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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.

FINRA's Mediation Program for Small Arbitration Claims

By Joan Protes

Introduction



Almost 20 years ago, FINRA (then NASD) initiated a mediation program to complement its well-respected arbitration program. FINRA's Mediation Program is an informal, voluntary dispute resolution process in which trained and experienced mediators assist parties in resolving their disputes. Since its inception in 1995,

FINRA's Mediation Program has consistently achieved an 80 percent settlement rate and has received high marks from the parties. Building upon its successful mediation program, in January 2013, FINRA launched a Mediation Program for Small Arbitration Claims, which offers parties in cases involving claims of \$50,000 or less a low-cost alternative to mediate their cases telephonically with an experienced mediator. Eligible cases include both investment matters and employment disputes. Only disputes solely involving expungement are excluded from the program.

This article explores the benefits of FINRA's small claims program and discusses the mechanics of telephonic mediation and the skills necessary to successfully mediate telephonically.

Benefits of FINRA's Mediation Program for Small Arbitration Claims

Reduced Costs

Parties in cases with claims under \$25,000 can mediate telephonically with an experienced mediator at no cost. Parties in cases involving claims between \$25,000.01 and \$50,000 can mediate telephonically at a reduced rate of \$50 an hour. Although regular mediation rates vary based on geography and the mediator's experience and expertise, the reduced rate of \$50 an hour is a significant savings.

Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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In addition to these savings, FINRA waives all mediation filing fees and any arbitration postponement fees if parties mediate their claim at FINRA. Telephonic mediation also allows parties to avoid travel and hotel expenses and eliminates conference room fees.

I recently mediated a case involving a claim under \$30,000 through FINRA's program. In that case, the in-house counsel of a major securities firm welcomed the opportunity to resolve the case with the claimant who had been a long-time client. Because of the small amount of the claim, the firm was hesitant to incur the cost of in-person mediation. By mediating telephonically, however, the parties were able to save the costs of travel, hotel and other expenses and had the opportunity to mediate at a significantly reduced rate of \$50 an hour rather than the \$300 an hour that I normally charge. These cost savings gave the firm some flexibility in the amount it was able to offer in settlement. At the conclusion of the mediation, the respondent was able to make an offer to the claimant that both parties found acceptable, and I was able to help the parties settle the matter.

Non-Monetary Benefits

In addition to substantial cost savings, the small claims program offers mediators the opportunity to refine their mediation skills. It also encourages parties to try mediation and to take advantage of the opportunity to enhance their advocacy skills.

Mediators

Veteran mediators have an opportunity to contribute to the success of FINRA's mediation forum. Mediating telephonically also helps mediators hone and broaden their skills and provides them exposure to parties and attorneys with whom they have not worked previously. The program offers mediators an opportunity to increase their name recognition with frequent users of the program and newcomers from around the country and to build their brand as an effective mediator.

Parties

Parties and attorneys who have mediated under FINRA's program have discovered that telephonic mediation is an effective process that allows them to mediate conveniently by telephone. In fact, mediators settle close to 80 percent of the cases through the small claims program, which is comparable to the settlement rate for FINRA's in-person mediations.

For elderly, ill or physically challenged parties who may find traveling to and attending an in-person mediation especially difficult, telephonic mediation is an effective way—and oftentimes the only way—to mediate their dispute. Telephonic mediations also are easier to schedule because parties, their attorneys and the mediator do not need to be in the same city at the same time.¹

Unlike a face-to-face meeting, which can be emotional and contentious, telephonic mediation provides distance that can be helpful when mediating a dispute. Parties report that the distance provided by telephonic mediation also levels the playing field. I recently mediated a claim where the claimant was an older gentleman who was *pro se*. He noted that he felt that the telephonic mediation process equalized the parties to some degree. He felt less intimidated by the brokerage firm's attorney when they were both on the telephone rather than mediating face-to-face. By allowing parties to remain on their own turf, telephonic mediation usually makes the parties and attorneys feel more at ease.

Telephonic mediation also eliminates the opportunity for the parties or their counsel to offend one another with disruptive behavior such as eye rolling or sighing, which sometimes occurs during in-person mediations. Relying solely on verbal communication allows the parties and the mediator to focus on the substance of the mediation without the non-verbal distractions.

Perhaps most important, telephonic mediation allows parties to save face, which is crucial to a successful mediation. It is often easier for parties and attorneys to gracefully back away from a "line in the sand" that they may have drawn prior to the mediation if the other side is not staring at them across a conference room table.

