

# A MODEL FOR POST-PANDEMIC REMOTE ARBITRATION?

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## I. INTRODUCTION

*Is Remote Justice Still Justice?* This Article approaches the question posed in this symposium by looking beyond the emergency use of remote arbitration proceedings during the first eighteen months of the COVID-19 pandemic. It describes how one mandatory arbitration forum—the Financial Industry Regulatory Authority (“FINRA”)—studied its experiences with emergency remote arbitration and used those findings to institutionalize remote arbitration, highlighting structural features unique to the FINRA forum that may position it as an exemplar.

One might wonder why two contributions to this symposium edition focus on the FINRA customer securities arbitration forum, a mandatory arbitration regime far less known than the American Arbitration Association (“AAA”) or JAMS.<sup>1</sup> Arbitration is, in general, not well-known to those bound by arbitration clauses, with many consumers oblivious to arbitration clauses and what they mean.<sup>2</sup> Even those consumers savvy enough to recognize that

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\* © 2023, All rights reserved. Assistant Professor of Law, Drexel University Thomas R. Kline School of Law. Disclosure: The author is Chair and a public member of the FINRA National Arbitration and Mediation Committee (“NAMC”) and a public member CFP Board of Advisors Public Policy Council. The opinions expressed herein are the author’s own. I am grateful to the editors and staff of the *Stetson Law Review* for their exceptional work in organizing the symposium from which this paper arose. Thank you to Jill I. Gross, Thomas B. Metzloff, symposium participants, and SEALS attendees for feedback, comments, and discussions that greatly improved this piece.

1. See, e.g., Nicole G. Iannarone, *Structural Barriers to Inclusion in Arbitrator Pools*, 96 WASH. L. REV. 1389, 1397 (2021) (“Many Americans have neither heard of securities arbitration nor know that if they have a brokerage agreement, they are most likely required to submit to arbitration if a dispute arises.”). FINRA also maintains a forum for the arbitration of intra-industry disputes. See *id.* at 1430. This Article focuses on consumer customer arbitration.

2. Kristen M. Blankley, Ashley M. Votruba, Logen M. Bartz & Lisa M. PytlikZillig, *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public’s Lack of Understanding of Mediation and Arbitration*, 99 NEB. L. REV. 797, 816 (2021) (finding 20.1% of surveyed community members had “no familiarity with

they entered into a Pre-Dispute Arbitration Agreement (“PDAA”) often do not understand how arbitration would impair their ability to pursue a claim in court.<sup>3</sup> Nearly 40% of surveyed investors who ultimately pursued legal action against a stockbroker were unaware, pre-filing, that they were subject to a PDAA requiring them to file the claim in the FINRA forum.<sup>4</sup> Though FINRA operates the largest securities dispute resolution forum in the United States through its Dispute Resolution Services (“DRS”)<sup>5</sup> division, most investors are surprised that they are required to bring their claim in an arbitration forum within the broker-dealer industry’s self-regulatory organization.<sup>6</sup> Arbitration in the FINRA forum is functionally mandatory because nearly all brokerage agreements require investors to arbitrate.<sup>7</sup>

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arbitration”); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, “*Whimsy Little Contracts with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*,” 75 MD. L. REV. 1, 4 (2015).

3. See, e.g., Sovern et al., *supra* note 2, at 4 (“Our findings suggest that consumers lack awareness of arbitration agreements and do not understand those agreements when they are aware of them.”); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341, 378–79 (2014) (“Because of the obscure location of the arbitration clause, social media users are likely to be unaware that they have waived their right to go to court.”).

4. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors’ Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 364 (2008) (finding “36.71% of customers were not aware” of a PDAA in their brokerage agreement prior to a dispute arising).

5. FINRA’s Office of Dispute Resolution changed its name to Dispute Resolution Services in mid-2020. See *New Name: FINRA Dispute Resolution Services*, 2 THE NEUTRAL CORNER (FINRA, Washington D.C.), July 1, 2020, at 6 (“FINRA Office of Dispute Resolution has officially changed its name to FINRA Dispute Resolution Services. This change highlights our focus on customer service and helps distinguish FINRA Dispute Resolution Services from FINRA Enforcement for our external stakeholders, lawmakers and the media. The name change also highlights our unique functions and speaks to our role as a neutral administrator of FINRA’s arbitration and mediation forum.”).

6. *Id.*; *FINRA Dispute Resolution Services: Arbitration & Mediation*, FINRA, <https://www.finra.org/arbitration-mediation> (last visited Jan. 7, 2023). Though it is now a subsidiary of FINRA, Dispute Resolution Services was previously a standalone entity separate and apart from FINRA Regulation. See Order Approving a Proposed Rule Change to Merge FINRA Dispute Resolution, Inc. into and with FINRA Regulation, Inc., 80 Fed. Reg. 79632 (Dec. 22, 2015) (approving proposal to merge FINRA Dispute Resolution into FINRA Regulation, Inc. and describing prior separate corporate status of regulatory and dispute resolution functions). It is outside the scope of this Article to examine whether procedural fairness would support the separation of dispute resolution functions to increase perceptions of independence and fairness.

7. Jill I. Gross, McMahon *Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 495 n.13 (2008) (“FINRA is now the only meaningful forum for securities arbitration . . .”); Barbara Black, *Can Behavioral Economics Inform Our Understanding of Securities Arbitration?*, 12 TRANSACTIONS: TENN. J. BUS. L. 107, 107 (2011) (“[V]irtually all disputes involving customers, brokerage firms, and their registered representatives are arbitrated before the [FINRA] forum.”); Charlotte S. Alexander & Nicole

FINRA arbitration is subject to the many critiques that have been levied against mandatory consumer arbitration. Critics complain that the industries who force consumers into arbitration have an unfair advantage due to informational asymmetries arising from industry repeat-players gaining knowledge from their multiple experiences in what is otherwise a black box, inaccessible to one-shot consumer parties.<sup>8</sup> Others criticize mandatory arbitration because it is largely designed by the very industries who force consumers into it.<sup>9</sup> In addition, arbitral forums are overseen by entities that survive solely as a result of the fees charged for claims to be filed within their proprietary forums.<sup>10</sup> Moreover, empirical research indicates that consumers are less likely to bring a claim in arbitration than in court.<sup>11</sup>

While FINRA DRS is subject to all these critiques, it also possesses unique structural elements that may set it apart from other mandatory consumer arbitration forums. The main difference between the FINRA forum and other mandatory consumer arbitration forums is that the FINRA forum aims, in part, to protect investors rather than simply facilitate brokerage firms and stockbrokers avoiding claims in court.<sup>12</sup> Accordingly, this Article describes FINRA's post-pandemic efforts to study and improve its securities arbitration forum and identifies experiences

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G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1707 (2021) (describing functionally mandatory nature of FINRA arbitration).

8. See Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L.J. 427, 430 (2018) (describing critiques of arbitration, including black box nature); see also Alexander & Iannarone, *supra* note 7, at 1704–08 (describing critiques to mandatory arbitration).

9. See, e.g., KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 26 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> (“By delegating dispute resolution to arbitration, the [Supreme] Court now permits corporations to write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise.”); see also Iannarone, *supra* note 1, at 1403–04 (“The perception of fairness has long been a concern in securities arbitration, an essentially mandatory regime designed to ensure systemic trust. Industries led by homogeneous parties that pit consumers against sophisticated repeat players raise fairness concerns. Those concerns are magnified when it appears the forum lacks diversity, has high barriers to inclusion, or is largely controlled by the industry it purports to regulate.”).

10. See *infra* notes 257–58 and accompanying text (describing FINRA distancing itself from other mandatory arbitration forums by highlighting U.S. Securities & Exchange Commission (“SEC”) oversight of it).

11. Farshad Ghodoosi & Monica M. Sharif, *Arbitration Effect*, (July 2022) (manuscript at 65), <https://ssrn.com/abstract=4010102> (“Individuals are less likely to sue in arbitration yet do not necessarily shun away from arbitration at the contracting stage.”).

12. Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 173–74 (2016).

that may serve as a framework for other mandatory consumer arbitration forums seeking to institutionalize remote arbitration.

This Article proceeds in four parts. Part II describes FINRA's pivot to remote operations and identifies existing infrastructure that aided this shift. Part III provides a first-hand, descriptive account of FINRA's actions to evaluate and improve its arbitration forum after the emergency phase of the pandemic concluded and in-person arbitration proceedings resumed, recounting the steps FINRA took and how it leveraged the existing infrastructure identified in Part II to assist its efforts. In particular, Part III describes the work of FINRA, its National Arbitration and Mediation Committee ("NAMC"), and a newly formed Zoom Task Force ("ZTF") in surveying remote hearing participants; proposing new forum rules, procedures, and best practices; and revising and preparing resources for forum participants. Part IV identifies unique characteristics of the FINRA securities arbitration forum that buttress its status as an arbitration archetype. Part V provides a potential path forward, suggesting why other arbitration forums may wish to learn from the descriptive account and voluntarily adopt infrastructure and other characteristics that would potentially enhance consumer access to justice in remote arbitration proceedings in the future.

## II. FINRA DISPUTE RESOLUTION SERVICES REVIEW AND EVALUATION OF EMERGENCY REMOTE HEARINGS

As COVID-19 emerged, FINRA DRS quickly responded, making the decision "to administratively postpone all in-person arbitration and mediation proceedings scheduled through May 31, 2020" on March 30, 2020.<sup>13</sup> During the time when health and safety concerns made it impossible to proceed via a regular, in-person proceeding, arbitration in the FINRA forum continued.<sup>14</sup>

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13. *Office of Dispute Resolution (ODR) and FINRA News*, 1 THE NEUTRAL CORNER (FINRA, Washington D.C.), Mar. 31 2020, at 1, <https://www.finra.org/sites/default/files/2020-03/neutral-corner-volume-1-2020-0331.pdf>.

14. See FINRA Unscripted, *Zoom Arbitration One Year Later: Lessons Learned, Tips for Practitioners and the Road Ahead*, FINRA (May 18, 2021), <https://www.finra.org/media-center/finra-unscripted/zoom-arbitration> ("The main thing that we have made clear is that health and safety of our arbitration participants is our number one priority. And it was clear early on that we needed to postpone in-person hearings due to the pandemic."); *Office of Dispute Resolution (ODR) and FINRA News*, *supra* note 13, at 1 ("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 May 31,

Parties were permitted to proceed via virtual hearing if they jointly agreed to do so or if the arbitrators ordered a virtual hearing.<sup>15</sup> This Part begins by describing the FINRA DRS adoption of emergency remote arbitration hearings. It next provides a descriptive account of the resources created for and shared with stakeholders concerning new remote hearings adopted to continue operations during the pandemic emergency. This Part concludes by identifying the infrastructure and organizational characteristics of the FINRA DRS forum that aided its response to the COVID-19 emergency.

#### A. FINRA Embrace of Remote Arbitration During the COVID-19 Pandemic

In March 2020, FINRA engaged in numerous communications with forum stakeholders about the changes to its arbitration forum in light of the COVID-19 pandemic. Among those efforts were email messages to forum participants and the creation of a webpage to provide forum participants with up-to-date information concerning how the pandemic impacted mediation and arbitration in the FINRA DRS forum.<sup>16</sup> FINRA made virtual options available to participants during the early phases of the pandemic.<sup>17</sup> As described by FINRA Executive Vice President and DRS Director Richard W. Berry:

[FINRA DRS] pulled out all the stops in terms of going to the Zoom platform, training our staff on Zoom, making them experts

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2020. . . . FINRA Dispute Resolution offers virtual hearing services (via Zoom and teleconference) to parties by joint agreement or by panel order.”).

15. *Office of Dispute Resolution (ODR) and FINRA News*, *supra* note 13, at 1 (“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 May 31, 2020. . . . FINRA Dispute Resolution offers virtual hearing services (via Zoom and teleconference) to parties by joint agreement or by panel order.”); *see also* Jill I. Gross, *Post-Pandemic FINRA Arbitration: To Zoom or Not to Zoom?*, 52 STETSON L. REV. 363 (2023) (describing, in Part III, FINRA response to COVID and arbitration during emergency phases of the pandemic, including advantages and disadvantages of Zoom arbitration in the forum); Kristen M. Blankley, *FINRA’s Dispute Resolution Pandemic Response*, 13 ARB. L. REV. (2021) (describing evolution of FINRA’s case processing and hearing procedures in the emergency phases of the COVID-19 pandemic).

16. *Coronavirus Impact on Arbitration & Mediation Hearings*, FINRA, <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited Jan. 7, 2023). As of the date of publication, this webpage is still actively updated. *Id.*

17. FINRA Unscripted, *supra* note 14.

and providing all kinds of training materials for our staff and for arbitrators and parties. So, bottom line, we wanted to make sure that there was another alternative and that [FINRA] cases could proceed if the parties stipulated to move forward by Zoom or if the panel ordered it to happen.<sup>18</sup>

FINRA DRS provided numerous resources and support to parties who participated in Zoom arbitration hearings.<sup>19</sup> Perhaps most important was offering all forum participants—parties, party representatives, witnesses, and arbitrators—training and technical support for Zoom arbitration proceedings.<sup>20</sup> In the early stages of the pandemic emergency, FINRA DRS staff proactively contacted remote hearing participants to provide training and resource guides before their remote hearing commenced.<sup>21</sup> In addition, FINRA DRS staff joined every virtual hearing to troubleshoot and provide, if necessary, technical support.<sup>22</sup> This level of support was well received by participants in the forum. An attorney who represents claimants in the FINRA forum reported that he appreciated FINRA staff presence during the virtual hearings in which he participated, stating, “there’s some real comfort in knowing that if there are some problems, whether technical or otherwise, you can call out to the FINRA person who will jump in and try to help.”<sup>23</sup> An in-house lawyer for a broker-dealer firm expressed a similar sentiment, noting that FINRA’s presence allowed arbitration participants to focus on the substance of the proceeding.<sup>24</sup>

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18. *Id.*

19. *Id.*

20. *Office of Dispute Resolution (ODR) and FINRA News*, *supra* note 13, at 1.

21. *Id.* (“If the parties in a case to which you are assigned jointly request a virtual hearing option or the panel orders the parties to proceed using a virtual hearing option, *FINRA staff will contact you to provide additional information and training on these virtual technologies.*”) (emphasis added).

22. *Id.* (“FINRA staff will also remain available to provide technical support for all virtual hearings.”); *FINRA Arbitrators Successfully Conduct Virtual Hearings*, 2 THE NEUTRAL CORNER (FINRA, Washington D.C.), July 1, 2020, at 2, <https://www.finra.org/sites/default/files/2020-07/neutral-corner-volume-2-2020-0701.pdf> (“The case administrator will also be available as a resource during the hearing.”).

23. FINRA Unscripted, *supra* note 14.

24. *Id.* (“It’s so great to have a FINRA representative there, because this is the kind of thing where you want the arbitrators really focused on the case and not necessarily focused on getting people in and out of meeting rooms and doing other kinds of things.”).

## B. Creating and Sharing Virtual Hearing Resources

As the pandemic emergency continued throughout 2020 and well beyond the initially envisioned two-month pause on in-person hearings, FINRA DRS created additional resource guides and materials for forum participants. These materials were made available via FINRA's website and via electronic communications sent directly to constituents.<sup>25</sup> FINRA held virtual conferences providing party representatives with information on conducting remote arbitration proceedings.<sup>26</sup> The materials were also shared electronically with arbitrators and parties through blast messages sent via FINRA's online dispute resolution portal.<sup>27</sup> Additionally, FINRA DRS publicized these materials and resources, answered questions, and obtained feedback through virtual outreach to constituents. As one example, FINRA's Karinya Verghese and the author served as panelists on a webinar hosted by the Public Investors Advocacy Bar Association ("PIABA") on July 14, 2020, to discuss FINRA's newly released Arbitrator Resource Guide for Virtual Hearings, tips for participating in remote hearings, and

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25. See, e.g., *Arbitrator Resource Guide for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/case-guidance-resources/arbitrator-resource-guide-virtual-hearings> (last visited Jan. 7, 2023); *Arbitrator Resource Guide for Virtual Pre-Hearing Conferences*, FINRA, <https://www.finra.org/arbitration-mediation/arbitrator-resource-guide-virtual-pre-hearing-conferences> (last visited Jan. 7, 2023); *Party Resource Guide for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/party-resource-guide-virtual-hearings> (last visited Jan. 7, 2023); *Party Resource Guide for Virtual Pre-Hearing Conferences*, FINRA, <https://www.finra.org/arbitration-mediation/party-resource-guide-virtual-pre-hearing-conferences> (last visited Jan. 7, 2023); *Fall 2020 Neutral Workshop: Tips for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/neutral-workshop-audio-and-video-files> (last visited Jan. 7, 2023); FINRA, THE NEUTRAL CORNER, <https://www.finra.org/arbitration-mediation/neutral-corner-view> (last visited Jan. 7, 2023) (containing links to FINRA newsletter sent to mediators and arbitrators that includes information concerning coronavirus impact to FINRA forum from 2020 through August 2022 when this Article was drafted); *Questions and Answers: Virtual Arbitration Hearings*, 1 THE NEUTRAL CORNER (FINRA, Washington D.C.), Mar. 31 2021, at 20–22, <https://www.finra.org/sites/default/files/2021-03/neutral-corner-volume-1-2021-0331.pdf> (answering questions concerning virtual hearings and directing readers to electronic resources and describing education and training for virtual hearings); *Questions and Answers: Etiquette for Virtual Arbitration and Mediation Hearings*, 4 THE NEUTRAL CORNER (FINRA, Washington D.C.), Dec. 30, 2021, at 22–23, <https://www.finra.org/sites/default/files/2021-12/neutral-corner-volume-4-2021-1230.pdf> (describing expected arbitrator and mediator behavior in virtual sessions).

26. *FINRA Virtual Conference Panel: COVID-19's Impact on Arbitration—Practical Tips & What's New in Arbitration Procedures*, FINRA (Aug. 18, 2020), <https://www.finra.org/virtual-conference-panels/video-covid-19-impact-on-arbitration>.

27. *DR Portal*, FINRA, <https://www.finra.org/arbitration-mediation/dr-portal> (last visited Jan. 7, 2023) (explaining portal role in FINRA arbitration proceedings and resources for using it).

how to navigate ethical concerns related to remote arbitration proceedings.<sup>28</sup> Though the title of FINRA's virtual hearing resource guide suggested it was solely focused on arbitrators, the information contained within it was of equal use to parties and their counsel.<sup>29</sup> FINRA DRS was also receptive to suggestions on how to improve participant experiences in remote hearings. For example, when FINRA DRS shared information concerning the support provided for remote arbitration proceedings during the annual Securities Arbitration Clinic Roundtable, it received feedback from professors who operate law school securities arbitration clinics that some retail investors had difficulty meaningfully participating in remote hearings because they did not have access to a computer or stable internet service.<sup>30</sup> FINRA DRS responded by piloting a program to lend a tablet and/or a mobile hotspot upon request to parties who did not otherwise have access to technology that would permit them to participate fully in a remote hearing.<sup>31</sup> The availability of technology for loan was shared throughout the securities arbitration clinic community, though it was not formally detailed on FINRA's webpage or in other resources for parties, which meant that unrepresented or otherwise unsophisticated parties might not have been aware of resources available to them.<sup>32</sup> FINRA also created numerous

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28. See *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 25.

29. *Id.*

30. Fordham Law School organizes a Securities Arbitration Clinic Roundtable every year where clinic directors, FINRA DRS representatives, and regulators from the SEC engage in discussions about and provide feedback concerning the clinics' work with retail investors, trends in investor claims, and experiences in the FINRA DRS forum. See, e.g., *Securities Clinic Hosts Annual Roundtable*, *FORDHAM L. NEWS* (June 20, 2018), <https://news.law.fordham.edu/blog/2018/06/20/securities-clinic-hosts-annual-roundtable/> (describing annual Securities Arbitration Clinic Roundtable). For a description of securities arbitration clinics and the services they provide to investors who are unable to otherwise obtain counsel due to the size of their claim, see generally Jill I. Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 *CARDOZO J. CONFLICT RESOL.* 597 (2014).

31. See *Resource Guide for Self-Represented Parties with Virtual ("Zoom") Hearings: Frequently Asked Questions*, FINRA, [https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves/virtual-hearings-faq#\\_ftn1](https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves/virtual-hearings-faq#_ftn1) (last visited Jan. 7, 2023) (detailing how parties can obtain technology to participate in a remote hearing). Professor Elissa Germaine, Executive Director of John Jay Legal Services and the Director of the RealFi Investor Rights Clinic at Pace University Elisabeth Haub School of Law, was the first lawyer to borrow technology from FINRA to permit a retail investor client to participate in remote representation.

32. See *infra* notes 182–84 and accompanying text (describing the Zoom Task Force's recommendation that resources for pro se parties specify that technology is available for loan so that claimants with claims will not forego them because they are not able to



videos to provide additional training and information for parties participating in remote arbitration proceedings, and participated in recorded panel discussions providing tips for virtual arbitration hearings.<sup>33</sup> Among these resources is a video for arbitrators that includes practitioner tips and a segment of a mock remote arbitration hearing to illustrate best practices.<sup>34</sup> These resources were, and remain, posted on FINRA's website and were highlighted in materials sent directly to current forum participants, arbitrators, and those who sign up to receive FINRA e-blasts and newsletters.<sup>35</sup> Information during the emergency phases of the pandemic was readily available from FINRA, though it may have been less accessible to those who did not currently have a pending proceeding or who had not previously participated in the FINRA DRS forum. For example, self-represented parties (or lawyers who had not previously engaged with the FINRA DRS forum) may not have accessed guides and resources that appeared to be aimed towards arbitrators. Moreover, because it was not, at that time, publicized, unrepresented parties were likely unaware that technology was available for loan and may have foregone initiating claims because they did not have access to the recommended technology to fully participate in a remote hearing.

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participate in an in-person hearing and do not have access to the technology to participate remotely).

33. See *Arbitrator Training Videos for Virtual Hearings*, FINRA, <https://www.finra.org/arbitration-mediation/case-guidance-resources/virtual-hearings-videos> (last visited Jan. 7, 2023) (containing links to videos including Zoom Basics for Arbitrators, How to Set Up Your Environment, Effective Zoom Practices for Arbitrators, and Host Responsibilities for Arbitrators); *Securities Arbitration 2022*, PRACTISING L. INST., <https://www.pli.edu/programs/securities-arbitration?t=ondemand> (last visited Jan. 7, 2023) (“Recent and Upcoming Developments in FINRA Arbitration and Mediation” panel including FINRA representatives, claimant counsel, and respondent counsel); *FINRA Dispute Resolution Services and FINRA News*, 3 THE NEUTRAL CORNER (FINRA, Washington D.C.), Sept. 30, 2021, at 13, <https://www.finra.org/sites/default/files/2021-09/neutral-corner-volume-3-2021-0930.pdf> (describing Practising Law Institute program as including “advocacy tips in virtual arbitrations and mediations”).

