parties*, at <https://www.finra.org/arbitration-mediation/expedited-proceedings-senior-or-seriously-ill-parties> (last visited Mar. 20, 2021) (discussing special considerations for vulnerable populations).

analysis of FINRA awards.<sup>109</sup> SLCG's advocacy services primarily resolves around calculating investor losses,<sup>110</sup> which raises some questions about the objectivity demonstrated in the report.

That said, the report compiles FINRA data and raises serious questions. The report cites FINRA's own publicly available information showing a 34% claimant win rate in 2020, down from rates from 42% to 45% since 2015.<sup>111</sup> A 10% decline based on FINRA's own published data is concerning and deserves additional attention and study. SLCG's report goes further by examining the awards themselves to determine which hearings occurred in person and which hearings occurred online. SLCG found that that between May and December 2020, when nearly all arbitrations were remote, investors won only 28.8% of cases.<sup>112</sup> In those remote hearings, claimants recover only 33.3% of the amount requested, down from 57.3% in 2019, and down at least 20 points compared to any other year since 2015.<sup>113</sup> In a March 2021 webinar, FINRA's Richard Barry claimed that SLCG's report contains methodological deficiencies and responded that the data show little change from year-to-year.<sup>114</sup>

Putting aside the more detailed findings of the SLCG report, FINRA should study whether any external factors can account for the 34% claimant win rate in 2020, which appears to be an aberration compared to the previous five years. Questions to be considered include the technological competency of investors compared to brokers, technological competency of investor's *counsel* compared to *counsel* for brokers, credibility determinations over technology, zoom fatigue in hearings, speed of the hearing, among other relevant topics. Arbitrators anecdotally report that online hearings are shorter in time than in-person hearings.<sup>115</sup> FINRA could investigate whether the length of hearing impacts the ultimate award.

At this point, the data from 2020 may be anomalous for a number of reasons; however, a study and report may explain the data and restore public confidence, particularly claimant confidence, in online arbitration. FINRA may be best served by hiring an outside consulting service through a public request for proposal process to ensure objectivity and confidence. Although the explanations may be explainable or innocent, until they are known, party questions and concerns may continue to arise.

#### IV. Conclusion

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109 Craig McCann & Chuan Qin, *The Impact of ZOOM on FINRA Arbitration Hearings*, at <https://www.slcg.com/pdf/sampleresults/Impact%20of%20Zoom%20on%20FINRA%20Claimants%20Final.pdf> (last visited Mar. 20, 2021).

110 SLCG, *Expert Testimony & Consulting*, at <https://www.slcg.com/securities-consulting/> (describing services offered).

111 FINRA, *Dispute Resolution Statistics*, at [https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm\\_source=MM&utm\\_medium=email&utm\\_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#pre-arbitration](https://www.finra.org/arbitration-mediation/dispute-resolution-statistics?utm_source=MM&utm_medium=email&utm_campaign=O%5FDR%5FMonthly%5F120320%5FFINAL#pre-arbitration) (last visited Mar. 20, 2021).

112 McCann & Quin, *supra* note 109, at 2 (see Table 1).

113 *Id.* (see Table 2).

114 Webinar, *supra* note 71.

115 Dan Zailskas *Virtual Arbitration and Beyond: Best Practices for COVID Times and Beyond*, in *THE NEUTRAL CORNER*, Vol. 4, 5 (2020) (discussing shorter hearings).

In all, FINRA was well positioned going into the pandemic. Most case operations continued as “normal,” other than final hearings. Case docketing and management, as well as prehearing conferences, need only periodically review to ensure efficiency and confidentiality. This paper recommends moving pre-hearing conferences to videoconferencing, which would be a relatively simple switch.

FINRA should give a closer look to virtual arbitration and mediation practices. To the extent that all neutrals may provide online hearings, FINRA should expand its training to a more robust program. If FINRA instead implements a roster of online neutrals post-pandemic, it could target that specific panel for additional training opportunities from FINRA staff, outside experts, and even small group reflective practices.

Now that the pandemic is in its second year, FINRA should have time to look back and study how well the transition online occurred. Of particular note, FINRA should study and report on win rate statistics. At this point, a cloud exists over the win rates that can hopefully be explained by a neutral party – or point out areas in which the panel needs additional training.

Hopefully online options are here to stay, even when public health experts indicate that people can safely meet in person in groups. The many benefits of online processes – including efficiency and access to justice – make the forum a good choice in many circumstances. The pandemic forced many neutrals, advocates, and others to become proficient at videoconferencing, and these skills can still be valuable in a post-pandemic world.