

The Neutral Corner

Volume 4 – 2009

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 serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

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Robbins to Bader to Lipner: A Securities Arbitration Triple Play

*By James D. Yellen

Three top securities practitioners recently completed or updated treatises that add immeasurably to the securities arbitration field. Separately, each will be handy on the practitioner's shelf. Together, there is not much more one needs for the field.

1. Securities Arbitration Procedure Manual, Fifth Edition (Matthew Bender 2007)

Since 1990, David E. Robbins has regularly updated his classic guide, *Securities Arbitration Procedure Manual* (Manual). The Manual aspires to be one-stop shopping for both the experienced and novice securities arbitrator and practitioner. With the three-ring binder, the reader is not required to repurchase the entire book after each update.

The fifth edition adds valuable new information on how to chair a hearing, explains the nuances of injunctive relief under FINRA's rules and details the attorney malpractice standards in a securities arbitration. The Manual's updates ensure that this guide is current. For instance, the damages chapter includes a nuanced and contemporary discussion about punitive damages in securities arbitrations in light of recent Supreme Court decisions. There is also discussion of intra-industry arbitrations and how they differ from customer arbitrations.

Securities mediation is mentioned briefly, giving potential claimants the tools to weigh the pros and cons of using mediation rather than arbitration. Robbins includes a brief walkthrough of the entire mediation process, though this subject could very well be the subject of an entire book.¹

Message from the Editor

Comments, Feedback and Submissions

In addition to comments, feedback and questions regarding the material in this publication, we invite you to submit suggestions for articles and topics you would like addressed. We reserve the right to determine which articles to publish.

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The appendix has the potential to be the most useful part of the Manual for the experienced arbitrator or attorney. The arbitration rules of FINRA and the American Arbitration Association are printed in full. In addition, state and federal arbitration statutes are included. There is also a short discovery guide, a perfect summary of the material covered earlier in the Manual.

The remainder of the Manual contains traditional teaching material. Like any good teaching book, the Manual begins with the familiar—an easy-to-follow comparison between arbitration and litigation. The Manual, unsurprisingly, is biased towards arbitration but it supports this bias with FINRA statistics that show how many arbitrations are filed each year, how many are closed, how they were closed, the causes of action and the results.

The Manual walks the reader through the process of a securities arbitration, which begins with predispute arbitration clauses, the reasoning behind recent modifications to FINRA's rules on predispute clauses and a few sample clauses. Then, as a refresher for the seasoned arbitrator and an introduction for the novice, there is a review of the legal history of securities arbitration, both before and after *Shearson v. McMahon*.² Robbins also presents an effective overview of when courts will require parties to arbitrate claims and everything counsel should know before commencing such an action.

The layperson should take note of Chapter 6, which gives tips on whether a party needs an attorney to file a claim. The Manual advises readers that small claims arbitrations may be handled *pro se* (without counsel) with proper preparation. One of the more valuable troubleshooting sections of the Manual is how to overcome the challenge of taking over an arbitration already in progress. Poorly filed pleadings can be a hindrance, but Robbins shows that it is not an insurmountable problem.

On the subject of responsive pleadings, the Manual provides insight from the perspective of seasoned defense counsel to help less experienced counsel and *pro se* claimants in preparing their pleadings. Next, the discovery chapters focus on the documents to request in particular scenarios. If you represent a brokerage firm involved in an arbitration and want to know which documents to request, this chapter will be particularly helpful.

In contrast to litigation, parties in arbitration select the referee(s). If you are bewildered about this process you have good reason—most people do not learn how to do this in law school. The Manual gives an overview of the major arbitration organizations' standards for arbitrators and advice on selecting arbitrators for different types of cases.

Arbitration rules are not entirely foreign to experienced litigators who are familiar with civil procedure, but Robbins has boiled down hearing rules to their essentials. Robbins emphasizes not only rules but also techniques for how to best use the rules as an effective advocate. Robbins discusses a wide range of hearing presentation techniques that optimize the arbitration rules.