34. *Neutral Workshop Audio and Video Files*, FINRA, <https://www.finra.org/arbitration-mediation/neutral-workshop-audio-and-video-files> (last visited Jan. 7, 2023) (containing Fall 2020 Neutral Workshop: Tips for Virtual Hearings segment that included a mock virtual arbitration proceeding segment).

35. See, e.g., *Education and Training*, 3 THE NEUTRAL CORNER (FINRA, Washington D.C.), Sept. 29, 2020, at 12, <https://www.finra.org/sites/default/files/2020-09/neutral-corner-volume-3-2020-0929.pdf> (describing and sharing links to videos for arbitrators and virtual conference panel discussion where panelists “offer tips and resources for conducting effective Zoom virtual arbitration hearings and share the latest in arbitration procedures”).

### C. Identification of Existing Infrastructure and Forum Characteristics Facilitating Swift Pivot to and Support of Remote Hearings During Emergency Phases of the Pandemic

This section uncovers characteristics of the FINRA forum that facilitated its continued operation during the emergency phases of the pandemic. FINRA's pivot to remote operations, provision of resource guides, and outreach efforts may have been facilitated by existing infrastructure in three key areas: (1) prior investment in technology; (2) a commitment to transparency; and (3) a practice of and commitment to routinely soliciting stakeholder feedback and recommendations. Identifying these areas may assist in review and improvement of operations within other arbitration forums that do not currently have similar infrastructure.

First, FINRA's DRS forum has dedicated technology support and regularly evaluates forum operations to ensure that technology assets are both up to date and able to facilitate operations.<sup>36</sup> FINRA DRS Director, Richard Berry, explained in an email communication to forum stakeholders on March 30, 2020, that technological infrastructure implemented years before the COVID-19 pandemic, including work-from-home capabilities, paperless files, and an online case management system permitted FINRA to swiftly pivot to remote operations.<sup>37</sup> As will be discussed in Part III.E., *infra*, FINRA DRS access to dedicated technologists also proved crucial in refining the technology available at FINRA's in-person hearing locations to facilitate hybrid arbitration hearings.<sup>38</sup>

Second, FINRA has chosen to include as a feature of its forum a measure of transparency that is unusual for a mandatory arbitration forum.<sup>39</sup> All decisions rendered in FINRA arbitration proceedings—known as “awards”<sup>40</sup>—are publicly available.<sup>41</sup> This

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36. *Office of Dispute Resolution (ODR) and FINRA News*, *supra* note 13, at 1.

37. Email from Richard Berry, Exec. V.P. & Dir. FINRA Disp. Resol. Serv., to author (Mar. 30, 2020, 17:01 EST) (on file with *Stetson Law Review*) (describing ability of FINRA Dispute Resolution to operate completely remotely).

38. *See infra* note 149.

39. *See generally* Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 Nev. L.J.F. 1, 8 (2019) (describing relative greater transparency of FINRA forum and recommending additional study of those measures).

40. FINRA, RULE 12100(c) (2022) (“An award is a document stating the disposition of a case.”).

41. *Decision & Award*, FINRA, <https://www.finra.org/arbitration-mediation/decision-award> (last visited Jan. 7, 2023) (“FINRA makes all arbitration awards publicly available

is a major point of contrast between the FINRA arbitration forum and other mandatory consumer arbitration forums: AAA and JAMS do not maintain a public database containing the full text of decisions rendered in their respective forums.<sup>42</sup> Accordingly, stakeholders can see—in real time—how customers fared in virtual arbitration proceedings.<sup>43</sup> In addition, FINRA provides detailed information concerning customer experiences in its securities arbitration forum.<sup>44</sup> For example, FINRA publishes and regularly updates statistics, including the percentage of cases in which consumer investors recover more than \$1 in damages, in the forum.<sup>45</sup> Additional disclosed information includes the frequency with which claims are alleged in the forum, how filed cases resolve (e.g., voluntary withdrawal, as a result of mediation, via direct party settlement, or decision by arbitrators), and the time it takes for FINRA arbitration cases to conclude.<sup>46</sup> FINRA also divides out consumer success rates in the forum and specifically details investor customers' results in remote arbitration hearings.<sup>47</sup>

FINRA DRS actively updates the information it provides relating to cases in the forum in light of stakeholder feedback and

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for free by posting them on Arbitration Awards Online.”); *Arbitration Awards Online*, FINRA, <https://www.finra.org/arbitration-mediation/arbitration-awards> (last visited Jan. 7, 2023) (providing means for members of public to access awards rendered in FINRA arbitration forum); *id.* (“FINRA’s Arbitration Awards database enables users to perform Web-based searches for FINRA and historical NASD arbitration awards free of charge, seven days a week.”).

42. FINRA, DISCUSSION PAPER—FINRA PERSPECTIVES ON CUSTOMER RECOVERY 3 (2018), [hereinafter FINRA PERSPECTIVES ON CUSTOMER RECOVERY] [https://www.finra.org/sites/default/files/finra\\_perspectives\\_on\\_customer\\_recovery.pdf](https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf).

43. Indeed, this transparency has made it possible to study how parties fared in FINRA remote arbitration proceedings. *See generally* Horton, *Forced Remote Arbitration*, *infra* note 181 (studying customer experiences with remote hearings in FINRA arbitration forum through public awards).

44. *Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics> (last visited Jan. 7, 2023).

45. *Id.*; *see also* Alexander & Iannarone, *supra* note 7, at 1750 (describing FINRA reporting of customer success as recovery of greater than \$1).

46. *Dispute Resolution Statistics*, *supra* note 44.

47. *Id.*; *see also* FINRA Unscripted, *supra* note 14 (“Rick Berry: One of the things we [FINRA] like to do is put out as much transparency as possible. So, when we saw that there were people wondering how are the Zoom hearings going? How are the parties faring in this? We decided to add Zoom hearings and in-person hearings to our website so you can see exactly what the outcomes are. So if you go to our stats page on FINRA.org, you can have that information and you’ll see that they’re very similar in terms of how often the claimant received damages. In addition to that transparency, we added information about how many stipulated Zoom hearings have been held and how many contested motions have been made and what the outcomes of those were. So, if you look at our website, you’ll see all that information too.”).

questions. For example, during the pandemic and in response to stakeholder questions about remote arbitration proceedings, FINRA added new categories of public information about customer hearings and began publicly sharing information about how remote hearings were operating within its forum, both in its online case statistics and through *The Neutral Corner* publication.<sup>48</sup> It revised its online arbitration statistics to include details concerning the number of opposed motions to proceed via a remote hearing where either the customer claimant or industry member respondent filed a motion seeking a remote hearing instead of an in-person hearing over the other party's objection.<sup>49</sup> It also amended its customer success rates to detail how investor claimants fared in virtual hearings.<sup>50</sup> From the beginning of the pandemic and through October 31, 2022, there have been 437 contested motions for virtual hearings in customer cases, 62% of which (263) were granted by arbitrators.<sup>51</sup> Throughout 2020, customers received recovery of at least \$1 in 40% of arbitration proceedings with at least one remote hearing, as compared to a 50% success rate for in-person hearings.<sup>52</sup> As of October 31, 2022, customers prevail at roughly the same rates in remote and in-person arbitration proceedings, 46% and 44% respectively.<sup>53</sup> Potential reasons for the initial customer success differential between remote and in-person hearings and the subsequent closing of that gap are described in Professor Gross's contribution to this symposium edition.<sup>54</sup>

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48. See, e.g., *FINRA Dispute Resolution Services and FINRA News*, THE NEUTRAL CORNER (FINRA, Washington D.C.), July 1, 2020, at 7, <https://www.finra.org/sites/default/files/2020-07/neutral-corner-volume-2-2020-0701.pdf> (detailing virtual hearing statistics, including 28 contested motions for remote hearings in customer cases, including 12 granted by the panel, and four joint motions for a remote hearing in a customer case); *FINRA Dispute Resolution Services and FINRA News*, 3 THE NEUTRAL CORNER (FINRA, Washington D.C.), at 4–5, <https://www.finra.org/sites/default/files/2020-09/neutral-corner-volume-3-2020-0929.pdf> (updating virtual arbitration hearing statistics); *FINRA Dispute Resolution Services and FINRA News*, 4 THE NEUTRAL CORNER (FINRA, Washington D.C.), at 10, <https://www.finra.org/sites/default/files/2020-12/neutral-corner-volume-4-2020-1222.pdf> (updating virtual arbitration hearing statistics).

49. *Dispute Resolution Statistics*, *supra* note 44.

50. *Id.*

51. *Id.*; see also Gross, *supra* note 15, at 375 (describing contested motions to proceed remotely and potential reasons for more contested motions in customer versus industry cases).

52. *Dispute Resolution Statistics*, *supra* note 44.

53. *Id.*

54. Gross, *supra* note 15, at 376.

Finally, FINRA DRS has historically engaged with forum stakeholders and sought their feedback concerning the operation of its securities arbitration forum in three main ways, all designed to assist FINRA in creating rules, procedures, and other guidance. First, FINRA surveys DRS forum participants at the conclusion of their cases. When every FINRA hearing concludes, parties and arbitrators receive a survey seeking their feedback about their experiences in the proceeding.<sup>55</sup> FINRA describes this Arbitrator Experience Survey as “essential” and uses the information it gathers to improve the FINRA DRS forum.<sup>56</sup> FINRA’s experience with surveying forum participants led it to actively solicit feedback from those participating in the earliest remote arbitration hearings in the forum and share findings with constituents.<sup>57</sup> For example, feedback obtained from the first fifteen virtual hearings conducted in the FINRA forum was shared with forum constituents via an article in FINRA’s *The Neutral Corner* publication.<sup>58</sup> Arbitration panels reported that while they were pleased with the ability to move forward remotely, they “wanted to make sure the virtual hearing experience did not sacrifice the

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55. See, e.g., FINRA, FINRA DISPUTE RESOLUTION SERVICES ARBITRATOR’S GUIDE 81 (2021), <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf> (“As part of FINRA’s ongoing effort to improve the arbitration process, FINRA encourages arbitrators to complete the Arbitrator Experience Survey at the end of every case. FINRA also asks parties to evaluate the arbitrators on their professionalism and conduct throughout the proceeding. FINRA staff evaluates arbitrators’ performance at the end of the case.”); FINRA, FINRA DISPUTE RESOLUTION SERVICES PARTY’S REFERENCE GUIDE 39 (2022), <https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf> (“As a service organization, the primary goals of the FINRA Dispute Resolution Services are the integrity of its process and the satisfaction of its clients. . . . To ensure that we are meeting your needs and satisfying our commitment to you, we need to hear from you. Please take the time to complete the evaluation. . . . Your responses to this survey will be kept confidential. Your feedback is a valuable and necessary component in our efforts to serve you better.”); *Arbitration Evaluation Form*, FINRA, <https://www.finra.org/arbitration-mediation/arbitration-evaluation-form> (last visited Jan. 7, 2023) (describing replacement of Arbitration Evaluation Form with Party Experience Survey and how to complete survey via Portal or share feedback via email to FINRA DRS).

56. *Portal Enhancement: New Arbitrator Experience Survey*, THE NEUTRAL CORNER (FINRA, Washington D.C.), Sept. 29, 2020, at 4, <https://www.finra.org/sites/default/files/2020-09/neutral-corner-volume-3-2020-0929.pdf> (“[The survey is] an essential part of FINRA DRS’s effort to ensure that arbitrators continue to meet their obligations to be fair, knowledgeable and professional. It also gives arbitrators an opportunity to evaluate FINRA DRS staff and the hearing facilities. Additionally, the survey helps us identify best practices and tips as well as suggestions for arbitrator training.”).

57. Nora Sassounian, *FINRA Arbitrators Successfully Conduct Virtual Hearings*, THE NEUTRAL CORNER (FINRA, Washington D.C.), July 1, 2020, <https://www.finra.org/sites/default/files/2020-07/neutral-corner-volume-2-2020-0701.pdf>.

58. *Id.*

important aspects of an in-person hearing.”<sup>59</sup> Arbitrators stated that the Zoom platform’s share screen and breakout room features had been helpful.<sup>60</sup> Arbitration panels also shared their experience that parties and the panel should meet in advance to plan for the logistics of a virtual hearing, including “creating a detailed schedule of when witnesses will be introduced and how exhibits will be presented” (either virtually via shared screen, via the DRS Portal, or mailed to the panel by FINRA).<sup>61</sup> In a subsequent edition of *The Neutral Corner*, FINRA interviewed two attorneys—one claimant counsel and one respondent counsel—who had participated in virtual customer arbitration proceedings and shared those lawyers’ experiences, feedback, and tips.<sup>62</sup>

Second, FINRA DRS representatives have established relationships with forum constituents and regularly meet and otherwise engage with them. For example, FINRA DRS attends the annual Securities Arbitration Clinic Roundtable and solicits feedback from the clinics’ directors, who are law professors with deep experience representing small claim investors not otherwise able to obtain legal assistance in the FINRA forum.<sup>63</sup> FINRA DRS participates in annual meetings of the Securities Industry Conference on Arbitration (“SICA”), PIABA, and Securities Industry and Financial Markets Association (“SIFMA”), sharing information about recent activities, fielding attendee questions, and providing tips for DRS hearings.<sup>64</sup>

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59. *Id.*

60. *Id.*

61. *Id.*

62. Dan Zailskas, *Virtual Arbitration: Best Practices for COVID Times and Beyond*, THE NEUTRAL CORNER (FINRA, Washington D.C.), Dec. 22, 2020, at 5–8, <https://www.finra.org/sites/default/files/2020-12/neutral-corner-volume-4-2020-1222.pdf> (interviewing attorneys Sam Edwards and Demian Betz about their virtual hearing experiences).

63. *Securities Clinic Hosts Annual Roundtable*, *supra* note 30 (describing annual Securities Arbitration Clinic Roundtable); *see also* Nicole G. Iannarone et al., *FINRA Special Notice: Engagement Initiative Dated March 21, 2017*, FINRA 5–6 (June 19, 2017), [https://www.finra.org/sites/default/files/notice\\_comment\\_file\\_ref/SN-32117\\_GSU\\_comment.pdf](https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf) (describing regulator and clinic director engagement through annual Fordham roundtable).

64. *See, e.g., C&L Virtual Forum Program*, SIFMA (Sept. 23–24, 2020), <https://www.sifma.org/wp-content/uploads/2020/07/cl-virtual-forum-program-v4.pdf> (listing “Arbitration 2020” panel including FINRA DRS’s Richard Berry as panelist); *2022 PIABA Annual Meeting Brochure*, PIABA (Oct. 25–28, 2022), <https://piaba.org/system/files/calendar/2022%20PIABA%20Annual%20Meeting%20Brochure.pdf> (listing “Review of FINRA DR[S] Activities & Developments in 2022” panel described as “Discussions include FINRA arbitration issues, approved rule changes, and rule proposals”); *Securities Arbitration 2022*, *supra* note 33 (“Recent and Upcoming Developments in FINRA Arbitration and Mediation” panel including FINRA representatives, claimant counsel, and

Third, FINRA DRS has a formal governance mechanism for soliciting advice from DRS forum stakeholders, the National Arbitration and Mediation Committee (“NAMC”), an advisory committee with which it regularly consults concerning the mandatory securities arbitration forum.<sup>65</sup> The NAMC has “the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board.”<sup>66</sup> The NAMC is charged with, among other things, advising FINRA “on the development and maintenance of an equitable and efficient system of dispute resolution that will equally serve the needs of public investors and FINRA members.”<sup>67</sup> There are presently thirteen NAMC members, including six each representing the public and the industry, and led by the public chair.<sup>68</sup> The author became NAMC Chair in June 2021 and has been a public member since June 2018. NAMC members have varied experiences and “include investors, securities industry professionals and FINRA arbitrators and

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respondent counsel); Matthew Kipnis, *FINRA Dispute Resolution Services and FINRA News*, THE NEUTRAL CORNER (FINRA, Washington D.C.), Sept. 30, 2021, at 13, <https://www.finra.org/sites/default/files/2021-09/neutral-corner-volume-3-2021-0930.pdf> (describing Practising Law Institute program as including “advocacy tips in virtual arbitrations and mediations”). The author participated on two panels with FINRA DRS representatives during the SICA 2021 meeting on November 12, 2021, *Recent NAMC Business* and *Zoom Hearings in the FINRA Forum*. Each panel described recent FINRA DRS activities and solicited feedback from SICA members and other attendees about remote hearings.

65. *Advisory Committees*, FINRA, <https://www.finra.org/about/governance/advisory-committees> (last visited Jan. 7, 2023) (“FINRA has 12 advisory committees that provide feedback on rule proposals, regulatory initiatives and industry issues.”); *id.* (“The NAMC also makes recommendations on rules, regulations and procedures that govern the conduct of arbitration, mediation, and other dispute resolution matters before FINRA.”). The author currently serves as Chair and a public member of the NAMC.

66. FINRA, RULE 12102(b) (2022).

67. FINRA, FINRA MANUAL § II.3.C.a (2015), <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/ii-finra-regulation-inc>; FINRA, The Mission of the National Arbitration and Mediation Committee (Sept. 25, 2009) (unpublished manuscript) (on file with author) (“To perform its Mission, it is the role of the [NAMC] to: Remain informed about the scope and nature of the arbitration and mediation programs of FINRA by reviewing materials provided to the Committee by staff on a regular basis. Serve as a sounding board for the staff by reviewing and commenting upon operations and policy proposals. Identify and review issues requiring study or action regarding dispute resolution processes. Provide advice regarding long term strategy for dispute resolution programs . . . Recommend to the staff and the Board procedures for the conduct of arbitration and mediation proceedings, assist in the development and implementation of other dispute resolution mechanisms, and recommend amendments to the Code of Arbitration Procedure and Mediation Rules.”).

68. *National Arbitration and Mediation Committee*, FINRA (June 1, 2022), <https://www.finra.org/arbitration-mediation/national-arbitration-and-mediation-committee-namc>.

mediators.”<sup>69</sup> A public majority on NAMC is intentional: FINRA states that “[t]his diverse composition ensures a neutral approach in the administration of Dispute Resolution’s forum, promoting fairness to all parties.”<sup>70</sup> The NAMC meets as a full committee multiple times per year to consider and discuss the operations of the FINRA DRS forum.<sup>71</sup> It develops and approves recommended rules and procedures for the forum.<sup>72</sup> As part of its role in making recommendations, NAMC members and staff liaisons engage with forum constituents to surface concerns, receive feedback on operations, and provide information about activities.<sup>73</sup> FINRA solicited and relied upon feedback, as detailed in Part III, *infra*, from NAMC throughout the pandemic emergency.<sup>74</sup>

Throughout the emergency stages of the pandemic, FINRA relied on its existing infrastructure. The combination of prior technological investment, transparency, and engagement with stakeholders facilitated the forum’s continued operations during the early phases of the pandemic. Though many arbitration forums leveraged prior technological infrastructure to continue operations during the pandemic, FINRA’s leveraging of transparency and engagement infrastructure may set it apart from those other arbitration forums. In particular, soliciting feedback and comments from the NAMC, engaging other constituents with which it had previously developed relationships, and surveying—formally and informally—remote hearing participants assisted in the transition to emergency remote hearings. As will be discussed in the next Part, these strategies also aided subsequent evaluation of whether and to what extent remote hearings would become a permanent feature in the FINRA securities arbitration forum.<sup>75</sup>

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69. *Advisory Committees*, *supra* note 65. For example, the author is a FINRA arbitrator in addition to having previously represented claimant investors in the FINRA forum as Director of a law school clinic providing *pro bono* representation to investors with smaller claims in the FINRA forum.

70. *Id.*

71. *Id.*

72. *Id.*

73. For example, the author has attended and reported on recent NAMC activities during the Securities Arbitration Clinic Roundtable hosted by Fordham Law School, the Securities Industry Conference on Arbitration (“SICA”), and the Practising Law Institute Securities Arbitration Seminar. FINRA Dispute Resolution Services also regularly engages with these audiences and others and includes such public outreach and engagement efforts in the Director’s Report prepared for each NAMC meeting.

74. Sassounian, *supra* note 57.

75. See *infra* pt. IV, for further exploration of how these (and additional) characteristics may position the securities arbitration forum as an exemplar mandatory arbitration forum.



### III. FINRA EVALUATION OF REMOTE HEARINGS AFTER THE PANDEMIC

During the eighteen months when FINRA's live hearing locations were closed and the only hearings that could proceed did so virtually or in-person by agreement of all participants,<sup>76</sup> stakeholders learned a number of lessons.<sup>77</sup> Throughout the pandemic, the NAMC continued to meet, albeit virtually, and frequently discussed remote hearings as part of its charge to study and recommend changes to the FINRA DRS forum.<sup>78</sup> As the world began to open and vaccines became more readily available, the NAMC began discussions focused on whether and to what extent arbitration hearings held entirely or partially remotely on video

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76. FINRA administratively postponed all hearings in March 2020 with the closure of all of its in-person hearing locations. All hearing locations reopened effective August 2, 2021. FINRA, FINRA Dispute Resolution Services Update (Aug. 2021) (unpublished manuscript) (on file with author); FINRA, *Coronavirus Impact on Arbitration & Mediation Hearings*, [hereinafter FINRA, *Coronavirus Impact*] <https://www.finra.org/rules-guidance/key-topics/covid-19/hearings/impact-on-arbitration-mediation> (last visited Jan. 23, 2023). However, FINRA has policies in place permitting it to cease or modify in-person hearings in the event health and safety so requires. FINRA, *Coronavirus Impact, supra* (detailing safety protocol for in-person hearings); Victoria Bonadies, *Vaccination Requirement for In-Person Participants (Except in Florida Hearing Locations)*, THE NEUTRAL CORNER (FINRA, Washington D.C.), June 27, 2022, at 3–4, <https://www.finra.org/sites/default/files/2022-06/neutral-corner-volume-2-2022-0627.pdf> (“Effective June 6, 2022 through December 31, 2022, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses and others, must be fully vaccinated to attend DRS arbitration hearings or mediation sessions (hearing). . . . All in-person participants must also attest that they have taken a negative PCR or antigen test within 24 hours of the start of the hearing and every 24 hours during the course of the hearing.”); Victoria Bonadies, *Testing Requirement for In-Person Participants (Florida Hearing Locations Only)*, THE NEUTRAL CORNER (FINRA, Washington D.C.), June 27, 2022, at 4, <https://www.finra.org/sites/default/files/2022-06/neutral-corner-volume-2-2022-0627.pdf> (“Effective June 6, 2022 through December 31, 2022, for cases with in-person arbitration hearings or mediation sessions (hearing) in Florida, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses and others must attest that they have taken a negative PCR or antigen test within 24 hours of the start of the hearing and every 24 hours during the course of the hearing.”).

77. See, e.g., FINRA Unscripted, *supra* note 14 (podcast featuring Executive Vice President of FINRA Dispute Resolution Services, investor claimant counsel, and in-house brokerage firm counsel discussing “lessons learned, tips for practicing in a remote environment and plans for the future of arbitration and mediation”).

