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## Mission Statement

We publish *The Neutral Corner* to provide arbitrators and mediators with current updates on important rules and procedures within securities dispute resolution. FINRA's dedicated neutrals better serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

## Office of Dispute Resolution and FINRA News

### Case Filings and Trends



Arbitration case filings from January through May 2019 reflect a 22 percent decrease compared to cases filed during the same five-month period in 2018 (from 1,909 cases in 2018 to 1,485 cases in 2019). Customer-initiated claims decreased by 14 percent through May 2019, as compared to the same time period in 2018.

### Removal of Initial Prehearing Conference Order PDF From FINRA's Website

Last year, FINRA added the Initial Prehearing Conference Order (IPHC order) to the DR Portal (portal). This allows arbitrators to complete the IPHC order in the portal in fewer steps and without having to download a PDF form to their personal computer. The IPHC order provides additional ease by pre-populating party names, case numbers and names of the arbitrators. Arbitrators can find the IPHC order under the Drafts & Submissions tab in the portal by selecting "Initial Prehearing Conference Order" as the submission type. The system alerts arbitrators if required information is missing.

On June 3, 2019, FINRA removed the PDF version of the IPHC order from the Office of Dispute Resolution's (ODR) website. The PDF will remain available to arbitrators upon request.

Since 2017, FINRA rules have required all parties, except customers representing themselves, to use the portal. While the portal is not yet mandatory for arbitrators, FINRA encourages all arbitrators to use the portal because it is the most efficient and secure way to communicate with parties and ODR. To facilitate the use of the portal, FINRA integrated the IPHC order, as well as the general, dismissal and postponement orders that can be submitted directly through the portal. If you have any questions about using the order forms, please review the User Guide or contact FINRA staff for assistance at (800) 700-7065.

## Register For the Portal Today

If you have not already done so, we strongly encourage arbitrators and mediators to register for the portal. The portal allows users to:

- file case documents including the electronic Oath of Arbitrator and
- Disclosure Checklist, IPHC order and general, dismissal and postponement orders;
- access information about assigned cases, including case documents, upcoming hearings and arbitrator payment information;
- schedule hearings;
- update profile information;
- view and print the disclosure report;
- update the last affirmation date on the disclosure report; and
- review list selection statistics to see how often an arbitrator's name has appeared on arbitrator ranking lists sent to parties and how often an arbitrator has been ranked or struck on those lists.

Portal registration is noted on the disclosure reports that parties review when selecting arbitrators and mediators. As advised earlier, use of the portal became mandatory for all parties (except for *pro se* investors) in April 2017. Although the portal is not mandatory yet for arbitrators, we encourage arbitrators to register and take advantage of the benefits of the portal.

## Portal How-to Videos

If you need assistance updating your profile or submitting the Oath of Arbitrator or other order forms in the [portal](#), the [how-to videos](#) are here to help. These videos are quick tutorials for arbitrators on navigating to the Update Form and Oath of Arbitrator. They also include information on how to disable pop-up blockers in different Internet browsers. We will add new videos as needed. Please contact FINRA staff at (800) 700-7065 with any questions about accessing the portal.

## Practising Law Institute's (PLI) Securities Arbitration 2019: September 10, 2019

PLI's Securities Arbitration 2019 provides an opportunity to hear about the latest developments and hot topics directly from ODR leadership, arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. PLI's distinguished faculty will provide practical tips for litigating and arbitrating elder abuse claims and strategies for knowing when and which claims are ripe for mediation. They will also explore ethical issues involved in securities arbitration for advocates and neutrals and discuss panel diversity in the forum. Finally, they will take a look at the latest hot topics and future trends in securities arbitration for 2019.

The program will be presented live in New York City on September 10 at 9 a.m. Eastern Time. It will also be available simultaneously via webcast, which can be accessed remotely. A recorded version may be viewed later. CLE credit will be available.

FINRA arbitrators and mediators will receive a 25 percent discount off the regular registration fee. Please contact PLI at (800) 260-4PLI and provide the source code "LFM9" and key code "FINRA" to register for the program at the reduced rate.

## SEC Rule Approval

### Amendments to Expand Time for Non-Parties to Respond to Arbitration Subpoenas and Orders

The Securities and Exchange Commission (SEC) approved amendments to FINRA Rules [12512\(d\) through \(e\)](#) and [13512\(d\) through \(e\)](#) of the Codes of Arbitration Procedure to expand the time for non-parties to respond to arbitration subpoenas and orders of appearance of witnesses and production of documents. The amendments will be effective for cases filed on or after July 1, 2019. For more information, please review [Regulatory Notice 19-20](#).

## Recent Case Involving the Enforceability of Non-Party Subpoenas for Documents

### [Next Level Planning & Wealth Management, LLC vs. Prudential Ins. Co. of America, No. 18-MC-65 \(E.D. Wis., 2/13/19\)](#)

In a recent FINRA arbitration, the claimant obtained a subpoena from the arbitrator for documents from a non-party. The non-party objected, arguing that under the Federal Arbitration Act (FAA), an arbitration panel does not have authority to issue a subpoena requiring a non-party to produce documents prior to a hearing. The court agreed, stating that the FAA provides that arbitrators may direct non-parties to bring documents in conjunction with their appearance at a hearing. However, the FAA does not authorize a subpoena for documents only.

