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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.

Properly Recording the Arbitration Hearing

By Jeremy Zeliger, Case Administrator, FINRA Dispute Resolution



Everyone is back from the lunch break. Counsel is ready to call the first witness. Your notepad and pen are in front of you, as is the oath that you will administer to the witness. Everything is in its place, yet you have the nagging feeling that you have forgotten something. All eyes are on you. You ask, "Are we ready to continue?"

These are the first spoken words that will go unrecorded for the rest of the afternoon because you and your fellow arbitrators innocently forgot to turn on the digital recorder.

Failing to record an arbitration proceeding properly can have significant consequences. Consider the effects on parties and arbitrators if the record is incomplete. A party might lose an argument to confirm or vacate an award if key testimony is missing from the record.

Conversely, recording the proceedings when conversations should be off-the-record—during a recess, executive session or deliberation—could also have negative consequences. A party might be emboldened to challenge the panel's findings based on statements inadvertently recorded during deliberations. Confidence in the arbitration process and finality of the award depend on creating an accurate record of the arbitration.

The Duty to Record Proceedings

[Rule 12606](#) of the Code of Arbitration Procedure for Customer Disputes and [Rule 13606](#) of the Code of Arbitration Procedure for Industry Disputes instruct the director of FINRA Dispute Resolution to "make a tape, digital, or other recording of every hearing." These rules also instruct the director to furnish a copy of the recording to any party upon request for a nominal fee. To fulfill this directive, FINRA requires arbitrators to operate a digital recorder so that all parts of the hearing—including oaths, testimony, arguments and arbitrators' questions—are recorded.

Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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[FINRA's Hearing Procedure Scripts](#) indicate that the presiding chairperson must:

- test the recorder prior to the hearing;
- operate the recorder during the **entire** proceeding;
- stop the recorder during breaks or executive sessions;
- resume recording after breaks or executive sessions;
- advise all participants to turn off handheld electronic devices to avoid interference with the digital recorder; and
- return the digital recorder to FINRA on the last day of the hearing (if the hearing takes place offsite).

A party might need to access recorded testimony during the arbitration to impeach the credibility of a witness or to challenge a witness's testimony with recorded testimony of another witness. Moreover, a complete record can resolve disputes among panel members whose memories differ regarding key testimony, particularly in cases where there was a lengthy adjournment between hearing sessions. An accurate record of the proceedings may also be vital in a subsequent action to confirm, modify or vacate an award. Further, an accurate and complete record can be as important to FINRA as to the parties, particularly for FINRA staff evaluations of arbitrators and FINRA investigations and disciplinary referrals. For these and other reasons, arbitrators should confirm that the digital recorder is on before beginning or resuming a hearing.

As indicated above, sometimes arbitrators should stop the recorder. Deliberations among arbitrators should not be recorded for the same reasons that deliberations among jurors are not recorded. Recording a frank discussion of the strengths and weaknesses of parties' claims and evidence could undermine the parties' confidence in the arbitration process. Likewise, deliberations after a telephonic hearing should not be recorded, and arbitrators should instruct the conference operator to stop the recording before deliberating. Recording these conversations could also threaten the finality of the arbitration award. Indeed, a reviewing court might usurp the fact-finding role of the arbitration panel and replace the panelists' conclusions and reasoning with its own.¹

Also, the recorder should be turned off prior to breaks to avoid capturing comments from arbitrators, counsel or parties that are not intended to be part of the record. For example, if the claimant and claimant’s counsel are the first to return from a recess to an empty room, they might discuss privileged information with the belief that their conversation is private.

Resources

To improve the recording process, FINRA replaced its analog tape recording equipment with digital recording equipment at its hearing locations. The digital recorders capture audio better and are easier to use than their analog predecessors.

FINRA offers several other resources to help arbitrators fulfill the obligation to record arbitration proceedings. In addition to reviewing the appropriate [Hearing Script](#) prior to and during each case, arbitrators should view the online video, [Operating the Digital Recorder for Offsite Hearings](#). Arbitrators should also contact staff to request assistance with using the digital recorders, if necessary.

What can you do to ensure that your panel properly records the arbitration? In addition to reviewing the appropriate hearing script and watching the video, you can affix a reminder note (facing the arbitrators) to the digital recorder. You can also designate one arbitrator to “double check” that the assigned arbitrator activates and deactivates the digital recorder appropriately. Placing a personal item, such as a watch or a cell phone (in the turned-off position), near the recorder during the session can serve as a reminder to turn off the recorder prior to breaks and to resume recording when the session continues.