Mechanics of Telephonic Mediation

Parties and attorneys who have never mediated telephonically may be unclear about the mechanics of telephonic mediation. While there are obvious differences between telephonic mediation and in-person mediation, there also are several key similarities.

First, parties and attorneys must prepare for a telephonic mediation just as they would for an in-person mediation. Just because a mediation is conducted telephonically is not a good reason to “wing” it. The parties should provide the mediator with all pleadings and other relevant materials and a confidential mediation summary,² in advance of the telephonic mediation.

Attorneys should prepare parties for what to expect during the telephonic mediation. The attorney should remind the party that mediation is generally more collegial than adversarial. The attorney should also discuss whether the client will speak during the joint conference. This is especially important if the client and the attorney are not going to be together during the mediation. The parties and their attorneys also should consider various settlement options in advance.

Telephonic mediation usually begins with a joint conference between the parties, their counsel and the mediator. At the beginning of the joint conference, the mediator will introduce the parties and their attorneys and review the ground rules for the mediation, which may include a request that no party may record the joint mediation session or any follow-up sessions. Similar to in-person mediation, the parties or their attorneys explain their respective views of the case and their thoughts on the damage calculation and respond to the remarks of the opposing side during the joint session.

At the conclusion of the joint session, the mediator disconnects the conference line and conducts separate, confidential telephonic caucus sessions with the parties and their counsel until the case is resolved. These private caucus sessions are similar to the private caucus sessions that occur during in-person mediation.

Parties and their attorneys should reserve an entire day for a telephonic mediation. If the parties are unable to resolve their case in a day, the mediator follows up telephonically with the parties and their attorneys until the matter is resolved.

Skills Needed

Based on my experience mediating thousands of investment and employment disputes for almost 23 years, parties, attorneys and mediators must have the following skills to resolve cases effectively: active listening skills; strong negotiation techniques; patience; a sense of humor; and an ability to think creatively to resolve a matter that satisfies all parties.

I have learned to hone my active listening skills and exercise patience to effectively conduct telephonic mediations. Both of these skills are crucial in developing a rapport with the parties, giving them an opportunity to vent and be heard. These skills also allow the mediator to gain the trust of the parties and counsel. Before parties can earnestly negotiate, they must be able to trust the mediator and allow the mediator to help them resolve their dispute.

Parties and attorneys who are patient and have strong listening skills generally negotiate successfully in telephonic mediations. Recently, I mediated a case with a *pro se* claimant with a small claim. The claimant was upset because he had tried to elevate his concerns up the chain of command at the brokerage firm before he filed his arbitration case but felt that no one was listening to him.

During the mediation, the respondent's counsel quickly recognized the claimant's frustration. He listened patiently to the claimant during the joint session, without interrupting him. Joint sessions usually last about 20-30 minutes—this one lasted over one hour.

When I confirmed that the claimant was finished explaining his side of the dispute, the respondent's counsel thanked the claimant for explaining his case, reiterated some of the claimant's points, thereby indicating that he had carefully listened to the claimant and asked some clarifying questions.

The claimant returned the favor and listened to the respondent's counsel's view of the case and his take on the damage calculation. Ultimately, I assisted the parties in settling the case. After the claimant signed the settlement agreement and received his settlement check, he copied me on an email that he had sent to the respondent's counsel thanking him for taking the time to listen and working with him to settle the case.

This case serves as a reminder that active listening and patience are essential mediation skills and are especially helpful in telephonic mediations.

Conclusion

FINRA's Mediation Program for Small Arbitration Cases is an effective, economical and efficient means of resolving disputes. Thus far, FINRA has received overwhelmingly positive feedback about this program from parties, attorneys and mediators. As more participants become aware of the numerous benefits of the program, I am fully confident that it will continue to develop as a successful component of FINRA's distinguished dispute resolution forum.

The views expressed in this article are solely the author's and do not necessarily reflect FINRA's views or policies.

Joan Protess is a principal of the dispute resolution firm, Joan Protess & Associates. Ms. Protess has been a licensed attorney in Illinois for over 33 years. She has a national mediation practice and has mediated successfully thousands of investment and employment cases both telephonically and in person since 1991.

Endnotes

1. See, Joan Stearns Johnsen, "Telephonic Mediation: An Overview," (*The Neutral Corner, Volume 5—2010*).
2. A mediation submission is a written summary of the relevant facts and issues involved in the dispute and also usually includes a detailed damages analysis. This summary is confidential and is not shared with the other parties.