2. Securities Arbitration: Practice and Forms (Matthew Bender 2008)

Securities Arbitration: Practice and Forms (Securities Arbitration), edited by W. Reece Bader, is a single-volume reference guide to securities arbitrations. Structurally, it is divided into two parts: "Practice" and "Forms." The Practice portion of the text covers various aspects of securities arbitration. It is basic enough to give a novice all of the information he or she needs to get started but also thorough enough to be an essential component of any securities litigator's library.

Each chapter in the Practice section features the work of a different contributor. The first chapter, written by Bader, details the history of securities arbitration and provides a regulatory framework. From here, the text addresses each aspect of a securities arbitration in the order that a litigator would naturally tackle them. The next chapter discusses jurisdiction and the often tricky ways to ascertain personal and subject matter jurisdiction when interpreting the rules of arbitration agreements.

Whether an arbitration agreement is explicit or implied can present particularly thorny issues of arbitrability. *Securities Arbitration* helps clear the air in a number of these situations. Many prominent cases are discussed, illustrating the particular problems. This chapter provides practical advice on how to draft an effective arbitration agreement, from the point of view of an experienced practitioner.

The Forms section of *Securities Arbitration* is the most useful part of the book for the experienced litigator. Bader provides a series of quick reference guides and forms that securities litigators need to

Robbins to Bader to Lipner: A Securities Arbitration Triple Play continued

consult. This includes a comprehensive list of arbitration and mediation forums. While FINRA remains the most popular forum, other options are available. Bader has also thoughtfully included the full text of the Federal Arbitration Act (FAA). As an addendum to the arbitration procedure covered in the first part of the book, there is also the FINRA Code of Arbitration Procedure (including the procedures for customer and industry disputes).

3. Securities Arbitration Desk Reference (Thomson/West 2008)

Professor Seth Lipner's *Securities Arbitration Desk Reference* (Desk Reference) contains material that overlaps with Bader's *Securities Arbitration*. Both include the full text of the FAA and FINRA Procedures and Rules. However, the Desk Reference is a more comprehensive guide for federal and state statutes and rules related to securities arbitration. It offers commentary and cross-references to comparable statutes allowing for further research.

The Desk Reference begins with the full text of the FAA, which is applicable in federal courts. The FAA also has limited applicability in state courts as it preempts any state law that restricts the enforceability of arbitration agreements. While the FAA applies to general arbitration, the author's commentary focuses on how it applies to investor arbitrations conducted at FINRA.

The following chapters give the full text of the Uniform Arbitration Act (UAA) and the Revised Uniform Arbitration Act (RUAA), which was completed in 2000. The commentary includes comparisons between the UAA and other acts including the FAA and the New York Civil Practice Law and Rules (NY CPLR) and the differences between the RUAA and

UAA. It is expected that most states will adopt the RUAA within the next few years, making it essential for practitioners to be familiar with the act.

Next, the Desk Reference provides the arbitration laws specific to New York. Securities arbitrations occur frequently in New York because New York is often the choice-of-law state in customer agreements and because of its role as a financial center. This chapter includes the NY CPLR Article 75, NY CPLR Article 2 and NY CPLR Article 50, regarding not only arbitration laws but also statute of limitations and calculations of interest. In addition, the chapter includes the New York General Obligations Law and New York General Construction Law.

The book goes on to discuss civil recovery under general securities acts and the federal securities laws. It includes an overview of federal securities law and state securities regulation. The federal government regulates securities under two primary statutes: the Securities Act of 1933 and the Securities Exchange Act of 1934.³ Additionally, every state has its own statutes regulating securities. The Desk Reference provides commentary on the Uniform Securities Act of 1957 and compares it to the Uniform Securities Act of 2002. Around 30 states have used the 1957 Act as the basis for their own statutes.