Conclusion

FINRA’s Codes of Arbitration Procedure promise parties a complete record of their arbitration hearing. As an arbitrator, you have an obligation to operate the digital recorder competently, and you should ensure that you understand when and how to record the hearing. If you have any questions about the recorder, please contact your case administrator.

Endnotes

- 1 See Alison Markovitz, *Jury Secrecy During Deliberations*, 110 Yale L.J. 1493, 1498 (2001) (discussing *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997)).

New: Arbitrator Experience Survey

The [Arbitrator Experience Survey](#) replaces the Peer Evaluation Form. The new survey allows arbitrators to rate their fellow panelists' performance as Exceptional, Satisfactory or Unsatisfactory, as well as provide feedback about their experience with FINRA staff. The survey is easier to read than the previous evaluation form, and arbitrators can now type their responses directly on the form and email it to FINRA.

Dispute Resolution and FINRA News



Case Filings and Trends

January to May 2012

Arbitration [case filings](#) from January through May 2012 reflect a 6 percent decrease compared to cases filed during the same five-month period in 2011 (from 2,126 cases in 2011 to 1,997 cases in 2012). Of the total cases filed through May, 1,137 (57%) were customer-initiated claims. The remainder of the cases, 860 (43%), were intra-industry claims.

Arbitration cases filed identified the following securities (listed in order of decreasing frequency): common stock, mutual funds, variable annuities, preferred stock, corporate bonds, annuities, options, limited partnerships, auction rate securities, derivative securities and certificates of deposit. The top two causes of action alleged were breach of fiduciary duty and negligence.

Regulatory Notice: Expungement Procedures for Persons Not Named in a Customer-Initiated Arbitration

In April 2012, FINRA requested comment on its proposed *In re* expungement procedures. The proposed new rules would permit persons who are the “subject of” allegations of sales practice violations made in arbitration claims, but who are not named as parties to the arbitration (unnamed persons), to seek expungement relief by initiating *In re* expungement proceedings at the conclusion of the underlying customer-initiated arbitration case. These allegations must be reported in the same way that customer complaints are reported—to the Central Registration Depository (CRD®) system in Forms U4 or U5. FINRA has received numerous inquiries from unnamed persons who want these disclosures expunged from their CRD records because they believe that the allegations against them in the arbitration claims are unfounded or that they have been incorrectly identified as the person involved in the alleged sales practice violation. Currently, the Codes of Arbitration Procedure for Customer Disputes and Industry Disputes do not provide unnamed persons with express procedures to seek expungement of these types of allegations.

Under the proposed rules, FINRA would notify an unnamed person in writing when a firm reports to the CRD system that an unnamed person was the subject of an investment-related customer-initiated arbitration proceeding alleging sales practice violations. An unnamed person would file a Notice of Intent to File to alert FINRA that the person is considering filing a claim for expungement relief. At the conclusion of the underlying customer-initiated arbitration case, FINRA would notify the unnamed person who filed the Notice of Intent to File that it has closed the underlying case. If an unnamed person decides to seek expungement relief, the person would then file a statement of claim and an *In re* Submission Agreement.

FINRA believes the proposed *In re* expungement rules would provide unnamed persons with a method to seek redress concerning allegations that could impact their livelihoods, yet maintain the protections of FINRA's expungement rules to ensure the integrity of the CRD records, on which the investing public relies.

The comment period expired on May 21, 2012. FINRA staff has reviewed the comments and will consider amendments to the proposal to address some of the concerns raised. Staff will meet with the National Arbitration and Mediation Committee in mid-summer 2012 to discuss any proposed revisions with a goal of resubmitting the proposal to FINRA's Board in September 2012. If the Board approves, staff anticipates filing the proposal with the Securities and Exchange Commission (SEC) in the last quarter of 2012.

For more information, please review [Regulatory Notice 12-18](#).

SEC Rule Approvals

SEC Approves Amendments to Align FINRA Rules With Statutes That Invalidate Predispute Arbitration Agreements for Whistleblower Disputes

On March 12, 2012, the SEC approved amendments to [Rule 13201](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to provide that a dispute arising under a whistleblower statute that prohibits the use of predispute arbitration agreements is not required to be arbitrated under the Industry Code. Parties may arbitrate such a dispute only if they have agreed to arbitrate it after the dispute arose. The rule change aligns the Industry Code with statutes that invalidate predispute arbitration agreements for whistleblower disputes and also makes a conforming change to FINRA [Rule 2263](#) (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4).

