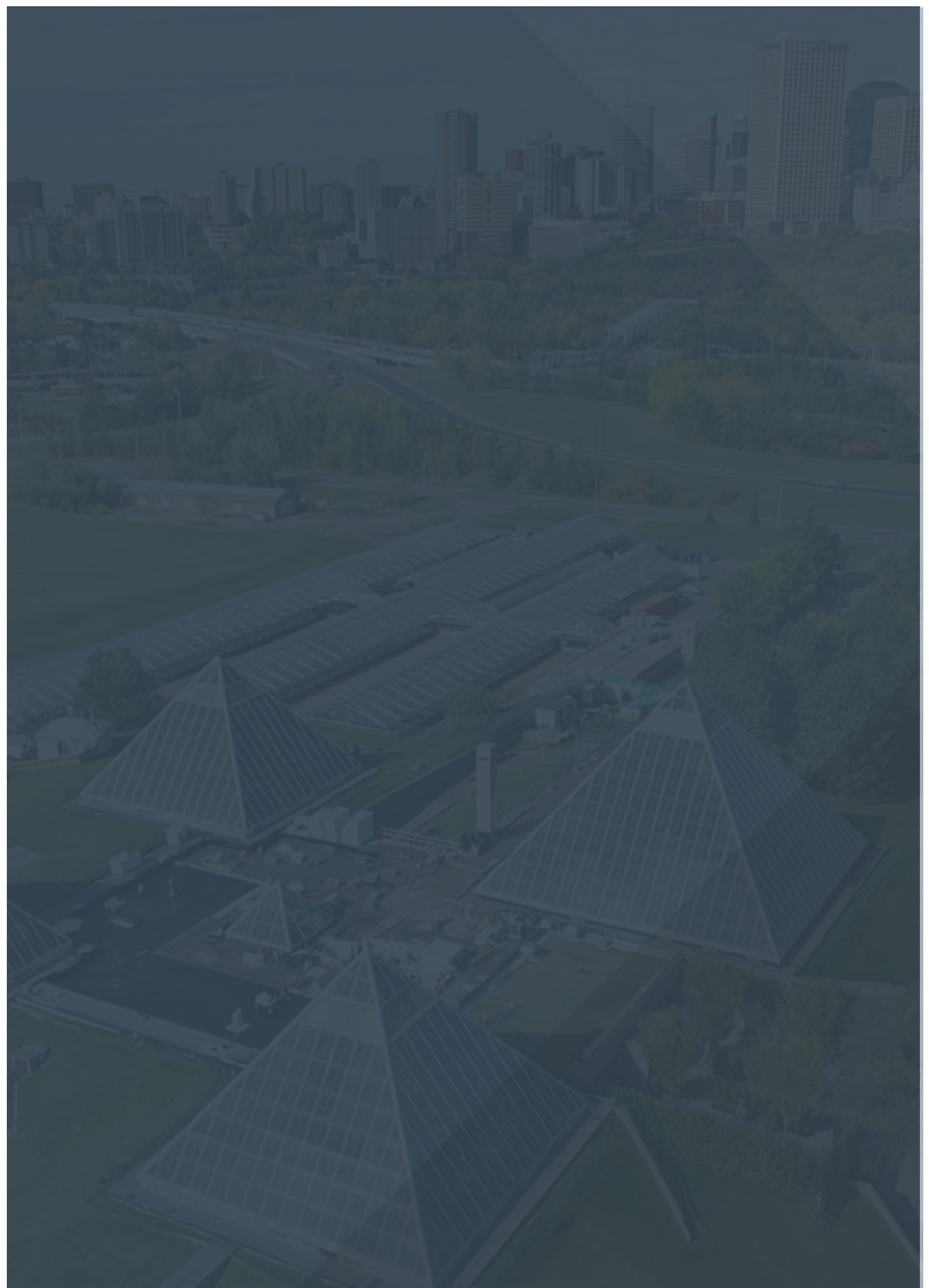


VIRTUAL HEARING GUIDE FOR ADMINISTRATIVE PROCEEDINGS

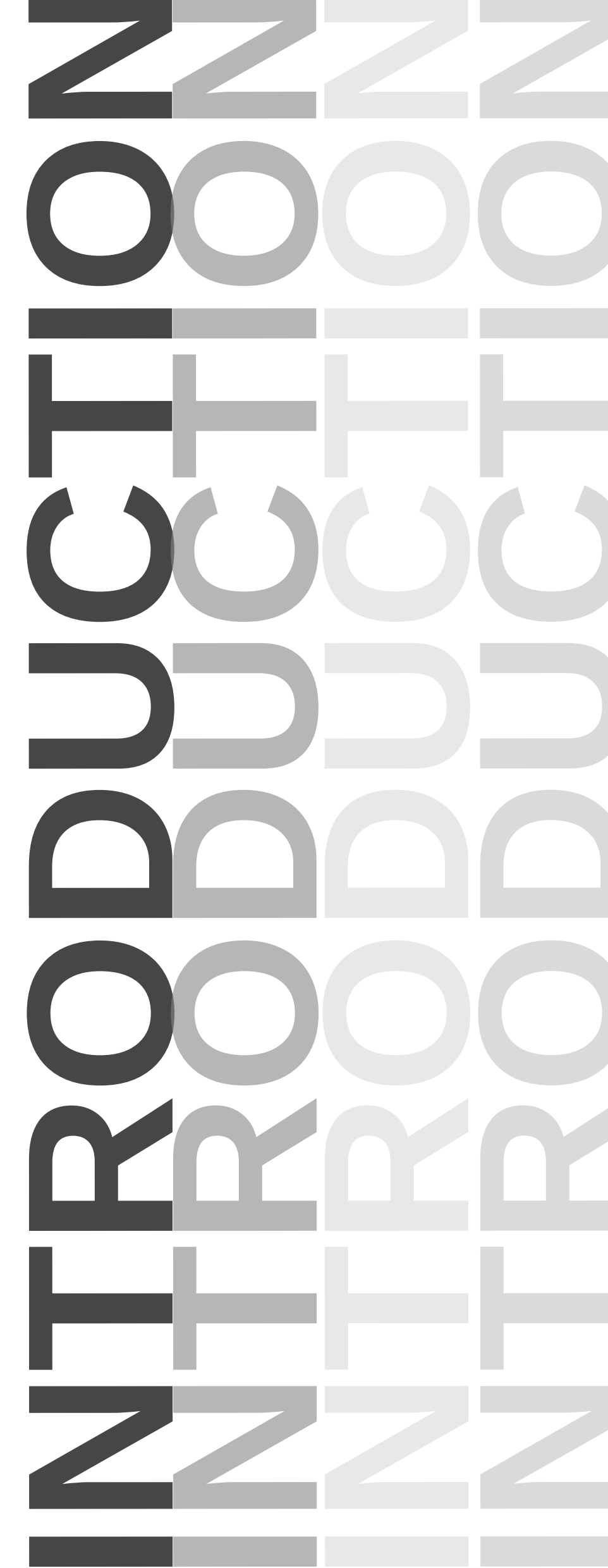
JUNE 2020

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This guide is meant to assist the organizers and participants of virtual administrative proceedings. Although the creation of this guide was prompted in part by COVID-19, we expect an increased number of administrative hearings will proceed virtually in the future.

Virtual hearings have many advantages: they can be more cost effective for the organizers and the participants, they can allow broader access and participation, they can proceed more efficiently, they can reduce resource needs, and they can be convened anywhere with internet access.

Virtual hearings also have disadvantages: there are accessibility concerns, additional steps may be required to ensure procedural fairness of the hearing, and there are logistical hurdles.

The purpose of this guide is to facilitate virtual hearings by providing a resource with information on common questions and concerns. The body of the guide is geared toward those organizing virtual hearings, and there are a number of resources provided in the appendices that can be shared with virtual hearing participants, including decision-makers or decision-making panels, counsel, and witnesses.

This guide is intended to be used as a general resource. If you or your organization encounters any particular dilemmas not addressed here, we encourage you to contact our firm directly for further consultation and advice.

CHOOSING YOUR PLATFORM

The organization (whether it's a public body, association or college, an agency, board, commission or otherwise) holding the hearing generally organizes the hearing logistics such as location, court reporter, and sending out notices, and undertakes other administrative tasks inherent in organizing a hearing. The organization typically has a hearing administrator who organizes and prepares the administrative elements of the hearing. In the virtual world, the hearing administrator for the organization should choose the virtual platform for hosting the hearing. The *procedure* of the hearing will be set by the panel of decision-makers.

Each hearing administrator will want to choose the best platform for its organization's needs. There are many existing platforms that provide a variety of different options for virtual hearings. If you require a court reporter for your virtual hearing, you may wish to speak to a representative from the company about what options they have available, and which platform will best suit your needs.

There should be a facilitator present during the hearing to assist with the logistics of the hearing, including allowing participants into the meeting, moving participants into break-out rooms as needed, and assisting with trouble shooting. The facilitator can be a member of the organization's staff, or in some cases, the court reporter. The facilitator will need to be familiar with the virtual platform being used.

Current virtual platform options include: Zoom, Webex, Microsoft Teams, Lifesize, Bluejeans, Google Meet, and GoToMeeting.

Participants will need to download the virtual platform, but do not need an account to join the hearing.