The Desk Reference also offers useful state-by-state charts showing the different versions of the Uniform Securities Act that each state has adopted. This section includes charts delineating the differences in liability across the states, followed by the full text of each state's civil liability statute. Most helpful for nationwide practitioners are the charts showing the differing judgment interest rates across the states and tables for certified interest rates.

Conclusion

Overall, I was left nearly agape at the end of the three treatises. Nothing was left out. As a critique, my observation is that this is not an easy field to summarize. If you can write on this subject in a more experienced, insightful or inclusive manner, go do it. For now and the foreseeable future, however, I will stick with Robbins to Bader to Lipner, and score it a triple play.

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

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Mr. Yellen expresses his gratitude to Catherine Chiou and Jonathan Forgang, students at Fordham Law, for their assistance with this review.

Endnotes:

- 1 James D. Yellen and Edward W. Larkin, "Effective Mediation Techniques," 2007 Securities Arbitration PLI Seminar.
- 2 482 U.S. 220 (1987).
- 3 There are several acts pursuant to which the federal government regulates securities.

Litigation Issues for Arbitrators

By Avi Rosenfeld, Case Administrator, FINRA Northeast Regional Office

Of the many cases filed each year with FINRA, only a tiny number result in arbitrator involvement in legal actions arising out of an arbitration. Even when arbitrators have appropriately discharged their responsibilities, and even though they enjoy quasi-judicial immunity, on rare occasions they may still be named in a lawsuit or subpoenaed to testify in a collateral legal action arising out of the arbitration.

Prior to the commencement of an arbitration hearing, parties may file a lawsuit to change the venue, disqualify an arbitrator or delay or expedite the hearing. More frequently, however, parties will file in court a motion to vacate an arbitration award due to dissatisfaction with the award. For example, a party may allege arbitrator misconduct, such as failure to grant a reasonable postponement request. Or, a party dissatisfied with an arbitration award may contend that an arbitrator failed to disclose a potential conflict or bias. In some cases, parties who sue their counsel for malpractice may also try to subpoena arbitrators to testify. Rarely, however, are arbitrators named as a party in any of these actions.

Although lawsuits naming arbitrators do not happen often, neutrals can take the following precautions to decrease the likelihood of being named in a suit:

- **Disclose Potential Conflicts of Interest.** An arbitrator may be named in a lawsuit for failure to disclose a potential conflict of interest or for failure to make a reasonable effort to identify a conflict of interest. FINRA provides the following items to the arbitrator at the time of appoint-

Litigation Issues for Arbitrators continued

ment: case packet containing the parties' pleadings, Oath of Arbitrator, arbitrator's disclosure report and the disclosure checklist. Arbitrators should not only review their disclosure reports for accuracy and provide updates accordingly, they should also disclose any undocumented circumstances that may prevent them from making an impartial determination or that may create even an appearance of bias.

Similarly, at the commencement of the hearing, arbitrators should reaffirm their previous disclosures to the parties, confirm that they have no additional disclosures to make or, when appropriate, disclose any additional information to the parties. Arbitrators should also review the parties' witness lists for potential conflicts and make necessary disclosures prior to the hearing. If the arbitrator has not been provided with the witness lists, the arbitrator should get the lists from the assigned case administrator. It is critical that arbitrators disclose all relevant professional, social and personal relationships as soon as they become aware of the relationship, regardless of the stage of the arbitration proceeding.

Arbitrators should not determine whether a potential conflict is important—that is a decision for the parties or FINRA. Therefore, arbitrators should always err on the side of caution and disclose anything that could be perceived—however slightly—as affecting their ability to act impartially.