78. FINRA, FINRA MANUAL, *supra* note 67, § II.3.C.a (describing role of NAMC and its composition); FINRA, RULE 14102 (2022) (“[T]he [FINRA] Board shall appoint a National Arbitration and Mediation Committee (‘NAMC’) . . . [which] shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the [FINRA] Board.”).

should become a permanent part of the FINRA DRS arbitration forum.<sup>79</sup>

This Part provides a first-hand descriptive account of steps taken by the NAMC in the FINRA securities arbitration forum after the emergency stages of the pandemic. It is informed by the author's membership on and role as Chair of the FINRA NAMC, work with the Zoom Task Force ("ZTF"), and participation in stakeholder meetings and discussions concerning post-pandemic remote arbitration in the FINRA DRS forum. This descriptive account is provided for three reasons. First, it seeks to bring light to actions and information that—despite FINRA's greater transparency than most arbitral forums—may not otherwise be available to the general public. Second, it may serve as a template or framework for other mandatory consumer arbitration forums seeking to evaluate remote hearings. Finally, it serves to inform FINRA DRS stakeholders and, in doing so, provide accountability.

This Part begins with a discussion of the creation of a Zoom Task Force ("ZTF"), a description of the ZTF's composition and structure, and survey and data collection efforts to inform the ZTF's agenda. It then describes the work of the ZTF, including a pilot program to move telephonic hearings to the Zoom video platform and recommending changes to rules, procedures, and guidance in light of experiences in remote hearings during the emergency phases of the pandemic. This Part concludes with a discussion of open questions that remain to be resolved.

#### A. Creation of the Zoom Task Force

Throughout the emergency phase of the pandemic, the NAMC discussed issues relating to remote hearings and asked for guidance concerning when FINRA DRS anticipated recommencing in-person arbitration hearings. During NAMC's February 2021 meeting, committee members began what would become a series of conversations aimed towards the potential permanent adoption of remote hearings.<sup>80</sup> In this meeting, NAMC members identified issues that should be evaluated and studied before making fully or partially remote video hearings a permanent feature of the FINRA

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79. Memorandum from FINRA on Zoom Task Force to the Nat'l Arb. & Mediation Comm. (Feb. 16, 2022) (on file with author).

80. *Id.*

forum.<sup>81</sup> As an initial matter, NAMC recommended that FINRA DRS seek feedback from participants in remote arbitration proceedings, including arbitrators and party representatives (or parties who represent themselves).<sup>82</sup> Members also recommended creating criteria and guidance for whether certain witnesses could appear remotely as part of an otherwise in-person hearing or when an entire arbitration proceeding would proceed remotely.<sup>83</sup> Such recommendations were necessary if the parties could not reach an agreement as to whether and what role a remote hearing might play in their case.<sup>84</sup>

As discussions concerning remote hearings continued, it quickly became clear that the many issues presented by remote hearings would require significant time and attention. A mechanism through which FINRA and the NAMC could study, identify, and remedy issues relating to remote hearings that had surfaced during the emergency phase of the pandemic was needed. In response, FINRA formed a Zoom Task Force (“ZTF”), which operated as a subcommittee of the NAMC.<sup>85</sup> FINRA charged the ZTF with making recommendations concerning whether and how virtual arbitration proceedings could or should become a permanent part of the FINRA DRS forum.<sup>86</sup> The NAMC would then consider ZTF’s recommendations and determine whether they should be recommended to FINRA’s Board of Governors and subsequently filed with the SEC for approval.

During the June 2021 NAMC meeting, FINRA discussed the formation of the ZTF, and NAMC members provided advice and guidance for shaping the ZTF’s agenda.<sup>87</sup> For example, NAMC members recommended that party representatives (or pro se parties, as applicable) and arbitrators who participated in remote

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81. *Id.*

82. *Id.*

83. *Id.*

84. The FINRA Code of Customer Arbitration Procedure provides parties great latitude to agree upon procedures for their hearing. FINRA, RULE 12105 (2022).

85. Memorandum from FINRA on FINRA Dispute Resolution Services (DRS) Zoom Task Force to the Nat’l Arb. & Mediation Comm. (May 27, 2021) (on file with author).

86. FINRA Unscripted, *supra* note 14 (“Rick Berry: [O]ne thing that we’re always trying to do at FINRA DRS is continuously improve. And one of the ways we want to do that in this Zoom area is convene practitioners from both sides in a Zoom task force to help us make sure that we improve the process, that we look at ways to use Zoom in new and better ways.”).

87. *See, e.g.*, Memorandum from FINRA on FINRA Dispute Resolution Services (DRS) Zoom Task Force, *supra* note 85 (posing questions for discussion during June 2021 NAMC meeting).

hearings when in-person hearings were suspended be queried about their experiences before the ZTF began its work in earnest.<sup>88</sup> Additional topics considered by the NAMC and referred to the ZTF for discussion in its first meeting included arbitrator equipment needs for participation in virtual hearings; rules, procedures, and guidance needed for permanent adoption of fully or partially remote arbitration proceedings; and conducting prehearing conferences virtually instead of via telephone.<sup>89</sup>

### B. ZTF Membership and Meetings

The ZTF held its inaugural meeting on July 26, 2021.<sup>90</sup> ZTF comprises eight members, four of whom represent investors and four of whom represent financial industry entities in FINRA arbitration, in addition to FINRA staff liaisons and the NAMC Chair (*ex officio*).<sup>91</sup> Two ZTF members are also arbitrators on FINRA's neutral roster.<sup>92</sup> Many ZTF members have experience representing parties in remote FINRA proceedings, in-person hearings, and experience on the NAMC.<sup>93</sup> FINRA intentionally selected ZTF members to represent different forum constituents, including law school clinics who represent investors with small claims, claimant-side firms with smaller and larger offices, respondent-side firms with smaller and larger offices, in-house counsel, and small broker-dealer firm representatives. During its foundational meeting, ZTF created an action plan for fulfilling its

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88. *Id.* (describing NAMC recommendation that DRS survey case participants concerning virtual hearing experiences).

89. *Id.* (detailing ZTF and suggesting discussion questions for NAMC June 2021 meeting).

90. FINRA, Keynote Presentation at DRS Zoom Task Force Inaugural Meeting (May 18, 2022) (unpublished presentation) (on file with author).

91. *Id.* The investor counsel members include: Sam Edwards, Elissa Germaine, Peter Mougey, and Darlene Pasieczny. Industry counsel members include: Ester Cho, Lisa Roth, Brad Rounsaville, and Beverly Jo Slaughter. FINRA staff members included: Richard Berry (FINRA Executive Vice President and Director of Dispute Resolution Services) Nora Sassounian, Cassandra Bartlett, and Terresa Byrd. The author served as an *ex officio* member as NAMC chair. *Id.*

92. Lisa Roth and Nicole G. Iannarone (the author) are both arbitrators on the FINRA arbitration roster.

93. For example, former NAMC member Sam Edwards and current NAMC member Beverly Jo Slaughter have represented claimants and respondents in both in-person and virtual hearings. See FINRA Unscripted, *supra* note 14 (including statements from Edwards and Slaughter concerning their experiences in virtual hearings).

charge.<sup>94</sup> Through numerous subcommittee meetings in addition to full ZTF meetings on October 1, 2021, November 30, 2021, January 6, 2021, March 8, 2022, and May 18, 2022, the ZTF addressed issues related to remote arbitration proceedings.<sup>95</sup> The following sections detail the ZTF's work, recommendations, and, where applicable, NAMC and FINRA Board of Governors actions related thereto.

### C. Collecting Information to Evaluate Remote FINRA Arbitration

Though ZTF comprised expert practitioners and FINRA staff liaisons with significant experience in and knowledge of remote hearings in the FINRA forum, it did not encompass the entire range of experiences with virtual securities arbitration proceedings. Accordingly, the ZTF agreed with the NAMC's recommendation that FINRA DRS query arbitrators and party representatives about their experiences in virtual arbitration hearings. As discussed more fully in Part II.C., above, FINRA DRS routinely surveys parties and arbitrators in its securities arbitration forum.<sup>96</sup> FINRA DRS collected and reported statistics related to contested motions to proceed remotely and customer results in arbitration proceedings with at least one virtual hearing.<sup>97</sup> This aggregate information did not, however, provide information upon which to base policy recommendations.<sup>98</sup> FINRA DRS was interested in obtaining a wider range of feedback than the informal comments it received directly from participants with which it had previous relationships. Accordingly, FINRA designed a new proposed survey instrument to collect a wider range of feedback on virtual hearing experiences.<sup>99</sup> ZTF members provided suggestions as to which remote hearing participants should be surveyed, recommending that arbitrators and party

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94. FINRA, Keynote Presentation at DRS Zoom Task Force Inaugural Meeting, *supra* note 90 (presentation at 4).

95. *Id.*

96. FINRA DISPUTE RESOLUTION SERVICES ARBITRATOR'S GUIDE, *supra* note 55, at 81 (describing FINRA DRS surveys of participants and arbitrators).

97. *Dispute Resolution Statistics*, *supra* note 44 (describing FINRA reporting of statistics concerning remote arbitration proceedings).

98. *Id.*

99. See generally Shannon Bond, *Pilot Programs: Prehearing Conferences by Zoom*, THE NEUTRAL CORNER (FINRA, Washington D.C.), Mar. 30, 2022, <https://www.finra.org/sites/default/files/2022-03/neutral-corner-volume-1-2022-0330.pdf> (describing survey date range and general questions).

representatives (or pro se parties) be surveyed.<sup>100</sup> ZTF decided that the survey period should focus on securities arbitration proceedings in which at least one virtual hearing was held between March 2020 and August 2021, the beginning of the pandemic emergency through the date upon which all of FINRA's hearing locations were open for in-person proceedings.<sup>101</sup> ZTF supported FINRA's recommendation to query arbitrators and party representatives as to their satisfaction with remote hearings in customer cases, and whether they supported moving telephonic prehearing conferences to a virtual modality.<sup>102</sup> Additional questions included technology used by participants, whether they had any difficulties participating in remote hearings, and factors that may lead them to participate in a remote hearing in the future.<sup>103</sup> FINRA DRS ultimately sent two surveys to both groups of remote hearing participants: one for party representatives (or pro se parties, as applicable) and the other for arbitrators.<sup>104</sup>

Surveys were sent to 1,528 participants in remote hearings, 706 party participants and 822 arbitrators.<sup>105</sup> FINRA has publicly shared selected portions of the results.<sup>106</sup> With FINRA's express permission, the survey questions and aggregate responses that were provided to the ZTF and the NAMC are appended to this Article.<sup>107</sup> The surveys were open for response for almost a month, from October 29, 2021, through November 26, 2021.<sup>108</sup> Multiple reminders were sent to survey recipients to complete the survey. FINRA DRS received over 600 responses to the surveys, 492 from arbitrators and 117 from parties and their representatives.<sup>109</sup> The response rate was much lower from party participants (approximately 17%) than from arbitrators (approximately

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100. *Id.*

101. *Id.* at 1 (describing survey date range and general questions).

102. *Id.*

103. See generally *infra* Appendix A (showing presentation slides of FINRA Zoom Arbitrator Survey Results); *infra* Appendix B (showing presentation slides of FINRA Zoom Participant Survey Results).

104. See generally *infra* Appendices A–B.

105. *Infra* Appendix A, at slide 94; *infra* Appendix B, at slide 133.

106. See Bond, *supra* note 99 (detailing party satisfaction with virtual hearings, FINRA DRS staff, and support for moving prehearing conferences from telephone to virtual modality). FINRA DRS representatives have also described the results in presentations to stakeholder groups, including SICA and the Securities Arbitration Clinic Roundtable.

107. See generally *infra* Appendices A–B.

108. *Infra* Appendix A, at slide 95.

109. Bond, *supra* note 99, at 1 (describing survey date range and general questions).

60%).<sup>110</sup> The majority of responses received to the party participant survey (69% total) comprise claimants' counsel (48%) or pro se parties (21%).<sup>111</sup> Party respondents generally reported a positive experience in the forum: 74% of virtual hearing participants described the hearing experience as exceptional or good, 15% as satisfactory, and 12% as unsatisfactory.<sup>112</sup> The vast majority of arbitrators—91%—described their experience as exceptional or good, 9% as satisfactory, and less than 1% as unsatisfactory.<sup>113</sup>

Survey responses suggested that remote hearings had proven popular during the pandemic and would likely continue after the pandemic emergency subsided.<sup>114</sup> For example, over 75% of party participant survey respondents indicated that cost and expense would influence their decision to participate in a virtual hearing in the future.<sup>115</sup> Additional factors that would lead parties to participate in future remote hearings included concerns with COVID-19 and variants (69%), a distant hearing location (65%), and issues related to travel (59%).<sup>116</sup> Arbitrators responded similarly.<sup>117</sup> The factors that would lead arbitrators to participate in a remote hearing in the future included: concerns with COVID-19 and variants (76%), issues related to travel (55%), a distant hearing location (52%), and costs and expenses (34%).<sup>118</sup>

Responses also indicated strong support for moving prehearing conferences, which are generally held by telephone, to a virtual format.<sup>119</sup> Over 85% of remote hearing party participants indicated support for conducting prehearing conferences via Zoom video rather than telephone, with 77% indicating the that Initial Prehearing Conference should be conducted via video and 83% supporting moving discovery prehearing conferences to Zoom.<sup>120</sup> Arbitrators responded similarly, with 75% recommending moving the Initial Prehearing Conference to a virtual format, 80% supporting virtual discovery prehearing conferences, and 85%

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110. *See infra* Appendix A, at slide 95; *infra* Appendix B, at slide 134.

111. *Infra* Appendix B, at slide 168.

112. *Id.* at slide 135.

113. *Infra* Appendix A, at slide 97.

114. *See generally id.*; *infra* Appendix B.

115. *Infra* Appendix B, at slide 160.

116. *Id.*

117. *Infra* Appendix A, at slide 121.

118. *Id.*

119. Bond, *supra* note 99 (describing survey date range and general questions).

120. *Infra* Appendix B, at slide 164.

supporting the movement of all other prehearing conferences to a video format.<sup>121</sup>

Questions addressing concerns anecdotally reported to NAMC and FINRA DRS provided useful information for the ZTF. For example, stakeholders relayed concerns that the pivot to remote hearings would impact some participants who may not have stable access to or comfort with the technology required to meaningfully participate in a remote arbitration proceeding.<sup>122</sup> Participant survey responses uncovered that access to technology was a concern to approximately 19% of respondents.<sup>123</sup> Most of these respondents identified lack of access to a laptop or desktop and unstable internet connections as concerns.<sup>124</sup> Approximately 11% of arbitrators responded that access to technology was a concern they faced.<sup>125</sup>

After FINRA presented the aggregate survey responses, ZTF worked through several subcommittees which began identifying areas where changes in rules, procedures, scripts, letters, or other guidance would be needed. These initial subcommittees included: the Expanding Zoom to Prehearing Conferences Group; the Hybrid Hearings Group; and the Arbitrator Equipment Needs Group.<sup>126</sup> Work would also be completed through additional subsequent subcommittees, including the following subcommittees: Pro Se Litigants and Zoom Challenges; Potential Rule Changes; and Additional Zoom Training for Arbitrators.<sup>127</sup> The remainder of Part III addresses the work of those subcommittees and proposals considered as a result of the ZTF's work.

#### D. Pilot Project: Replacing Telephonic Prehearing Conferences with Virtual Prehearing Conferences

The first change enacted by the ZTF and the NAMC was considered because the initial stages of the pandemic illustrated an area where technology had not been deployed to its fullest advantage in pre-pandemic FINRA arbitration: the initial

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121. *Infra* Appendix A, at slide 125.

122. *Infra* Appendix B, at slide 141.

123. *Id.* at slide 142.

124. *Id.* at slide 144.

125. *Infra* Appendix A, at slide 103.

126. FINRA, Keynote Presentation at DRS Zoom Task Force Inaugural Meeting, *supra* note 90 (presentation at 4).

127. *Id.* (presentation at 9).



prehearing conference. Experiences during the emergency phases of the pandemic and survey responses prompted FINRA DRS, the NAMC, and the ZTF to evaluate whether virtual—instead of telephonic—hearing sessions would improve operations in the FINRA DRS forum. Prior to the pandemic, FINRA DRS heavily relied upon telephone conference calls as the default modality for all prehearing conferences.<sup>128</sup> As a result of feedback gathered from surveys and informal feedback to FINRA,<sup>129</sup> the ZTF considered whether FINRA should change the default modality of prehearing conferences from telephonic to video.<sup>130</sup>

In FINRA arbitration proceedings, an Initial Prehearing Conference (“IPHC”) is held in all cases where the customer investor seeks more than \$50,000 or, in cases involving less than \$50,000, requests a regular hearing or a Special Proceeding.<sup>131</sup> The IPHC, which pre-COVID was “generally held by telephone,”<sup>132</sup> is the first opportunity for the parties, counsel, and arbitrators to meet concerning the proceeding.<sup>133</sup> During the IPHC, the arbitrator panel “will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters.”<sup>134</sup> Additional prehearing conferences may also be held in the FINRA forum, including hearings to address discovery disputes, witness lists, scheduling issues, and

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128. *Id.* (presentation at 6).

129. *See generally infra* Appendices A–B (showing the majority of respondents supporting conducting prehearing conferences via video as opposed to telephonically); FINRA Unscripted, *supra* note 14 (“Rick Berry: One of the things that we hear from some practitioners, and we’ll see what the task force says, is that maybe we should be having some of our pre-hearing conferences by Zoom instead of telephone. So, we’re going to convene this task force to get practitioner guidance. We also will be working with our arbitrators to get more feedback from them.”).

130. FINRA, RULE 12500 (2022) (“Initial Prehearing Conference”).

131. FINRA, RULE 12000, pt. V (2022) (“Prehearing Procedures and Discovery”); FINRA, RULE 12500 (2022) (“Initial Prehearing Conference”); FINRA, RULE 12800(a) (2022) (describing simplified arbitration rules for claims involving \$50,000 or less); FINRA, RULE 12800(c)(1) (2022) (“No hearing will be held in arbitrations administered under this rule unless the customer requests a hearing.”); FINRA, RULE 12800(c)(2) (2022) (“If no hearing is requested, no initial prehearing conference or other prehearing conference will be held . . .”).

132. FINRA, RULE 12500(b) (2022).

133. *Pre-Hearing Conferences*, FINRA, <https://www.finra.org/arbitration-mediation/prehearing-conferences> (last visited Jan. 7, 2023) (“Once the panel is appointed, FINRA schedules the Initial Pre-Hearing Conference (IPHC). The IPHC is the first time that the parties and arbitrators meet . . .”).

134. FINRA, RULE 12500(c) (2022) (stating IPHC is similar in many regards to both discovery and scheduling conferences in federal court). *See, e.g.*, FED. R. CIV. P. 26(f) (describing discovery conference); FED. R. CIV. P. 40 (concerning procedures for scheduling trials).

other motions.<sup>135</sup> Like the IPHC, these hearings have typically been held over the telephone.<sup>136</sup> Motions to dismiss, though “discouraged” and rare because they are only permitted on extremely narrow grounds, may also be heard telephonically.<sup>137</sup>

Positive party and arbitrator experiences with the video hearings during the COVID-19 pandemic led the ZTF to recommend moving all prehearing conferences to a video default so parties and arbitrator panels could better engage on the important matters decided during these hearings.<sup>138</sup> ZTF members supported steps to enhance connection, interaction, and engagement between the arbitrators and the parties by adding a video component to the FINRA forum’s prehearing conferences.<sup>139</sup>

As a result of the ZTF’s advice and feedback, FINRA conducted two pilot programs in February 2022 to hold all prehearing conferences via the Zoom platform.<sup>140</sup> In the first pilot program, the Los Angeles FINRA hearing location conducted all prehearing conferences via Zoom video.<sup>141</sup> The second pilot, in the

135. FINRA, RULE 12501(b) (2022).

136. FINRA, RULE 12501(c) (2022) (“Prehearing conferences will generally be held by telephone.”).

137. FINRA, RULE 12504(a)(1) (2022) (“Motions to dismiss a claim prior to the conclusion of a party’s case in chief are discouraged in arbitration.”); *id.* at (a)(5) (“The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. . . .”); *id.* at (a)(6) (“The panel cannot act upon a motion to dismiss . . . unless the panel determines that (A) the non-moving party previously released the claim(s) . . . (B) the moving party was not associated with the account(s), security(ies), or conduct at issue; or (C) The non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award or decision.”). Parties may file motions to dismiss based upon allegations that the claim or dispute is not eligible to be decided in the FINRA forum. *See* FINRA, RULE 12206 (2022). If such a motion is granted, however, the dismissal “does not prohibit a party from pursuing the claim in court.” *id.* at (b).

138. *See* E-mail from Nora Sassonian to ZTF Members (Feb. 7, 2022) (on file with author) (describing responses in favor of moving prehearing conferences from telephonic to virtual modality).

139. Elayne E. Greenberg, *Blinding Justice and Video Conferencing?*, 52 STETSON L. REV. 275 (2022) (discussing how participants noted that they enjoyed the informality of telephonic hearings, which gave them greater flexibility as to their location and appearance). Relatedly, as other contributions to this symposium have recognized, video can highlight differences that may lead to unconscious bias. *Id.*

140. E-mail from Nora Sassonian to ZTF Members, *supra* note 138 (“[S]urveys revealed that the arbitrators and party participants are in favor of having initial prehearing conferences, discovery prehearing conferences and other prehearing conferences take place by Zoom instead of by telephone.”); *Pre-Hearing Conferences*, *supra* note 133 (describing virtual pre-hearing conferences).

141. *FINRA Dispute Resolution Services (DRS) and FINRA News*, THE NEUTRAL CORNER (FINRA, New York, N.Y.), 2022, at 6, <https://www.finra.org/sites/default/files/2022-06/neutral-corner-volume-2-2022-0627.pdf>.

New York, Chicago, and Boca Raton FINRA hearing locations, involved using Zoom video for discovery motions and motions to dismiss; all other prehearing conferences, including IPHCs, were conducted in the default modality: telephonically.<sup>142</sup>

During the pilots, FINRA reported that 847 prehearing conferences were held using the Zoom platform, 312 with video and 535 with audio only.<sup>143</sup> FINRA received positive feedback in the initial two pilot programs, causing it to pivot in July 2022 to one nationwide pilot program whereby all prehearing conferences would be held via Zoom with video.<sup>144</sup> The IPHC scripts for both single arbitrator and three arbitrator panel cases have been updated to reflect that prehearing conferences will be generally held via videoconference unless the parties agree or the arbitrator orders otherwise.<sup>145</sup> The NAMC recommended in its February 2022 meeting that the FINRA Board of Governors amend FINRA's arbitration rules to reflect that pre-hearing conferences will generally be held via remote video conference instead of by telephone. FINRA's Board of Governors approved this recommended rule change for filing with the SEC during its September 2022 meeting.<sup>146</sup>

Prior to reconsidering the use of telephonic proceedings in prehearing conferences, the NAMC also considered whether another area where telephonic hearings are held by default—

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142. *Id.*

143. *See id.*

144. *Pre-Hearing Conferences*, *supra* note 133 (“Starting on July 1, 2022, there will only be one pilot program. All pre-hearing conferences will be held on the Zoom platform with video. As always, the panel may order, or the parties may agree, that a pre-hearing conference be held another way.”); *see FINRA Dispute Resolution Services (DRS) and FINRA News*, *supra* note 141, at 6 (“Starting on July 1, 2022, DRS will have only one pilot program for prehearing conferences. All prehearing conferences will be held on the Zoom platform with *video*.”) (emphasis in original).