The virtual platform should, at a minimum:

- provide protections for confidentiality;
- provide high resolution video imaging and quality audio;
- enable smaller groups (e.g. counsel and client, the decision-making panel, etc.) to meet by themselves during the proceeding (sometimes called caucusing or “break-out rooms”); and
- enable documents and other participants to be displayed on the screen at the same time (sometimes called a “share screen” feature).

Things you might want to consider when selecting your platform:

- Who will be the facilitator during the hearing?
- How many hearing participants will you have?
- If the hearing must be public, how will the public get access? What will that access entail?
- Will hearing participants require “break-out rooms”?
- Will document sharing programs be required? If so, how many documents are likely to be shared and is an additional program necessary to facilitate this?

Make sure each participant in the virtual hearing has access to the platform you choose. Each participant must also have:

- A quiet, private place to connect from;
- Reliable and strong internet access; and
- A camera, microphone and speakers on their computer.

You might also recommend that each participant have:

- A headset;
- An extra monitor to view documents on.

Virtual hearing participants should share their cell phone numbers and email addresses with the facilitator and be provided with the facilitator's contact information prior to the hearing so that any technical issues or disruptions can be addressed efficiently during the hearing.

Hearing administrators should provide the meeting password shortly before the meeting start time and ask participants not to share it with anyone. Recommended security features include using 2-factor authentication and strong passwords.

Hearing administrators should use host security features such as:

- locking the meeting;
- enabling a “waiting room”; and
- limiting participants' ability to share screens, “chat” or rename themselves.

TIP

The Hearing Administrator Chooses the Platform

The Decision-Maker Determines the Procedure

TRAINING/ ORIENTATION

In advance of any virtual hearing, you should expect that participants will need an introduction to the process. While some aspects of a virtual hearing are very similar to an in-person hearing, others can be quite different.

Orientation should be made available for all decision-makers (including each member on a decision-making panel), as well as for the decision-maker's independent legal counsel. The orientation can be simple and straightforward. It should include information such as:

- who will facilitate the hearing;
- which platform your organization uses;
- when and how to connect;
- basic troubleshooting; and
- the expected procedure.

Decision-makers, especially if making a decision as a panel, should be provided the opportunity to experience the platform prior to the hearing. A "test" meeting with the decision-making panel is a great way to make people feel more comfortable. It may also be beneficial to hold a “test” meeting with all participants. This could be done in advance of the hearing or 30 minutes before the hearing start time on the day of the hearing.

Counsel for parties in virtual hearings are expected to ensure that their clients and witnesses have received their own orientation in the expected procedure, including orientation, practice sessions, and written material as necessary.

TIP

**Prevent Fear of the Unknown:
Participants should Practice with the Platform
until they are comfortable**



tips for your set-up

TIP: Make sure you can be seen and heard by everyone, and make sure you can see and hear all the participants.

- 1.** Make sure you have a working camera, microphone and speakers in advance of the hearing. If you are using a laptop or tablet device, it likely has these built in. If you are using a desk-top computer, you may need to acquire a camera, microphone, and speakers to be able to participate.
- 2.** It is best to have an extra monitor to view documents. Any additional screen connected to your computer should work, including a television or laptop.
- 3.** Clear your calendar for the duration of the time you are expecting to participate in a hearing. If you have children, pets, or other distractions that may interrupt, do your best to make sure their needs are met by others during the time you are expected to attend the hearing.
- 4.** Make sure you have a quiet, private space that will be available for the duration of your participation in the hearing.
- 5.** Make sure your internet connection is stable and minimize other usage for the duration of your participation in the hearing. Wifi will work, but hardwired internet connections are better. Close any programs unrelated to the hearing which can slow down the connection.
- 6.** You may wish to use headphones connected to your computer to block external noise and help focus your attention on the hearing.
- 7.** You will need to download the virtual platform, but you do not need an account in order to participate.
- 8.** Be prepared to join the hearing about half an hour before it is scheduled to begin, in case there are any technical difficulties.
- 9.** When participating in a hearing, face the camera with your full face in the screen. Try to make sure you do not turn away from the camera.
- 10.** Try to position yourself with a blank wall with no distractions behind you, and no bright lights (e.g. windows) either in front of you or behind you.
- 11.** Wear appropriate clothing. You might be at home, but the participants can still see you.

TIPS FOR THE HEARING

1

Make sure the hearing administrator has a master list of everyone's contact information (name, cell phone number, email) including the the court reporter, in case of technical problems.

2

Make sure there is a protocol in place to deal with technical problems (e.g. all parties stop until everyone is reconnected).

3

Before the hearing begins, make sure everyone can hear and see each other.