- **Maintain Composure.** The integrity of and the parties' confidence in the arbitration process depend on an arbitrator's impartial and unbiased demeanor. Throughout the arbitration proceedings, an arbitrator should exhibit patience, understanding and compassion. Although an arbitration may become contentious, arbitrators must always maintain composure and remain fair—in fact and in appearance.
- **Stay on the Record.** A panel should conduct executive sessions and deliberations off the record, but FINRA recommends that the panel stay on the record at all other times. By remaining on the record, FINRA can maintain a verbatim record of the hearing and ensure the integrity and propriety of the proceedings. The tape or digital recording of the hearing is the official record of the arbitration. Therefore, arbitrators should not leave blank gaps on the recording; this will enhance the integrity and authenticity of the record.
- **Refrain from Independent Factual Investigations.** As stated in [The Arbitrators Manual](#), arbitrators should never make independent factual investigations. The arbitration case belongs to the parties, and the parties should present the facts as they wish. Nothing, however, prohibits an arbitrator from reading the text of a rule, statute or legal citation referred to in a party's pleading (*e.g.*, if the complaint charges a violation of a suitability rule, the arbitrator may read the rule).

When in doubt about an issue, legal or otherwise, arbitrators should request briefs from the parties. If cases are cited in a party's motion or brief, and the arbitrators wish to read the full court opinions, the arbitrators should ask the parties to supply copies, and if necessary, the arbitrators may look up the cited authorities themselves.

In those limited instances where an arbitrator looks up a cited authority—one that was not provided by the parties—the arbitrator should disclose the nature of that research to the parties. By doing so, the arbitrator makes the parties aware of the matters being considered by the arbitrator and the parties may respond accordingly.

- **Render a Decision Promptly.** The panel should rule promptly on all claims when the hearing concludes. If that is not possible, the panel should schedule a deliberation conference immediately following the hearing. Arbitrators should resolve all relief requests made by the parties, including any oral requests.
- **Maintain Proper Post-Hearing Conduct.** Pursuant to Canon VI of the [AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes](#) (Code of Ethics), which FINRA arbitrators are required to follow, the arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings (such as a lawsuit) to enforce or challenge the award.

In the unlikely event that an arbitrator, party, counsel or reporter contacts an arbitrator regarding an arbitration, the arbitrator should decline to discuss any matter relating to the arbitration (such as the award or deliberations) and refer the inquiry to the assigned FINRA case administrator.

Arbitral and Testimonial Immunity

Arbitral immunity protects the decision-making process from attack by dissatisfied litigants. Arbitrators, like judges, are independent decision makers and are generally immune from civil liability for actions that are within the scope of their arbitral duties. If an arbitrator is sued, subpoenaed or subjected to a bar complaint or inquiry, and the action arises from the arbitrator's service as a FINRA arbitrator, FINRA will provide legal representation.

Courts have been steadfast in extending judicial and testimonial immunity to arbitrators for acts arising within the scope of their arbitral duties. For example, courts have applied the doctrine of arbitral immunity to dismiss claims that arbitrators or arbitration forums lost evidence, failed to adequately tape hearings and wrongly permitted certain witnesses to testify.

Generally, courts will not require arbitrators to testify for the purpose of contradicting or clarifying an award. Courts are more likely to remand an award to the arbitrators for clarification. In rare occasions, courts have required arbitrators to testify about alleged bias and disclosure issues, but the requesting party must first present clear evidence of arbitrator misconduct. Courts are also more likely to require an

Litigation Issues for Arbitrators continued

arbitrator to testify if the arbitrator discussed the case off the record with one party or signed an affidavit requested by one party.

What to Do if an Arbitrator Is Named as a Litigant

Parties sometimes name arbitrators in litigation, incorrectly believing that arbitrators are necessary parties to the case. If arbitrators are served with a petition, complaint, motion, subpoena or bar complaint or inquiry relating to their role with FINRA Dispute Resolution, they should not discuss the case with anyone. Instead, they should contact FINRA's Office of General Counsel immediately at (202) 728-8294 and ask to speak to a litigation attorney. Arbitrators should never ignore a complaint or other legal document.

