THE NEWSLETTER FOR FINRA NEUTRALS

Volume 1 – 2021

The Neutral Corner

What's Inside

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.

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Understanding the Assertion of Legal Privileges in Arbitration Proceedings

*By Steven B. Caruso and Kenneth Crowley**

A privilege is a legal right, recognized under various federal and state laws, that allows a person to resist compelled disclosure of documents and information. Commonly asserted privileges are attorney-client privilege and attorney work product privilege. Attorney-client privilege protects against the disclosure of oral and written communications between an attorney and their client. Attorney work product privilege protects against the disclosure of an attorney's work product that has been prepared in connection with an anticipated or pending arbitration or litigation.

Asserting Privilege in FINRA Arbitration

In FINRA arbitrations, parties are required to "cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration" under FINRA Rule 12505/13505 of the Codes of Arbitration Procedure (Codes). However, there may be times when parties have a dispute about a claim of privilege.

If a party objects to producing any document on the Document Production Lists of the Discovery Guide or any document or information requested under FINRA Rules 12507/13506, the objecting party must specifically identify, in writing, which document or requested information is being objected to and the legal basis for the assertion of the privilege.

If parties are unable to resolve a dispute related to a legal privilege, the requesting party can file a motion to compel discovery in accordance with FINRA Rules 12503/13503 and 12509/13509. These motions must include the disputed document request or list, a copy of any objection thereto and a description of the moving party's efforts to resolve the issue before filing the motion..

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While discovery-related motions are often decided solely by the Chairperson (Chair), the Chair may refer such motions to the full panel at the Chair's request or at the request of a party. However, under FINRA Rule 12503(d)(3)/13503(d)(3), the Chair must refer motions relating to privilege to the full panel at the request of a party.

Because recognized legal privileges may differ depending on applicable state law, the panel may ask the parties to provide a brief of the issues. Parties should brief the issues sufficiently for the arbitrators to assess the privilege claim without revealing the document or information itself.

Privilege Logs

When a claim of privilege is asserted, the party asserting the privilege has the burden to show that the privilege applies. In appropriate circumstances, the party may be required to produce a privilege log.

Privilege logs normally identify the following details—all of which should be sufficient to show why the privilege applies:

- date of the communication;
- parties to the communication (including their names and positions);
- names of any attorneys who were parties to the communication; and
- subject matter of the communication.

Privilege logs can be time consuming and costly to prepare and are not required by the Codes. In appropriate cases, however, they may allow the opposing party and the arbitrators to assess the claim of privilege and inquire further. In some cases, the panel may request an *in camera* review of the withheld documents or information. *In camera* review allows the panel to review the documents or information in private without revealing them to the other party. Note, however, that *in camera* review should be a last resort, as it risks defeating the purpose of the privilege by revealing to the arbitrators the contents of the allegedly privileged document or information.

If a party challenges a claim of privilege, arbitrators must determine whether a privilege exists based on the applicable law and the facts and circumstances of the case. It is important to remember, however, that arbitrators may not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege.

Understanding the Assertion of Legal Privileges in Arbitration Proceedings *continued*

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Bits, Bytes and E-Discovery Fights

*By Lisa Miller, FINRA Arbitrator**

This article is the first in a multi-part educational series on e-discovery and motion practice for FINRA arbitrators. This article analyzes fundamental issues that arbitrators face when dealing with e-discovery conflicts.

FINRA Arbitration and E-Discovery (and COVID)

The COVID-19 pandemic has compressed years of the financial industry business model evolution into a few months, favoring technology and automation, and expanding electronically stored business records. Even with vaccines on the horizon, the workplace migration to mostly online is likely here to stay. Global electronic data is expected to nearly quadruple by 2025.[2] All of this means that FINRA arbitrators are managing more and increasingly sophisticated, e-discovery and related motions.

FINRA Guidance and E-Discovery

Codes of Arbitration Procedure and Discovery Guide

FINRA Rules 12505-12514/13505-13514 and the Discovery Guide (Guide) address e-discovery in arbitrations. They consider requests, responses, objections and sanctions. The Guide requires a cooperative exchange of information and includes two Document Production Lists (Lists) detailing broadly what each side must produce. E-evidence includes email, word-processed documents, audio recordings, text messages, instant messages, direct messages, Twitter, Yammer, Slack and probably new communication channels yet to be invented. E-evidence is stored across many devices, including laptops, desktops, servers, external drives, cell phones and tablets.