145. *See* E-mail from FINRA, drportal@finra.org, to Nicole G. Iannarone, Chair and public member of FINRA NAMC (Aug. 9, 2022, 11:42 EDT) (on file with author) (“Today, we updated the Initial Prehearing Conference (IPHC) Script. We incorporated feedback and suggestions from arbitrators, the NAMC, the Zoom Task Force, and Staff.”); *Initial Prehearing Conference Script for Single Arbitrator Cases*, FINRA 9, [https://www.finra.org/sites/default/files/2022-08/iphc\\_script\\_single\\_cases.pdf](https://www.finra.org/sites/default/files/2022-08/iphc_script_single_cases.pdf) (Dec. 22, 2022) (“Prehearing conferences are videoconferences unless the parties stipulate otherwise or I order otherwise.”); *Initial Prehearing Conference Script for Panel Cases*, FINRA, [https://www.finra.org/sites/default/files/2022-08/iphc\\_script\\_panel\\_cases.pdf](https://www.finra.org/sites/default/files/2022-08/iphc_script_panel_cases.pdf) (Dec. 22, 2022) (“Prehearing conferences are videoconferences unless the parties stipulate otherwise or the panel orders otherwise.”).

146. *September 2022 Board Meeting*, FINRA (Sept. 28, 2022), <https://www.finra.org/about/governance/finra-board-governors/meetings/update-finra-board-governors-meeting-september-2022>.

Special Proceedings—should be updated to default to video conferences.<sup>147</sup> The NAMC recommended in October 2020 that the customer claimant have the unilateral right to choose, at the Initial Prehearing Conference, whether a Special Proceeding is conducted via a telephonic or video conference. In February 2021, the NAMC approved proposed rule language to formalize this proposed change and recommended that it be approved by FINRA's Board of Governors.

### E. Hybrid Hearings

Though forum stakeholders overwhelmingly supported upgrading hearings previously held by telephone to a virtual format, determining how and when witnesses, parties, or arbitrators would be able to appear virtually while others appeared in person presented more challenges. The ZTF tasked the Hybrid Hearings Subcommittee with recommending procedures for deciding contested motions for a virtual hearing as well as how to decide motions for witness(es)'s virtual participation in otherwise in-person proceedings.<sup>148</sup> Although, as described in Part III.H., *infra*, consensus was not reached on these questions, the ZTF was able to develop recommendations and best practices for conducting hearings where some participants appear in person and others participate remotely.<sup>149</sup> These recommendations came after reviewing survey responses, informal feedback from other stakeholders with experience in the forum, and consultation with FINRA technologists.

ZTF's work product includes a public-facing resource guide available on FINRA's website detailing the technological and other logistical issues that should be addressed before a party

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147. See FINRA, RULE 12800 (c)(3)(B) (2022) (describing investor's ability to choose a special proceeding limited in time and prohibiting cross-examination of the opposing parties' witnesses); *id.* at (i) (quoting "a special proceeding will be held by telephone unless the parties agree to another method of appearance").

148. Memorandum from FINRA on FINRA Dispute Resolution Services (DRS) Zoom Task Force, *supra* note 85, at 2 (describing subcommittee's focus on all issues related to hybrid hearings).

149. Memorandum from FINRA on Zoom Task Force Update to Nat'l Arb. & Mediation Comm., 2 (July 7, 2022) (on file with author) (describing finalization of recommendations for best practices in hybrid hearings).

participates in a hybrid hearing.<sup>150</sup> For example, parties are instructed to: ensure adequate technology is available at both the in-person and virtual sites; coordinate with FINRA staff to ensure that all parties have the ability to test-run the technology; and ensure that remote participants are aware of their responsibility to coordinate with the in-person venue in advance of the hearing to facilitate the process moving smoothly when it commences on the record.<sup>151</sup>

The Hybrid Hearing subcommittee's work was informed by multiple discussions with the FINRA technology team, which had vetted various remote hearing platforms and developed technological solutions for FINRA's hearing locations to solve concerns raised by those who had participated in hybrid hearings.<sup>152</sup> FINRA technologists described legacy Cisco Telepresence systems and FINRA's significant monetary investment in next generation Zoom Rooms at each of its hearing locations to facilitate remote participation of some arbitration participants.<sup>153</sup> The new technology is considered more user friendly than the legacy virtual hearing technology.<sup>154</sup> In addition, it exhibits features that facilitate remote participation, including automatically featuring the speaker and correcting sound to eliminate background noise and feedback.<sup>155</sup> New technology to facilitate hybrid hearings has been installed in FINRA's New York, NY and Jersey City, NJ hearing locations and is currently live. During the June 2022 NAMC meeting, NAMC members received a tour of the new hearing rooms with this updated technology at FINRA's New York, NY hearing location. Additional hearing locations in Boca Raton, FL, Chicago, IL, and Los Angeles, CA are expected to be outfitted with updated technology by fall 2022. FINRA has also invested in two technology bundles that can be deployed to hybrid hearings held in hotels to facilitate the remote participation of some witnesses or parties.

Additionally, because FINRA had, early in the pandemic, created resource guides for parties and highlighted the ability to

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150. See, e.g., *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 25 (describing technological and logistical matters to be resolved to adequately participate in remote hearings).

151. Memorandum from FINRA on Zoom Task Force Update, *supra* note 149, at 2–3.

152. *Id.* at 2.

153. The author attended and participated in these discussions.

154. *Id.*

155. *Id.*

conduct test runs in advance of virtual hearings, subcommittee members used their and FINRA case administrators' experiences with these resources to guide their work and recommendations going forward.<sup>156</sup> Pre-existing guidance and materials concerning hybrid hearings were reviewed and revised to reflect current knowledge and experiences. The hybrid hearing checklist and updated best practices for participating in virtual hearings is available on FINRA's website and reflected in revised resource guides.<sup>157</sup>

### F. Pro Se Litigants and Zoom Challenges

Technological access is often a challenge for one-shot players and those who represent themselves in remote arbitration, requiring collaboration with relevant stakeholders to ensure less-resourced parties are equitably treated.<sup>158</sup> Members of the ZTF most familiar with pro se and less-resourced parties evaluated barriers particular to those forum participants and aimed to develop solutions.<sup>159</sup> During the early stages of the pandemic, FINRA developed a program to loan technology to pro se and less resourced parties, making mobile hot spots and tablets available for remote hearings upon request.<sup>160</sup> However, only parties who

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156. See, e.g., *Party Resource Guide for Virtual Hearings*, *supra* note 25 (“Upon request, FINRA Dispute Resolution Services can set up a Zoom ‘trial run’ with the parties or party representatives in advance of the virtual hearing.”); see also FINRA Unscripted, *supra* note 14, at 21:03 (“Beverly Jo Slaughter: If you’re a practitioner and you’re listening, my advice is practice, practice and keep practicing over and over again because it’s in the best interest of your clients and in your presentation. You always do a lot of prep when you’re getting ready to go to a hearing. Being in the virtual atmosphere added another layer of prep.”); *id.* at 24:07 (“Rick Berry: [I]t bears repeating that FINRA is happy to work with counsel and their parties to walk them through the Zoom process.”); *id.* at 19:02 (“Sam Edwards: I will tell you, I’ve made that part of my practice and every one of the cases we do a test run with FINRA staff.”).

157. See generally *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 25.

158. See, e.g., Drew Simshaw, *Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH 150, 156–57 (2022) (proposing collaboration between legal and technology sectors while ensuring inclusion of less-resourced stakeholders to improve access to justice when artificial intelligence used in legal field).

159. For example, subcommittee members including the author and Professor Elissa Germaine had experience representing investors with small claims through their work in securities arbitration clinics. These investors, without representation through a clinic, would have likely filed claims (if at all) on a pro se basis. Other subcommittee members included in-house counsel who often defended their brokerage firms in claims levied by pro se parties.

160. This practice arose from recommendations surfaced during the Securities Arbitration Clinic Roundtable held in summer 2020. See *supra* notes 30–31 and accompanying text.

routinely practiced in the forum were aware of the program because it was not detailed in any of FINRA's online resources relating to remote hearings.<sup>161</sup> Survey results reported that access to technology was a concern for approximately 19% of party participants and 11% of arbitrators in virtual arbitration proceedings during the emergency phase of the pandemic.<sup>162</sup> In addition, subcommittee members with experience working with pro se parties recommended that FINRA DRS expand its materials directed to parties representing themselves in the forum.<sup>163</sup> A review of these pre-existing resources uncovered that many had not been updated to fully describe new options for hearing modalities available to investors with smaller claims.<sup>164</sup> Moreover, although FINRA DRS has long maintained resources in an attempt to demystify the securities arbitration process for pro se parties, none of those resources had been updated to contain information or links to materials concerning virtual arbitration proceedings.<sup>165</sup> In addition, subcommittee members were concerned that while repeat players in the forum may be able to adapt to virtual hearings because they already had experience in the FINRA DRS forum, pro se parties would likely be required to navigate an unfamiliar forum using unfamiliar technology. Finally, FINRA DRS Case Administrators expressed concerns to the subcommittee that the permanent adoption of virtual arbitration proceedings in the securities arbitration forum would result in unrepresented parties needing significant assistance from and posing multiple questions to FINRA DRS staff.

Accordingly, the Pro Se Litigants and Zoom Challenges subcommittee undertook to review, revise, and—where necessary—create online FINRA resources directed specifically for

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161. See *supra* notes 30–31 and accompanying text.

162. See *infra* Appendix B, at slide 142; *infra* Appendix A, at slide 103.

163. The author made this recommendation with support from ZTF member Professor Elissa Germaine. Subcommittee members who had experience representing parties in cases involving pro se parties likewise supported these efforts.

164. For example, online resources do not currently describe the availability of a special proceeding as a hearing option, but instead provides a link to another guide on Simplified Proceedings under the heading “Additional Resources.” *Resources for Investors Representing Themselves*, FINRA (2017), <https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves>.

165. See *id.*; see generally *Investor's Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker*, FINRA, [https://www.finra.org/sites/default/files/Investors\\_Guide\\_to\\_Securities\\_Industry\\_Disputes.pdf](https://www.finra.org/sites/default/files/Investors_Guide_to_Securities_Industry_Disputes.pdf) (last visited Jan. 7, 2023).

parties representing themselves.<sup>166</sup> Future updates to existing pro se resources on FINRA's website are expected to include a discussion of the technological aspects and practical considerations of participating in a remote hearing to improve transparency and ensure unrepresented parties have access to information specifically tailored to them.<sup>167</sup> Online resources, including a new pro se party guide now available on FINRA's website, include detailed frequently asked questions ("FAQs") and checklists to assist pro se parties in preparing for a virtual hearing.<sup>168</sup> These materials were evaluated to ensure that they are presented in a fashion that novice forum participants will be able to easily access and understand. Moreover, they provide extensive links to additional resources and information to ensure that pro se parties have access to the full range of resources available to all forum participants.<sup>169</sup> Finally, pro se parties are directed to sources of additional assistance from law school securities arbitration clinics who may be able to accept their case to the availability of loaned technology.<sup>170</sup> The ZTF also recommended that FINRA DRS develop tutorial videos specifically for parties representing themselves in virtual arbitration proceedings.

#### G. Developing New Resources and Revising Existing Resources

The use of remote hearings in the FINRA forum on a non-emergency basis required review of existing guides, resources, and materials to identify information that must be revised and where additional guidance is required. The ZTF reviewed and provided substantive feedback on FINRA's online guides to parties and

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166. See, e.g., *Resources for Investors Representing Themselves*, FINRA, <https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves> (last visited Jan. 7, 2023) (containing no mention of remote arbitration proceedings).

167. See, e.g., Memorandum from FINRA on Zoom Task Force Update, *supra* note 149, at 2 ("The guide is drafted in a 'Q&A' format that is easy to follow. . . . The guide contemplates issues relating to background, lighting, Zoom trial runs with DRS staff, tips for improving the Zoom experience, exhibits, recording the proceeding, witnesses, and general troubleshooting.").

168. *Resource Guide for Self-Represented Parties with Virtual ("Zoom") Hearings: Frequently Asked Questions*, FINRA, [https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves/virtual-hearings-faq#\\_ftn1](https://www.finra.org/arbitration-mediation/resources-investors-representing-themselves/virtual-hearings-faq#_ftn1) (last visited Jan. 7, 2023) (providing information to pro se parties concerning virtual arbitration proceedings in a FAQ format).

169. *Id.*

170. *Resources for Investors Representing Themselves*, *supra* note 166 (including link to FAQs directed towards pro se parties in virtual proceedings and information concerning availability of law school clinics).



arbitrators concerning arbitration in the FINRA forum with an eye towards updating preexisting documents that had not yet been updated to reference procedures concerning remote hearings. For example, the ZTF recommended changes to the script read by arbitrators during the IPHC, so participants would be aware of procedures that would occur for any prehearing conferences (which will now be held via video by default).<sup>171</sup> In addition, ZTF recommended changes to the IPHC script by adding a new “Mode of Hearing and Presentation of Witnesses” section to “instruct the Chairperson to initiate a discussion amongst the parties as to whether the evidentiary hearing in the case will proceed in person, by Zoom with video, or as a hybrid.”<sup>172</sup> In addition, for those hearings that will proceed virtually, IPHC script revisions will prompt the arbitrator to engage in a discussion with the parties concerning “technological requirements for participating in a virtual arbitration hearing, remind the parties of the various resources available to them on the [FINRA] DRS website, and encourage the parties to participate in a trial-run with DRS staff, if needed.”<sup>173</sup> In addition to increasing transparency by ensuring that parties are aware of the resources available to them concerning remote arbitration proceedings, the IPHC changes are also intended to educate and inform arbitrators.<sup>174</sup> This is because approximately 14% of participant survey respondents indicated that they were not satisfied with the arbitrators’ comfort with remote hearing technology.<sup>175</sup> The ZTF-recommended revisions to the IPHC script were unanimously approved by the NAMC during its July 22, 2022 meeting and took effect on August 10, 2022.<sup>176</sup>

Members of the Additional Zoom Training for Arbitrators subcommittee reviewed and provided recommended changes to

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171. See *supra* notes 140–42 and accompanying text (describing pilot program whereby all prehearing conferences are now held via video by default instead of telephone).

172. See Memorandum from FINRA on Zoom Task Force Update, *supra* note 149, at 3.

173. *Id.*

174. *Id.* (noting that recommended revisions derived from Additional Zoom Training for Arbitrators Subcommittee).

175. See *infra* Appendix B, at 152.

176. See E-mail from FINRA, [drportal@finra.org](mailto:drportal@finra.org), *supra* note 145 (“Today, we updated the Initial Prehearing Conference (IPHC) Script. We incorporated feedback and suggestions from arbitrators, the NAMC, the Zoom Task Force, and Staff.”); *id.* (“[T]he IPHC Scripts have an expanded discovery section and new sections that address virtual and hybrid hearings, hearing exhibits and expungement requests.”); see also *Forms & Tools*, FINRA, <https://www.finra.org/arbitration-mediation/forms-tools> (last visited Jan. 7, 2023) (containing links to IPHC scripts for single arbitrator and panel cases).

FINRA's Arbitrator Resource Guide for Virtual Hearings.<sup>177</sup> This particular resource was consulted by approximately 78% of surveyed arbitrators as they prepared to conduct a remote arbitration proceeding, leading ZTF members to focus on how the resource could be strengthened.<sup>178</sup> In addition, the subcommittee developed an equipment checklist highlighting considerations and best practices for both arbitrators and parties.<sup>179</sup> The equipment checklist reflects both the experience of practitioners with extensive experience in remote hearings and responses received to the surveys. It describes technological layouts that subcommittee members believe will provide a more seamless virtual hearing experience for all participants. ZTF's recommended changes have been incorporated into FINRA's online materials concerning remote arbitration proceedings.<sup>180</sup>

#### H. Open Questions

Though the ZTF has held numerous full task force and subcommittee meetings since first convened in July 2021, consensus could not be reached on all matters considered. This Section concludes the discussion of the NAMC and ZTF review of remote arbitration proceedings during the pandemic emergency by describing open questions in the FINRA DRS forum that will need to be resolved.

Among the more challenging issues that remain to be resolved is who is permitted to decide whether a FINRA arbitration proceeds partially or entirely in a remote modality.<sup>181</sup> Currently, FINRA's rules are silent as to how an evidentiary hearing in a customer arbitration will proceed.<sup>182</sup> This ambiguity has resulted in party participants reporting concerns about being forced into

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177. Memorandum from FINRA to Nat'l Arb. & Mediation Comm., *supra* note 79, at 2; *see also Arbitrator Resource Guide for Virtual Hearings*, *supra* note 25 (containing Arbitrator Resource Guide before ZTF recommended revisions and additions).

178. *Infra* Appendix A, at slide 113. Other FINRA resources were less relied upon by arbitrators as they prepared for remote hearings, including training videos (31%), a mock Zoom arbitration (17%), and articles in The Neutral Corner (36%). *Id.*

179. Memorandum from FINRA to Nat'l Arb. & Mediation Comm., *supra* note 79, at 2.

180. *Arbitrator Resource Guide for Virtual Hearings*, *supra* note 25.

181. *See, e.g.*, David Horton, *Forced Remote Arbitration*, 108 CORNELL L. REV. (forthcoming 2022) (manuscript at 52–53) (available at <https://ssrn.com/abstract=4035835>) (describing concerns with which party can elect for a remote arbitration proceeding).

182. *See, e.g.*, FINRA, RULE 12600 (2022) (stating that “[h]earings will be held” without describing the modality in which they will be held, *e.g.*, virtually, telephonically, or in-person).

remote hearings against their joint will. For instance, parties representing both claimants and respondents have shared that arbitrators are deciding to conduct a hearing fully remotely either without seeking the parties' feedback or ordering a remote hearing over the parties' objection. Hypothesized reasons for these arbitrators' orders are that arbitrators may still be wary of COVID-19 variants, prefer not to travel to hearing locations due to cost and time concerns, or are simply more comfortable at home. FINRA DRS asked the ZTF to consider a rule change that would permit arbitrators to unilaterally order remote hearings over the parties' objections.<sup>183</sup> The ZTF declined to recommend such a rule change, and the issue was referred to the NAMC.<sup>184</sup>

During its February 2022 meeting, the NAMC recommended that the FINRA Board of Governors close the loophole that permits arbitrators to unilaterally order remote hearings by approving a change to FINRA's rules that will specify that hearings will generally be held in-person.<sup>185</sup> If approved by the FINRA Board of Governors, this change is expected to eliminate the concerns raised by arbitrators *sua sponte* ordering remote hearings. At the same time, this rule change would not foreclose the parties from jointly agreeing to proceed virtually, as FINRA's code of arbitration procedure provides great flexibility to parties to agree as to how their cases proceed.<sup>186</sup>

Though the ZTF and the NAMC were able to agree that arbitrators should not be able to unilaterally order remote hearings, agreement could not be reached as to a related question: When one party seeks a remote hearing and the other prefers an in-person hearing, how should the arbitrators proceed? Professor David Horton's recent empirical analysis of remote arbitration hearings opens with the account of an investor who was forced—over his objections—to proceed, if at all, via a remote FINRA proceeding.<sup>187</sup> As Horton describes, consumer protection concerns

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183. Memorandum from FINRA to Nat'l Arb. & Mediation Comm., *supra* note 79, at 3.

184. *Id.* In addition, the ZTF recommended that FINRA include a segment in THE NEUTRAL CORNER publication to alert arbitrators that they should not order a virtual hearing over the parties' joint objections. *Id.*

185. See FINRA, RULE 12600 (2022) (describing evidentiary hearings without reference to whether they are conducted in-person, remotely, or telephonically).

186. FINRA, RULE 12105 (2022) (describing process for agreement of parties to modify arbitration procedures).

187. See Horton, *supra* note 181 (manuscript at 3) (opening article with experience of investor forced into arbitration over objections).

arise when repeat players have the ability to force consumers into remote arbitration over their objection.<sup>188</sup> On the other hand, industry parties will likely argue that they should not be forced to participate in an in-person hearing where, for example, concerns about new variants and high levels of community spread may make them uncomfortable.

Permitting any party to move for remote arbitration proceedings over the other party's objection does not recognize the unequal status of one-shot investors, who are generally forced to arbitrate in the FINRA forum. In fact, as a result of these concerns, there are a number of one-way levers that only investor claimants can initiate to determine the modality via which a FINRA securities arbitration case will proceed.<sup>189</sup> For example, investors who are not bound by a PDAA can either force a broker-dealer or stockholder into arbitration or choose to proceed in court.<sup>190</sup> Additionally, in smaller claim arbitrations, consumer investors are permitted to choose the means by which the case will proceed.<sup>191</sup> In the event an investor files a claim seeking \$50,000 or less in the FINRA forum, they choose between three different arbitration procedures at the time of filing.<sup>192</sup> First, an investor may choose to have a regular evidentiary hearing subject to FINRA's normal rules related to hearings.<sup>193</sup> Alternatively, a customer can request an abbreviated "special proceeding" in which each party has two and a half hours to present their respective cases and neither are permitted to cross-examine the other party's witnesses.<sup>194</sup> If the investor does not choose a regular hearing or a special proceeding, their smaller claim will be decided as a desk arbitration, "on the pleadings and other materials submitted by the parties," and known in FINRA parlance as an arbitration "on the papers."<sup>195</sup> In addition, NAMC has recommended that claimants in Special

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188. *Id.* (manuscript at 26–27).

189. See Iannarone, *supra* note 1, at 1396–1403 (describing investor protection features related to choices afforded to investors with smaller claims to proceed on the papers, via special proceeding, or via a regular hearing).

190. FINRA, RULE 12200 (2022) (describing ability of investor customer to initiate arbitration against industry parties when the relationship is not governed by a PDAA).

191. FINRA, RULE 12800(a) (2022) (detailing procedures for Simplified Arbitration).

192. *Id.*

193. FINRA, RULE 12800(c)(3) (2022) ("If the customer requests a hearing, the customer must select between one of two hearing options under this rule. (A) Option One – the regular provisions of the Code relating to prehearings and hearings, including all fee provisions.").

