Effective Practice Tips for your next FINRA Arbitration Hearing - A view from the Arbitrator's Chair

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Whether by zoom or in person, arbitration disputes are becoming more complex and requiring more time. Most counsel and arbitrators are familiar with the customary "**streamlining techniques"** such as: stipulated facts; joint exhibits with joint stipulations for admission at the start of the hearings; direct testimony by Affidavit with live cross examination and re-direct; chess clocks; taking witnesses out of order so they only appear once in the hearing experience; reliance on the categorization/legitimacy of business documents/records to avoid the need for verification witnesses, etc.

But, is there more that can be done, especially on the front end, in the **preparatory stages**, that will reduce hearing time? The answer is clearly "yes."

For the sake of everyone's calendar, **engage in settlement negotiations** long before final pre-hearing submissions are due. The amount of time, energy and cost of preparing for a hearing can be minimized if not entirely avoided if there is a concentrated opportunity to evaluate the risk of hearing vis a vis the relief that comes with discovering the livable solution. Recognize that most Panels want counsel and parties to make the outreach and conduct legitimate settlement discussions long before final due dates.

Once discovery is complete and counsel is beginning to prepare for trial, this is the time to give serious consideration to what might be the possible livable solution. Rarely does any new persuasive or case turning evidence rise up at this stage and thus there is no reason not to make a final attempt at resolution Adopting this practice is helpful to the opponent. It is also a welcome and **respectful** conscious recognition of the efforts of FINRA to set up hearings, and the calendars and energies of the Panel. More often than not, cases settle so finding that magic recipe for resolution should occur soon after discovery is complete and not on the eve of a hearing. If it can settle the day before the hearing, it could have settled 30 days earlier.

Be amenable to setting **pre-hearing submission dates** at least 30-45 days in advance of the scheduled hearing. For the reasons addressed above, such planning reduces the likelihood that calendars can't be filled, revenue lost and the imposition of unnecessary postponement or adjournment fees at the clients' expense. Going through this planning work will also sharpen counsel's focus and they will be better prepared to consider how to further streamline their respective cases and evidence, with ample time to make the course corrections.

Write a **cogent, case specific pre-hearing brief.** Identify the uncontested facts and history which will reduce the hearing time dedicated to the "collection" of background data. Provide (breakdown) and connect the applicable law to each claim or defense. Ask if the Panel wants copies of relevant cases cited in the brief. These can be delivered at the hearing and if not needed, will save paper and personnel expense.

Think about how you will organize your **exhibits.** Claimant's exhibits can be identified beginning with a "C,", Respondent's with an "R" and joint exhibits with a "J." More importantly, remember it is far easier (and less confusing) for the Panel to follow the testimony from a witness using a joint exhibit than to switch back and forth between each party's exhibit books or computer screens to see the same document with multiple witnesses.

Opening statements are helpful but counsel should remember an opening statement should be a brief summary of the story, not the whole story. There will be ample time in the course of testimony to fill in the blanks.

Beware of **repetitive testimony.** Generally, your Panel has experience in the types of cases you are presenting. They are listening attentively. They do not need to hear the same factual background from more than one or two witnesses. Presenting the same evidence through multiple witnesses dilutes its effect, not to mention the attention of your decision makers.

If there are many transactions or key event dates, a visual **timeline**, in chronological order, is helpful to remembering important history. It should not contain controversial assertions but serve more like a reference calendar of undisputed events in the history of the relationship of the parties and in the dispute.

At the conclusion of your hearings, **be very specific about the relief being requested.** If it is contained in multiple categories of claims or defenses, identify/associate the requested relief to the claim/defense. If you are seeking **attorney fees and/or forum fees**, provide the legal authority for that request, regardless of whether you can actually provide an expense summation for the Panel's consideration at that moment in the process.