The Guide and its Lists are not analytical straightjackets. While the parties and arbitrators should consider the documents described in the Lists to be presumptively discoverable, parties and arbitrators retain their flexibility in the discovery process. Arbitrators can order the production of documents not provided for by the Lists as well as order that parties do not have to produce certain documents on the Lists in a particular case. Overall, FINRA arbitration e-discovery is more limited than the Federal Rules of Civil Procedure or state discovery rules allow, but the bedrock is still constitutionally sound due process.

Arbitrator Tip

It is not always clear-cut whether a claim is a "product case." Arbitrators make that call after the parties argue their positions.

The Guide addresses product cases, which focus on a specific security or specific group of securities, usually in the context of alleged mismarketing or defective development. E-discovery in product cases differs from other customer cases in several ways:

- The volume of documents tends to be much greater
- Multiple investor claimants may seek the same documents.
- The documents are not client specific.
- The product at issue is more likely to be the subject of a regulatory investigation.
- The cases are more likely to involve a class action with documents subject to a mandatory hold.
- The same documents may have been produced to multiple parties in other cases involving the same security or to regulators.
- Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

E-Discovery Process: Issues and Answers

Production and Admissibility

Production of e-evidence in discovery does not create a presumption that the documents are admissible at the hearing. Parties may object to admission of e-evidence to the same extent as any evidentiary objection at an arbitration hearing.

Litigation Hold and E-Evidence Preservation

When a party realizes a claim is reasonably anticipated, the party must save related electronically stored documents. They identify, collect and preserve potentially relevant e-evidence and place a "litigation hold" on it. Parties must notify anyone who may have claim-related e-evidence (including family members who share computers and outside consultants). Because counsel routinely send litigation hold letters to clients, in e-discovery disputes, arbitrators might see alleged negligent destruction of e-evidence cloaking intentional destruction.

Attorneys consult their clients on e-evidence preservation early in the process to learn the types of evidence in existence and the best ways to preserve it. Failure to thoroughly participate in this process is a factor that can inform an arbitrator's analysis regarding intentional versus negligent destruction of e-evidence and sanctions.

Data Dumping and Malicious Compliance

Sometimes, parties may attempt to bury damaging information in voluminous production. This is known as "data dumping." Data dumping improperly delays discovery and depletes resources. To address data dumping, arbitrators can review the requests and responses to determine:

- whether the requesting party's response or the responding party's production struck a balance between too broad and too specific; and
- whether available technology could validate results and minimize duplicate production.

"Malicious compliance" occurs when a party follows directions literally, without variance, despite knowing that the outcome will not be what the rules were designed to achieve. To short-circuit malicious compliance in e-discovery, arbitrators can ask the party engaged in this type of production what outcome it hoped to achieve.

Forcing e-discovery obstructionists to explain their counterproductive contribution to the process is a practical way to emphasize that malicious compliance is not acceptable. Malicious compliance is a choice, and arbitrators can reinforce the message that e-discovery misconduct has consequences. Arbitrators who pursue an avenue of functional practicality can guide parties to a productive e-discovery path.

Spoliation of E-Evidence

Spoliation is intentional or negligent destruction or material alteration of potentially relevant evidence when claims are pending or reasonably anticipated. These allegations arise when e-evidence production reveals obvious gaps.

Search Terms

Agreement on search terms, search methodology, electronic media to be searched, data to be produced, acceptable types of documents and time frames streamlines the process and contains costs. To avoid repeating searches or starting additional searches on the same sources, counsel test-run the search terms and time frames. When the results do not produce the expected results, counsel may challenge whether the proper databases were searched, with the proper search terms, using the proper mechanisms. Arbitrators can order e-discovery parameters, if needed.