4

As participants join the meeting, they will likely need to be admitted to the hearing, and a password may be required to enter. Ensure all participants are aware of the protocol.

5

All participants should silence their cellphones and any other communicating devices for the duration of the hearing.

6

All participants should "mute" their microphone unless they are speaking. Background noises, typing, shuffling papers, or other sounds will distract from the hearing.

7

Be prepared for glitches, and establish a protocol for what will happen if someone is "kicked out" of the platform.

8

Consider scheduling your hearing for longer than you would an in-person hearing. Using a virtual setting, especially if it is new to some or all of the participants, can mean extra time is required.

9

Consider scheduling periodic 10 to 15-minute breaks to give participants a rest; focusing on a screen for long periods of time can be visually draining.

TIP

**Remind All Participants to Speak Slowly and
One at a Time**

SECURITY/ PRIVACY

Open Hearings

Some administrative proceedings are open to the public. If a virtual hearing is to be open to the public, the hearing will need to be publicized in advance in the usual fashion, including information on who to contact in order to attend the virtual hearing.

If a member of the public wishes to attend the hearing, they should have contact information of who to contact to receive a link to view the hearing. This is preferable to posting a link to the hearing platform directly on the organization’s website. In addition, the hearings administrator should consider the settings in the platform for members of the public attending the hearing. Some virtual hearing platforms allow participants to watch and listen only, but they cannot be seen or heard and cannot participate in any other fashion. The organization can also have a "viewing room" available at its office space where the hearing is displayed on a screen, in the event a member of the public attends to view the hearing.

If an organization's hearings are open to the public, it will need to consider protocols to ensure public access to the hearing while ensuring that hearings are not recorded by any participants or members of the public. Ensuring all participants are aware of and agree to the prohibition on recording the hearing at the start of a hearing is a good practice. Organizations could also require participants to sign an undertaking that they will not record or rebroadcast any part of the hearing (see Appendix D and Appendix E for template undertakings).

Closed Hearings

If a hearing or part of a hearing is held in private, the virtual platform should have security settings to prevent anyone without permission from entering the hearing and participating in any way.

The facilitator should ensure that they are able to stop and re-start public access (either online as part of the platform or in the organization’s office in person) should the hearing need to be closed in full or in part.

All Hearings

To prevent unwanted parties entering the hearing without consent, it is advisable for the hearing administrator to set a password to enter the meeting.

The hearing administrator should also disable individual “chats” so that no-one can “chat” with another participant without all parties being aware of it. The meeting should be locked, the hearing administrator can enable a “waiting room”, and participants’ ability to share screens or rename themselves should be limited.

TIP

NEVER SHARE MEETING
LINKS PUBLICLY

PRINCIPLES OF NATURAL JUSTICE

The principles of natural justice must remain at the forefront of any administrative proceeding. At their most basic, this means that anyone subject to an administrative proceeding has:

1. The right to know the case against them;
2. The right to be heard;
3. The right to an impartial and unbiased decision-maker;
4. The right to a decision made by those who heard the case; and
5. The right to a decision with reasons.

Ensuring that these principles remain in place in a virtual hearing is of vital importance. All decision-makers should be reminded of these fundamental principles and be alive to their role in making sure they are met, even in a virtual context.

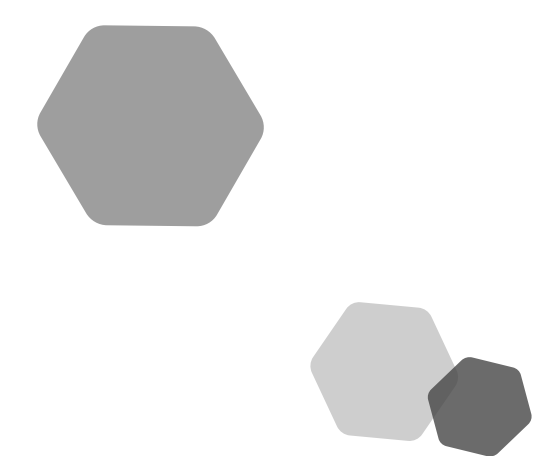
There should be minimal change to the process of the hearing itself. The platform is new, but the same principles apply. If the decision-maker or panel of decision-makers needs to caucus, ask questions of independent legal counsel, or take time to review the evidence, these options are still available and break-out rooms or a separate conference call line can be used.

There is some evidence that hearing evidence virtually, versus in-person, can impact the apparent authenticity and credibility of a witness. The decision-makers should be informed of this potential bias to ensure they are aware of the issue.