DR Portal Update

Neutrals



FINRA recently enhanced the DR Portal to allow neutrals to submit documents related to some cases through the portal. Currently, arbitrators may submit documents related to cases involving Wells Fargo, Morgan Stanley and UBS through the portal. For example, you may submit a ruling on a motion through the portal rather than faxing or mailing the document. After discussing the merits of a motion with your co-arbitrators, you may draft the ruling and save the document as a PDF on your computer. Once you are in the portal, select the case you are working on and upload the ruling to send to FINRA through the portal. You may confirm that you submitted the document by reviewing the “Drafts and Submissions” tab.

As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal to take advantage of the numerous benefits it provides, such as:

- viewing and updating your current profile information;
- viewing and printing your disclosure report;
- accessing information about your assigned cases, including upcoming hearings and payment information;
- scheduling hearing dates;
- viewing case documents; and
- submitting case documents.

Registration with the DR Portal is particularly important and useful in cases that are being processed through the portal. Accordingly, we are actively reaching out by letter, phone calls and emails to arbitrators assigned to cases administered through the portal to encourage registration.

If you have not received your invitation and would like to register with the DR Portal, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

Parties

FINRA is taking an incremental approach to inviting parties to the portal to address any concerns before making it available on a large scale. In June 2013, we launched the portal and invited parties with cases involving Wells Fargo and Morgan Stanley and subsequently UBS. Soon, we will be adding three additional firms to the portal: Merrill Lynch, Raymond James and Ameriprise. We anticipate that we will open the portal to all parties, on a voluntary basis, by early 2015. We are encouraged by the parties' positive feedback and look forward to making the portal available to all parties.

Midwest Regional Director: Carolann Gemski

We are delighted to announce that effective March 24, 2014, Carolann Gemski became FINRA Dispute Resolution's new Midwest Regional Director. Carolann spent the majority of her distinguished career with the U.S. Securities and Exchange Commission, working as an Enforcement Attorney in Chicago. Carolann's public service career also includes working as a Child Support Enforcement Attorney in Rockville, MD, and as an Assistant Corporation Counsel for the District of Columbia government. Most recently, Carolann has held senior leadership positions in Compliance at BMO Financial Group (Senior Compliance Officer and Vice President) and Kaplan Higher Education (Associate General Counsel and Vice President).

Carolann is a graduate of the University of Chicago Booth School of Business (MBA), American University Washington College of Law (JD) and Louisiana State University (BA). She is an attorney admitted to practice in Illinois, District of Columbia and Maryland. Please join us in welcoming Carolann to FINRA Dispute Resolution.

Dispute Resolution and FINRA News

Case Filings and Trends



Arbitration case filings from January through May 2014 reflect a six percent increase compared to cases filed during the same five-month period in 2013 (from 1,602 cases in 2013 to 1,692 cases in 2014). Customer initiated claims increased by 18 percent through May 2014, as compared to the same time period in 2013.

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

Guidance in Cases Involving Puerto Rico Bonds

FINRA issued [guidance](#) to parties for the administration of cases relating to Puerto Rico bonds. Over the past several months, FINRA has received an influx of arbitration case filings relating to Puerto Rico bonds from claimants, almost all of whom reside in Puerto Rico. The guidance addresses the venue for hearing cases and expansion of the available pool of arbitrators in Puerto Rico.

FINRA is reaching out to arbitrators from hearing locations in the South to serve in the Puerto Rico cases involving the sale of Puerto Rico bond funds. In the first phase of roster expansion (which was focused on Florida-based arbitrators), FINRA increased the number of arbitrators available to serve on Puerto Rico cases from around 60 to almost 400. In April, FINRA began the second phase and reached out to more than 600 arbitrators from hearing locations in Atlanta, Birmingham, New Orleans, Dallas, Houston and Jackson. From April 28 – May 1, FINRA staff visited Puerto Rico and met with numerous professional organizations to recruit additional Puerto Rico-based arbitrators. Our recruitment efforts have resulted in over 100 applications from Puerto Rico residents to serve on our roster. These applications are being handled with priority to accelerate the review and approval process. On May 1, FINRA staff conducted an arbitrator training at the University of Puerto Rico School of Law for 28 of these applicants.

FINRA arbitration hearings generally are conducted in English. However, FINRA recognizes that Spanish is the primary language in Puerto Rico and that many claimants are not conversant in English. Therefore, at FINRA's request, UBS and Merrill Lynch have agreed to bear the costs of consecutive translation services in the Puerto Rico bond cases venued in Puerto Rico in which either is a named respondent. FINRA is in discussions with other named Respondents to obtain their agreement to bear the cost of translation services. Customer-claimants should make arrangements directly with UBS and Merrill Lynch's counsel regarding translation services.

The Customer Code of Arbitration Procedure and the Code of Mediation Procedure are available in Spanish on [FINRA's website](#).

