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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.

Ten Tips for an Effective Securities Mediation*

By James D. Yellen and Edward W. Larkin**



Securities mediation 30 years ago was an informal way to resolve disputes and save the expenses and unknowns of a hearing. The process evolved over time and has become more contentious and litigious, where both sides want to win. It does not have to be that way. Below are some tips to help parties prepare for and participate in an effective mediation where adversaries can come away with a fair and final settlement.

It has been 24 years since the Securities Arbitration Commentator dedicated an entire issue to mediation, *Tackling Obstacles to Mediation of Broker/Client Disputes*. The respondent's counsel's perspective was authored by Ted Krebsbach and the claimant's counsel's perspective by Roger Deitz. These seasoned practitioners noted that, while mediation of securities disputes had gained some favor, efforts to increase the use of mediation had been met with limited success.¹

Does the mediation landscape look much different today? We have witnessed the run-up of the markets through the spring of 2000 and again through 2018, and the inevitable decline back to the mean. Claims follow the markets. We were working through the tech-wreck case filings that peaked in 2002 and 2003, and then slowed down through 2007.² Since then, the 2008 financial crisis led to a peak of [claims filed in 2009](#).³ While new claims have tapered off since then, FINRA still sees [more than 3,000 new claims per year](#).⁴

In arbitration, the results lead almost inevitably to some sharing of the loss by the parties. Mediation provides parties with a less adversarial and more efficient process. And because mediation is voluntary and non-binding, parties are free to discontinue the mediation at any time.⁵ However, there has been a trend toward a more litigious approach to mediation⁶ that looks more like arbitration⁷. In response, FINRA has recommended changes to the mediation program.⁸

Year End Message

As we approach the end of 2018, we would like to extend a heartfelt thanks to our arbitrators and mediators. We value the expertise and skill you bring to the process and appreciate your dedicated service. Without you, we could not provide the high level of service that parties have come to expect at FINRA.

As a forum, we continue to look for ways to enhance the dispute resolution experience for all participants. Whether it relates to technology, the case management process or honorarium, we welcome your suggestions for ways to improve the forum.

We wish you a wonderful holiday season and look forward to working together in 2019.

Many securities claims could benefit from mediation. Below are 10 suggestions to increase the use and effectiveness of mediation.

1. **Mediate early**—experienced in-house and claimant’s counsel should be able to realistically evaluate their claims by the time the answer is submitted. This is the time when customers and firms can benefit the most from early evaluation and resolution. Early mediation gives parties the opportunity to resolve the claims before incurring significant outside counsel fees and before the parties’ positions become too hardened. From the claimant’s perspective, an early settlement is often better than one later, assuming the settlement amount is in the same range. Early mediation can also help parties focus on issues and allow them to see the possible weaknesses in their cases.
2. **Involve clients**—mediation gives parties a chance to hear the other side’s claims or defenses firsthand. It is an effective way to manage expectations from counsel’s perspective. From the claimant’s side, counsel often needs the mediator to provide a neutral and unvarnished view as to why the claims may not be worth the damages sought. On the firm side, often the branch manager or broker will learn of vulnerabilities in the defense during the mediation. Without mediation, these vulnerabilities may not surface until the eve of the hearing.
3. **Prepare to mediate**—too many practitioners just “show up,” make a brief opening statement and expect to let the game play out on its own inertia. The more prepared you are, the more effective you will be in controlling the process to your client’s advantage. Mediation also gives parties an opportunity to impress the other side with the merits of their cases. If you are not prepared, the settlement range widens instead of narrows and opportunities vanish.
4. **Mediation is not war**—it is a business meeting aimed at settling the case. The confidentiality of mediation leads to frank discussions about a party’s strengths and weaknesses. Even if the parties do not settle, you will learn more about your opponent’s case before the hearing and fine tune your trial strategy.

Ken Andrichik Retirement

After 38 years at FINRA, Ken Andrichik will retire on January 8, 2019. As Senior Vice President, Chief Counsel and Director of Mediation and Strategy, Ken has been an ambassador for alternative dispute resolution (ADR) and a tireless advocate for FINRA's dispute resolution forum. He has helped guide and improve FINRA's forum to ensure that FINRA's forum continues to be recognized as a preeminent organization. Ken brought keen insight and thoughtful execution to many of ODR's most important initiatives, including the development of the first full-scale mediation program in the securities industry and expanding FINRA's dispute resolution services internationally. He was also instrumental in revising FINRA's expungement rules and procedures and creating the Discovery Guide, to name a few. Ken has also been a leader in diversity and inclusion and has served on FINRA's Diversity Leadership Council.