Form and Format

The Guide, which denotes electronic files as "documents," addresses the form and format of e-discovery. Parties should discuss the format for document production and work to agree on the form of production. According to the Guide, e-discovery must be produced in a "reasonably usable format," which contemplates either the format in which the document is ordinarily maintained or a converted format that does not burden accessibility. In determining whether electronic files are in a reasonable usable format, arbitrators should consider the totality of the circumstances including:

- For documents in a party's possession or custody, whether the chosen form of production is different from the form in which the document is ordinarily maintained.
- For documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it.
- For documents converted from their original format, the responding party's reason(s) for choosing the particular form of production; how the substance of the documents may be affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by changes in the documents' appearance, searchability, metadata or maneuverability.
    - Appearance can be affected by conversion to another format. The conversion sometimes scrapes off portions of the native file.
    - Electronic searchability can be affected by conversion of the document to certain formats.
    - Metadata can be affected by format conversion, deleting data about by whom, when and how the document has been manipulated. This information includes e-evidence collection, creation, access, modification and formatting.
    - Maneuverability or navigability can be affected by converting a native file into another format, impairing a party's ability to manipulate data using the native application, such as sorting and filtering information.

Arbitrator Tips

Arbitrators may also order a party to provide such affirmations regarding discovery requests for documents beyond those contained in the Guide.

Arbitrators can schedule a prehearing conference before deciding e-discovery motions.

Affirmations

"Affirmations" in e-discovery come into play when a party does not produce e-discovery. When a party asserts that it has no responsive documents, the Guide directs that the non-producing party provide affirmations if the party seeking the e-evidence requests them.

Affirmation language usually:

- indicates that the responding party has conducted a good faith search for the requested documents;
- describes the extent of the search and lists the sources searched; and
- states that, based on the search, the party does not have the requested document in the party's possession, custody, or control.

Objecting to and Compelling E-Discovery

Parties may object to e-discovery demands if they call for documents that are burdensome, irrelevant and unlikely to lead to the discovery of relevant material, or the documents are protected by privilege or other recognized confidentiality requirement. Under FINRA Rule 12508/13508, a party's objections to production, which must be served on all parties, must clearly state, in writing, the specific e-discovery request to which the party is objecting and the basis for the objection to each request.

Parties in conflict over e-discovery production must make a good faith attempt to resolve their issues. If the parties cannot agree, the party requesting production can file a motion to compel discovery detailing why the discovery is relevant or likely to lead to relevant evidence. In the motion to compel, the party can request that the arbitrator issue an order compelling production or some subset of the disputed discovery.

**Lisa Miller is a FINRA public arbitrator and administrative hearing officer in California. She wrote the American Bar Association's practice guide Art of Advocacy in Administrative Law and Practice. She consults on administrative law, cryptocurrency and third-party litigation funding. She welcomes your inquiries and can be reached at ProTem@LMillerConsulting.com.*

Endnotes

1. See FINRA Rules 12508/13508.
2. McLaughlin, Meg. "Five Corporate Ediscovery Realities for 2021," *Ediscovery Today*, October 19, 2020, https://zapproved.com/blog/five-corporate-ediscovery-realities-for-2021/.

FINRA Dispute Resolution Services and FINRA News

COVID-19 Vaccine Information for Hearing Purposes

FINRA DRS has become aware that some arbitrators are asking participants—during a prehearing conference or in a written order—to provide their vaccination status in anticipation of in-person hearings. While we understand that these inquiries are made in an effort to make participants feel comfortable moving forward with in-person hearings, we have consulted with FINRA's Office of General Counsel and have been advised that these types of questions are not appropriate. Therefore, we ask arbitrators to refrain from including this information in their orders.

COVID-19 Hearing Postponements and Virtual Hearings

In response to COVID-19, FINRA has decided to administratively postpone all in-person arbitration and mediation proceedings scheduled through **June 4, 2021**, unless the parties stipulate to proceed telephonically or by Zoom or the panel orders that the hearings will take place telephonically or by Zoom. FINRA has been extending administrative postponements in short increments since March 2020. Though we realize this postponement method can make planning ahead difficult for parties and arbitrators, administratively postponing hearings on a short-term basis will allow us to resume in-person hearings in individual hearing locations quickly if the health data supports it.

If you have an in-person hearing or mediation session scheduled through this date, you will be contacted by FINRA staff to reschedule or discuss remote scheduling options. Please note that postponing a hearing will not affect other case deadlines. All other case deadlines will continue to apply and must be timely met unless the parties jointly agree otherwise. Further, FINRA will waive postponement fees when parties stipulate to adjourn in-person hearing dates scheduled through August 31, 2021. To avoid postponement fees, parties must provide written notice of the stipulation to adjourn at least 20 days prior to the first scheduled hearing date. Parties stipulating to adjourn in-person hearing dates should also consider stipulating to changing other case deadlines.