TIP: Whether virtually or in-person, the parties subject to an administrative proceeding have the same rights and will experience the same impact

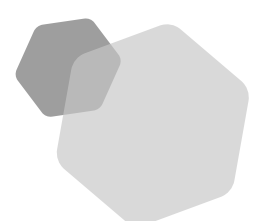
Preliminary conference

Consider whether it is necessary to have a preliminary conference to decide how to manage procedural issues in advance of the hearing. For example, participants may wish to sort out the best way to share documents, whether documents should be password protected and shared in advance, how and who will number exhibits, etc. Some of these questions are addressed in the next section.



Where appropriate, the organization should provide participants with the opportunity to present motions or joint proposals to the decision-maker or panel of decision-makers, who will ultimately decide its own process.

A preliminary conference can avoid a hearing that is convened and then adjourned because procedural issues need to be addressed before proceeding with the substance of the hearing.



TIP

**Iron out the procedural wrinkles
prior to the hearing**

DEALING WITH DOCUMENTS

Parties should turn their minds to how they wish to deal with any documents to be tendered at a virtual hearing. Some options include:

- i. An agreed exhibit book (PDF with page numbers), distributed in advance with undertakings by the decision-maker(s) not to look at it or send any part of it to anyone. The PDF can be password protected and the password only distributed once the particular party should have access;
- ii. A screen share for exhibits to show to a witness; or
- iii. Use of a secure program such as ShareFile or Sync to share documents as the hearing progresses.

Other considerations:

- i. Documents a party wishes to tender as an exhibit: There might be documents which have been excluded from the agreed exhibit book, but which a party plans to tender as an exhibit. To avoid any surprises, parties could share their documents with the other party or parties in advance of the hearing. This will allow a smoother process because all parties will be able to speak to the document without the need to adjourn the hearing. Another option is for the document to be exchanged between counsel (if parties are represented by counsel) email during the hearing so that both parties can make submissions on whether it should be entered as an exhibit.
- ii. How to enter exhibits: Some options available are:
 - a. the court reporter can mark the exhibits electronically; or
 - b. for tribunals or panels where the Chair marks the exhibit, the Chair can print the first page of each exhibit, mark it, and then send the marked exhibit pages to the hearing administrator after the hearing.
- iii. Document disposal: decision-makers (and anyone else receiving materials) must ensure secure disposal of documents after a hearing. Options include secure shredding if a document has been printed or returning all materials to the hearing administrator after the written decision has been issued. Documents received electronically should be permanently deleted from the decision-maker's or panel member's computer or device after the written decision has been issued.
- iv. Physical evidence: Consider if physical evidence will be an issue in the hearing. Unless a process is agreed to in advance of the hearing for the entry of this evidence, this type of evidence can be challenging to deal with in a virtual hearing.

Ultimately, the decision-maker, whether it is an individual or a panel, is the master of its own procedure. If the parties cannot come to a consensus on how to deal with documents, the decision-maker or decision-making panel may need to make a ruling on the procedural component of how to deal with disputed documents.

For parties tendering evidence, consider having one person handle the questioning, while an assistant or co-counsel manages the documents and any necessary note-taking.

TIP

THE DECISION-MAKER IS THE MASTER OF ITS PROCEDURE

WITNESSES

Witnesses in administrative hearings are required to take an oath that they will tell the truth. There are typically two ways to do this: the witness may affirm, or they may swear on a religious text. In a virtual hearing, the simpler procedure is to have the witness affirm. However, if a witness wishes to swear on a religious text in a virtual hearing, the witness must provide their own religious text.

Counsel for the participants (or participants themselves, if self-represented), should be responsible for making sure that witnesses have:

- The required technology;
- Contact information for counsel, who will notify them when to call in and how they will be admitted to the hearing; and
- The materials they require in order to participate (including a religious text to swear on, if necessary).

Make sure the witness is only able to open and view the required documentation when asked to do so during the hearing (see comments above about document sharing and password protecting documents).

There is some evidence that hearing testimony virtually, versus in-person, can impact the apparent authenticity and credibility of a witness. One way to combat this is to ensure the witness is in good lighting, easy to see and easy to hear. In addition, it may be wise to have a witness show the room in which they are testifying before they give their evidence, to show that they do not have additional notes or individuals providing them with evidence or coaching. Having the witness’ camera pulled back, so that a broader view is allowed which includes their upper body and the table in front of them, can make it easier for a decision-maker(s) to evaluate a witness’s evidence.

The decision-makers should be aware of these issues, as with any other bias issues. Decision-Makers may benefit from training in assessing witness credibility and understanding and addressing bias.

Appendix B includes tips for witnesses participating in virtual hearings and what they can expect.

The organization will also need to consider whether there is a need for interpreters or any considerations that may be needed for special needs participants. These issues should be addressed well in advance of the hearing.