Please join us in thanking Ken for his tremendous leadership and contributions to the forum. We wish him success and happiness as he starts this new chapter of his life.

5. **When to mediate**—nearly all disputes, except those with clearly no merit benefit from mediation. Mediation may not be appropriate if a party is mediating as a way to delay (bad-faith) the case; if a party does not have settlement authority or if the parties can settle the case directly. Otherwise, mediation can be a win-win scenario for both parties.
6. **Mediator style and level of experience**—the rule of thumb for brokerage firm attorneys is that the stronger you evaluate your case, the more evaluative you want the mediator to be. We often put too much stock in whether a mediator is evaluative or facilitative. Each mediation is unique. Experienced practitioners are receptive to a true evaluation by an experienced mediator who should be able to answer the question: what is the case worth in front of the assigned arbitration panel, this set of lawyers, these witnesses and the facts of the case? We know all the industry statistics of what has come before. What we do not is how our case will play before arbitrators. Will the claimant make it through cross-examination, will the panel believe the broker? Will the quiet arbitrator suddenly ask a question that sends all sides reeling? A good mediator can give the case a test. Good mediators are knowledgeable about the arbitration process, and the best have served as arbitrators. In short, when you mediate, you take the arbitrary out of arbitration.
7. **Parties control the process**—most mediations settle.⁹ There is an objectively “fair range” to resolve most disputes. Rationality can be mutual.
8. **Mediation is less costly than arbitration**—the savings alone is often enough to bridge the gap to reach a settlement. This allows parties to avoid spending more resources on arbitration and leaving their fate to a panel of arbitrators.
9. **Management support is essential**—adopt an institutionalized presumption of mediation, unless there is a compelling reason not to mediate. The best argument for mediation is simply that it works.
10. **Mediation without mediators**—experienced practitioners should have the expertise to evaluate cases. While mediators see it from a broader perspective and can evaluate the value of a case. Parties should also roll up their sleeves with their adversary and try to resolve the case on their own.

Conclusion

While much has changed in securities dispute resolution, the value of mediation for customer and employment disputes has never been greater. Mediation provides parties a less adversarial way to resolve their claims fairly, efficiently and economically. Parties control the process and take responsibility for the outcome of the dispute. Its use is and should be on the rise.

**This article is an excerpt from the materials for the [New York State Bar Association's program, Securities Arbitration and Mediation 2018: Evolution](#).*

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***Edward W. Larkin is the director of Commercial and Criminal Litigation at Gibbons P.C. Prior to joining Gibbons, Mr. Larkin was a partner in the New York office of Baritz & Colman, and a member and Executive Director of Morgan Stanley's Law Division. With more than 25 years of experience in the securities industry, Mr. Larkin has handled many arbitrations and mediations. While at Morgan Stanley, Mr. Larkin advised the firm's largest brokers and managers on a diverse range of issues including modifications to policies and procedures in response to regulatory initiatives. Prior to becoming a defense attorney for securities professionals, Mr. Larkin first worked at NASD. A graduate of Holy Cross College, Mr. Larkin received his law degree from Fordham University School of Law, where he was Managing Editor of the Fordham Urban Law Journal.*