Arbitrators should not hesitate to contact FINRA's Office of General Counsel with any questions. FINRA also encourages arbitrators to review the [Code of Ethics](#) and the [Codes of Arbitration Procedure](#), which are all available at www.finra.org.

Please listen to the March 13, 2008, [Neutral Workshop](#) for additional information on this topic.

Dispute Resolution News

Case Filings

Arbitration case filings from January through October 2009 reflect a 54 percent increase compared to cases filed during the same 10-month period in 2008 (from 3,971 cases in 2008 to 6,113 cases in 2009). Customer-initiated claims during this 10-month period increased by 56 percent. The types of arbitration cases filed to date in 2009 (listed in order of decreasing frequency) are: mutual funds, common stock, annuities, options and limited partnerships. Also, there has been a sizeable number of cases involving auction rate securities (299 cases in 2008 and 237 cases through October 2009), collateralized debt/mortgage obligations (801 cases in 2008 and 536 cases through October 2009), preferred stock (115 cases in 2008 and 425 cases through October 2009), and corporate bonds (143 cases in 2008 and 315 cases through October 2009).

Despite the rather large increase in arbitration case filings, case processing times are actually faster than in 2008. Through October 2009, the overall processing time from service of the claim to close of the case was 11.5 months (a 12 percent decrease compared to the same time period in 2008).

Updates to the Arbitrator Application

FINRA has updated its Arbitrator Application to require more information from applicants about the types of publications they have authored. Specifically, we request applicants to disclose all publications including, but not limited to, books, articles and

blogs, when applying to serve on our roster. We ask active arbitrators to inform us—on an ongoing basis—of any new publications, so we may include this information in their Arbitrator Disclosure Reports, which are ultimately distributed to the parties.

The Arbitrator Application is now available [online](#) in an interactive PDF format. Applicants may fill out the application electronically, rather than completing the information by longhand, before mailing it, with all required documents, to FINRA for review.

Public Arbitrator Pilot Program

Summary and Progress of the Program

As we reported in previous issues of this newsletter, FINRA launched an innovative Public Arbitrator Pilot Program (pilot program) for eligible investor claims received on or after October 6, 2008, that gives investors greater choice when selecting an arbitration panel. The pilot program will run for two sequential years. Year one began October 6, 2008, and ended October 5, 2009.

Year two began on October 6, 2009, and will end October 5, 2010. For year two, FINRA expanded the pilot from 11 to 14 broker-dealers, and many of the original participating firms have increased their case commitments, resulting in an increase of eligible cases from 276 to 411, a rise of nearly 50 percent. For the upcoming year, three new firms have agreed to contribute cases to the pilot program: Chase Investment Services, Oppenheimer & Co. and Raymond James Financial Services/Raymond James & Associates.

Each participating firm has agreed to commit to a specific number of cases to the pilot. Cases enter the pilot on a first-come basis at the sole discretion of the claimant, who is typically a retail brokerage customer.

Pilot Program Statistics

In year one of the pilot program, 52 percent of the eligible claims opted in. This resulted in 245 cases (out of 475 eligible cases). In 50 percent of the cases that elected to participate in the pilot program—in which lists have been returned by the parties through October 26—the customer has ranked one or more of the non-public arbitrators.

The first arbitration awards are being issued in cases that proceeded in the pilot program. To make the pilot program results as transparent as possible, and to make it easier to find these awards on FINRA's Arbitration Awards Online database, FINRA has modified its award template to clearly denote pilot program cases. Additionally, the Arbitration Awards Online webpage has been updated to include a Public Arbitration Pilot Program drop down box to further facilitate identification of awards rendered under the Pilot.

Please review the [Frequently Asked Questions](#) and the most recent [News Release](#) on our Web site for additional information about the Public Arbitrator Pilot Program.

Dispute Resolution News continued

Neutral Workshop

In early 2010, FINRA will begin offering a new pre-recorded neutral workshop. The workshop will provide a summary of FINRA Dispute Resolution's accomplishments in 2009, discuss the interplay between FINRA Dispute Resolution and FINRA's regulatory units and provide an update on the Arbitration Fairness Act of 2009.