194. FINRA, RULE 12800(c)(3)(B) (2022) (describing the process for special proceedings).

195. FINRA, RULE 12800(a) (2022).

Proceedings have the unilateral ability to choose between telephonic or virtual proceedings during the IPHC.<sup>196</sup> Other FINRA rules provide investors with similar one-way levers, including a proposal recently recommended by the NAMC whereby investors with cases decided on the papers or via special proceedings would be able to unilaterally choose whether FINRA's Discovery Guide will apply to their cases.<sup>197</sup> The Discovery Guide contains a list of documents that are presumptively discoverable and must be produced by each side absent a relevant objection in a FINRA arbitration proceeding.<sup>198</sup> Finally, industry members are not permitted to include certain forum selection clauses in PDAAs to avoid the FINRA DRS forum.<sup>199</sup>

As such, investors who work with stockbrokers, like plaintiffs in civil lawsuits, have a great deal of discretion in choosing the forum in which their claims are decided and electing between various modalities of how the case will proceed. While industry representatives are likely to argue that both claimants and respondents should have an equal ability to file a motion for a virtual hearing that is decided by the arbitrators, this argument does not reflect investor protection measures embedded in FINRA rules that permit investor choice, the general unequal standing of one-shot investors, or the particular concerns identified by Professor Horton concerning forced remote arbitration.<sup>200</sup> Indeed, FINRA has noted the investor protection features of its arbitration forum: "FINRA's arbitration rules ensure that its forum is fair and protective of investors."<sup>201</sup>

Because the NAMC was not able to reach consensus concerning this open question, its resolution will be made by

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196. See *supra* pt. III.D.

197. FINRA, RULE 12800(a)(c)(3)(A)(d)(2) (2022). Investors with claims under \$50,000 who choose a regular hearing are afforded all the procedural mechanisms tied to those claims, including the application of the Discovery Guide. *Id.*

198. FINRA, RULE 12506(a) (2022) ("Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person); FINRA, RULE 12506(b) (2022) (requiring production of Document Production List documents within 60 days unless an objection is levied within that timeframe, or the parties agree otherwise).

199. FINRA REGUL. NOTICE 16-25 (2016) ("[A]ny member firm's denial, limitation or attempt to deny or limit a customer's right to request FINRA arbitration, even if the customer seeks to exercise that right after having agreed to a forum selection clause specifying a venue other than a FINRA arbitration forum, would violate FINRA Rules 2268 and 12200.").

200. Horton, *supra* note 181 (manuscript at 1).

201. FINRA REGUL. NOTICE 16-25 (2016).

FINRA. Through both the NAMC and the ZTF, FINRA has received significant feedback to take into account as it determines how to proceed on this hotly contested issue. The remaining ZTF items—related to final approval of revisions to guides and online materials—are far less controversial. These matters were finalized when the ZTF concluded its work and held its last meeting on October 19, 2022, immediately prior to the NAMC’s October meeting.

#### IV. FEATURES SUPPORTING FINRA ARBITRATION AS A POTENTIAL MODEL FOR POST-PANDEMIC REMOTE ARBITRATION

Parts II and III provided descriptive accounts of FINRA DRS activities related to the implementation and evaluation of remote arbitration proceedings in its forum. But how do we identify whether any remote arbitration forum’s practices may serve as a model? Professor Jill Gross argues that mandatory arbitration comprises multiple different schemes of arbitration, some of which contain consumer-focused characteristics and others which do not.<sup>202</sup> Gross isolated and identified features that could uniformly apply to all arbitration forums and which provide greater measures of consumer protection while enhancing consumers’ access.<sup>203</sup> Only two arbitration forums exhibited all of these justice-enhancing attributes: “grievance (rights-based) arbitration pursuant to a collective bargaining agreement (“CBA”) and customer arbitration at FINRA.”<sup>204</sup> Gross highlighted multiple justice-enhancing features that make the FINRA forum “an arbitration archetype.”<sup>205</sup>

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202. Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2326–27 (2020) (identifying characteristics that enhance justice in mandatory arbitration forums and applying said characteristics to existing forums to identify “archetypes” that are set apart from other forums and should be viewed as models).

203. *Id.* at 2327. These features include whether: (1) arbitration costs less and is faster than court proceedings; (2) decisions reached by the arbitrator(s) are published and explained; (3) the parties are able to bring the same claims and seek the same remedies that are permitted in court; and (4) the parties have the ability to proceed with representation. *Id.*

204. *Id.* at 2334.

205. *Id.* at 2335. These characteristics include the low cost of FINRA arbitration, publicly available awards, access to the same claims and remedies as in court, the right to be represented, the short timeframe from claim filing to arbitrator decision, flexibility to parties to jointly request changes to procedures, and access to multiple hearing modalities for investors with the smallest claims. *Id.* at 2335–36.

Professor Gross proposes arbitration archetypes to differentiate between arbitration forums based upon criteria that any one forum could voluntarily adopt.<sup>206</sup> This Part takes an intentionally divergent approach, identifying features unique to the FINRA forum. These unique-to-FINRA features further support FINRA's classification as an arbitration archetype and may position its customer securities arbitration forum as a blueprint for other mandatory consumer arbitration forums that are undertaking efforts to implement virtual arbitration in a non-emergency world. The sections that follow describe these unique-to-FINRA characteristics: disciplinary action to enforce forum rules and norms, government oversight, and enhanced transparency and disclosure.

#### A. Disciplinary Action to Enforce Forum Rules

FINRA's securities arbitration forum is inexorably linked to the regulation of broker-dealers because the FINRA forum includes several investor-friendly mechanisms that are enforced through membership rules.<sup>207</sup> For example, if a brokerage agreement does not contain a PDAA, investors can unilaterally choose between proceeding via arbitration or in court, effectively forcing members of the industry to arbitrate if the customer investor wishes to do so.<sup>208</sup> Allowing customers to force stockbrokers into an arbitral forum has existed since securities arbitration was introduced in the United States.<sup>209</sup> FINRA

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206. *Id.* at 2336.

207. FINRA, RULE IM-12000 (2022) (describing violations of FINRA Code of Customer Arbitration that may lead to disciplinary action).

208. FINRA, RULE 12200 (2022) ("Parties must arbitrate a dispute under the Code if: Arbitration under the Code is either: (1) Required by a written agreement, or (2) Requested by the customer; The dispute is between a customer and a member or associated person of a member; and The dispute arises in connection with the business activities of the member or the associated person except disputes involving the insurance business activities of a member that is also an insurance company."); FINRA REGUL. NOTICE 16-25 (2016) ("FINRA reminds member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time . . ."). Investors may very well choose arbitration over court in a number of circumstances because of the justice enhancing features of the FINRA forum identified by Professor Gross, including speed, efficiency, and low cost of the FINRA forum as compared to court. *See* Gross, *supra* note 202, at 2320 and accompanying text.

209. Iannarone, *supra* note 1, at 1399 (describing the ability of customer to force a stockbroker into arbitration in the early history of securities arbitration in America); FINRA, RULE 12200 (2022) (requiring stockbrokers and brokerage firms to arbitrate if a customer so requests and the dispute "arises in connection with the business activities of the member or the associated person . . ."); FINRA REGUL. NOTICE 16-25 (2016) ("FINRA

members are also required to follow the rules of the FINRA customer arbitration forum, which include the mandatory exchange of presumptively discoverable documents without waiting for a request from a party opponent in cases where a regular hearing is held.<sup>210</sup> In addition, investors who are awarded damages against a stockbroker or their firm in an arbitration have a higher likelihood of receiving payment of the award because stockbrokers and brokerage firms are required to pay customers when arbitrators rule in the customer's favor.<sup>211</sup> Accordingly, nearly all customer awards in the FINRA forum are paid, and only about 2% of awards received by customers in the FINRA forum go unpaid.<sup>212</sup>

These rules would be of little consequence if there was not a mechanism by which to enforce them. FINRA enforces the rules of its customer arbitration forum by wielding a big stick. Regulated parties' failure to follow FINRA's customer arbitration rules risks suspension or removal from the broker dealer industry.<sup>213</sup> This risk is a significant one—membership in FINRA is required to serve as a stockbroker or brokerage firm.<sup>214</sup> A strong, consumer-focused

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reminds member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time . . . .").

210. See FINRA IM-12000 (2008); FINRA, RULE 12506 (2022) (describing application of document production lists).

211. FINRA, RULE IM-12000 (2022) ("All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award."); *id.* ("It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to . . . (d) fail to honor an award . . . ."); FINRA, RULE 10330(h) (2022) (requiring payment of arbitration award within 30 days); FINRA, RULE 9554 (2022) (providing for expedited procedures to remove or suspend a member or associated person for failure to pay arbitration award).

212. FINRA PERSPECTIVES ON CUSTOMER RECOVERY, *supra* note 42, at 3. The 2% of unpaid customer awards in the FINRA arbitration forum does not reflect that 2% of investors who engage with the forum are left without recovery. *Id.* In nearly one third of unpaid customer awards, customers received some quantum of recovery by virtue of settling with another respondent in the same arbitration proceeding. *Id.*

213. See, e.g., FINRA IM-12000 (2008) ("It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to: (a) fail to submit a dispute for arbitration under the Code as required by the Code; . . . (c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code; (d) fail to honor an award, or comply with a written and executed settlement agreement . . . ."); FINRA, RULE 2010 (2022) ("A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."); FINRA REGUL. NOTICE 16-25 (2016) ("[F]ailure to submit a dispute to FINRA arbitration as required by FINRA's rules, would violate FINRA rules, and member firms may be subject to disciplinary action.").

214. FINRA, RULE 1210 (2022) ("Each person engaged in the investment banking or securities business of a member shall be registered with FINRA . . . ."); *Individual Registration*, FINRA, <https://www.finra.org/registration-exams-ce/individuals> (last visited



enforcement mechanism to ensure stockbrokers and their firms adhere to customer-focused arbitration rules sets FINRA apart from other arbitral forums.<sup>215</sup> As FINRA puts it: “What is unique to arbitration against broker-dealers is that FINRA suspends individuals and firms from the broker-dealer industry due to non-payment of a FINRA arbitration award.”<sup>216</sup>

### B. Government Oversight of and Public Participation in FINRA Rulemaking Process

FINRA’s ability to discipline members who refuse to follow the forum’s rules arises from another characteristic that distinguishes a FINRA arbitration from other mandatory arbitration forums. FINRA’s rules and procedures—including those relating to customer arbitration—are subject to the oversight of the United States Securities & Exchange Commission (“SEC”).<sup>217</sup> The relationship between the SEC and FINRA has its roots in the history of the securities industry as a self-regulated profession in the United States.<sup>218</sup> Stockbrokers were required to be members of a self-regulating exchange to participate in the industry.<sup>219</sup>

After the Great Depression, when Congress debated the first major legislation to regulate the financial services industry, broker-dealers argued that they should not be subject to governmental oversight but should instead be self-regulated, particularly due to their long history of self-regulation and the highly technical aspects of their work that they believed would be difficult for a newly formed regulator to understand and oversee.<sup>220</sup> Ultimately, through a series of major Congressional enactments in

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Jan. 7, 2023) (“You must be registered with FINRA if you’re engaged in the securities business of your firm, which includes salespersons, branch managers, department supervisors, partners, officers and directors.”); *Register a New Broker-Dealer Firm*, FINRA, <https://www.finra.org/registration-exams-ce/broker-dealers/new-firms> (last visited Jan. 7, 2023) (“To conduct securities transactions and business with the investing public in the United States, both firms and individuals must be registered with FINRA.”).

215. FINRA PERSPECTIVES ON CUSTOMER RECOVERY, *supra* note 42, at 2.

216. *Id.*

217. *Id.*

218. *See, e.g.*, Gross, *supra* note 12, at 180 (describing self-regulation of securities industry in early America).

219. *Id.* at 176.

220. Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 CIN. L. REV. 573, 581–82 (2017) (describing New York Stock Exchange self-regulatory structure before the formation of the U.S. Securities & Exchange Commission and role of SEC in overseeing self-regulatory organizations); *see also* Gross, *supra* note 12, at 174–75 (describing history of self-regulation of stock exchanges).

the 1930s,<sup>221</sup> a newly formed SEC received authority to authorize self-regulated organizations (“SROs”), which stockbrokers and broker-dealer firms were required to join in order to conduct their brokerage business.<sup>222</sup> FINRA is the successor to the SRO regulating members of the broker-dealer industry.<sup>223</sup> Required SRO membership became more meaningful in the 1970s, when the Securities Exchange Act of 1934 was amended to require SEC review and approval of SRO rule proposals.<sup>224</sup>

As a result of this regulatory structure, FINRA is a quasi-governmental self-regulatory organization that shares characteristics both of a regulator and a professional membership organization as it oversees the broker-dealer industry.<sup>225</sup> Today, FINRA describes its goals in the functionally mandatory securities arbitration system as “to provide a fair, efficient and cost-effective program.”<sup>226</sup> Perhaps this description results from two features that are part and parcel to the quasi-governmental nature of FINRA and the SEC’s oversight of it: (1) the SEC has the ability to conduct examination and study of operations in the FINRA arbitration forum; and (2) all FINRA rules, including the rules and procedures related to its dispute resolution forum, are subject to public notice-and-comment and SEC approval.<sup>227</sup>

Through its Division of Examinations, the SEC reviews FINRA’s operations.<sup>228</sup> Though recently critiqued for its efforts in doing so, the SEC has authority to examine functionally mandatory arbitration in the FINRA forum and use the resulting

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221. Securities Act of 1933, 15 U.S.C. §§ 77a–mm (1934); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–qq (1934); Maloney Act of 1938, 15 U.S.C. § 78o-3 (1938).

222. Andrew Tuch, *The Self-Regulation of Investment Bankers*, 83 GEO. WASH. L. REV. 101, 112–13 (describing history of and mechanism for self-regulation in broker dealer industry); 15 U.S.C. § 78o-3.

223. Tuch, *supra* note 222, at 112; *see also* Edwards, *supra* note 220, at 582 (describing Maloney Act requiring SEC approval of SRO through which broker dealer industry would be regulated).

224. *See* 15 U.S.C. § 78s(b) (describing process for SROs to obtain SEC approval of potential rule changes).

225. Edwards, *supra* note 220, at 583–84 (describing quasi-governmental status of FINRA).

226. FINRA Unscripted, *supra* note 14.

227. U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105367, SECURITIES REGULATION: SEC COULD TAKE FURTHER ACTIONS TO HELP ACHIEVE ITS FINRA OVERSIGHT GOALS 5 (2021); 15 U.S.C. § 78s(b).

228. U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105367; *see also* Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1737 (2016) (describing prior GAO critique of SEC oversight of FINRA).

data to guide rulemaking.<sup>229</sup> The SEC's independent Office of the Investor Advocate also has authority to study FINRA arbitration proceedings on behalf of retail investors and has taken steps to do so in several respects in recent years.<sup>230</sup> In addition, all FINRA rulemaking, including rulemaking related to its securities arbitration forum, is subject to a public notice-and-comment process.<sup>231</sup> Rule proposals must be filed in the Federal Register.<sup>232</sup> Any comments received related to the proposals become part of the public record, and the SEC officials reviewing the proposed rule analyze and respond to public feedback received during the comment period as part of their consideration process.<sup>233</sup> Other mandatory arbitration forums—like AAA and JAMS—are not subject to mandated membership in a SRO overseen by a governmental agency, federal agency examination, approval of rule changes, or a public notice-and-comment process when they wish to enact or amend forum rules.<sup>234</sup>

In addition, rule changes in the FINRA arbitration forum involve various degrees of public participation before proposals are filed with the SEC. Proposals to amend FINRA rules are approved for filing with the SEC by the FINRA Board of Governors, a 20-member governing body comprising 10 industry members, 11 public members, and FINRA's Chief Executive Officer.<sup>235</sup> Though the Board originates proposals to change the FINRA arbitration forum's rules,<sup>236</sup> a great number of rule proposals begin with

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229. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105367 (describing current SEC oversight of FINRA and recommending action steps to improve).

230. For example, the Office of the Investor Advocate has begun an academic study of parties' experiences in the FINRA forum's discovery process. U.S. SEC. & EXCH. COMM'N, OFFICE OF THE INVESTOR ADVOCATE REPORT ON OBJECTIVES FOR FISCAL YEAR 2022, at 31 (2021), <https://www.sec.gov/files/sec-office-investor-advocate-report-objectives-fy2022.pdf>.

231. 15 U.S.C. § 78s(b).

232. *Id.*

233. See generally Nicole G. Iannarone & Benjamin P. Edwards, *Crafting Comment Letters: Teach Policy, Develop Skills, and Shape Pending Regulation*, 18 TRANSACTIONS TENN. J. BUS. L. 381 (2015) (describing comment process related to FINRA Dispute Resolution Services rule changes); Hammond, *supra* note 228, at 1734–39 (describing FINRA rulemaking process).

234. FINRA PERSPECTIVES ON CUSTOMER RECOVERY, *supra* note 42, at 3.

235. *FINRA Board of Governors*, FINRA, <https://www.finra.org/about/governance/finra-board-governors> (last visited Jan. 7, 2023) (describing composition of FINRA board); *c.f.* Edwards, *supra* note 220, at 575–77 (challenging classification of FINRA Board of Governors public members as truly public).

236. See, e.g., Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend FINRA Rule 13000 Series, 87 Fed. Reg. 31592 (proposed May 24, 2022) (proposing rule change to industry arbitration code in light of Congressional action); Mark Schoeff Jr., *Expungement Reform Advocates Taken by Surprise as FINRA Revises Proposal*,

recommendations from the NAMC.<sup>237</sup> Whatever their origin, however, FINRA rule proposals filed with the SEC are subject to a public notice-and-comment process, providing members of the public with an additional opportunity to provide feedback on potential rule changes.<sup>238</sup>

In sum, the public has various mechanisms through which it can participate in and learn about rulemaking in the FINRA forum—from reviewing and participating in notice-and-comment rulemaking, to serving as a public member of FINRA’s Board or providing advice as part of one of FINRA’s advisory committees.

### C. Transparency and Disclosure

FINRA’s quasi-governmental status results in a greater degree of transparency in its securities arbitration forum in addition to public disclosure of customer complaint information.<sup>239</sup> As noted in prior work, “[d]isclosure could be aptly described as a regulatory darling and is often relied upon to regulate the financial services industry.”<sup>240</sup> As it relates to the resolution of customer disputes in the broker-dealer industry, disclosure has both regulatory and investor protection functions.<sup>241</sup> All awards rendered in FINRA arbitration proceedings are publicly

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INVESTMENTNEWS (May 24, 2022), <https://www.investmentnews.com/expungement-reform-advocates-taken-by-surprise-as-finra-revises-proposal-221903> (describing critique of FINRA Board approval of rule change relating to expungement process without input from investor-focused bar association).

237. *Advisory Committees*, *supra* note 65 (“The NAMC also makes recommendations on rules, regulations and procedures that govern the conduct of arbitration, mediation, and other dispute resolution matters before FINRA.”).

238. 15 U.S.C. § 78o-3; 17 C.F.R. § 240.19-b4 (2022).

239. See Iannarone, *supra* note 39, at 2–8 (describing relatively greater transparency in the FINRA arbitration forum than other mandatory arbitration forums).

240. Nicole G. Iannarone, *Rethinking Automated Investment Adviser Disclosure*, 50 U. TOL. L. REV. 433, 439 (2019).

241. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1199 (1999) (describing role of disclosure in securities regulation); Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 53 (2014) (“[T]he federal securities laws focus principally on disclosure.”); FINRA, DISCUSSION PAPER—EXPUNGEMENT OF CUSTOMER DISPUTE INFORMATION 3 (2022), [https://www.finra.org/sites/default/files/2022-04/Expungement\\_Discussion\\_Paper.pdf](https://www.finra.org/sites/default/files/2022-04/Expungement_Discussion_Paper.pdf) (“The collection of registration information in the CRD system and the disclosure of the information through BrokerCheck serves three important purposes: (1) allowing investors to obtain information about an RFP or securities firm with whom they may do business; (2) providing securities regulators with a critical regulatory tool in overseeing the activities of RFPs and in detecting regulatory problems; and (3) providing securities firms with information for use in making informed employment decisions.”).

available.<sup>242</sup> This is a major point of contrast between the FINRA arbitration forum and other mandatory consumer arbitration forums: AAA and JAMS do not maintain a public database containing the full text of decisions rendered in their respective forums.<sup>243</sup> Gross identified the provision of public awards as a feature that enhances consumer access to justice.<sup>244</sup> FINRA takes this transparency a step further, however, as such awards parallel and supplement non-arbitration rules requiring stockbrokers to report certain customer complaints for inclusion on a disciplinary record accessible by regulators, brokerage firms, and (on a more limited basis) investors and other members of the public.<sup>245</sup>

Both filed arbitration claims (including those where the stockbroker is named as a party and those where only the firm is named as a party) and customer allegations that are informally levied outside of the FINRA arbitration forum are reported to a Central Registration Depository (“CRD”) that is jointly owned by FINRA and the state securities regulators.<sup>246</sup> The CRD is used by federal and state regulators, brokerage firms, and investors to obtain information about stockbrokers.<sup>247</sup> Investors have access to a subset of CRD information in a public-facing tool known as BrokerCheck and are encouraged to consult it when making a decision about working with a financial professional.<sup>248</sup> Notably,

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242. *Decision & Award*, *supra* note 41; *Arbitration Awards Online*, *supra* note 41 (providing means for members of public to access awards rendered in FINRA arbitration forum); *id.* (“FINRA’s Arbitration Awards database enables users to perform Web-based searches for FINRA and historical NASD arbitration awards free of charge, seven days a week.”).

243. FINRA PERSPECTIVES ON CUSTOMER RECOVERY, *supra* note 42, at 3.

244. *See* Gross, *supra* note 202, at 2331–32 (including explained and publicly available arbitration awards as justice-enhancing feature).

245. *See, e.g.,* Christine Lazaro, *Has Expungement Broken BrokerCheck?*, 14 J. BUS. & SEC. L. 123, 126–27 (2014) (detailing customer complaints stockbrokers and firms required to report, including disputes where stockbroker not named as a party).

246. *Id.* at 123 (“Brokers have broad disclosure obligations and, unlike most other occupations, these obligations require the disclosure of even mere allegations of wrongdoing against a broker.”); *id.* at 125–28 (describing CRD system).

247. *Central Registration Depository (CRD)*, FINRA, <https://www.finra.org/registration-exams-ce/classic-crd> (last visited Jan. 7, 2023) (“FINRA is responsible for the Central Registration Depository (CRD®) program, which supports the licensing and registration filing requirements of the U.S. securities industry and its regulators. The CRD program covers the registration records of broker-dealer firms, branch offices and their associated individuals, including their qualification, employment and disclosure histories . . .”).

248. *Id.* (“The general public can review information about investment professionals with the registration information collected through the CRD program and is disclosable via our investor protection tool, BrokerCheck.”); *About BrokerCheck*, FINRA, <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck> (last visited Jan. 7, 2023) (“BrokerCheck is a free tool from FINRA that can help you research the

BrokerCheck will include detail about customer complaints that were filed and resulted in a settlement paid to a customer even though FINRA's awards database will not detail the settlement.<sup>249</sup> BrokerCheck also lists and describes unfiled complaints levied against stockbrokers and how they were resolved.<sup>250</sup> Accordingly, in addition to being able to search FINRA's awards database for information about stockbrokers, FINRA enhances transparency of customer experiences with its members and their associated persons by aggregating customer complaint data and presenting it in a format that can be readily accessed by the investing public.