If there is a concern with witness conduct during the hearing (i.e. appearing to be taking cues, reading from an unknown document, or consulting with someone off-screen), it should be addressed by the decision-maker as soon as it is noticed so that the witness can have an opportunity to explain the conduct. This is preferable to having the witness' evidence tainted by the suspicion of coaching.

TIP

Counsel or a self-represented party is responsible for preparing the witness

The Decision-Maker is responsible for hearing and understanding the evidence without bias

Conclusion

This guide was created to help organizations involved in administrative proceedings organize and run virtual hearings. Virtual hearings have become a necessity due to the COVID-19 pandemic. However, learning how to have virtual hearings will continue to have benefits. This guide is the start of the learning process, but practice and experience are extremely important.

Attached to this guide are a number of appendices with tips and suggestions for the procedure of a virtual hearing. These are excellent resources to have with you during a virtual hearing.

We hope you will find this guide helpful, but if any dilemmas or problems arise that are not addressed here, we encourage you to contact our firm directly for further consultation and advice.

TIP

We have sample procedural outlines and scripts to help decision-Makers or tribunal chairs. If you would like more information about this, please contact us at ClientRelations@rmrf.com.

APPENDIX A

Chair Instructions for Witnesses

CHAIR DIRECTIONS TO A WITNESS

Note: This is a lengthy list and not all items will be required in each case. "Chair" refers either to the sole decision-maker in an administrative proceeding, or the person designated as the chair of a decision-making panel. The Chair can decide what is needed depending on the circumstances.

I. AFTER THE WITNESS HAS BEEN SWORN IN

1. Please show the camera a copy of a piece of government issued photo identification.
2. Please position yourself in front of the camera so we can see your hands and adjust your lighting so we can clearly see your face.
3. It is important for the integrity of this process that this be your own evidence, given in response to questions from counsel, without prompting by way of a person in the room or by way of notes, texts or email messages. Do you understand?
4. Is there is anyone else in the room with you?
5. Can you communicate with anyone outside your space during your testimony?
6. Do you have any communication tools open on your computer? (e.g. email, telephone, cellphone, etc.)
7. Please exit any programs on your computer or tablet except the one you are using to communicate with the hearing. Make sure all notifications are turned off on your computer, cellphone and other devices.
8. Do you have any smart speaker devices, such as Alexa, in the room with you?
9. Can you tell me what is in front of you?
10. Do you have any electronic or paper notes?
11. Are you recording this hearing?
12. Please move the camera to show the decision-maker(s) and hearing participants a 360 degree view of the space you are participating in.
13. Do you have any devices with the ability to communicate?
14. Please place your cellphone and any other communicating device where everyone participating in the hearing can see it.
15. As much as possible, please make sure your hands are visible to the camera.
16. Are you willing to sign and be bound by the undertaking provided to you?
17. From time to time, counsel may be referring you to documents on the screen. *[Instructions on how to use whichever document sharing program has been selected]*

APPENDIX B

Tips for witnesses

TIPS FOR WITNESSES

Preparing for a Hearing

1. The person who will be questioning you may want to do a “dry run” to make sure everything works on your end.
2. Make sure you have a working camera, microphone, and speakers in advance of the hearing. If you are using a laptop or tablet device, it likely has these built in. If you are using a desk-top computer, you may need to acquire a camera, microphone and speakers to be able to participate.
3. You may need an extra monitor to view documents.
4. Clear your calendar for the duration of the time you are expected to be needed. If you have children or pets who may interrupt, do your best to make sure their needs are met by others during the time you are expected to attend the hearing.
5. Identify and raise any concerns or problems as early as possible.

Before the Hearing

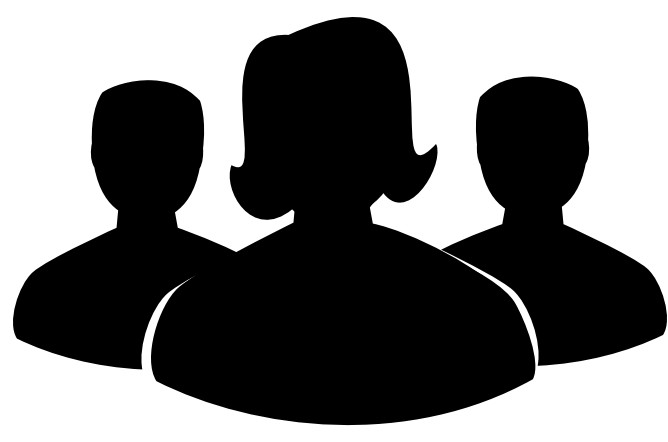
1. Dress as you normally would to appear at a hearing.
2. Make sure you have a quiet, private space that will be available for the duration of your participation in the hearing.
3. Make sure your internet connection is stable and minimize other usage for the duration of your participation in the hearing. Wifi will work, but hardwired is better.
4. Exit any programs on your computer or tablet except the one you will use to communicate with the hearing. Make sure all notifications are turned off on your computer, cellphone, and other devices.
5. If you wish to swear an oath using a religious text, make sure to have a copy available, as no-one will be able to give you one.