The amendments to Rule 13201 became effective on May 21, 2012, for all whistleblower disputes arising under a statute that prohibits the use of predispute arbitration agreements, regardless of when the predispute arbitration agreement was executed. The amendments do not apply to any pending matters at FINRA. The conforming change to FINRA [Rule 2263](#) also became effective on May 21, 2012.

For more information on amendments to FINRA Rule 13201, please read [Regulatory Notice 12-21](#).

Proposed Rule Change to Amend the Industry Code to Preclude Collective Action Claims From Arbitration

On April 9, 2012, the SEC approved the proposed amendment to [Rule 13204](#) of the Industry Code to preclude collective action claims under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA) of 1963 from being arbitrated under the Industry Code. The amendment codifies FINRA's interpretation of its class action rules to expressly exclude collective actions from being arbitrated in its forum. The amendments are effective on July 9, 2012, for any claims that are part of a certified or putative collective action under the FLSA, ADEA or EPA.

For more information on amendments to Rule 13204, please read [Regulatory Notice 12-28](#).

Simplified Arbitration

On May 3, 2012, the SEC approved a proposal to amend the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Code of Arbitration Procedure for Industry Disputes (Industry Code) to raise the limit for simplified arbitration. Specifically, the proposed rule change amends [Rules 12401](#) and [12800](#) of the Customer Code and [Rules 13401](#) and [13800](#) of the Industry Code, to raise the limit for simplified arbitration from \$25,000 to \$50,000. The rule amendments raise the dollar limit for damages sought in order to offer simplified arbitration to claimants seeking damages of \$50,000 or less. The amended rules will benefit forum users by reducing forum fees for these claims; minimizing the time and expense of preparing for, scheduling and traveling to the hearing; and providing flexibility to choose whether to request a hearing.

Please visit our website for more information about [SR-FINRA-2012-012](#).

Mediator Selection

On May 22, 2012, the SEC approved a proposal to amend [Rule 14107](#) of the Code of Mediation Procedure to provide the Director of Mediation with discretion to determine whether parties to a FINRA mediation may select a mediator who is not on FINRA's mediator roster.

Please visit our website for more information about [SR-FINRA-2012-011](#).



Questions and Answers

Arbitrator Withdrawals

Question: Under what circumstances may I withdraw from a case after I have accepted an appointment to serve?

Answer: Absent an emergency, arbitrators should refrain from withdrawing from a case once hearings are scheduled. Withdrawals undermine the arbitration process, delay the proceedings and are unfair to the parties who have selected the arbitrator.

The [Code of Ethics for Arbitrators in Commercial Disputes](#) (Code of Ethics) guides arbitrators who may consider withdrawing after accepting an appointment.¹ Canon I(B)(4) of the Code provides that an arbitrator should accept appointment only if the arbitrator is fully satisfied that he or she can devote the time and attention to complete the arbitration that the parties are reasonably entitled to expect. Canon I(H) further provides that once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. In summary, an arbitrator should not decide to withdraw in haste.

There may be certain circumstances, however, that make an arbitrator's decision to withdraw understandable. These circumstances include medical or family emergencies or a new conflict such as the discovery that the arbitrator worked with a recently identified witness. Any circumstance that would jeopardize the arbitrator's ability to decide the case in a just, independent and deliberate manner would also justify withdrawal.²

To ensure a vibrant roster of arbitrators, FINRA tracks instances of arbitrator withdrawals and may remove from its roster arbitrators who unjustifiably withdraw from cases in which hearing dates have been set.

Allocating Member Fees

Question: Can arbitrators allocate member surcharges and process fees, assessed to a brokerage firm, to another party?

Answer: No. Although arbitrators generally have wide latitude in determining how to assess fees and costs against the parties, they do not have discretion in allocating member surcharges and process fees.

Rules 12901 and 12903 and Rules 13901 and 13903 of the Codes require a brokerage firm to pay a surcharge and process fees when the firm:

- files a claim;
- is named as respondent in a claim, counterclaim, cross claim or third party claim; or
- employed an associated person at the time of the dispute who is named as a respondent in a claim, counterclaim, cross claim or third party claim.

Arbitrators may not reallocate to another party any of the member surcharge or process fees paid by a brokerage firm.

Discovery in Arbitration

Question: Is discovery in FINRA arbitration more limited than discovery under the Federal Rules of Civil Procedure or state discovery rules? If so, how is it more limited?

Answer: The **forms** of discovery are more limited in FINRA arbitration than they are in court. For example, under the Codes of Arbitration Procedure, interrogatories are generally not permitted, and depositions are strongly discouraged except under very limited circumstances. However, document discovery is not necessarily more limited than it is in court.