Workshop faculty include: Linda D. Fienberg, president, FINRA Dispute Resolution; George Friedman, executive vice president, FINRA Dispute Resolution; and Richard Berry, vice president and director of Case Administration and Regional Office Services.

As part of our continuing dialogue with FINRA's neutrals, we invite you to submit questions for FINRA Dispute Resolution. You may email your questions to finradrnm@finra.org.

We will send an email notice as soon as the neutral workshop becomes available on our Web site.

The Discovery Guide

On June 11, 2008, after an exhaustive three-year review process involving various constituent groups to build consensus, FINRA filed with the SEC SR-FINRA-2008-024, a proposed rule change to amend the Discovery Guide to update the Document Production Lists for use in customer cases. FINRA has not amended these lists since they were made available in 1999.

Through the amendments, FINRA aimed to:

1. Eliminate mandatory production of certain documents that the other party is likely to have in its possession—or that are labor intensive or expensive to produce and should be considered by the arbitrators on a case-by-case basis;
2. Provide clarity to the lists by specifying documents that would be responsive to list items;
3. Require customers and firms/associated persons to produce, in all customer cases, documents received by third-party subpoenas;
4. Simplify the lists' language to "plain English"; and
5. Expand the list of documents that must be produced in a number of instances.

Many thoughtful comment letters were submitted to the SEC in response to the proposed amendments to the Discovery Guide. A review of the comment letters submitted indicates that the consensus reached was not broad enough. FINRA withdrew the rule filing on May 21. FINRA is working on a new proposal that is informed by the comments submitted and plans to submit a new rule proposal this winter.

SEC Approval

Procedures to Expedite the Administration of Promissory Note Cases

The SEC approved new procedures to expedite the administration of promissory note cases under the Code of Arbitration Procedure for Industry Disputes (Industry Code). Effective September 14, 2009, new Rule 13806 of the Industry Code applies to arbitrations solely involving a firm's claim that an associated person failed to pay money owed on a promissory note. In order to proceed under the new rule, a claimant would not be permitted to include any additional allegations in the statement of claim. Rules 13214 and 13600 of the Industry Code have also been amended to make conforming changes.

Under the new procedures:

- Parties choose a single public arbitrator from the roster of arbitrators approved to hear statutory discrimination claims—unless the associated person files a counterclaim or third-party claim of more than \$100,000, in which event the case is heard by a panel of three arbitrators. The three-arbitrator panel will include one public arbitrator who is qualified to hear statutory discrimination claims, one arbitrator from the roster of public arbitrators and one arbitrator from the roster of non-public arbitrators.
- If the associated person does not file an answer, simplified discovery procedures apply, and, regardless of the amount in controversy, the single arbitrator renders an award on the papers.
- If the associated person files an answer—but does not seek additional relief or assert any counterclaims or third-party claims—the single public arbitrator decides the case after holding a hearing, regardless of the amount in controversy.
- If the associated person files a counterclaim or third-party claim, the panel composition is based on the amount of the associated person's claim. If the counterclaim or third-party claim is more than \$100,000, a panel of three arbitrators will be appointed with the single arbitrator, approved to hear statutory discrimination cases, serving as the chair.

The new rule applies to all cases filed on or after September 14, 2009. See [Regulatory Notice 09-48](#) for more information about this new rule.

Arbitrator Training

Update to Basic Arbitrator Training

New arbitrators must complete three training requirements to become active on the roster:

- an eight-hour, self-led online course;
- a four-hour, live, instructor-led course; and
- a one-hour, self-led online expungement course.