We will allow in-person hearings to move forward in cases where all parties and arbitrators have agreed to appear in person, provided that in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic. As of March 2021, we have had four such cases. In one of the cases, the participants ultimately decided to postpone the in-person dates and proceed virtually based on health and safety concerns. Similarly, participants in another case decided to postpone hearings until regular in-person hearings could resume safely. Participants in a third case postponed in-person hearings scheduled for March 2021, due to health and safety concerns, but intend to have in-person hearings in June. Finally, one case successfully completed in-person hearings at the end of January. We have one in-person mediation scheduled for April.

We have been continuously monitoring health data in each of our hearing locations since administrative postponements began in March 2020. We have a detailed action plan, which is posted on our website, that will allow us to resume in-person hearings in locations where public health conditions have improved consistent with CDC guidance. Unfortunately, public health data has not supported the resumption of in-person hearings in any of our hearing locations to date, but we will continue to monitor conditions in all locations going forward. Information about individual locations where we have considered resuming in-person hearings will be posted on FINRA.org regularly.

As noted above, FINRA Dispute Resolution Services (FINRA DRS) offers virtual hearing services (via Zoom and teleconference) to parties in all cases by joint agreement or by panel order. These services provide high-quality, secure, user-friendly options for conducting video and telephonic hearings and sharing documents remotely. Staff is available to schedule virtual hearings and provide technical support for virtual hearings. FINRA has also developed the Arbitrator Resource Guide for Virtual Hearings, Arbitrator Training Videos, Neutral Workshop: Tips for Virtual Hearings and a Guide for Using Breakout Rooms in Mediation. Parties who are interested in exploring the virtual hearing option should contact their case administrator for details.

FINRA Arbitrators Lead the Way with COVID-19 Era In-Person Hearing

By Khoi Dang-Vu, Case Administrator, FINRA Midwest Regional Office

On January 26, 2021, FINRA administered an in-person hearing in Houston, TX—FINRA's first in-person hearing in the COVID-19 era. Months prior to the hearing, the arbitrators and parties unanimously agreed to hold the hearing in person, even if FINRA administratively postponed other in-person hearings.

To ensure the hearing went smoothly, FINRA staff worked diligently to make arrangements that were consistent with the safety protocols for in-person hearings found on the FINRA website. The arrangement also allowed for some participants to appear via Zoom. To facilitate compliance with safety protocols during the hearing, FINRA provided a safety officer and arranged for the hotel to clean all surfaces during hearing breaks and at the end of each hearing day. To facilitate the use of Zoom, the hotel provided a large monitor, cameras and microphones. The hotel also had technicians available to facilitate the use

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Virtual Arbitration Hearing Statistics

Rather than postponing their hearings, some parties have opted to go forward with virtual hearings by Zoom. Since the postponement of in-person hearings through February 28, 2021, 206 arbitration cases have conducted one or more hearings via Zoom (82 customer cases and 124 industry cases).

Through February 28, 2021, FINRA DRS received 555 motions for Zoom hearings:

- 342 contested motions
  - 266 customer contested motions
    - 150 granted
    - 81 denied
    - 35 open
  - 76 intra-industry contested motions
    - 54 granted
    - 17 denied
    - 5 open
- 213 joint motions (72 in customer cases and 141 in industry cases).

The virtual arbitration hearing statistics are now available on the Dispute Resolution Statistics page.

Arbitration Case Filings and Trends

2020 Year-End Statistics

Arbitration case filings in 2020 reflect a four percent increase compared to cases filed in 2019 (from 3,757 cases in 2019 to 3,902 cases in 2020). Customer-initiated claims decreased by 12 percent in 2020 compared to cases filed in 2019.

In 2020, the following securities were most commonly identified in customer arbitration cases (listed in order of decreasing frequency): real estate investment trusts, common stock, business development company, private equities, options, mutual funds, municipal bonds, limited partnerships, municipal bond funds, exchange-traded funds, variable annuities, annuities, corporate bonds, 401(k) and government securities. The top two causes of action alleged were breach of fiduciary duty and negligence.

of Zoom, while FINRA case administrators served as meeting hosts in Zoom. FINRA staff did not attend the hearing in person.