Parties and arbitrators should look to discovery Rules 12505-12514 and Rules 13505-13514 under the Codes of Arbitration Procedure, guidelines, including the Discovery Guide, and Regulatory Notice 11-17 for guidance on the scope of discovery in FINRA's arbitration forum. For customer cases, FINRA provides the Discovery Guide, which outlines documents that the parties should exchange without arbitrator or staff intervention. The Discovery Guide contains

two document production lists of presumptively discoverable documents: one for the firm/associated person to produce and one for the customer to produce. Additionally, [Rule 12507](#) allows parties to request additional documents or information, beyond the Discovery Guide, from any party by serving a written request on the party. If parties have a dispute that requires an arbitrator's ruling, [Rule 12508](#) provides that arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce the information. The Discovery Guide explains this standard of production by advising arbitrators that they should determine whether a document is relevant or likely to lead to relevant evidence.

Court Reporters

Question: During a recent case, the parties agreed to share the cost of a stenographic record and to have the transcript serve as the official record of the arbitration. Despite the parties' agreement, can the arbitrators decide to use the digital recording as the official record instead of the transcript?

Answer: Under Rules [12606](#) and [13606](#) of the Codes, the panel will make the decision as to which recording—transcript or digital recording—will be used for the official record. However, absent good cause, the arbitrators should generally honor the parties' agreement if they agree to a stenographic record as the official record of the arbitration proceeding.

Endnotes

- 1 While the Code of Ethics is not part of FINRA's Codes of Arbitration Procedure, FINRA Dispute Resolution adopted the Code of Ethics and requires arbitrators to abide by its principles.
- 2 See Canon V of the Code of Ethics for Arbitrators in Commercial Disputes.

Mediation and Business Strategies Update



2012 Mediation Case Statistics

From January through May 2012, parties initiated 267 [mediation cases](#). FINRA also closed 366 mediation cases during the same five-month period. Approximately 77 percent of these cases concluded with successful settlements.

Recognition

Ken Andrichik, Director of Mediation and Chief Counsel of FINRA Dispute Resolution, received The Association of Conflict Resolution—Greater New York Chapter’s ADR Achievement Award for 2012. As one of two recipients of this year’s award, Mr. Andrichik received the award for his extensive contributions to the field of dispute resolution.

Mediation Survey

FINRA provides mediation parties the opportunity to evaluate the services of the staff and mediators. FINRA uses the Mediation Questionnaire to review the impact of mediation on the settlement of arbitration cases and to enhance the mediation program. Starting with this issue of *The Neutral Corner*, FINRA will provide a summary of responses for selected portions of the questionnaire.

Between January 2010 and January 2012, FINRA received 178 questionnaires from mediation parties. Below is a summary of numerical responses received to questions in the “Mediation Process” section from these 178 questionnaires. A numerical evaluation of “1” indicates that a party strongly agreed, whereas a numerical response of “5” indicates that a party strongly disagreed with the question asked.

The following results are the average values for each question in the “Mediation Process” section:

- 1.5: The mediation process resulted in time savings.
- 1.6: The mediation process resulted in cost savings.
- 1.7: The mediation process clarified issues in the case.

- 1.8: The mediation process improved communication between the parties.
- 2.2: The mediation process achieved better results than could have been achieved through arbitration.
- 2.8: The mediation process restored business relationships.

The results are not surprising for the two highest rated categories of time and cost savings. This is consistent with the general consensus that mediation affords parties the opportunity to resolve their conflict in a cost effective and efficient manner.

The result for the last category regarding restored business relationships is promising. Even though it was the lowest-rated category with a rating of 2.8, which puts it in the “neither agree nor disagree” range of the answer scale, it indicates that there were instances in which the mediation contributed to the successful restoration of business relationships. This is a testament to the quality of FINRA’s mediators and mediation program, and FINRA is encouraged by this positive outcome.

In the next volume of *The Neutral Corner*, FINRA will provide results of the “Mediator” portion of the Questionnaire and discuss how the results may help mediators understand what qualities parties value in a securities mediator.

Arbitrator Training



FINRA Dispute Resolution Arbitrator Trainings

The following is a summary of FINRA's advanced arbitrator training courses. All trainings are free, and arbitrators are encouraged to complete these courses to ensure that they have the most current information about these topics.