Endnotes

- 1 See 6 Sec. Arb. Commentator, Vol. 4, at 1–7 (1994).
- 2 Arbitration filings at FINRA (then NASD) from January 1 through March 31, 2006, reflected an 11 percent decrease from the comparable period one year earlier. See FINRA's *The Neutral Corner*, April 2006 at 5. Filings at the NYSE shared a similar decrease.
- 3 Following the financial crisis, in 2009, there were more than 7,000 new claims filed with FINRA. See FINRA, [Dispute Resolution Statistics](#) (last visited Aug. 24, 2018).
- 4 In 2017, FINRA recorded 3,456 new cases filed, and through July 2018, there had been 2,578 cases filed. *See id.*
- 5 See generally Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 Fordham J. Corp. L. & Fin. 476–78 (2006). Other leading articles on the topic are J. Boyd Page et al., *The Role of Mediation and Early Evaluation in Facilitating Settlement Negotiations*, *PLI/Sec/Arb.*, Vol 2: Course Handbook Series No. B-899, at 60 (1995); Roger M. Deitz, *Understanding Function, Use of Mediation*, N.Y.L.J., Apr. 12, 1999; Joel E. Davidson, *The Case for Mandatory Mediation of Securities Disputes*, Sec. Arb. Commentator, Dec. 1998; Joel Davidson & Romaine L. Garner, *Mediation: The Best Surprise is No Surprise*, ABA Section of Litigation, *Securities News*, Vol. 7, No. 3, Fall 1997. For suggestions on how to make mediation more convenient and cost-effective, see Christopher Kauders, *Seven Steps to a Successful Telephonic Mediation*, *The Neutral Corner* (FINRA, New York, N.Y.), Vol. 4–2017, at 1, 1–3. For the emerging use of mediations of international securities disputes, see Roger M. Deitz, *International Securities Mediation*, *New York City Bar Securities Arbitration & Mediation Hot Topics 2006*, at 170 (May 2006).
- 6 See generally, Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 Harv. Negot. L. Rev. 61, 91–93 (2012). For a discussion on the important differences between mediation and arbitration, see Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 Ohio St. J. on Disp. Resol. 329, 380–81 (2006).
- 7 See Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157, 200–03 (2015) (concluding that Med-Arb solutions to mediations will lead to the mediation process becoming more similar to formal litigation, thereby leading to the potential increase in cost and time, two issues that mediation was originally set out to solve). For suggestion on how to use the hybrid approach to arbitration and mediation in a less adversarial way, see Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, *The Neutral Corner* (FINRA, New York, N.Y.), Vol. 2–2018, at 1, 1–3.
- 8 See FINRA Disp. Resol. Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force* (Dec. 16, 2015), at 55–56. For a discussion on the report, see Jill I. Gross, *FINRA Dispute Resolution Task Force Releases its Final Report, with Support for Mediation and Live Hearings*, 34 *Alts. to High Cost Litig.* 19 (2016).
- 9 Industry statistics indicate that 75 to 85 percent of mediated claims settle. See FINRA, [Dispute Resolution Statistics](#), (last visited Aug. 24, 2018). Only 10 percent of FINRA filings, however, utilize FINRA's formal mediation program.

Office of Dispute Resolution and FINRA News

Case Filings and Trends



[Arbitration case filings](#) from January through November 2018 reflect a 26 percent increase compared to cases filed during the same 11-month period in 2017 (from 3,137 cases in 2017 to 3,937 cases in 2018). Customer-initiated claims increased by 23 percent through November 2018, as compared to the same time period in 2017.

DR Portal Enhancements

New Online Portal Initial Prehearing Conference Order

Arbitrators can now submit the Initial Prehearing Conference Order (order) directly through the [DR Portal](#). After completing the form, arbitrators can hit submit and send it to FINRA. In addition to the ease of completing the form online and submitting it directly through the portal:

- arbitrators can save a draft and return to it later;
- the system alerts arbitrators if required information is missing before or after submitting the order; and
- a copy of the order is saved in the portal for your review.

You can submit the order in the portal by going to the Drafts & Submissions tab of your case and selecting “Initial Prehearing Conference Order” as the submission type. If you have any questions about using the new order, 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 like the electronic Oath of Arbitrator and
- Disclosure Checklist and Initial Prehearing Conference Order;

New Director of Mediation: Manly Ray

Effective January 9, 2019, Manly Ray will serve as the Director of Mediation. Manly will also remain in his current position as the Regional Director in the Southeast Region. As a regional director, Manly has worked closely with the mediation team and looks forward to leading the mediation program in January. Congratulations to Manly in his new role.

- access information about assigned cases, including case documents, upcoming hearings and 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. 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.

DR Portal How-to Videos

If you need assistance updating your profile or submitting the Oath of Arbitrator in the DR Portal, the new [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 [DR Portal](#).

FINRA Arbitrator Travel Policy

FINRA updated its [arbitrator travel policy](#). Please review the new guidelines as you prepare to travel for arbitration hearings. Among other changes, please note that arbitrators who stay with friends or relatives may be reimbursed up to \$100 per stay for a token host gift (receipts required); however, gift cards and/or cash are not reimbursable.