Taken together, these examples of transparency exceed the disclosures required under the law of those states that require mandatory consumer arbitration forums to disclose certain information concerning consumer arbitration.<sup>251</sup> Moreover, FINRA's transparency serves several investor protection goals, differentiating its forum from other mandatory arbitration forums on several key levels of transparency. First, the information is intended to be used for and marketed to consumers for consultation *before* they enter into a relationship governed by a PDAA.<sup>252</sup> Second, the information provided is more extensive than the summary statistics provided by other forums due to the provision of full awards and additional analyses and aggregate data.<sup>253</sup> Finally, the information related to the results in the forum is provided in an easy to search, more consumer-friendly format.<sup>254</sup>

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professional backgrounds of brokers and brokerage firms, as well as investment adviser firms and advisers.”).

249. *About BrokerCheck*, *supra* note 248.

250. *Id.*

251. *See* Alexander & Iannarone, *supra* note 7, at 1717–18 (describing information provided by AAA and JAMS concerning consumer arbitration in their respective forums as mandated by law of several states).

252. *Choosing an Investment Professional: Where Do I Start?*, FINRA, <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/where-do-i-start> (last visited Jan. 7, 2023) (“Check out each person on FINRA BrokerCheck. It’s a free online tool that helps investors research the backgrounds of brokers and brokerage firms. . . . BrokerCheck can tell you if an individual or firm is registered. It provides an overview of an individual’s work history, as well as the firm’s history. BrokerCheck also provides other important information such as regulatory actions, criminal convictions and customer complaints involving the investment professional.”).

253. Alexander & Iannarone, *supra* note 7, at 1717–19 (comparing and contrasting information provided by FINRA, AAA, and JAMS arbitral forums about claims within the forum).

254. *BrokerCheck*, FINRA, <https://brokercheck.finra.org/> (last visited Jan. 7, 2023) (providing instructions for using searchable BrokerCheck database); *Arbitration Awards Online*, *supra* note 41 (providing instructions and link to FINRA arbitration awards database).

#### D. Critiques of the FINRA Securities Arbitration Forum

That the FINRA forum contains many characteristics that may support consumer access to justice does not mean that the FINRA forum is perfect. The FINRA forum shares many of the characteristics that result in critique of mandatory arbitration forums.<sup>255</sup> Indeed, many, including the author, have identified issues that should be remedied within the FINRA arbitration forum.<sup>256</sup> First, some question whether government oversight of FINRA's arbitration forum is sufficiently strong to serve as an investor protection mechanism.<sup>257</sup> For example, the SEC's oversight of FINRA has been described as weak and highly deferential to FINRA.<sup>258</sup> Though stakeholders are regularly involved in providing feedback on potential rule changes, the FINRA Board sometimes approves for filing with the SEC rule changes that have not been subject to advisory committee input.<sup>259</sup> This is perhaps problematic because FINRA has been criticized for describing its Board of Governors as including public members when many of those members have significant ties to the financial industry.<sup>260</sup>

Second, public participation in the FINRA rulemaking process has been criticized for appearing to have the imprimatur of all of

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255. See, e.g., Edwards, *supra* note 8, at 430–32 (cataloging critiques to mandatory arbitration and highlighting how those critiques manifest in FINRA arbitration); Alexander & Iannarone, *supra* note 7, at 1705–07 (describing critiques to mandatory arbitration as including loss of jury trial, lack of consumer understanding, and lack of precedent and stagnation of law).

256. See, e.g., Iannarone, *supra* note 1, at 1447–50 (arguing for rule changes to facilitate inclusion in arbitrator selection); Iannarone, *supra* note 39, at 10–12 (recommending study of FINRA forum to determine the extent to which its voluntary transparency benefits stakeholders); Alexander & Iannarone, *supra* note 7, at 1754–60 (recommending enhancements to FINRA's arbitration awards).

257. See e.g., Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK L. REV. 1459, 1465 (1996).

258. See e.g., *id.* at 1465 (describing SEC as a weak regulator with most rule changes initiated by SROs or the SRO-initiated SICA); Hammond, *supra* note 228, at 1738 (describing SEC oversight of FINRA as deferential and notice-and-comment rulemaking process as masking said deferential SEC oversight); see generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-105367, SECURITIES REGULATION: SEC COULD TAKE FURTHER ACTIONS TO HELP ACHIEVE ITS FINRA OVERSIGHT GOALS (2021) (recommending enhancements to improve SEC oversight of FINRA).

259. Schoeff Jr., *supra* note 236 (collecting critique of FINRA Board approval of expungement rule change without stakeholder input).

260. See Edwards, *supra* note 220, at 575 (“Many of FINRA’s public governors have had long industry careers and serve on the boards of other financial services firms.”); see also Hammond, *supra* note 228, at 1735 n.182 (“[S]ome of the public members [of FINRA’s Board], however, appear to have very close industry ties.”).

the protections associated with public notice-and-comment rulemaking under the Administrative Procedure Act while not actually promoting meaningful public participation and feedback.<sup>261</sup> For example, when FINRA's Board directly proposes regulation, FINRA notes that stakeholders will be permitted to provide feedback in the regulatory notice-and-comment period.<sup>262</sup> Seeking stakeholder feedback on a post hoc basis raises concerns about their utility when a rule package has already been proposed and economic impact analysis conducted, particularly because the SEC typically approves FINRA's rule proposals as drafted, and, if it does not approve them outright, negotiates directly with FINRA to revise and approve a final rule.<sup>263</sup> Moreover, comments in response to FINRA rule proposals are principally submitted by more resourced parties representing the industry or groups of attorneys whose practice focuses in the FINRA arena.<sup>264</sup> As with the regulatory notice-and-comment process in general, consumers often lack the technical expertise and ability to meaningfully participate in the comment process.<sup>265</sup> Comments from the viewpoint of consumer retail investors are far less frequent when FINRA proposes changes to its arbitration forum.<sup>266</sup> In addition, though there is public involvement in developing rule changes via NAMC, that group is entrenched within FINRA, created via its

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261. See, e.g., Hammond, *supra* note 224, at 1736 (“The SEC almost never disapproves a [FINRA] rule; the ‘understanding’ is that SEC review is deferential.”); *id.* at 1738.

262. Schoeff Jr., *supra* note 236.

263. Hammond, *supra* note 228, at 1736. As one concrete example, FINRA withdrew its rule proposal concerning expungement in 2021 after consultation with the SEC and, without seeking NAMC feedback, directly filed a new rule proposal on July 29, 2022. See Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information, 87 Fed. Reg. 50170 (proposed Aug. 15, 2022).

264. Hammond, *supra* note 228, at 1738.

265. See, e.g., Steven J. Balla et al., *Responding to Mass, Computer-Generated, and Malattributed Comments*, 74 ADMIN. L. REV. 95, 160 (2022) (“In the five decades since ACUS [Administrative Conference of the United States] first endorsed broader public participation, notice-and-comment rulemaking has become the central mechanism for agency policymaking, and its particulars have been transformed through judicial elaboration, legislation, and technological developments. Yet the basic concerns have remained unchanged: how to ensure that the agency is fully informed and that all ‘interested persons’ are able to participate but that the process remains manageable.”); *id.* at 149–57 (describing how technology can “enhance and supplement the notice-and-comment process”).

266. *FINRA Rulemaking Process*, FINRA, <https://www.finra.org/rules-guidance/rulemaking-process> (last visited Jan. 7, 2023) (explaining that FINRA has discretion on whether to “authorize the publication of a Regulatory Notice soliciting comment on the proposal or filing of the proposal with the SEC for notice and comment”).



rules and does not operate independently from FINRA.<sup>267</sup> Previously, recommendations concerning uniform arbitration rules were made by the Securities Industry Conference on Arbitration (“SICA”), a group operating independently from SROs and composed of expert advisers with viewpoints representing investors as well as the securities industry.<sup>268</sup> Stakeholders have also criticized FINRA’s Board of Directors for the significant period of time between NAMC recommendation of rule changes and their consideration by the Board and filing with the SEC, alleging that delays in approving rules unanimously recommended by the NAMC results in investor harm.<sup>269</sup> Taken together, these critiques raise questions about whether public participation in FINRA rulemaking is merely illusory.

In addition, FINRA’s transparency has also been critiqued as needing improvement.<sup>270</sup> For example, although FINRA does make award documents publicly available, it is important to note that FINRA arbitrators are not required to provide any rationale for their decisions unless the parties jointly request an explained award.<sup>271</sup> As a result, while FINRA awards detail the parties and their representatives, generally describe the allegations, provide a procedural overview of events in the proceeding, and record the

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267. See, e.g., FINRA, R. 12102(b) (2015); FINRA, FINRA MANUAL § II.3.C.a (2015), <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/ii-finra-regulation-inc>.

268. See Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM L. REV. 483 (1996) (describing SICA role in creation of uniform code of securities arbitration and recommendations to improve same). *But c.f.* Iannarone, *supra* note 1, at 1399–1400 (describing potential industry capture in creation of mandatory FINRA arbitration forum as created by group outside SEC).

269. For example, in a recent comment letter, former NAMC Chair Steven B. Caruso wrote, “It is deeply concerning that, rather than immediately addressing the proposed solution to one of the least controversial rule amendments in recent memory by effectuating a rule filing with the SEC, FINRA has instead chosen to ‘kick the proverbial can’ down the road . . . .” Letter from Steven B. Caruso, former NAMC Chair, to FINRA concerning FINRA Reg. No. 22-09, at 2 (Apr. 28, 2022), [https://www.finra.org/sites/default/files/NoticeComment/Steven%20B.%20Caruso\\_4.28.2022\\_FINRA\\_Comment\\_RN%2022-09%20%28redacted%20ppi%29.pdf](https://www.finra.org/sites/default/files/NoticeComment/Steven%20B.%20Caruso_4.28.2022_FINRA_Comment_RN%2022-09%20%28redacted%20ppi%29.pdf); see also *id.* at 3 (“Notwithstanding both the unanimous support of the NAMC for a prohibition on allowing compensated NARs from representing parties in all arbitration cases in the FINRA forum and the approval of the FINRA Board for the filing of a proposed rule change with the SEC consistent with this recommendation, as of the present date, nothing has been filed in the subsequent forty (40) month period of time nor has any explanation been provided to explain this unconscionable delay.”).

270. See, e.g., Alexander & Iannarone, *supra* note 7, at 1741–54; Iannarone, *supra* note 1, at 1440–47; Iannarone, *supra* note 39, at 8–11.

271. FINRA, RULE 12904(e) (2022) (describing information required to be included in award document); FINRA, RULE 12904(g) (2022) (describing process for and components of explained award).

result of the hearing, awards rarely provide rationale for the decision.<sup>272</sup> Accordingly, scholars have described FINRA awards as opaque and perhaps of no use to anyone other than the parties to the proceeding.<sup>273</sup> Scholars have also critiqued the process by which stockbrokers are able to use the arbitration process to remove information from their CRD and BrokerCheck reports and complain that BrokerCheck reports do not contain the full range of information in the CRD.<sup>274</sup>

#### E. FINRA as Potential Model for the Study of Post-Pandemic Arbitration?

The SEC and FINRA most certainly can—and probably should—address concerns raised with regard to the FINRA arbitration forum. Any changes implemented in response to such concerns would most certainly enhance the consumer protection features already present within the FINRA arbitration forum. However, that the forum is by no means perfect and can be improved does not mean that it should be disregarded as a potential model. The fact remains that, coupled with its status as an arbitration archetype, the unique features that otherwise set the FINRA forum apart from other mandatory consumer arbitration forums, including government oversight, disciplinary capabilities, and greater transparency situate the forum as one with greater potential for consumer protection than other mandatory arbitration forums. In particular, these unique characteristics may have led to FINRA’s adoption of the infrastructure identified in Part II.C. that permitted FINRA to quickly respond to the pandemic emergency and then review and evaluate whether it should institutionalize remote arbitration

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272. FINRA, RULE 12904(e) (2022).

273. See, e.g., Brunet, *supra* note 257, at 1484 (“Awards remain inscrutable documents that give the losing party no idea whatsoever of the basis for decision. A statement summarizing the issues in an arbitration is a far cry from a statement of reasons. The arbitration loser wonders why the loss occurred and whether the arbitrators really understood the issues presented.”); Edwards, *supra* note 220, at 585 (“Given the lack of explanation or precedent, determining the actual level of investor protection provided by FINRA’s arbitration process may be impossible.”); Alexander & Iannarone, *supra* note 7, at 1755 (“FINRA should designate and make available to researchers the more granular means by which it classifies awards.”). *But see* Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1, 9 (2004) (arguing that explained awards provide no benefit to parties unless they present grounds for appeal).

274. See generally Lazaro, *supra* note 245, at 129–34; Benjamin P. Edwards, *Adversarial Failure*, 77 WASH. & LEE L. REV. 1053, 1072–74 (2020).

proceedings after the emergency subsided. As such, studying FINRA's infrastructure and post-pandemic steps to learn from and improve its arbitration process may assist policymakers focused on increasing access to justice in other mandatory arbitration forums.

### V. A POTENTIAL PATH FORWARD?

As described more fully in Professor Gross's contribution to this symposium edition, scholars are studying the operation of remote proceedings during the pandemic's emergency phase and their impact on consumers in mandatory arbitration forums.<sup>275</sup> Online dispute resolution ("ODR") scholars have long proposed models for designing and evaluating ODR and continue to refine their recommendations in light of the swift and nearly wholesale adoption of remote proceedings during the emergency phases of the pandemic.<sup>276</sup> These works provide a strong theoretical basis for evaluating and recommending improvements to post-pandemic remote arbitration. Studying the structure and real-world descriptive experiences of a mandatory arbitration forum exhibiting a unique combination of justice-enhancing characteristics supplements this body of literature and may expand existing blueprints for studying remote arbitration

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275. Gross, *supra* note 15, at 365.

276. See, e.g., Amy J. Schmitz et al., *Researching Online Dispute Resolution to Expand Access to Justice*, 1 GIUSTIZIA CONSENSUALE 269, 272 (2022) (arguing "for an empirical analysis of court and other government connected ODR"); Oladeji M. Tiamiyu, *The Impending Battle for the Soul of ODR: Evolving Technologies and Ethical Factors Influencing the Field*, 23 CARDOZO J. OF CONFLICT RESOL. 75, 142 (2022) ("As we witness the inescapable reality of technological innovation, the soul of ODR will continue to evolve. The outcome of this impending battle should be the prevalence of dispute systems with greater responsiveness to the particular circumstances of disputants."); Amy J. Schmitz & John Zeleznikow, *Intelligent Legal Tech to Empower Self-Represented Litigants*, 23 COL. SCI. & TECH. L. REV. 142, 180 (2021) ("We are not including Zoom as an ODR provider. Zoom is merely a communication tool that could be part of an ODR program, but its main purpose is not dispute prevention or resolution. Still, Zoom may be a component within some of the entities [including FINRA] studied."); *id.* at 183 (proposing evaluating post-pandemic ODR on whether they include six modules "that advance[] user-centric system design—namely, case management, triaging, advisory, communication, decision support, and drafting tools"); Horton, *supra* note 181 (identifying policy considerations to be addressed in review of remote hearings, including PDAs that are silent as to the modality via which an arbitration will proceed, whether required remote arbitration procedure is procedurally and substantively fair to consumers with less bargaining power, and whether results in forced remote arbitration proceedings are publicly disclosed); Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 243–44 (2010) ("Properly regulated OArb would provide consumers with realistic means for asserting their claims while augmenting companies' cost savings from avoiding court and class actions.").

proceedings.<sup>277</sup> FINRA's structural elements of transparency and disclosure, government oversight, and stakeholder engagement may not be subject to wholesale replication in other mandatory consumer arbitration forums. Yet, FINRA's structure and experiences may strengthen post-pandemic reviews of remote arbitration in other mandatory arbitration forums. A suggested path forward follows.

Mandatory arbitration forums should learn from the pre-existing infrastructure in the FINRA DRS forum described in Part II.C., *supra*, and consider adopting, if these characteristics do not already exist within those forums, similar mechanisms to prepare for and respond to future service disruptions. First, creating strong technological infrastructure may hedge against pandemic or other disruption risks.<sup>278</sup> Second, adopting transparency as a foundational forum feature permits stakeholders to evaluate the impact of emergency shifts in procedure in real time.<sup>279</sup> In addition, transparency by design facilitates trust building and legitimacy.<sup>280</sup> Communication with and support of all stakeholders further assists in this regard. Finally, building relationships with and continuously surveying and soliciting feedback from a wide-ranging group of stakeholders creates channels through which new processes can be evaluated and a means for obtaining candid thoughts and assisting forums in implementing well-reasoned changes.<sup>281</sup> The gathered information should then be shared in a transparent fashion and used to build a process for suggesting rule and policy changes and creating guidance to facilitate all

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277. See, e.g., Jean R. Stearnlight & Jennifer K. Robbennolt, *High-Tech Dispute Resolution: Lessons from Psychology for a Post-COVID-19 Era*, 71 DEPAUL L. REV. 701, 755 (2022) ("As courts and others experiment with and increasingly use new mechanisms for dispute resolution, their efforts have the potential to provide a sandbox within which research can explore the effects of the options they make available."); Gross, *Arbitration Archetypes*, *supra* note 202, at 2336 ("[A]rbitration archetypes' should be used as models for reforms to types of arbitration that do not have the archetypal characteristics—both to improve the fairness of those processes and to put a stop to the overgeneralized nature of arbitration critique. By preserving some types of arbitration and improving others, disputants will continue to believe in the legitimacy of the process and ensure additional access to justice.").

278. See *supra* pt. II.C. and accompanying text (identifying FINRA technological infrastructure).

279. See *supra* pt. II.C. and accompanying text (identifying FINRA transparency measures).

280. See *supra* pt. II.C. and accompanying text (identifying FINRA transparency measures).

281. See *supra* pt. II.C. and accompanying text (identifying FINRA relationship building and surveying infrastructure).

stakeholders' participation in subsequent virtual proceedings.<sup>282</sup> All voices should be represented within that process, and work product should be publicly distributed and open to additional stakeholder feedback.

Second, mandatory arbitration systems should also learn from the unique-to-FINRA characteristics that enhance its status as an arbitration archetype as described in Part IV, above.<sup>283</sup> For example, voluntarily adopting broader transparency—including features like FINRA's board and committee structure and public notice-and-comment process such as that which results from FINRA's quasi-governmental status—permits open dialogue with and engages the public as permanent forum changes or rules are under consideration. While most arbitration forums are not subject to government oversight, that does not mean that they cannot voluntarily adopt any of the features that buttress the securities arbitration forum's status as an arbitration archetype.

Finally, mandatory arbitration systems should look to the descriptive account of FINRA's efforts after the emergency phase of the COVID-19 pandemic concluded to see how a strong infrastructure and unique forum characteristics resulted in study, stakeholder guidance, and proposed policy changes concerning the institutionalization of remote hearings in the securities arbitration forum.

In sum, in order to ensure that remote justice is still justice, a potential path forward could include arbitration forums adopting stronger infrastructure, providing transparency concerning results in virtual arbitration hearings, actively seeking stakeholder feedback on their experiences, engaging representative stakeholders in considering change, involving public participation, providing robust and accessible guidance and resources, and considering stakeholder suggestions before changes to arbitration rules are formally adopted. Each of these activities formed part of FINRA's actual efforts to study emergency remote arbitration before proposing to institutionalize it.<sup>284</sup>

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282. FINRA DRS's agreement to publish, as Appendices A and B, responses it received to its remote hearings participant and arbitrator experience surveys is an example.

283. *See supra* pt. IV.A.–C.

284. *See generally supra* pt. III (providing descriptive account of FINRA efforts to evaluate remote arbitration proceedings and recommend changes after the emergency stages of the COVID-19 pandemic).

## VI. CONCLUSION

While the COVID-19 pandemic has moved beyond emergency stay-at-home orders, and it is now possible for arbitration hearings to be held in person, there is no doubt that experiences gained during the emergency phases of the pandemic, and particularly the embrace of virtual arbitration hearings, will become permanent features of post-pandemic life. This contribution does not answer the question posed in the symposium—*Is Remote Justice Still Justice?*<sup>285</sup> Instead, it provides a descriptive account of how one mandatory arbitration forum—FINRA DRS—approached evaluating and improving stakeholder experiences in remote arbitration as it decided whether and how to make them a permanent feature of the forum. FINRA DRS capitalized upon pre-existing infrastructure, including technology, transparency, and a framework for stakeholder communication and engagement to convene a wide-ranging group of forum participants who worked together to make recommendations for improving remote hearings. These actions may provide a framework for other mandatory consumer arbitration forums evaluating and seeking to improve experiences in remote hearings. This is because, in addition to other justice-enhancing features, the FINRA forum offers transparency that permits study of customer experiences, is subject to government oversight, and creates accessible channels for stakeholder participation and input in the forum’s design and improvement. Moreover, after the emergency phase of the pandemic, the FINRA forum moved quickly, capitalizing on its existing infrastructure to provide additional transparency and engage stakeholders to participate in crafting updated rules, procedures, and other best practices. FINRA DRS solicited remote hearing participant feedback and involved experienced stakeholders. Due to unique characteristics identified in this Article, FINRA’s post-pandemic attempts to improve remote arbitration may serve as a potential blueprint for the design,

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285. There are also significant questions about whether in-person dispute resolution provides justice that remain unanswered. See, e.g., John Lande, *Evolution of New Normals in Dispute Resolution*, INDISPUTABLY (Apr. 4, 2022), <http://indisputably.org/2022/04/evolution-of-new-normals-in-dispute-resolution/> (“The question ‘Is remote justice still justice?’ implies that in-person justice really is justice. Of course, that’s not always true. In our field, we often are especially concerned about the effects on weaker, one-shot parties—the ‘have-nots’—and whether ‘haves’ come out ‘ahead’ in various dispute resolution processes.”).

continued study, and future improvement of remote arbitration. At the same time, the FINRA DRS forum must not stop its efforts to evaluate party experiences in post-pandemic remote arbitration. Instead, to ensure that its forum provides justice in remote hearings, FINRA must redeploy its pandemic-created model for evaluating remote proceedings and evaluate non-emergency remote FINRA arbitration proceedings to ensure that they do, in fact, provide justice.

