

**CNAR NEWSLETTER SUBMISSION**  
**BACK TO BASICS: 8 THINGS TO CONSIDER WHEN CONDUCTING A VIRTUAL HEARING**

Anastasia-Maria Hountalas and Valreen Sealie

As we mark two years since the move to virtual hearings, it is important to reflect on skills developed and lessons learned. When planning for a virtual hearing, what can a regulator do to ensure a smooth and fair process?

**Document Management**

Document management has emerged as one of the more challenging aspects of virtual hearings. The ease of "handing up" documents is not easily replicated on phone calls or videoconferences and accessing and navigating electronic documents can be challenging for participants.

It is helpful for the regulator's discipline arm to establish basic document management protocols and clearly communicate expectations to participants in advance of a virtual hearing. Simple guidance around page numbering, file type, naming conventions and colour coding can greatly reduce interruptions during a hearing and ensure that participants stay on the literal same page.

Regulators should also review their rules of procedure and consider whether amendments or guidance is necessary in order to facilitate electronic service and filing. How are documents to be filed in advance of the hearing? How and when will they be made available to the Panel, independent legal counsel, the court reporter, the hearings coordinator and other participants? Are paper copies required? Will the Panel review documents in advance of the hearing or do the parties prefer that materials be reviewed in real time as they are "handed up"? While strict protocols are not necessary (and indeed some flexibility is appreciated by the participants), it is important for a regulator to turn its mind to document management in order to ensure that the virtual hearing process is efficient and accessible on the day in question.

**Technology**

The importance of well-planned technology cannot be overstated. Regulators should advise participants as to the format, platform and technology requirements prior to the hearing, and be prepared to address a host of technological challenges (i.e., issues with internet connectivity, hardware and/or applications).

Regulators may consider offering technology tests for witnesses and other participants in advance of a virtual hearing to ensure that everyone has the technology necessary to participate. What steps can be taken for participants who do not have the necessary technology? Perhaps participants can attend at an alternative location (i.e., court reporter's office, lawyer's office, other designated location) where they can have access to and/or assistance with the required technology. Alternatively, regulators might send the required technology to the participant's home.

At the outset of the hearing, staff should confirm the procedure if a participant experiences technical difficulty and how it should be addressed. Staff may provide participants with call-in credentials or contact information for a designated staff member who can assist with any technological issues that arise during the hearing.

## **Virtual Decorum**

The formality of a physical hearing environment encourages a level of decorum and formality that is often missed by participants in a virtual hearing. It is prudent for regulators to communicate expectations at the outset of the hearing. Keep in mind that participants may have varied experience levels with the virtual hearing process, so it is important to clearly communicate expectations (especially for self-represented participants) in order that the process may proceed as desired.

In particular, regulators may provide direction to participants on whether microphones and cameras should remain on or off when a participant is not speaking, remind participants to choose a quiet location free from interruptions and distractions, and/or remind participants that virtual hearings are a formal setting where business attire is appropriate.

## **Plea Inquiries**

Whether a hearing proceeds virtually or in-person, clear communication is particularly important during the plea inquiry. It is crucial that plea inquiries are conducted in a manner where the Panel's questions and practitioner's responses are clear, understandable and properly recorded. In a virtual hearing, this requires sufficiently clear audio for all participants.

What assistance is available if Panel members or practitioners (or the court reporter) experience technological issues during a plea inquiry? Given the importance of this exercise, staff should be on hand to facilitate breakout rooms or another manner in which the practitioner and their counsel can have a private conversation if necessary. Regulators may also consider providing Panels with specific training on conducting virtual plea inquiries, including ensuring that each question and response is clearly communicated and recorded by the court reporter.

## **Marking Exhibits**

Although the process for tendering and marking exhibits is straightforward, it can present challenges if electronic documents are not easily accessible by participants in a virtual hearing. To that end, basic document management guidelines as set out above can greatly assist.

When a party intends to mark a document as an exhibit, the Panel should first ascertain whether the other parties object or consent to the document being so marked. When a document is tendered, how will it be distributed to participants? Will this be done by email, file share or screen share? This process should be set out in advance to minimize delays during a virtual hearing.

Similarly, once a Panel has decided to mark a document as an exhibit, the exhibit should be identified on the record and the assigned person (usually a court reporter or staff person) will mark an exhibit copy and place it in the record file. This process requires that multiple individuals have access to (and the ability to manipulate) electronic documents with relative ease.

## **Calling Witnesses**

Witness management is another aspect of virtual hearings where the in-person process can be tricky to replicate. When planning for a virtual hearing, regulators should consider where witnesses will "sit" while they are waiting to give evidence, during breaks and during objections. Witnesses should generally be separated from one another until they have given evidence, so regulators should consider how best to implement this rule in a virtual environment. Perhaps witnesses will be placed in individual breakout rooms. Or perhaps witnesses will be asked not to log into the virtual hearing room until they are alerted by counsel or staff that it is time for their

evidence. Either way, this process should be communicated to participants in advance of the hearing to minimize interruptions and delays.

It is also important to ensure the integrity of a witness' surroundings when they give evidence virtually. Will the Panel ask each witness to conduct an environment scan before giving evidence and after each break to ensure that they are alone? What happens if another individual can be heard in the background? Regulators and lawyers might consider whether to ask each witness to confirm on the record that they are alone and that they did not discuss their evidence during breaks or technical interruptions where the witness was not visible on screen.

### **Objections**

When planning for a virtual hearing, regulators should also consider setting out a process for objections. The most efficient and effective process will depend largely on the format of the virtual hearing. In phone proceedings, it may be most impactful to simply request that counsel state their objection orally should the need arise. In a videoconference proceeding, counsel might communicate an objection by turning on their camera, using the raise hand function in the platform, raising their hand in front of their camera, or unmuting to state the objection orally.

While the process may vary, the chosen method should allow counsel to clearly and quickly indicate an objection such that the Panel is then able to pause, move the witness out of the virtual hearing room, and address the objection before proceeding.

### **Public Access**

Finally, regulators should consider how public access will be granted and monitored during a virtual hearing. Generally speaking, discipline hearings are open to the public and regulators are obliged to permit public access to virtual hearings in accordance with the open court principle.

But what does public access look like when observers cannot simply sit at the back of a hearing room? Will the virtual hearing be live streamed online using a platform such as YouTube? If so, will observers be required to register in advance or can they simply tune in online? Will observers be required to request login credentials or will access information be readily available on the regulator's website? Will observers have different or limited settings that allow them to observe but not participate in or interrupt the virtual proceedings?

Regulators will also want to consider how (and how frequently) information related to publication bans will be communicated to observers. If there is a publication ban in effect, regulators might consider a slide or announcement feature to remind observers of the terms of the publication ban. This information could also be posted in the comments or description section, if such a function is available. Alternatively, the Panel may remind observers about the publication ban at the outset of the hearing and following every break. While the process may vary between regulators, it is important that publication bans are properly implemented, while maintaining public access.