Out-of-State Attorneys Practicing in Oregon

FINRA has received a letter from the Oregon State Bar regarding out-of-state lawyers participating in Oregon arbitration and mediation proceedings. A non-Oregon attorney who provides legal services in connection with a pending or potential arbitration proceeding must, among other things, certify that the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice.

Please refer to the [Notice to Attorneys and Parties Represented by Out-of-State Attorneys](#) page for more information and to review the [letter](#) from the Oregon State Bar.

Securities Arbitration and Mediation Hot Topics 2014

On June 11, 2014, FINRA participated on the panel at the Securities Arbitration and Mediation Hot Topics program at the New York City Bar Association. The panel of experienced practitioners and a senior representative from FINRA examined rule changes, decisions and future developments. This program delivered practical suggestions on prosecuting and defending securities arbitrations and mediations.

Practising Law Institute: Securities Arbitration 2014

On July 31, FINRA will participate in the Practising Law Institute's (PLI) Securities Arbitration 2014 program. The program will feature FINRA staff, FINRA arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. Among other topics, faculty will discuss proposed rule changes, recent case law trends and post-hearing

practices. The faculty will also provide practical tips on handling employment disputes such as wrongful termination and promissory note cases, while examining the ethics of mediation compared to arbitration.

Please visit [PLI's website](#) for more information about the Securities Arbitration 2014 program.

SEC Rule Approval

Protecting Personal Confidential Information

On May 28, 2014, the Securities and Exchange Commission (SEC) approved FINRA's proposed changes to Rules [12300](#) and [12307](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rules [13300](#) and [13307](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code). These amendments provide that any document that a party files with FINRA Dispute Resolution that contains an individual's Social Security number, taxpayer identification number or financial account number must be redacted to include only the last four digits of any of these numbers. If FINRA receives a claim, including supporting documents, with the full Social Security number, taxpayer identification number or financial account number, FINRA will deem the filing deficient under Rule 12307 or 13307 and request that the party refile the document in compliance with Rule 12300 or 13300. The deadline for correction is 30 days from the time the party receives notice of non-compliance from FINRA. If the deficiency is corrected within 30 days from the time the party receives notice, FINRA will consider the corrected documents to be filed on the date the party initially filed the documents with FINRA.

The amendments apply only to documents filed with FINRA. They do not apply to documents that parties exchange with each other or submit to the arbitrators at a hearing on the merits. In addition, the amendments do not apply to cases administered under the [Simplified Arbitration](#) rules.

The amendments are effective on July 28, 2014 for all documents filed with FINRA on or after the effective date. Please visit our website for information about [SR-FINRA-2014-008](#).

SEC Rule Filings

Defining the Arbitrators' Authority to Make Regulatory Referrals During an Arbitration Proceeding

On May 19, 2014, FINRA responded to comments and filed a partial amendment with the SEC to a proposed change to amend Rules [12104](#) and [13104](#) of the Customer and Industry Codes. These proposals would allow arbitrators to make regulatory referrals during an arbitration proceeding in a very limited defined circumstance.

On May 20, the SEC published a Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings on whether to approve or disapprove the proposed rule change.

FINRA believes that mid-case referrals would provide it with an important tool to protect investors by alerting FINRA to potentially serious wrongdoing earlier than is currently possible. FINRA believes that the current proposal contains stringent criteria for making mid-case referrals which should make them an extremely rare occurrence in its forum.

Please visit our website for more information about [SR-FINRA-2014-005](#).

Prohibited Conditions Relating to Expungement of Customer Dispute Information

On April 17, 2014 FINRA filed with the SEC a proposed rule change to adopt FINRA Rule 2081 to prohibit member firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the firm's or associated person's request to expunge customer dispute information from the Central Registration Depository (CRD®). The SEC extended the comment period to July 22, 2014.

Please visit our website for more information about [SR-FINRA-2014-020](#).

Update: FINRA Board of Governors Meeting

Board Decision Finds Charles Schwab & Co. Violated FINRA Rules by Adding Waiver Provisions in Customer Agreements Prohibiting Customers From Participating in Class Actions; Reverses FINRA Hearing Panel Decision

FINRA's Board issued a [decision](#) finding that Charles Schwab & Co., Inc. violated FINRA rules when the firm attempted to keep investors from participating in judicial class actions by adding waiver language to customer account agreements. The ruling by the Board affirms in part and reverses in part an earlier FINRA Hearing Panel decision. The Board upheld the Hearing Panel's determination that Schwab's attempt to prevent FINRA arbitrators from consolidating more than one party's claims in a FINRA arbitration forum violated FINRA rules.