FINRA to Close Miami Hearing Location

FINRA is closing the Miami hearing location as of January 1, 2019. Given the relatively short distance between Boca Raton and Miami and the underutilization of the hearing rooms in Boca Raton, FINRA decided to close its Miami hearing location. Current Miami cases will continue to conclusion in Miami, but all new cases will be assigned to Boca Raton. Arbitrators with a Miami primary hearing location will serve in Boca Raton as their primary hearing location. Please contact the [Southeast Regional Office](#) in Boca Raton with any questions about this change.

Results of the Tenth Annual Securities Dispute Resolution Triathlon

On October 13 – 14, 2018, FINRA and St. John’s University Hugh L. Carey Center for Dispute Resolution held the Ninth Annual Securities Dispute Resolution Triathlon in New York City. Twenty teams of law students from 19 law schools competed and demonstrated their advocacy skills in three critical forms of alternative dispute resolution: negotiation, mediation and arbitration.

Congratulations to the competitors.

- **Overall Winner:** University of Pittsburgh School of Law
- **Negotiation Round Winner:** University of Houston Law Center
- **Mediation Round Winner:** University of Maryland School of Law
- **Arbitration Round Winner:** Cardozo School of Law
- **Advocate’s Choice Winner*:** University of Maryland School of Law

**Advocate’s Choice is based on votes by competitors for the team that demonstrated skill, competence and professionalism.*

Neutral Roster Demographic Survey Thank You

Thank you to those who participated in the 2018 demographic survey of the neutral roster. As in previous years, the survey was administered by a third-party consulting firm and participation in the survey was voluntary.

FINRA is [committed to diversity](#) and has embarked on a [campaign](#) to recruit individuals from varied backgrounds to serve as arbitrators. The data received from this annual survey helps us track our progress in enhancing the diversity of the roster and helps to inform future recruitment events. We are not attempting to assess the quality of the roster or the arbitrators' awards. All responses are anonymous and confidential. The results cannot affect your chances of being selected to serve on cases.

We look forward to publishing the 2018 results early next year. You may review the results of past demographic surveys on our [website](#).

Diversity Symposium at New York Law School

On January 31, 2019, New York Law School and the American Arbitration Association will present a symposium on [ADR and Diversity](#). FINRA is co-sponsoring this event, which will feature First Lady of New York City, Chirlane McCray. She will discuss challenges to achieving greater diversity in the practice of dispute resolution and how to overcome them. The program will take place at New York Law School from 4:30 – 7:50 p.m.

NYCLA Program: 20th Annual FINRA Listens...and Speaks

On Monday, February 11, 2019, at 5 p.m. Eastern Time, the [New York County Lawyers' Association](#) (NYCLA) will present the "20th Annual FINRA Listens...and Speaks" program. The program will be moderated by FINRA arbitrator, Martin L. Feinberg. FINRA's Northeast Regional Director, Katherine Bayer, will discuss recent initiatives such as changes to the arbitrator honoraria for late cancellations of prehearing conferences and for contested subpoena requests or orders, the new special proceeding for simplified cases and more. Ms. Bayer will also be available to answer questions from the audience.

The event is free and will take place at NYCLA located at 14 Vesey Street in New York, NY. If you have any questions about the event, please contact NYCLA at (212) 267-6646.

Rulemaking Items Discussed at the FINRA Board of Governors September 2018 Meeting

Expand Time for Non-Parties to Respond in Arbitration

The [Board approved](#) filing with the Securities and Exchange Commission (SEC) proposed amendments to: (1) extend the response time for non-parties to object to an order or subpoena from 10 calendar days of service to 15 calendar days of receipt of the order or subpoena; and (2) exclude first-class mail as an option to serve documents on the non-party and as an option for the non-party to file the objection to the scope or propriety of the order or subpoena. The proposed rule change would address arbitration forum users' concern that non-parties wanting to object to an order or subpoena have insufficient time to do so.

SEC Rule Approval

Provide Arbitrators a \$200 Honorarium to Decide a Contested Subpoena Request or Order

On October 12, 2018, the SEC approved amendments to FINRA [Rule 12214\(c\) through \(e\)](#) of the Customer Code and [Rule 13214\(c\) through \(e\)](#) of the Industry Code to provide each arbitrator a \$200 honorarium to decide a contested subpoena request or order. The new honorarium will be effective for cases filed on or after January 7, 2019.

Please review [Regulatory Notice 18-40](#) for additional information.