Each day, in-person participants were required to complete a Health Certification form, and the safety officer took their temperature before admitting them into the hearing room. Each person sat at their own socially distanced table and wore a face mask at all times, unless they were testifying. Witnesses testified at a table behind a plexiglass barrier and wore a face shield.

The feedback from the in-person participants was universally positive. Participants appreciated the service and the safety measures that FINRA and the hotel took to ensure participants felt confident to proceed with an in-person hearing.

Statistics through February

Arbitration case filings from January through February 2021 reflect an 18 percent decrease compared to cases filed during the same two-month period in 2020 (from 593 cases in 2020 to 484 cases in 2021). Customer-initiated claims also decreased by six percent through February 2021, as compared to the same time period in 2020.

Now Available: 2020 Arbitrator and Mediator Diversity Statistics

To track our progress, we hired a third-party consultant to survey—on an anonymous and voluntary basis—the demographics of the neutrals on our roster in 2016, 2017, 2018, 2019 and 2020. In sharing the findings, FINRA strives to provide transparency about the current makeup of our arbitrator roster. In 2020, we saw increases in the Female and Asian categories. While we are encouraged by these short-term results and incremental progress made, we recognize this is a long-term effort. There is more progress to make and we remain fully committed toward achieving our diversity goals.

FINRA Dispute Resolution Services Headquarters and Northeast Regional Office Have Moved

FINRA DRS's Headquarters and Northeast Regional Office have moved to a new location in lower Manhattan. The new offices (11th floor) and hearing rooms (10th floor) are at Brookfield Place located at 200 Liberty Street, New York, NY 10281. Effective immediately, any in-person hearings scheduled to be heard in New York, NY will be held at Brookfield Place. The new space provides upgraded hearing rooms and is convenient to many nearby dining and hotel options. Please contact the Northeast Regional Office with any questions about our new offices at Brookfield Place.

FINRA Opens Jersey City Hearing Location and Closes Newark Hearing Location

This spring, FINRA will open a new conference center at its office location in Harborside Jersey City, NJ. The conference center will serve as the location for arbitration hearings held in New Jersey. The new location will feature state of the art hearing rooms with several large capacity rooms and will be convenient to public transportation, parking, multiple restaurants and hotels.

Given the relatively short distance between Jersey City and Newark, FINRA has closed its Newark hearing location effective December 1, 2020. Newark cases will be reassigned to Jersey City. Arbitrators who serve in Newark will be reassigned to the Jersey City hearing location. Please contact the Northeast Regional Office with any questions about this change.

Register for the DR Portal Today

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

- file case documents including the electronic Oath of Arbitrator and Checklist, the Initial Prehearing Conference Scheduling Order, general, dismissal and postponement orders, the Award Information Sheet and the Arbitrator Experience Survey;
- 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 your name has appeared on arbitrator ranking lists sent to parties and how often you have been ranked or struck on those lists.

Portal registration is reflected on the disclosure reports that parties review when selecting arbitrators and mediators.

Portal How-to Videos

If you need assistance updating your profile or submitting the Oath of Arbitrator or other forms in the portal, the portal 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.

American Bar Association 2021 Dispute Resolution Spring Conference

The American Bar Association's (ABA) conference, "Agility, Disruption and Reinvention: ADR in a New World," will examine how recent current events have disrupted the field of dispute resolution, how the field has adapted and what additional reinvention may be necessary or beneficial. The program will be held virtually on April 14 – 17, 2021. Each day will include live educational webinars and opportunities to network in real-time with participants. CLE credit will be available. FINRA is proud to be a cooperating organization for this event. Please visit the ABA website for more information about the program and how you can register. Please be sure to use this discount code at checkout: SDISC21.

2021 FINRA Annual Conference

This year, the FINRA Annual Conference—FINRA's premier event—will be held entirely online. This virtual conference provides the opportunity for practitioners, peers and regulators to exchange ideas on timely compliance and regulatory topics. FINRA is excited to offer participants a unique opportunity to hear from leaders in the industry, discussing issues that matter most for the financial services industry. The conference will take place over three days from May 18 – 20, 2021. Please visit FINRA's website for more information.