During the Hearing

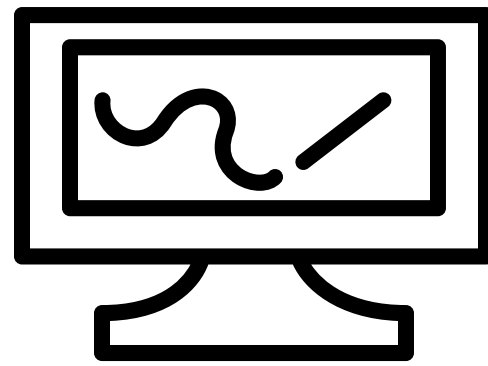
1. Once you join the virtual platform, you may need a password to enter and you will likely need to be admitted to the hearing, which may take a few minutes.
2. Face the camera with your full face in the screen. You may be asked to sit so that your hands can be seen while you testify.
3. Expect to be asked if there is anyone else in the room with you.
4. Expect to be asked to show the panel of decision-makers and hearing participants a 360 degree view of your space.
5. Expect to be asked to put your cellphone in place where everyone participating in the hearing can see it.
6. Do not speak over other participants. Wait until you are certain the other person has stopped speaking before you answer a question.

APPENDIX C

Chart comparing in-person hearings to virtual hearings



IN-PERSON



VIRTUAL

Access	Anyone can attend, so long as they can get to the venue where the hearing is held	Anyone can attend, so long as they have internet access and devices to meet their needs
Accessibility	<p>May be more accessible to some groups and less to others (for example, even people without internet can attend, but people without transportation cannot)</p> <p>Most other accessibility issues, such as hearing or seeing difficulties can be addressed with technology</p>	<p>May be more accessible to some groups and less to others (for example, people in other countries or remote locations will be able to attend, but people without internet access will not be able to)</p> <p>Most other accessibility issues, such as hearing or seeing difficulties can be addressed with technology</p>
Efficiency	Generally relatively efficient	Generally relatively efficient once parties get "into the flow"
Expenses	<p>More costly – food, hotels, transportation, hearing venues, parking, printing, etc.</p> <p>More expensive for hosts and participants</p>	<p>Much less expensive – cost of virtual hearing platform, mailing</p> <p>Less expensive for hosts and participants</p>
Interruptions	Less likely, although uncontrollable elements can still interrupt	Much more likely, and much less easily controlled. In addition to technological interruptions, because the hearing is taking place in multiple locations, many of which are unlikely to be routinely reserved for hearings, the likelihood of an interruption is dramatically increased
Logistics	<p>More familiar to most people. Easier to envision in advance and to plan for</p> <p>Traditional methods for submitting exhibits</p>	<p>More difficult for some people to navigate. More difficult, at least initially, to plan for the unexpected</p> <p>Plans need to be in place for how to submit exhibits, exhibit stamping etc.</p>
Natural Justice	Easier to be aware of and to address issues of natural justice immediately	Some concerns that natural justice will be harder to address. For example, if someone cannot be heard, how will other participants know that the person is trying to make themselves heard?
Resources	Much more paper, potentially less energy usage, although many people bring devices with them to in-person hearings as well	Much less paper, potentially more energy usage
Security/Confidentiality	Easier to regulate attendance and to see if people are doing things they are not supposed to, but always subject to the honour of the participants	More difficult to secure. Always subject to the honour of the participants
Technology	Much less technology and technological knowledge required. Where there are technological needs, others are present to help address	All participants will require certain technology and certain technological knowledge in order to participate

Appendix D

APPENDIX D

Undertaking of a party attending the hearing

UNDERTAKING AND AGREEMENT OF PARTY TO A PROCEEDING

HEARING OF THE [INSERT NAME OF THE TRIBUNAL, BOARD, COMMISSION, OR BODY]

Hearing respecting: _____

Hearing Date: _____

I am a party to a hearing of the *[name of tribunal, board, commission or body]*. I understand that the hearing in the above noted matter will proceed virtually. I further understand that in accordance with section *[insert]* of the *[insert Act]*, the hearing is open to the public. I can attend or participate in this hearing by audioconference or videoconference.

To protect the integrity of these proceedings, I undertake and agree not to record or rebroadcast in any manner the proceedings.