FINRA is now offering the four-hour, live, instructor-led course (referred to in the second bullet above) via live video through WebEx. Instead of traveling to a FINRA hearing location to attend the four-hour, live, instructor-led course, arbitrators can now satisfy this training requirement by participating in the live WebEx program. FINRA will continue to conduct in-person basic training programs in our four regional offices (Boca Raton, Chicago, Los Angeles and New York City) for the convenience of arbitrators who work or reside near a FINRA regional office or prefer the in-person training method.

Arbitrators who are active on the roster do not need to take this training. This update is intended to be informational only for arbitrators who have already completed their training requirements.

Benefits of Live Video Training Sessions

With the ease of WebEx, we offer the same content as the in-person training—video vignettes followed by a discussion of the scenarios, lively exchange of ideas between and among the trainer and the participants and participant role play in calculating

an award. In addition, the new video training offers a range of flexibility not available with in-person training:

Consistency: FINRA will use one national trainer for all live video trainings, which ensures that FINRA is providing all of its arbitrators with a consistent message.

Convenience: Arbitrators can attend training without leaving the privacy of their offices or homes, saving them valuable travel time and—in some instances—travel costs.

Reliability: Unlike in-person training, arbitrators won't have to worry about cancellations due to low registration. Using WebEx and Verizon, FINRA can offer as many live video training sessions as necessary throughout the year to anyone in the country, at any time.

Expanded Training: Using live video sessions, the trainer is able to give the participants a tour of the forum's Web site. The Web connectivity enables the trainer to take the trainees through a tour of Dispute Resolution's home page on www.finra.org, and to show the trainees how to access important sites such as: the online Arbitrator Information Update Form, arbitration forms, the Codes of Arbitration Procedure, the Arbitrator's Reference Guide, Neutral Workshop recordings, and *The Neutral Corner*.

As indicated above, arbitrators who are active on the roster do not need to take this training.

Question and Answer: Discoverable and Admissible Evidence—What Is the Difference?

Question: In arbitration, what is the difference between a document that is discoverable and a document that is admissible?

Answer: A document is discoverable if a party must produce the document to the opposing party during the prehearing discovery process. Rules 12506 and 12507 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) define the parties' obligations to produce documents in customer cases.

If the parties have a dispute about whether a document is discoverable, Rule 12503(c)(3) of the Customer Code provides that one arbitrator, generally the chairperson, will decide the dispute before the start of the evidentiary hearing. The scope of discoverable documents is much broader than the scope of admissible documents.

To determine whether a document request is reasonable, your first goal will be to determine whether the document is relevant or likely to lead to relevant evidence. Only after determining that a document is relevant, or likely to lead to relevant evidence, should you consider the cost or burden of production. If a party has demonstrated that the cost or burden of production is disproportionate to the need for the documents, determine whether there are alternatives that can lessen the impact, such as narrowing the scope of the request, or whether other documents can provide the same information.

Rule 12604(b) of the Customer Code provides that the production of documents in discovery (discoverable documents) does not create a presumption that the documents are admissible at the hearing. The Rule also states that a party may object to the admission of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

However, a document is admissible under Rule 12604 if the panel decides to accept the document as evidence at the hearing. The Rule also states that the panel is not required to follow state or federal rules of evidence.

Mediation and Business Strategies Update

New Mediator Payment Structure Effective September 1, 2009

FINRA's Mediation Program has enhanced the fee structure for FINRA mediators in an effort to keep the program competitive.

Effective September 1, 2009, FINRA began deducting a one-time flat fee of \$150 per mediation case. This is a change from our past practice of deducting fees per hour based on a mediator's hourly rate.

We also instituted a \$200 annual membership fee due by September 1 each year for all mediators who wish to remain on FINRA's roster. We are extending a grace period to FINRA mediators to December 1, 2009, to submit their annual membership fee. Mediators may submit their annual fee safely and easily on our [Web site](#), where they will also find more information about the new mediator fee structure. Mediators who have not paid the annual fee by December 1, 2009, will be listed as inactive.