Online Trainings Available Through FINRA Learning Management System

FINRA offers most of the advanced trainings through [FINRA's Learning Management System](#) (LMS). Arbitrators must register in the LMS before accessing the courses. The courses are provided in an online format where arbitrators review the information on their computers, answer practice questions throughout the course and complete the online exam. After completing a course, FINRA will add this information to the arbitrator's disclosure report.

Arbitrators can also print the course materials in a PDF format. Arbitrators can then complete the exam online or on paper.

- **Chairperson Training:** Instructs arbitrators on the added responsibilities of serving as the chairperson of the panel.
- **Civility in Arbitration:** Helps arbitrators evaluate their obligations before and during service on a case, and set a proper tone for conducting fair and efficient hearings.
- **Direct Communication Rule:** Provides an overview of FINRA's direct communication rule and its practical application.
- **Discovery, Abuses & Sanctions:** Focuses on the respective duties of arbitrators and parties in the discovery process, explains the Discovery Guide and helps arbitrators recognize and address discovery abuses.
- **Expungement:** This mandatory course provides an overview of the expungement process and gives an in-depth review of FINRA Rule 2080 and Rules 12805 and 13805 of the Codes of Arbitration Procedure. The course also explains the role of CRD.

- **Revised Code of Arbitration Procedure:** Discusses the key, substantive changes of the Customer Code with complementary Industry Code highlights from the 2007 revision of the Code of Arbitration Procedure.
- **Understanding the Prehearing Stage:** Helps arbitrators manage and organize the Initial Prehearing Conference.
- **Your Duty to Disclose:** Explains the importance of disclosure to the neutrality of the process and instructs arbitrators on how to make disclosures.

Written Materials for Arbitrator Training Courses

FINRA provides PDF (printable and searchable) versions of all of its arbitrator trainings, offered through the LMS, on [FINRA's website](#). The training materials are provided as a resource to all arbitration participants—including parties, parties' representatives and arbitrators—who want to refresh their knowledge.

Video Trainings Available Through FINRA's Advanced Arbitrator Training Page

Arbitrators may access the video training courses directly from FINRA's [Advanced Arbitrator Training Web page](#), with no registration required. After completion of a course, arbitrators may send an email to FINRA to confirm completion and request that FINRA include the training on their disclosure report, unless otherwise specified.

In addition to viewing a training video, arbitrators may download the accompanying training documents available on the Web page.

- **Explained Decisions:** Helps arbitrators understand the explained decisions rules and apply them in an arbitration case.
- **Motions to Dismiss:** Explains the three types of motions to dismiss and provides guidance to arbitrators on how to address them during arbitration.
- **Anti-Money Laundering Requirements and Suspicious Activity Reporting:** Discusses anti-money laundering requirements and provides guidance to arbitrators about what to do if suspicious activity report (SAR) issues arise during arbitration; explains how

Arbitrator Tip

Returning Exhibits to FINRA After an Offsite Hearing

At the conclusion of the case, the chairperson should return the official set of exhibits, including the digital recorder, to FINRA. FINRA will provide a return mailing label to facilitate the return of these case materials. If the arbitrators have not concluded their deliberation, the chairperson should return the official record immediately following the final deliberation. As always, arbitrators should be aware of information security concerns and follow [FINRA's guidelines](#) when transporting and storing case materials—some of which may contain personal confidential information.

suspicious activity reporting fits into anti-money laundering regulation; and helps arbitrators understand and follow the confidentiality requirements for SARs.

- **Operating the Digital Recorder:** Provides step-by-step instructions on how to operate the digital recorder for offsite hearings to ensure that arbitrators comply with the requirement under FINRA's Code of Arbitration Procedure to make a tape, digital or other recording of every hearing. Completion of this course is not included on an arbitrator's disclosure report.
- **Completing the Arbitrator Expense Report:** Provides an overview of the Guidelines for Arbitrator Reimbursement and offers step-by-step instructions on how to complete the Arbitrator Expense Report. Completion of this course is not included on an arbitrator's disclosure report.

Other Trainings

Neutral Workshops: Neutral workshops provide information about new developments within FINRA's dispute resolution program for practicing arbitrators and mediators, and allows them to hear directly from DR senior leaders. FINRA pre-records neutral workshops and posts the audio files on FINRA's website for arbitrators and mediators to listen to at any time.

DR Monthly Email: FINRA distributes a monthly email that highlights new developments in FINRA's dispute resolution program. For example, the email includes information about SEC rule filings and approvals and arbitrator training. The email is sent at the beginning of each month to all available arbitrators and mediators on the roster, as well as to individual subscribers.

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