Print Name

Signature

Date

Status: party/witness/observer

Name of Lawyer, if any

Appendix E

APPENDIX E

Undertaking of member of the public attending the hearing

UNDERTAKING AND AGREEMENT

HEARING OF THE *[INSERT NAME OF THE TRIBUNAL, BOARD, COMMISSION, OR BODY]*

Hearing respecting: _____

Hearing Date: _____

I understand that the hearing in the above noted matter will proceed virtually. I further understand that in accordance with section *[insert]* of the *[insert Act]*, the hearing is open to the public. I can attend this hearing by audioconference or videoconference.

To protect the integrity of these proceedings, I undertake and agree not to record or rebroadcast in any manner the proceedings. I acknowledge that if I breach this undertaking and agreement, I may be prohibited from further participation in the proceedings.

Print Name

Signature

Date

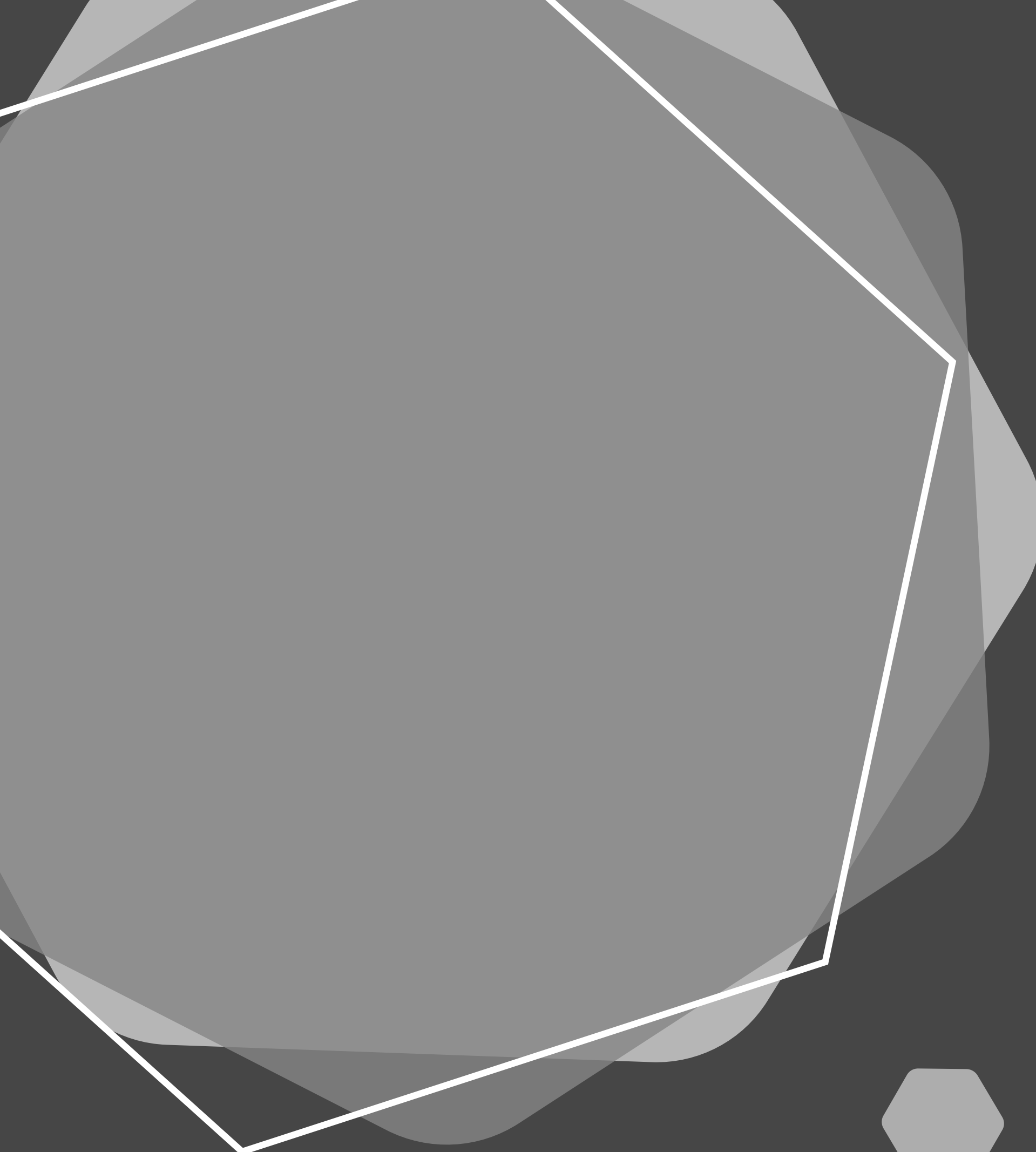
Status: party/witness/observer

Address

Name of Lawyer, if any

Email address

Phone number



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