We encourage mediators to listen to the July 10, 2009, [Neutral Workshop](#) about the new mediation payment structure. Mediators may also contact the Mediation Department at mediate@finra.org or a Senior Mediation Administrator in their region for additional information about the new fee structure.

Straight-in Requests for Mediation

The number of requests submitted prior to filing an arbitration case (straight-in requests) increased 85 percent from January through July 2009 over the same time period in 2008. This increase is consistent with the increase we have seen in arbitration case filings.

Mediation Outreach Efforts

In September, mediation staff participated on a panel entitled "Putting ADR on Your Radar" at the New York City Bar Association. Staff also spoke about FINRA's dispute resolution program with members of the Association of South Florida Mediators and Arbitrators in Hollywood, FL.

Mediation staff has also lectured at the following law schools regarding securities dispute resolution:

- Hofstra Law School Mediation Clinic
- Fordham Law School
- Brooklyn Law School
- St. John's Law School
- New York University Law School

Securities Dispute Resolution Triathlon

The Hugh L. Carey Center for Dispute Resolution at St. John's University, in conjunction with FINRA Dispute Resolution, hosted the first annual Securities Dispute Resolution Triathlon competition on October 17 – 18, 2009, in New York City. The Triathlon provided aspiring attorneys from law schools around the country with an opportunity to build their advocacy skills in three key areas of alternative dispute resolution: negotiation, mediation and arbitration. By combining these techniques in a single event, the competition tested student advocacy skills in a comprehensive and realistic securities dispute resolution experience.

FINRA neutrals participated as judges, mediators and arbitrators during this event. Kenneth Andrichik, Director of Mediation and Chief Counsel of FINRA Dispute Resolution, served on the planning committee, and FINRA staff helped coordinate the event.

Linda Fienberg delivered the keynote speech during the participants' luncheon held on October 17. George Friedman presented awards to the following winning teams at the ceremony on October 18:

Overall Champion:	St. John's University
Advocate's Choice:	Pennsylvania State University
Negotiation:	Seton Hall University
Mediation:	University of Florida
Arbitration:	New York University

Please visit St. John's University's [Web site](#) for more information about the Securities Dispute Resolution Triathlon.

National and Regional Updates

National Updates

On August 11, 2009, FINRA attended the annual conference for the Association of Latino Professionals in Finance and Accounting in Boston, Mass. In October, FINRA attended a joint conference sponsored by the American Society of Women Accountants (ASWA) and the American Woman's Society of CPAs (AWSCPA) in Las Vegas, Nev. FINRA also attended AARP's National Event and Expo, which was also held in Las Vegas. At these events, FINRA discussed its dispute resolution program with conference attendees and encouraged them to apply to FINRA's arbitrator roster.

George Friedman and Richard Berry served on the faculty of the annual meeting of the Public Investors Arbitration Bar Association (PIABA) from October 28 – 31. They appeared on a plenary session discussing the latest developments at FINRA Dispute Resolution. Mr. Berry also conducted an "arbitration basics" workshop.

Regional Updates

Effective October 12, 2009, FINRA replaced the onsite training requirement of the Basic Arbitrator Training Program with a live, video WebEx training for all basic trainings scheduled outside of a regional office. FINRA will continue to conduct in-person basic trainings in our regional offices for the convenience of arbitrator applicants who prefer the in-person training method. Please see the Dispute Resolution News section of this newsletter for information about our new training format.

Live Video WebEx Basic Training Schedule

The following is the training schedule for the remainder of 2009. All training start times are **Eastern Time**.

December 16	1:00 p.m. – 5:00 p.m.
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Please contact Suzanne Green at Suzanne.Green@finra.org to register for an upcoming WebEx training.

While FINRA will continue to conduct in-person basic training programs in our four regional offices, there are no additional training programs in Boca Raton, Chicago, Los Angeles and New York City for the remainder of 2009. Please visit FINRA's Web site for the 2010 schedule of trainings held in the regional offices.

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