As the hearing winds down, think honestly about whether or not you need to present a post hearing brief if the Panel is not requesting one. The most helpful **post hearing brief** is one that has a summary of the legal issues and relevant case law that arose during the hearing and that **was not** addressed in the pre hearing submissions.

Do not be afraid of zoom or virtual platforms for your hearings. The format does require a bit more up-front work by counsel, FINRA and the Panel. Each participant needs a backup plan if his/her technology fails. Power outages come at most inopportune times and a different physical location may even need to be in the plan. There should be a concrete methodology to deliver exhibits to the Panel and to witnesses in advance. Just having them on the portal does not make them accessible to everyone. Think about what documents or power point presentations

you may want put into screen sharing and practice in advance. These tasks may involve extra personnel to assist counsel and/or participants with technology and the flow of the hearings.

Think about the **visual impressions** on the screens. What does the background tell about the person in the picture? Should others see the environment the person is in, for security and other reasons or, should there be an agreement to use the "blur" virtual background provided by zoom? Consider the lighting and the attire of persons appearing before the Panel. While it may seem less formal, it is still a legal proceeding suggesting proper deference to the process and to all participants would be wise.

Think about the **people groupings.** Who should be sequestered? Who will be appearing on a single screen? Can some key people be watching proceedings from a virtual methodology as opposed to being in person in the same physical space?

Plan to "**arrive at the hearings"** at least 15-30 minutes before the actual start time. Any technological challenges can be identified early and perhaps adjusted. In addition, be mindful of "zoom fatigue." Think about your lines of questioning and prepare for logical breaks in the flow to allow for an appropriate recess/refreshment break. The Panel can instruct witnesses about no coaching from counsel during these periods while a witness is still "on the stand."

Take advantage of FINRA's "**practice sessions"** prior to your hearing dates. This allows counsel and parties to become more familiar and comfortable with the platform. A practice session may also identify potential "bugs" in technology prior to the actual hearing. FINRA's website contains helpful guidance for counsel and witnesses on what to expect and how to use a virtual platform for hearings.

The Panel will instruct counsel, parties and witnesses, and **implement several protocols** to ensure the security of the proceedings including but not limited to: directions to secure the surroundings and physical safety of the participants; seeing and understanding the locations of all the participants via camera images and representations (perhaps under oath) of the privacy of the locale; sequestration of uninvited witnesses; virtual participation of known and approved decision makers, experts and parties; witness cameras showing the witness surroundings including privacy, no cell phones (to avoid "text" coaching by counsel or inadvertent recording of testimony) and no public internet access during any part of the hearings.

Witnesses using exhibits to testify can be asked to show their exhibit binders on camera. They can also be asked about any notes from which they may be testifying. All are aware there is no recording except as required by FINRA which will be in control of the Panel/FINRA. If a party has a court reporter, the same rules for engagement and protections will be followed, and in fact, the court reporter may be one of the participants who will help secure the events for all participants.

If you are congregated in a large conference room with a group of people, be mindful of the challenges participants may have watching your conference room, trying to hear from people speaking through masks, and looking very small in the screen. It is nearly impossible to see the faces of the relevant participants in a large group on a single camera. Consider a separate seating, second camera and additional computer screen for your presenters and witnesses. Be mindful of potential "feedback" from more than one virtual source in close proximity to others- use of "mute" on all but one device is often the solution.

Most of the neutrals this author has polled have grown to like virtual proceedings. **Virtual** is here to stay for all the obvious reasons. FINRA, counsel and Panels have been creative and agile in adopting to the changing landscapes of the pandemic and to the chagrin of some, Zoom actually works pretty well for most situations.

As you move toward your next hearing or FINRA case event, **be agile** in your approach and positions. Do not hesitate to offer a helpful idea even if it doesn't end up being an appropriate adaptation. Sometimes a bit of flexibility brings about minor adjustments that are in everyone's best interests and go a long way to making the dispute experience substantively, procedurally and emotionally satisfactory for all.