Mediation Update

Mediation Statistics



From January through November 2018, parties initiated 479 mediation cases, a decrease of 18 percent for the same period in 2017. FINRA also closed 639 cases during this time. Approximately 78 percent of these cases concluded with successful settlements.

Mediation Settlement Month

This year, FINRA extended [Mediation Settlement Month](#) from September 15, 2018, through November 15, 2018, to encourage more parties to experience the benefits of mediation and to reinforce its value for those who have mediated already. During this 60-day period FINRA cuts its mediation fees in half, and participating mediators reduce their rates significantly.

Mediation Settlement Day

On October 9, 2018, FINRA participated as a sponsoring organization for the [kick-off event](#) held at the Thurgood Marshall Courthouse. This year's theme was Access to Justice in Dispute Resolution. Participants discussed how Alternative Dispute Resolution (ADR) supports access to justice with programs like free and low-cost ADR services and explored other ways ADR programs could reach a broader audience. More than 100 guests attended the reception.

Mediation Program for Small Arbitration Claims

This [telephonic mediation program](#) is available to parties in active arbitration cases with claims of \$50,000 or less.

The program offers free or low cost mediation (depending on the claim amount) with a FINRA mediator. It provides parties, many who find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute. Parties and mediators have been pleased with the process. The settlement rate for cases in the program has averaged 80 percent, which is consistent with the settlement rate for all cases over the lifetime of FINRA's Mediation Program. If you are not already participating and you wish to do so, email us at mediate@finra.org.

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 [DR Portal](#).

Mediator Training Opportunities

Occasionally, FINRA receives information about mediator training that we think our mediators would be interested in. We will post information and links to these training opportunities on the [Administrative Resources for Mediators](#) page of our website.

Become a FINRA Mediator

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



Questions and Answers

Securities Arbitration Clinics

Question During an arbitration, parties representing themselves (*pro se* parties) will sometimes seek legal advice from the panel. While I understand that neither the panel nor FINRA staff can provide legal advice to any party, is there a legal resource available to *pro se* parties?

Answer An excellent legal resource for *pro se* parties are law schools that provide legal representation through securities arbitration clinics. These clinics help parties with smaller claims and who are unable to hire an attorney. Under the supervision of attorneys, law students will represent qualified parties in an arbitration, including drafting statements of claim through conducting arbitration hearings. Parties should check directly with each clinic for information on the clinic's qualifications. FINRA staff recommends these clinics to *pro se* parties.

For information about obtaining representation and a list of law schools that have securities arbitration clinics, please visit our [website](#).

Postponement Fee Waivers

Question If a panel grants a party's request to waive both the postponement fee and last minute postponement fee in connection with an evidentiary hearing or prehearing conference, how does FINRA process the fee waivers?

Answer *Regular Hearings*

A postponement fee will be charged for each postponement agreed to by the parties or granted upon the request of one or more parties. The fee will equal the applicable hearing session fee under Rules [12902](#) and [13902](#). If a panel decides to grant a party's request to waive the fee, the applicable fee will not be assessed.

A last minute postponement fee will be assessed to the parties to compensate arbitrators if an evidentiary hearing is postponed 10 days prior to a scheduled hearing. For cases filed on or after July 6, 2015, arbitrators will each be

compensated \$600 for the last minute postponement. If the panel grants a party's request to waive the last minute postponement fee, the fee will not be assessed to any party. Arbitrators will still each be compensated \$600.

Prehearing Conferences

For cases filed on or after October 29, 2018, arbitrators will each be compensated \$100 if one or both parties request cancellation of a prehearing conference within three business days of a scheduled conference. If the panel grants a party's request to waive the fee, the fee will not be assessed. Arbitrators will still each be compensated \$100.

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 in their hearing locations during arbitrator selection. 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 [DR Portal](#) to update their disclosure reports.

FINRA enhanced arbitrator disclosure reports by publishing the date arbitrators last affirmed the accuracy of their entire disclosure reports. Arbitrators can affirm the accuracy of their disclosure reports and refresh the affirmation date by submitting an update through the DR Portal.

The affirmation date appears prominently at the top of the disclosure report that parties review during the arbitrator selection process. Parties may consider the last affirmation date as a factor when choosing arbitrators. Therefore, arbitrators are encouraged to review and affirm regularly the accuracy of their disclosure reports using the DR Portal. Even if arbitrators have no changes to their profile, they can update the affirmation date by affirming the information on their disclosure reports through the DR Portal.

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