APPENDIX A

Exhibit B



FINRA Dispute Resolution Services  
Zoom Task Force 2021

# Zoom Arbitrator Survey Results

Tuesday, November 30, 2021

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Exhibit B

# 492

## Total Responses

Survey Opened: Friday, October 29, 2021  
Survey Closed: Friday, November 26, 2021


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Exhibit B

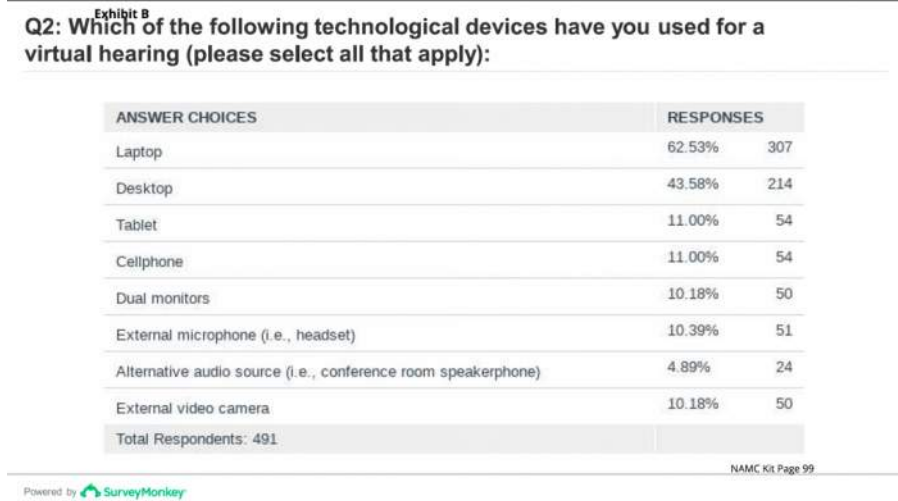
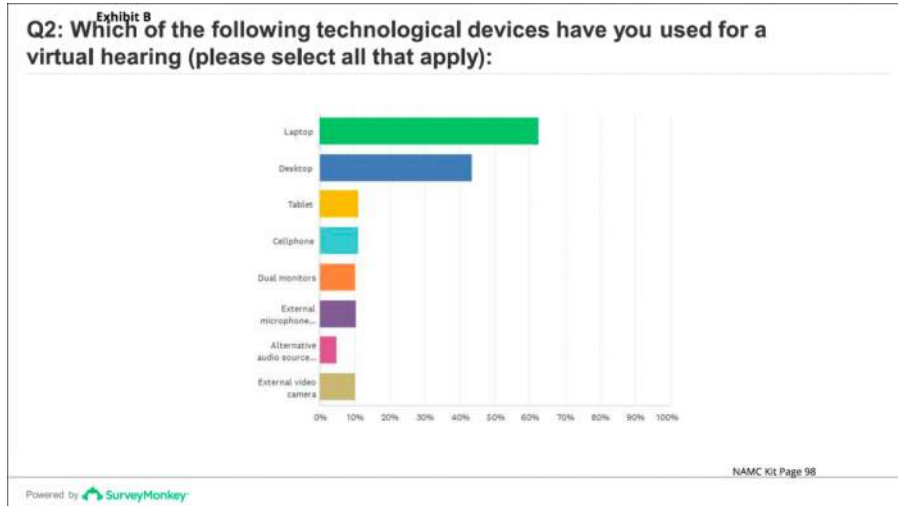
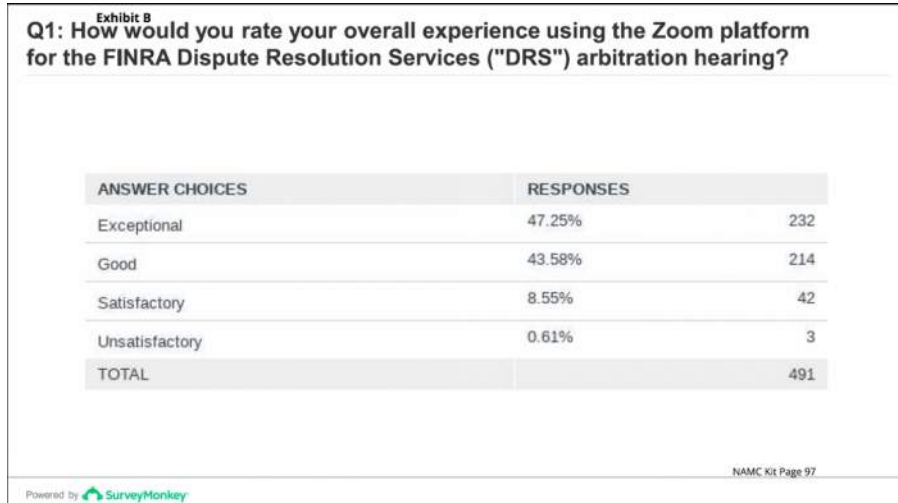
### Q1: How would you rate your overall experience using the Zoom platform for the FINRA Dispute Resolution Services ("DRS") arbitration hearing?

Rating	Percentage
Exceptional	48%
Good	42%
Satisfactory	10%
Unsatisfactory	1%

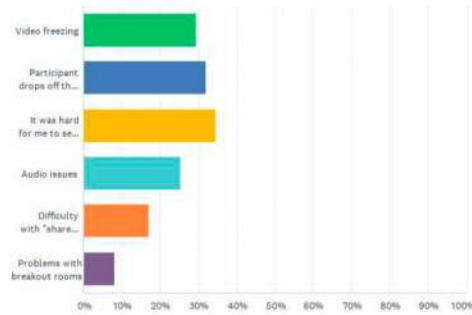
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**Exhibit B**  
**Q3: What challenges, if any, did you have with the technology you used?**  
 (Please select all that apply)



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**Exhibit B**  
**Q3: What challenges, if any, did you have with the technology you used?**  
 (Please select all that apply)

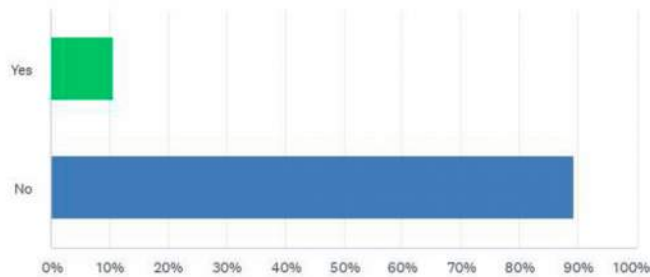
ANSWER CHOICES	RESPONSES
Video freezing	29.37% 79
Participant drops off the hearing	31.97% 86
It was hard for me to see all parties at once when document was shared due to computer set-up	34.57% 93
Audio issues	25.28% 68
Difficulty with "share screen" feature	17.10% 46
Problems with breakout rooms	8.18% 22
Total Respondents: 269	

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**Exhibit B**

**Q4: Was access to technology a concern for you?**



NAMC Kit Page 102

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Exhibit B

**Q4: Was access to technology a concern for you?**

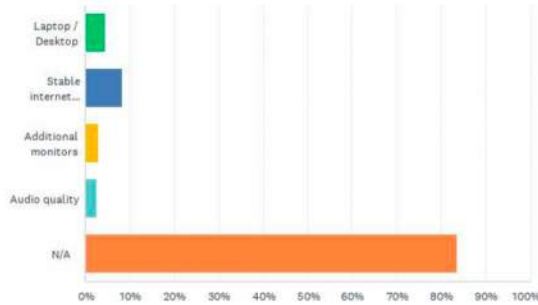
ANSWER CHOICES	RESPONSES	
Yes	10.61%	52
No	89.39%	438
TOTAL		490

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Exhibit B

**Q5: If access to technology was a concern please select the item(s) you had difficulty accessing:**



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Exhibit B

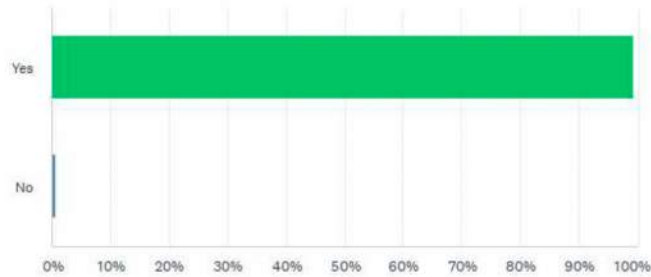
**Q5: If access to technology was a concern please select the item(s) you had difficulty accessing:**

ANSWER CHOICES	RESPONSES	
Laptop / Desktop	4.56%	12
Stable internet connection	8.37%	22
Additional monitors	3.04%	8
Audio quality	2.66%	7
N/A	83.65%	220
Total Respondents: 263		

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**Exhibit B**  
**Q6: Did you have access to a space that was private, quiet and appropriate for the hearing?**



NAMC Kit Page 106

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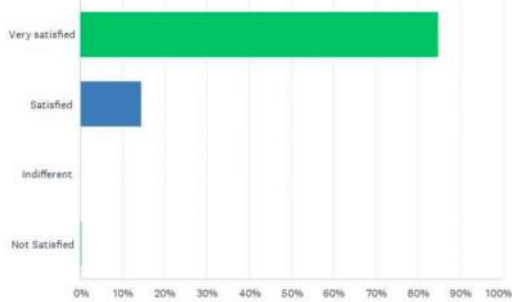
**Exhibit B**  
**Q6: Did you have access to a space that was private, quiet and appropriate for the hearing?**

ANSWER CHOICES	RESPONSES
Yes	99.39% 486
No	0.61% 3
TOTAL	489

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**Exhibit B**  
**Q7: How satisfied were you with the DRS staff support during the Zoom hearing?**



NAMC Kit Page 108

Powered by SurveyMonkey

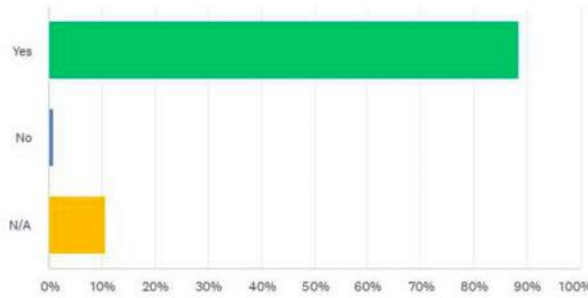
**Exhibit B**  
**Q7: How satisfied were you with the DRS staff support during the Zoom hearing?**

ANSWER CHOICES	RESPONSES	
Very satisfied	84.84%	414
Satisfied	14.55%	71
Indifferent	0.20%	1
Not Satisfied	0.41%	2
<b>TOTAL</b>		<b>488</b>

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**Exhibit B**  
**Q8: Was it easy to communicate with DRS staff when issues arose during the hearing?**



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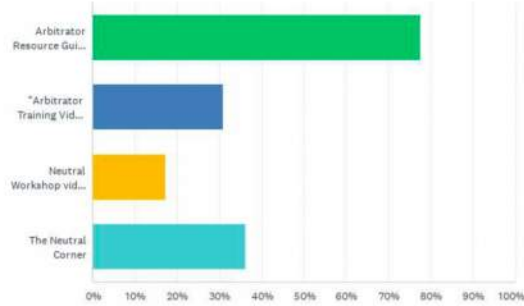
**Exhibit B**  
**Q8: Was it easy to communicate with DRS staff when issues arose during the hearing?**

ANSWER CHOICES	RESPONSES	
Yes	88.55%	433
No	0.82%	4
N/A	10.63%	52
<b>TOTAL</b>		<b>489</b>

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**Exhibit B**  
**Q9: What training materials provided by FINRA did you review about conducting a successful Zoom hearing?**



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NAMC Kit Page 112

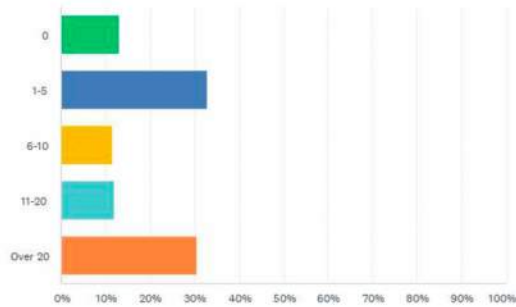
**Exhibit B**  
**Q9: What training materials provided by FINRA did you review about conducting a successful Zoom hearing?**

ANSWER CHOICES	RESPONSES
Arbitrator Resource Guide for Virtual Hearings	77.64% 309
"Arbitrator Training Videos for Virtual Hearings" (Four-part video series on DRS website)	30.90% 123
Neutral Workshop video featuring mock Zoom arbitration	17.34% 69
The Neutral Corner	36.18% 144
Total Respondents: 398	

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NAMC Kit Page 113

**Exhibit B**  
**Q10: Approximately how many non-virtual DRS arbitration hearings have you participated in?**



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NAMC Kit Page 114

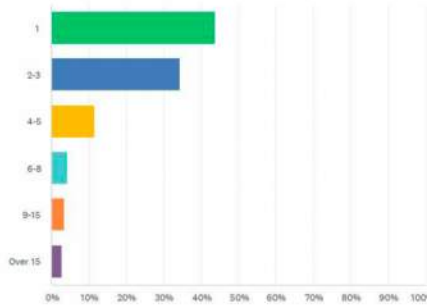
**Exhibit B**  
**Q10: Approximately how many non-virtual DRS arbitration hearings have you participated in?**

ANSWER CHOICES	RESPONSES	
0	13.03%	64
1-5	32.79%	161
6-10	11.61%	57
11-20	12.02%	59
Over 20	30.55%	150
<b>TOTAL</b>		<b>491</b>

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**Exhibit B**  
**Q11: Approximately how many virtual DRS arbitration hearings have you participated in, including hybrid hearings? A hybrid hearing is a case where some participants appear in-person while other participants appear virtually (by Zoom).**



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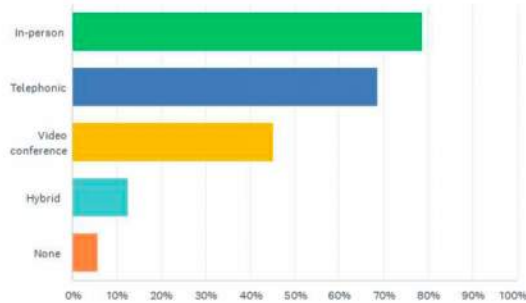
**Exhibit B**  
**Q11: Approximately how many virtual DRS arbitration hearings have you participated in, including hybrid hearings? A hybrid hearing is a case where some participants appear in-person while other participants appear virtually (by Zoom).**

ANSWER CHOICES	RESPONSES	
1	43.67%	207
2-3	34.39%	163
4-5	11.60%	55
6-8	4.22%	20
9-15	3.38%	16
Over 15	2.74%	13
<b>TOTAL</b>		<b>474</b>

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**Exhibit B**  
**Q12: What DRS arbitration hearing types have you participated in previously (please select all that apply):**



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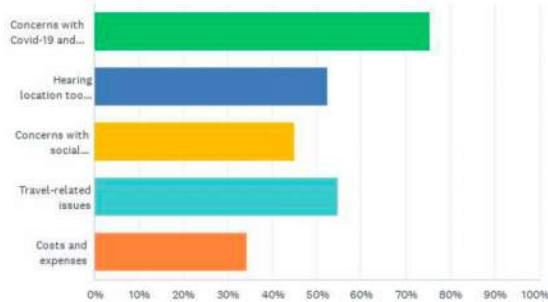
**Exhibit B**  
**Q12: What DRS arbitration hearing types have you participated in previously (please select all that apply):**

ANSWER CHOICES	RESPONSES	
In-person	78.78%	386
Telephonic	68.57%	336
Video conference	45.10%	221
Hybrid	12.65%	62
None	5.71%	28
Total Respondents: 490		

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**Exhibit B**  
**Q13: Which of the following factors would impact your decision to participate in a virtual hearing (please select all that apply):**



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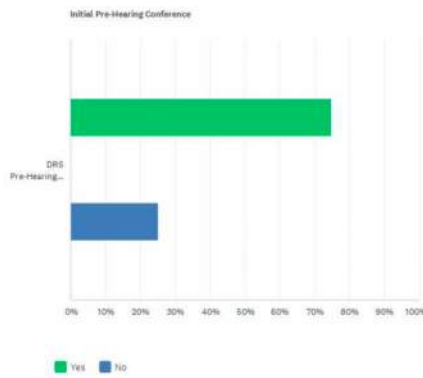
**Exhibit B**  
**Q13: Which of the following factors would impact your decision to participate in a virtual hearing (please select all that apply):**

ANSWER CHOICES	RESPONSES	
Concerns with Covid-19 and variants	75.52%	327
Hearing location too far	52.42%	227
Concerns with social distancing	45.03%	195
Travel-related issues	54.73%	237
Costs and expenses	34.41%	149
Total Respondents: 433		

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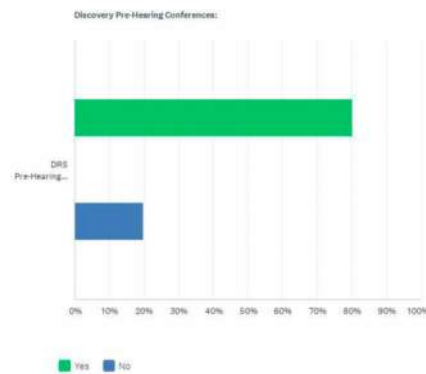
**Exhibit B**  
**Q14(a): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



NAMC Kit Page 122

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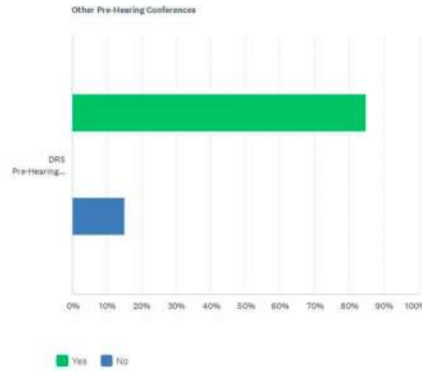
**Exhibit B**  
**Q14(b): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



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**Exhibit B**  
**Q14(c): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



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**Exhibit B**  
**Q14: Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**

Initial Pre-Hearing Conference			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	74.84%	25.16%	461
	345	116	
Discovery Pre-Hearing Conferences:			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	80.13%	19.87%	458
	367	91	
Other Pre-Hearing Conferences			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	84.90%	15.10%	437
	371	66	

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**Exhibit B**

These final questions (Questions 15 – 20) are optional. While we would appreciate your time in providing responses to these narrative questions, if you do not wish to do so, you may select “Done”. Thank you!

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**Exhibit B**  
**Q15: What specifically did you like about your DRS virtual hearing experience?**

"There were no travel hassles. Also, it was easy to follow. Everything was done professionally."

"The hearing is much more efficient than an in-person hearing."

"The ability to continue the hearing in a difficult environment."

"Ease of use."

"It was comfortable and I did not have to worry about COVID issues."

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**Exhibit B**  
**Q16: How did the DRS virtual arbitration hearing compare to the other DRS arbitration hearing types you have previously participated in?**

"I believe the zoom hearing is more effective."

"It was harder to read body language in the virtual hearing. Also it was harder to be "present" for the parties, as it was impossible to review exhibits and be looking into the camera at the same time."

"Both are effective."

"I was the sole arbitrator so it is hard to compare to my in-person experience where I was part of a panel. However, in person is much better to judge witnesses and for personal interactions with counsel. The virtual hearing did seem to move more efficiently."

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**Exhibit B**  
**Q17: Under what circumstances would you be willing to participate in a 100% virtual arbitration hearing with DRS?**

"Covid-19 protocols, all parties and arbitrators have to travel long distances, and inclement weather."

"All circumstances."

"I don't have a problem participating in virtual hearings any time the parties want to. I wouldn't limit it to Covid-19 issues or any other particular circumstances."

"Any hearing not local. All expungement-only hearings. All pre-hearing conferences including IPHC, discovery, motions. Deliberation conferences with panel."

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**Exhibit B**  
**Q18: Under what circumstances would you be willing to participate in a DRS hybrid arbitration hearing?**

"Any and all circumstances."

"I would do a hybrid in a case where an expert witness might have availability issues for in person or video hearing and would consider the option for them to appear telephonically."

"I cannot think of any circumstance in which I WOULD NOT be willing to participate."

"If we all agree it is necessary then we have to do it. I would prefer that those appearing virtually be minor witnesses or expert witnesses, not counsel or the parties."

"Again, it should be used sparingly, and the issue would be one of degree. When would the use of many remote witnesses, say, cross over into being essentially virtual hearing? There should be general guidelines established and final decisions left to panels."

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**Exhibit B**  
**Q19: What topics would be helpful for additional training on using technology during a Zoom 100% virtual or hybrid hearing?**

"Organizing and presenting evidence/documents. How to set these up so panel can get to them quickly, transition from one document to the next, with index on the side of the screen. Most useful for panelists who have only one screen. Use of the "share" facility of Zoom. How to highlight parts of documents to emphasize portions. For panelists not so tech-savvy: how to attend with only one screen; how to attend with two screens."

"No training is needed, its sooooo easy."

"Non-verbal communication."

"I think the training videos were sufficient."

"Zoom etiquette (i.e., background, distractions, etc.)."

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**Exhibit B**  
**Q20: Please provide any other feedback regarding your virtual hearing experience with FINRA DRS:**

"I've got to say, the Zoom hearings are far superior to telephonic."

"I'm very much in favor of continuing to offer virtual hearings. Also, I found the DRS staff support to be excellent."

"You must be mindful that you are on video. remembering non-verbal communication."

"Just that it was a very well run operation."

"My virtual experiences have been very positive and I see it as the wave of the future."

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*APPENDIX B*

Exhibit C



FINRA Dispute Resolution Services  
Zoom Task Force 2021

# Zoom Participant Survey Results

Tuesday, November 30, 2021

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Exhibit C

# 117

## Total Responses

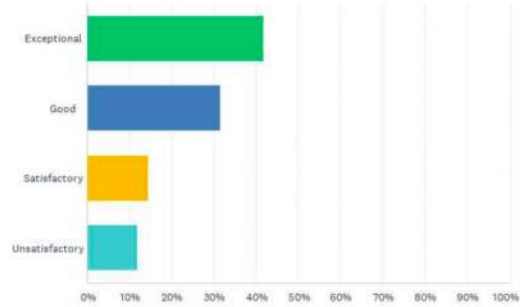
Survey Opened: Friday, October 29, 2021  
Survey Closed: Friday, November 26, 2021

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Exhibit C

### Q1: How would you rate your overall experience using the Zoom platform for the FINRA Dispute Resolution Services ("DRS") arbitration hearing?