2021 Dispute Resolution Arbitration Training Institute

The ABA will present its 14th Annual Arbitration Training Institute in June 2021. The program will be presented live in a virtual online setting over a period of six days: June 14, 16, 18, 21, 23 and 25. A different topic will be presented each day. Most sessions will be followed by a facilitated break-out session, allowing attendees to interact directly with the faculty:

- Session 1 - The All-Important Preliminary Hearing
- Session 2 - Discovery and Motion Practice
- Session 3 - The Evidentiary Hearing
- Session 4 - Awards and Post-Award Issues
- Session 5 - Arbitration Ethics
- Session 6 - Remote Arbitration: A Practicum

FINRA is proud to be a cooperating organization for this unique program and encourages arbitrators to consider attending. Visit the ABA website for more information.

Regulatory Notice

Regulatory Notice 21-04: FINRA Amends Arbitration Codes to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees

FINRA has amended its Codes to: (1) increase the additional hearing-day honorarium chairs receive for each hearing on the merits from $125 to $250 and (2) create a new $125 chair honorarium for each prehearing conference in which the chair participates. To fund the increase in payments to chairs, the amendments make minimal increases to certain arbitration fees. The amendments are effective for cases filed on or after April 19, 2021.

Please review Regulatory Notice 21-04 for more information.

SEC Rule Filing

Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests

On September 22, 2020, FINRA filed with the Securities Exchange Commission (SEC) a proposal to amend the Codes relating to requests to expunge customer dispute information, including establishing a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide certain expungement requests. The comment period ended on October 22, 2020. FINRA filed a response to comments and Amendment No. 1 on December 18, 2020. Also on December 18, 2020, the SEC published an Order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1. Please see SR-FINRA-2020-030 for more information.

Mediation Update

Expansion of FINRA's Mediation Program for Small Arbitration Claims

Effective November 1, 2020, FINRA expanded the Mediation Program for Small Arbitration Claims by increasing the maximum amount in controversy from $50,000 to $100,000 and making available all virtual platforms (telephonic and video) for these mediations. With these changes, the program is providing more parties the benefit of an expedient and cost-effective option for resolving small claims while also introducing parties to qualified, but underutilized diverse mediators on our roster. Since the expansion, there have been 11 requests to mediate under this program.

The program offers virtual mediation at these costs:

- no cost for arbitration claims of $25,000 or less;
- $50 per hour for cases with claims between $25,000 and $50,000 to cover reduced mediator fees. (FINRA collects this fee and divides it equally between the parties); and
- $100 per hour for cases with claims between $50,000 and $100,000 to cover reduced mediator fees. (FINRA collects this fee and divides it equally between the parties).

Virtual mediation offers parties who do not wish to travel the option to participate in a mediation from their own homes. It also provides mediators with additional opportunities to mediate in hearing locations across the country, regardless of the mediator's home base.

When parties mediate through this program, FINRA waives all mediation filing fees. Please contact FINRA's Mediation Department if you have any questions about this program.

Please note ALL mediation cases can proceed virtually at this time, whether or not a case is eligible to participate in the Mediation Program for Small Arbitration Claims. Please contact FINRA's Mediation Department with any questions.

Mediation Case Filings and Trends

2020 Year-End Statistics

In 2020, parties initiated 413 mediation cases, a decrease of 30 percent from 2019. FINRA also closed 564 cases during this time. Approximately 85 percent of these cases concluded with successful settlements, and the average case turnaround time was 124 days.

Statistics through February

From January through February 2021, parties initiated 75 mediation cases, a decrease of 28 percent from the same period in 2020. FINRA closed 73 cases during this time. Approximately 81 percent of these cases concluded with successful settlements.

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. References who can attest to your skill and mediation style help parties select the right mediator for their case. Please add references to your disclosure report, so parties may consider them during mediator selection. If you have a cancellation policy, please include it in your disclosure report. You can update your mediator profile anytime through the portal.

Mediator Training Opportunities

Occasionally, FINRA receives information about mediator training that we think would be of interest to our mediators. We will post information and links to these training opportunities on the Resources for Mediators page on our website.

Become a FINRA Mediator

Do you have experience working as a mediator? Consider joining the FINRA mediator roster. Please email the Mediation Department for more information.