Increase to Arbitrator Honoraria

On June 18, 2014, FINRA filed with the SEC a proposed rule change to amend the Customer and Industry Codes to increase arbitration filing fees, member surcharges and process fees, and hearing session fees for the primary purpose of increasing arbitrator honoraria. Specifically, the proposed rule change would amend Rules 12214 and 13314 (Payment of Arbitrators), 12800 and 13800 (Simplified Arbitration), 12900 and 13900 (Fees Due When a Claim Is Filed), 12901 and 13901 (Member Surcharge), 12902 and 13902 (Hearing Session Fees and Other Costs and Expenses) and 12903 and 13903 (Process Fees Paid by Members) of the Customer and Industry Codes.

Under the proposed rule change, FINRA would amend Rules [12214](#) and [13314](#) and [12800](#) and [13800](#) of the Codes to increase the arbitrator honoraria. The following table illustrates the proposed increases and the percentage changes from the current rates:

Arbitrator Honoraria	Current	Proposed	Percentage Change
Per arbitrator, per hearing session	\$200	\$300	50%
Chairpersons (per day of hearing)	\$75	\$125	67%
Contested Subpoena Requests	\$200	\$250	25%
Simplified Arbitration Cases (flat rate)	\$125	\$350	180%

Please visit our website for more information about [SR-FINRA-2014-026](#).

Revisions to Arbitrator Definitions

On June 18, 2014, FINRA filed with the SEC a proposed rule change to amend Rules [12100](#) and [13100](#) of the Customer and Industry Codes to refine and reorganize the definitions of “non-public” arbitrator and “public” arbitrator. The amendments would, among other matters, provide that persons who worked in the financial industry for any duration during their careers would always be classified as non-public arbitrators. Additionally, persons who represent investors or the financial industry as a significant part of their business would be classified as non-public, but, unlike persons who worked in the industry, they could become public arbitrators after a cooling-off period. The amendments would reorganize the definitions to make it easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.

Please visit our website for more information about [SR-FINRA-2014-028](#).

Mediation Update

Mediation Statistics



From January to May 2014, parties initiated 203 mediation cases. FINRA closed 238 cases during this time. Approximately 82 percent of these cases concluded with successful settlements, and the average case turnaround time was 92 days.

Annual Mediator Fee Due September 1, 2014

FINRA mediators must submit their \$200 annual mediator renewal fee by September 1 to remain active on the roster. All active FINRA mediators will receive email notices around mid-August with instructions on how to pay the annual fee. Please contact [Marilyn Molena](#) if you have questions regarding your mediator availability status.

Mediation Outreach

In March, mediation staff spoke to students about FINRA's arbitration and mediation programs at the Cardozo Law School ADR Field Clinic. Mediation staff also led a mock mediation and provided a guest lecture at St. John's University School of Law Securities Arbitration Clinic.



Questions and Answers

Returning Exhibits to FINRA

Question What should the panel do with hearing exhibits at the end of the hearing?

Answer At the conclusion of the case, the chairperson should return the official set of exhibits to FINRA. FINRA will provide a return mailing label to facilitate the return of the exhibits. If deliberation is needed, the chairperson should return the official record immediately following the final deliberation.

The other arbitrators should take their copy of the case materials, including the exhibits, with them when they leave the hearing and either shred them at home or return them to FINRA. They should not dispose of the case materials in a regular trash receptacle.

For hearings that take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents marked to be shredded remain in the room.

When a hearing takes place at a FINRA office, duplicate materials may be left in the hearing room clearly marked for disposal. FINRA staff will properly discard the documents.

Sharing Email Accounts

Question Can I use a shared email account to receive and send communications when conducting an arbitration case?

Answer No. Arbitrators should not use shared email accounts with a spouse, family member or colleague when receiving and sending communications containing case-related information. Arbitration is a private, contractual matter among the parties to a particular case, and arbitrators must safeguard any information they receive in connection with an arbitration case. Instead, arbitrators should use an email account that they alone can access. This may require opening a new email account.

Education and Training

Neutral Workshop: Review of 2013 and Looking Ahead to 2014



During the May 8, 2014, Neutral Workshop, Linda Fienberg, president of FINRA Dispute Resolution, was joined by key members of Dispute Resolution to provide an overview of the forum's accomplishments in 2013 and proposed initiatives for 2014, including changes to the rules relating to expungement, modifications to the definitions of public and non-public arbitrators, safeguarding personal confidential information and increases to the arbitrator honorarium. You may access the workshop, along with previous workshops, on the [Neutral Workshop page](#) of our website.

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