Rating	Percentage
Exceptional	~42%
Good	~32%
Satisfactory	~15%
Unsatisfactory	~11%

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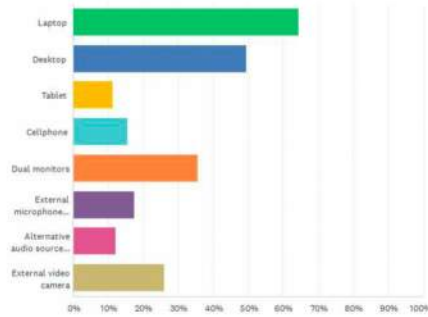
**Exhibit C**  
**Q1: How would you rate your overall experience using the Zoom platform for the FINRA Dispute Resolution Services ("DRS") arbitration hearing?**

ANSWER CHOICES	RESPONSES	
Exceptional	41.88%	49
Good	31.62%	37
Satisfactory	14.53%	17
Unsatisfactory	11.97%	14
<b>TOTAL</b>		<b>117</b>

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**Exhibit C**  
**Q2: Which of the following technological devices have you used for a virtual hearing (please select all that apply):**



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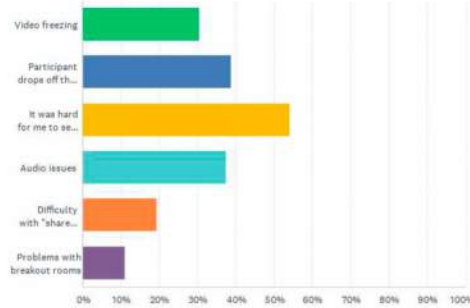
**Exhibit C**  
**Q2: Which of the following technological devices have you used for a virtual hearing (please select all that apply):**

ANSWER CHOICES	RESPONSES	
Laptop	64.35%	74
Desktop	49.57%	57
Tablet	11.30%	13
Cellphone	15.65%	18
Dual monitors	35.65%	41
External microphone (i.e., headset)	17.39%	20
Alternative audio source (i.e., conference room speakerphone)	12.17%	14
External video camera	26.09%	30
<b>Total Respondents: 115</b>		

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**Exhibit C**  
**Q3: What challenges, if any, did you have with the technology you used?**  
 (Please select all that apply)



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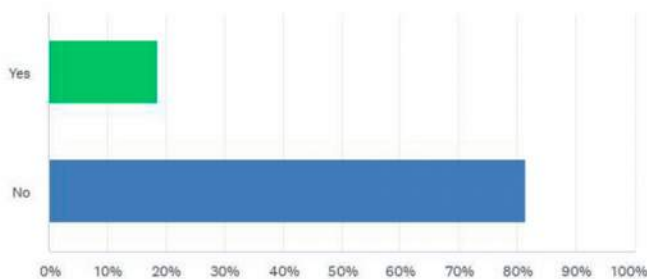
**Q3: What challenges, if any, did you have with the technology you used? (Please select all that apply)**

ANSWER CHOICES	RESPONSES
Video freezing	30.56% 22
Participant drops off the hearing	38.89% 28
It was hard for me to see all parties at once when document was shared due to computer set-up	54.17% 39
Audio issues	37.50% 27
Difficulty with "share screen" feature	19.44% 14
Problems with breakout rooms	11.11% 8
Total Respondents: 72	

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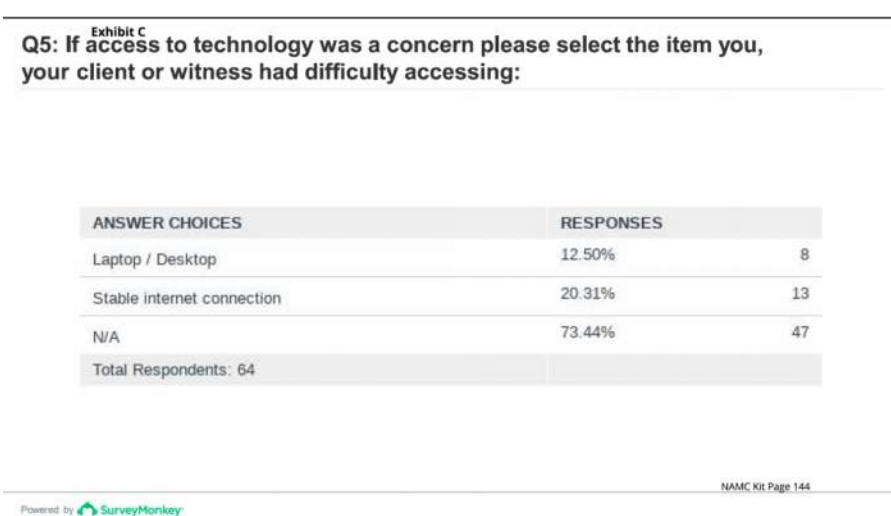
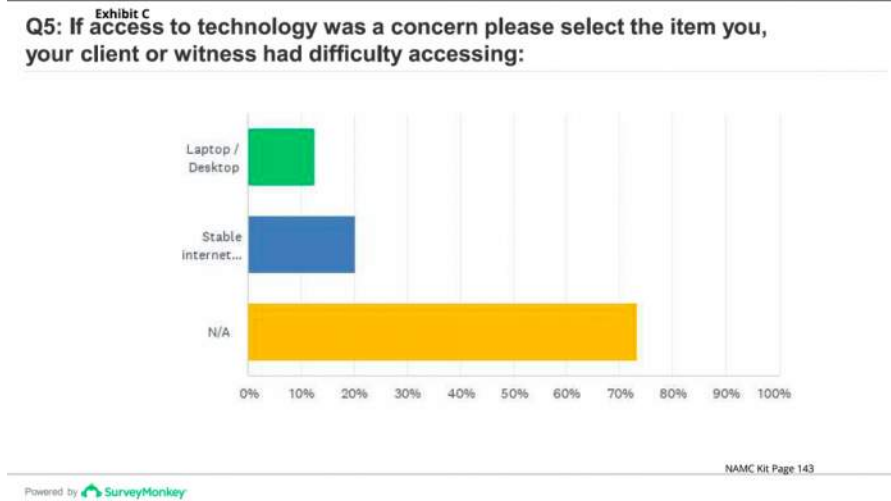
**Exhibit C**  
**Q4: Was access to technology a concern for you, your client or witness?**



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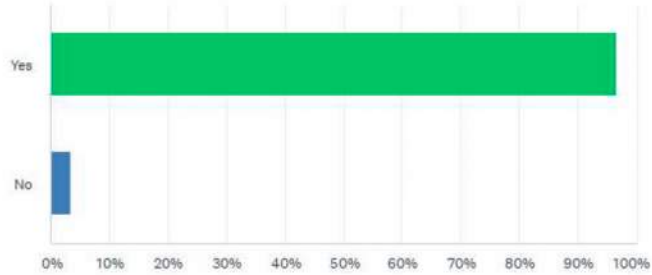
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**Exhibit C**  
**Q6: Did you have access to a space that was private, quiet and appropriate for the hearing?**



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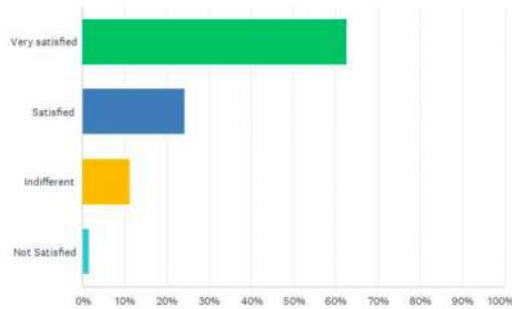
**Exhibit C**  
**Q6: Did you have access to a space that was private, quiet and appropriate for the hearing?**

ANSWER CHOICES	RESPONSES
Yes	96.52% 111
No	3.48% 4
TOTAL	115

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**Exhibit C**  
**Q7: How satisfied were you with the DRS staff support during the Zoom hearing?**



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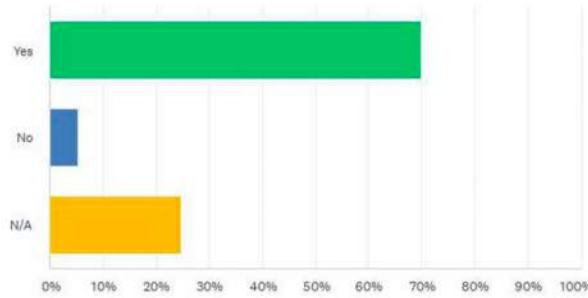
**Exhibit C**  
**Q7: How satisfied were you with the DRS staff support during the Zoom hearing?**

ANSWER CHOICES	RESPONSES	
Very satisfied	62.61%	72
Satisfied	24.35%	28
Indifferent	11.30%	13
Not Satisfied	1.74%	2
<b>TOTAL</b>		<b>115</b>

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**Exhibit C**  
**Q8: Was it easy to communicate with DRS staff when issues arose during the Zoom hearing?**



NAMC Kit Page 149

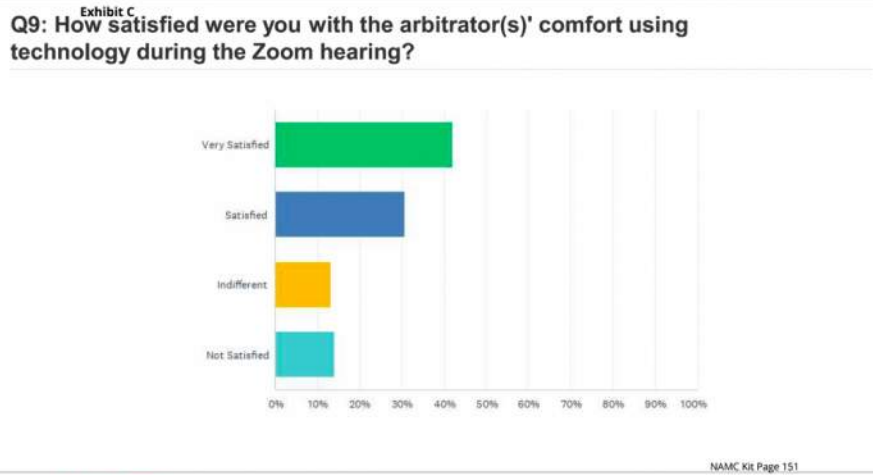
Powered by  SurveyMonkey

**Exhibit C**  
**Q8: Was it easy to communicate with DRS staff when issues arose during the Zoom hearing?**

ANSWER CHOICES	RESPONSES	
Yes	69.91%	79
No	5.31%	6
N/A	24.78%	28
<b>TOTAL</b>		<b>113</b>

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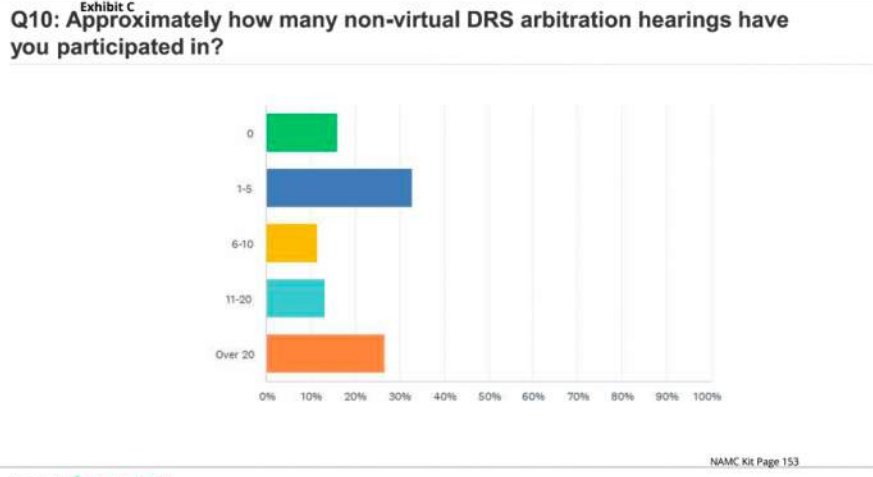


**Exhibit C**  
**Q9: How Satisfied were you with the arbitrator(s)' comfort using technology during the Zoom hearing?**

ANSWER CHOICES	RESPONSES
Very Satisfied	42.11% 48
Satisfied	30.70% 35
Indifferent	13.16% 15
Not Satisfied	14.04% 16
Total Respondents: 114	

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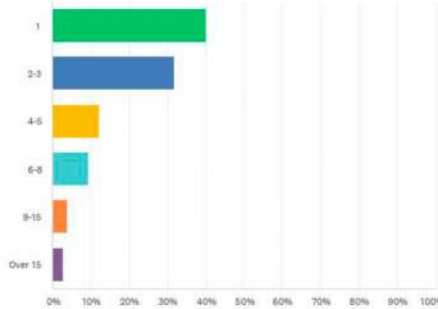
**Exhibit C**  
**Q10: Approximately how many non-virtual DRS arbitration hearings have you participated in?**

ANSWER CHOICES	RESPONSES	
0	15.93%	18
1-5	32.74%	37
6-10	11.50%	13
11-20	13.27%	15
Over 20	26.55%	30
<b>TOTAL</b>		<b>113</b>

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**Exhibit C**  
**Q11: Approximately how many virtual DRS arbitration hearings have you participated in, including hybrid hearings? A hybrid hearing is a case where some participants appear in-person while other participants appear virtually (by Zoom).**



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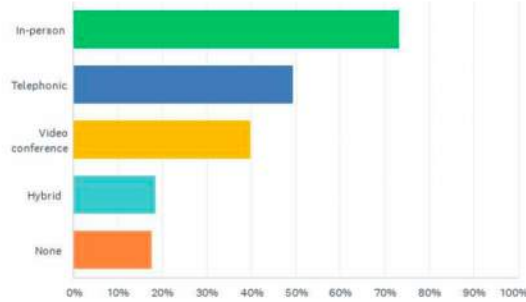
**Exhibit C**  
**Q11: Approximately how many virtual DRS arbitration hearings have you participated in, including hybrid hearings? A hybrid hearing is a case where some participants appear in-person while other participants appear virtually (by Zoom).**

ANSWER CHOICES	RESPONSES	
1	40.19%	43
2-3	31.78%	34
4-5	12.15%	13
6-8	9.35%	10
9-15	3.74%	4
Over 15	2.80%	3
<b>TOTAL</b>		<b>107</b>

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**Exhibit C**  
**Q12: What DRS arbitration hearing types have you participated in previously (please select all that apply):**



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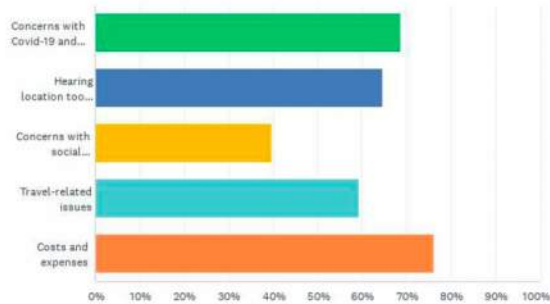
**Exhibit C**  
**Q12: What DRS arbitration hearing types have you participated in previously (please select all that apply):**

ANSWER CHOICES	RESPONSES	
In-person	73.45%	83
Telephonic	49.56%	56
Video conference	39.82%	45
Hybrid	18.58%	21
None	17.70%	20
Total Respondents: 113		

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**Exhibit C**  
**Q13: Which of the following factors would impact your decision to participate in a virtual hearing (please select all that apply):**



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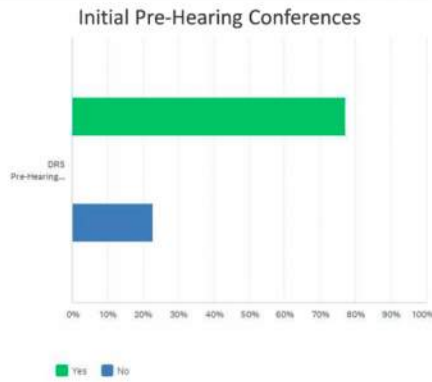
**Exhibit C**  
**Q13: Which of the following factors would impact your decision to participate in a virtual hearing (please select all that apply):**

ANSWER CHOICES	RESPONSES	
Concerns with Covid-19 and variants	68.75%	66
Hearing location too far	64.58%	62
Concerns with social distancing	39.58%	38
Travel-related issues	59.38%	57
Costs and expenses	76.04%	73
Total Respondents: 96		

NAMC Kit Page 160

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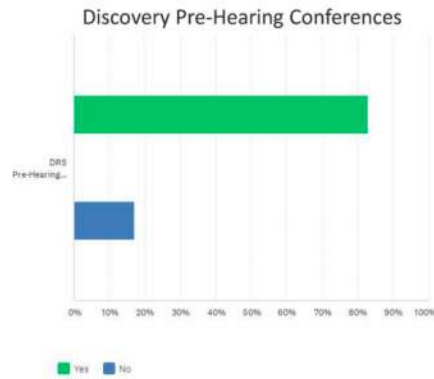
**Exhibit C**  
**Q14(a): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



NAMC Kit Page 161

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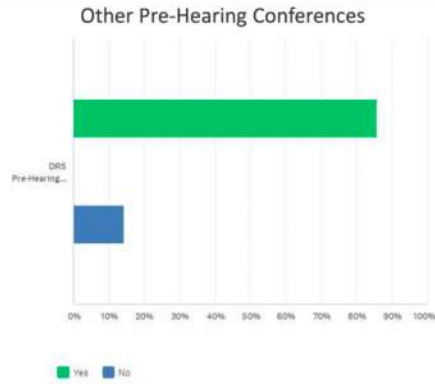
**Exhibit C**  
**Q14(b): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



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**Exhibit C**  
**Q14(c): Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**



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**Exhibit C**  
**Q14: Would you support conducting the following types of DRS pre-hearing conferences by Zoom video conference instead of by telephone?**

Initial Pre-Hearing Conference			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	77.14%	22.86%	105
	81	24	

Discovery Pre-Hearing Conferences:			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	82.86%	17.14%	105
	87	18	

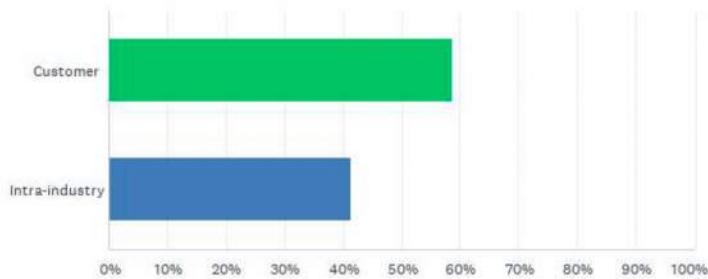
  

Other Pre-Hearing Conferences			
	YES	NO	TOTAL
DRS Pre-Hearing Conferences	85.71%	14.29%	105
	90	15	

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**Exhibit C**  
**Q15: Demographic information: Kindly recall the last DRS virtual hearing that you participated in. Was it a customer case or an intra-industry case?**



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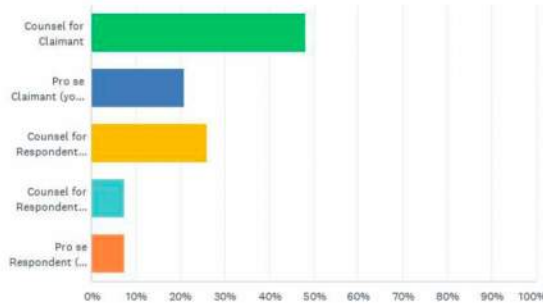
**Exhibit C**  
**Q15: Demographic information: Kindly recall the last DRS virtual hearing that you participated in. Was it a customer case or an intra-industry case?**

ANSWER CHOICES	RESPONSES	
Customer	58.72%	64
Intra-industry	41.28%	45
<b>TOTAL</b>		<b>109</b>

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**Exhibit C**  
**Q16: In which role(s) did you participate, if you participated in a customer case? Please select all that apply:**



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**Exhibit C**  
**Q16: In which role(s) did you participate, if you participated in a customer case? Please select all that apply:**

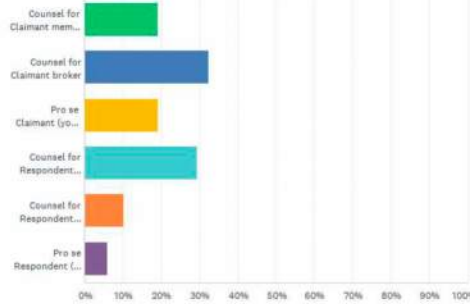
ANSWER CHOICES	RESPONSES	
Counsel for Claimant	48.15%	39
Pro se Claimant (you represented yourself in the proceeding)	20.99%	17
Counsel for Respondent member firm	25.93%	21
Counsel for Respondent broker	7.41%	6
Pro se Respondent (you represented yourself in the proceeding)	7.41%	6
<b>Total Respondents: 81</b>		

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**Exhibit C**  
**Q17: In which role(s) did you participate, if you participated in an intra-industry case? Please select all that apply:**



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**Exhibit C**  
**Q17: In which role(s) did you participate, if you participated in an intra-industry case? Please select all that apply:**

ANSWER CHOICES	RESPONSES	
Counsel for Claimant member firm	19.12%	13
Counsel for Claimant broker	32.35%	22
Pro se Claimant (you represented yourself in the proceeding)	19.12%	13
Counsel for Respondent member firm	29.41%	20
Counsel for Respondent broker	10.29%	7
Pro se Respondent (you represented yourself in the proceeding)	5.88%	4
Total Respondents: 68		

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**Exhibit C**

**These final questions (Questions 18 – 22) are optional. While we would appreciate your time in providing responses to these narrative questions, if you do not wish to do so, you may select “Done”. Thank you!**

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**Exhibit C**  
**Q18: What specifically did you like about your DRS virtual hearing experience?**

"Efficient, much better than telephonic. Allowed arbitrator to be in Florida and parties to be in New York and Minneapolis."

"The virtual hearings allowed my cases to proceed while in-person hearings were canceled due to COVID."

"In a case where there are multiple minor witnesses, it is much more efficient. You don't have witnesses waiting in a lobby for hours for their turn to testify, and they don't have to rearrange flights and travel. Zoom should be considered post-covid for witnesses other than the claimant and broker."

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**Exhibit C**  
**Q19: How did the DRS virtual arbitration hearing compare to the other DRS arbitration hearing types you have previously participated in?**

"It was efficient and inexpensive."

"You lose some of the interaction of a live hearing. Much better than telephonic."

"Much better."

"Not great. It is difficult to examine adverse witnesses remotely. It is also too easy for arbitrators to be distracted by non-hearing related intrusions."

"Far better."

"Just as good."

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**Exhibit C**  
**Q20: Under what circumstances would you be willing to participate in a 100% virtual arbitration hearing with DRS?**

"I would almost always be willing to consider virtual."

"A short hearing of a day or less. Any expungement hearing."

"Covid, or other issues."

"I think it should be optional on the consent of all the parties (not including the arbitrators)."

"Expungements and other intraindustry. Customer cases where the amount at issue is small (i.e., less than \$100K). Video also a good option for hearings with are shorter, i.e., a couple days. I think video saves money and time, while expanding access and enabling a better presentation for all involved."

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**Exhibit C**  
**Q21: Under what circumstances would you be willing to participate in a DRS hybrid arbitration hearing? What challenges do you see with hybrid arbitration hearings?**

"When in-person hearings aren't permitted."

"I'm comfortable with hybrid - so long as both parties agree to rules (who is permitted to appear via Zoom)."

"I would try and hybrid hearing in almost any circumstance. There are always minor witnesses who could appear via video rather than having to travel to appear in person."

"Generally would be willing to do it for many or most cases."

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**Exhibit C**  
**Q22: Please provide any other feedback regarding your virtual hearing experience with FINRA DRS:**

"FINRA staff has been very helpful throughout this process. I greatly appreciate all that they do."

"Frankly, it was tough to gauge whether the arbitrators were actively listening."

"Great way to do these cases, especially for clients and counsel who have a high volume of cases, which is often the case in this kind of work."

"FINRA technology support was excellent. My clients and I appreciated the opportunity to have a "practice session" in advance to learn the technology and features. One suggestion for future virtual hearings would be to build into the IPHC script whether panelists will want the parties to provide printed copies of exhibits in advance of the hearing (in addition to displaying exhibits on the screen)."

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