Questions and Answers

20-Day Exchange in Special Proceedings

Question Recently, I was the sole arbitrator on a Special Proceeding case (FINRA Rule 12800(c)(3)(B)/13800(c)(3)(B)). The parties did not exchange witness lists or any exhibits that had not already produced. Are they required to do so?

Answer As in regular hearing cases, at least 20 days before the first scheduled hearing date, parties in Special Proceeding cases must exchange witness lists (FINRA Rule 12514(b)/13514(b)) and exhibits that they have not already produced (FINRA Rule 12514(a)/13514(a)). During the Initial Prehearing Conference (IPHC), arbitrators should remind the parties of this requirement and specify the date when witness lists are due. The IPHC Script provides language to remind the parties. When completing the IPHC Order (available in the DR Portal), arbitrators should include the witness list due date and the date by which exhibits should be submitted on the DR Portal, so that they are available during the hearing.

Social Media Disclosures

Question Am I required to disclose my personal social media accounts?

Answer Yes, all arbitrators and mediators are required to disclose both **professional and personal** social media accounts.

Question If my accounts are set to private, do I need to disclose them?

Answer Yes, even if your accounts are private, they are still disclosable. However, arbitrators and mediators are not required to make their accounts viewable to the public.

Question I have a public account, but I want to set it to private. Do I need to leave my account set to public after I have already disclosed it?

Answer If you previously disclosed a public social media profile, you have no obligation to keep those profile settings. Arbitrators and mediators are free to set their accounts to "private."

Questions and Answers *continued*

Question Why must I disclose my personal social media accounts?

Answer Under FINRA Rule 12405/13408 arbitrators have a duty to "disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding." The Arbitrator's Guide further notes that, "[a]rbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative."

Parties can and will likely search arbitrators' social media activity regardless of whether the accounts have been disclosed. If a party discovers any activity suggesting bias, they can ask the Director to remove the arbitrator from the case or from the FINRA arbitrator roster for egregious content or conduct. Furthermore, if an arbitration has already been decided, parties may file a motion to vacate the arbitration award based on the arbitrator's failure to disclose.

Disclosing personal social media accounts provides clarity and candor for the parties and negates any potential challenges for failure to disclose relevant information.

Question Will FINRA police my content or remove me from the arbitrator roster based on my social media activity?

Answer FINRA does not police arbitrators' content or posts. We welcome professionals from a diverse range of backgrounds and with that diversity comes many differing viewpoints. Arbitrators have no duty to refrain from posting on social media.

However, FINRA must ensure the integrity of the arbitration forum. If there are posts or content that show bias or reflect poorly on FINRA, such activity could result in removal from the roster.

We understand that there are uncertainties associated with social media disclosures. We invite you to read a previous issue of *The Neutral Corner,* Volume 3—2020, for a more detailed discussion on social media and arbitrator neutrality. You may email or call the Department of Neutral Management with any disclosure questions at (212) 858-3999.

Virtual Arbitration Hearings

Question — I have been assigned to a case that is scheduled to proceed via Zoom videoconference. What is the best way for me to prepare for the virtual hearing?

Answer — Your FINRA case administrator will reach out to you and offer to conduct a Zoom trial run with you and your co-panelists. The purpose of the trial run is for you to become familiar with the Zoom platform in advance of the hearing. Trial runs usually last 30 to 45 minutes and are meant to be interactive. We encourage arbitrators to ask questions to help them become comfortable and confident using the platform during the hearing. Further, each arbitrator who participates in a trial run will receive an honorarium.

FINRA has also developed the Arbitrator Resource Guide for Virtual Hearings, Arbitrator Training Videos, Neutral Workshop: Tips for Virtual Hearings and a Guide for Using Breakout Rooms in Mediation. Parties who are interested in exploring the virtual hearing option should contact their case administrator for details.

Question — How are virtual hearings recorded?

Answer — FINRA staff administering the hearing or the Chair serving as the meeting host will be responsible for recording the virtual proceeding using the "record" button on Zoom. Under FINRA Rule 12606/13606, this recording is the "official record of the proceeding." Just like in-person hearings, only the audio recording will be retained as the official record. Video recordings of the proceeding will not be retained or made available. FINRA staff will provide a copy of the audio recording to any party upon written request. Any unauthorized or surreptitious recordings of the hearings are prohibited.