Some federal appellate courts, however, have held that the FAA's provision authorizing an arbitrator to compel non-party document production implicitly includes the authority to compel such production prior to a hearing. Arbitrators considering whether to issue non-party subpoenas may order the non-party to appear at the hearing with the documents and, for the non-party's convenience, permit a waiver of appearance if he or she produces the documents as ordered.

Please also review the article, "Subpoenas and Orders of Production," previously published in [Volume 3, 2017](#) on the topic of non-party subpoenas.

## Become a FINRA Mediator

Do you have mediator experience? Consider joining the FINRA mediator roster. Please email the [Mediation Department](#) for more information.

## Mediation Update

### Mediation Statistics



From January through May 2019, parties initiated 241 mediation cases, an increase of six percent for the same period in 2018. FINRA also closed 242 cases during this time. Approximately 89 percent of these cases concluded with successful settlements.

### Mediation Program for Small Arbitration Claims

FINRA's [Telephonic Mediation Program for Small Arbitration Claims](#) continues to receive positive feedback from parties and mediators. Active FINRA arbitration cases with initial claims of \$50,000 or less are eligible for the program. Claims for \$25,000 or less are eligible for mediation at no cost. Claims for more than \$25,000 through \$50,000 are eligible for a reduced fee of \$50 per hour (divided by the parties). FINRA collects no mediation filing fees for these cases.

To date, more than 90 percent of the cases mediated through this program have reached a settlement. Throughout their work, FINRA mediators emphasize the value of telephonic mediation and help parties understand the strengths and weaknesses of their cases and assist them with shaping their own outcomes.

Telephonic mediation offers seniors, or those with difficulty traveling, the option to participate in a mediation from the comfort of their own homes. Telephonic mediation also offers mediators, in areas of the country with fewer opportunities to mediate, the ability to mediate with parties in any location.

We encourage parties and counsel in small cases to consider using the telephonic mediation program.

### Keep It Current

Keeping your mediator disclosure report up-to-date—including the number of times you have mediated cases, your success rate and types of cases mediated—matters to parties when selecting a mediator. Parties have also requested references from mediators who do not list them on their disclosure report. Please add references to your disclosure report, so parties may consider them when selecting a mediator. You can update your mediator profile anytime through the [portal](#).



## Questions and Answers

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### Clarifying Arbitrator Classification

**Question** I recently began employment with a staffing agency as a contract attorney and am assigned to review documents for a law firm with a substantial securities practice. Will my assignment as a contract attorney for this law firm, through the staffing agency, affect my classification as a public arbitrator?

**Answer** FINRA Rules 12100(y)(9)-(10) extend to contract attorneys. If the law firm has derived at least \$50,000 or 10 percent of its annual revenue in either of the last two calendar years from handling securities clients and/or securities matters, you will be reclassified temporarily as non-public. This is true even though you are technically employed by the agency, regardless of where you are physically working. You may be eligible to be reclassified as a public arbitrator two calendar years after you have stopped performing work on behalf of the law firm.

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### Awarding Attorneys' Fees

**Question** When can arbitrators award attorneys' fees as part of the award?

**Answer** Arbitrators may award attorneys' fees when requested by a party and: 1) the parties' contract includes a clause that provides for attorneys' fees; 2) the governing law provides for attorneys' fees when all of the parties request or agree to such fees; 3) the fees are required or permitted as part of a statutory claim; or 4) as otherwise provided by law.

FINRA does not provide guidance on whether arbitrators may award attorneys' fees. The law may vary widely and may require interpretation that FINRA, as a neutral forum, will not provide. In addition, arbitrators should not conduct independent legal research. If a party requests the recovery of attorneys' fees and arbitrators have questions regarding their authority to award such fees, arbitrators should request briefs from the parties that identify the basis for awarding attorneys' fees. If the panel determines that a party has a right to recovery, that party must prove the amount to the satisfaction of the panel. The panel may permit testimony or evidence to be submitted during the case-in-chief, or in post-hearing written submissions.

## Arbitrator Disclosure Reminder



As a reminder, arbitrators should review their disclosure reports regularly to ensure that all information is accurate and current. Even if arbitrators are not currently assigned to cases, their disclosure reports may be sent to parties during the arbitrator selection process. Parties should have the most current and complete information about an arbitrator to make an informed decision when selecting arbitrators. Arbitrators should log into the [portal](#) to update their disclosure reports.

## Last Affirmation Dates on Arbitrator Disclosure Reports

In 2017, FINRA enhanced arbitrator disclosure reports by publishing the date that arbitrators last affirmed the accuracy of their disclosure reports. The affirmation date appears prominently at the top of the disclosure report that parties review during the arbitrator selection process. Parties may consider the affirmation date when making decisions about ranking and striking arbitrators on their lists.

In order to provide parties with the most current arbitrator information, we are asking arbitrators to review their disclosure reports regularly and affirm the information contained in the disclosure report. Arbitrators can affirm their disclosures and refresh the affirmation date by submitting an update through the [portal](#) or by submitting an Oath of Arbitrator when assigned to a case. Even if you have no changes, you can update the affirmation date by affirming the information on your disclosure report and submitting an update form through the portal. If you have not registered in the portal, please send an email to the department of [Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

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