Question — What are Breakout Rooms and how do they work? When case participants convene in Breakout Rooms, are their conversations recorded?

Answer — Breakout Rooms are the virtual equivalent to private meeting rooms. The panel may request to use their Breakout Room to go into executive session, and the parties may request to use their respective Breakout Rooms to meet and confer privately. FINRA staff will create separate Breakout Rooms for each group during the hearing: one for the panel, one for the claimant's side, one for the respondent's side and any others that are required (*e.g.*, for a court reporter, if one is in attendance).

Breakout Rooms are never recorded. Prior to opening the Breakout Rooms, FINRA staff will announce that the hearing is off-the-record and will stop the recording. FINRA staff will then "open" all Breakout Rooms for the panel and parties to use.

Virtual hearing participants should rest assured that other case participants will not have access to their Breakout Room. Further, only the participants in the Breakout Room can see and hear what is happening in that Breakout Room.

Question What should I do if I get an urgent telephone call or email during a virtual hearing?

Answer Arbitrators should refrain from looking at their phones during virtual hearings. Arbitrators should also turn off email notifications on their computers during virtual hearings. Arbitrators should remain focused and engaged during the entire proceeding. If any urgent issues come up during the hearing, please request a brief recess. The Chair will also schedule regular breaks, including a one-hour lunch break. For more information, please contact your FINRA case administrator and review the resources for virtual hearings.

Virtual Mediations

Question This is my first mediation on Zoom, where do I start?

Answer FINRA Mediation Staff recommends scheduling a Zoom tutorial with your case administrator ahead of the scheduled mediation. A Zoom tutorial allows you to test out the different Zoom functions, including, admitting participants from the waiting rooms, how to mute/unmute parties and how to use breakout rooms. This is a great opportunity to get more comfortable using this technology and to ask questions. FINRA has also developed the Guide for Using Breakout Rooms in Mediation for your convenience, but FINRA staff is happy to assist and guide you in learning this new technology. If you would like to schedule a tutorial (whether or not you have a virtual mediation scheduled), please feel free to reach out to the National Mediation Administrators, Narielle Robinson and Mara Weinstein.

Education and Training

Fall 2020 Neutral Workshop: Tips for Virtual Hearings

In this neutral workshop, FINRA Principal Analyst, Stefanie Kendall, moderates a discussion on conducting virtual hearings with arbitrator, Tracy Allen, and forum practitioners, Beverly Jo Slaughter and Sam Edwards. They share best practices for effectively using exhibits and examining witnesses during a virtual hearing. The workshop also features a mock arbitration segment that demonstrates the hearing tips in practice and gives viewers a peek inside a virtual hearing, as guided by FINRA Case Administrator, Nora Sassounian.

Arbitrator Training Videos for Virtual Hearings

FINRA DRS is committed to providing training resources to arbitrators on how to use Zoom effectively when participating in virtual hearings. The first training video, "Zoom Basics for Arbitrators," provides an overview of the ways in which Zoom is secure, easy to use and helps to replicate the in-person experience.

Beyond the basics for using Zoom, there are training videos that address specific topics in depth, including: "How to Set Up Your Environment for Virtual Hearings," "Effective Zoom Practices for Arbitrators" and "Zoom Host Responsibilities for Arbitrators." Although arbitrators can host a Zoom hearing, FINRA staff will generally serve as the host and perform the Zoom tasks, such as starting and pausing the recording, admitting participants into the meeting and managing breakout rooms. All of these training videos are available now on FINRA.org.

FINRA Virtual Conference Panels: Practical Tips & What's New in Arbitration Procedures

FINRA's Virtual Conference Panels series provides a unique opportunity to hear the most up-to-date information directly from industry and regulatory experts. In a recent video, Director of FINRA DRS, Richard Berry, moderates a discussion on timely arbitration topics with FINRA arbitrator, Renee Gerstman, and practitioners, Beverly Jo Slaughter and Jeff Kaplan. They discuss the impact of COVID-19 on arbitration cases, offer tips and resources for conducting effective Zoom virtual arbitration hearings and share the latest in arbitration procedures. The videos are available for free on FINRA.org.

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. Giving parties the most current and complete information helps them make informed decisions when selecting their panel. Arbitrators should log in to the DR 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.

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 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 do not have any 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 would like to register in the portal or need to reactivate a dormant account, 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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