

The Neutral Corner

Volume 3 – 2010

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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Thank You to Arbitrators and Mediators for Completing Background Verification Forms

FINRA wishes to thank arbitrators and mediators for completing the Consent to Background Verification and Investigation forms (verification forms). We appreciate your cooperation in this important initiative.

Since October 2003, FINRA has retained a third-party vendor to verify certain background information provided by individuals who apply to our arbitrator roster, including employment history, education background, professional licenses (or the last degree awarded); the vendor also checks for criminal convictions.

To maintain constituent confidence in our dispute resolution forum, FINRA sent over 4,500 letters to FINRA arbitrators who were approved prior to October 2003, asking them to complete and return the verification form. We also sent requests to all FINRA mediators who were not also FINRA arbitrators. We have since received over 4,300 completed forms from the arbitrators—an overwhelming 95 percent. Mediators have also returned their verification forms at a similarly high response rate. Neutrals who do not complete and return the verification form will be made unavailable for future assignments.

As FINRA arbitrators and mediators, you play a critical role in establishing and maintaining the high level of trust and confidence the parties expect in the dispute resolution system. Thank you for helping FINRA carry out its mission to deliver outstanding dispute resolution services.



Financial Industry Regulatory Authority

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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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FINRA Revises Online Basic Arbitrator Training Materials

*By Robert S. Banks, Jr.

In June, FINRA revised the online Basic Arbitrator Training course that all new arbitrators must complete successfully. The National Arbitration and Mediation Committee (NAMC) unanimously approved the revised training materials at its November 2009 meeting.¹

After a year-long process, the NAMC Arbitrator Training Materials Task Force (Task Force), which included representatives from all viewpoints of the arbitration process, reached consensus on the materials.² While the diverse members of the Task Force brought different perspectives to the process, the members all shared a goal of improving and updating the arbitrator training materials.

Overview of the Basic Arbitrator Training

The training materials explain the arbitration process in clear language. They cover all topics that may arise during arbitration, including the ethical responsibilities of arbitrators and factors affecting an arbitrator's ability to serve on a case. The prehearing section of the training materials provides an overview of the discovery process and motion practice, including the new motions to dismiss rules. The materials also provide guidance on conducting an arbitration hearing, such as discussions on basic evidentiary questions, burdens of proof and procedural disputes that may arise during the hearing. The training materials conclude with guidance on how to deliberate and prepare an award.

The training materials offer a fair amount of detail on how to address specific issues. Yet they judiciously avoid giving specific training on substantive law issues. The materials do not make pronouncements on what constitutes a state or federal securities law violation, nor what an investor must prove to prevail on a claim for unsuitability, misrepresentation, negligence or fraud. The applicable law varies considerably—from claim to claim, between federal and state laws and among the states and territories—making it impossible to provide generic statements of the law. In most instances, the materials counsel arbitrators to look to the parties for guidance on the applicable law.

Guidance on Legal Concepts

For some situations, the Task Force determined that providing legal guidance was necessary. For example, the Task Force decided that statutes of limitation required some discussion. Recognizing that statutes of limitation differ considerably, and that they have been held not to apply to arbitration claims in some states, the revised training materials provide the following:

A statute of limitations is a time limit after which a claim may not be brought. For example, some states have a two-year statute of limitations for breach of contract claims. Whether or not statutes of limitation are applicable to the arbitration or the claim and the length of any applicable statutes depends on the nature of the allegations and the law of the relevant jurisdiction. You may ask the parties for instructions on these issues. Note that a statute of limitations may apply to one claim in a statement of claim but not to all the claims.

If the statute of limitations applies to a particular claim, you must also consider whether certain circumstances have tolled or extended the statute. A statute of limitations can be tolled for legal and equitable reasons. Examples of such reasons are concealment of wrongdoing by a party; continuing wrong or misrepresentation; or filing of a prior legal action. In addition, the date on which the statute of limitations begins to run sometimes depends upon the date that a party discovered, or should reasonably have discovered, the alleged wrongdoing. Again, you should look to the parties for instructions on these issues. If you find that a statute of limitations applies and, therefore, bars a claim, you should dismiss the claim with prejudice. And remember to consider the statute of limitations argument separately for each claim as different claims are subject to different limitations periods.

Another example where the new training materials describe legal concepts is mitigation of damages. The Task Force agreed that some discussion of mitigation was necessary because parties frequently raise the issue. The revised training materials provide a general definition of mitigation, and instruct that the mitigation defense applies to some, but not all, claims:

“Mitigation” refers to the concept that a party should, when possible, take action to limit loss or avoid damage. The law varies as to when an injured party is required to mitigate damages. Some laws allow a respondent to raise the issue of mitigation, and require a claimant to act reasonably to avoid losses once the harm is discovered. Other laws, including some “blue sky”

*FINRA Revises Online Basic Arbitrator Training Materials
continued*

laws (state securities laws), do not recognize mitigation as a defense. If the issue of mitigation arises, ask the parties for guidance as to the role of mitigation in each theory of recovery.

The Task Force revised the training materials to ensure that they were not contrary to any potentially applicable law. For example, the earlier training materials suggested that, in cases involving multiple respondents, arbitrators could always consider the respective fault of each, and apportion liability accordingly. The revised materials clarify that, in some cases, the applicable law may impose joint and several liability. It also mentions that allocating an award based upon fault could be contrary to the law. The revised training materials state:

If there is more than one respondent, you will have to determine the liability of each. You may decide that only one respondent is liable, and dismiss the others. Similarly, you may determine that two respondents are liable, but in different amounts. This may occur, for instance, in cases in which the claimant had accounts with two different respondent firms, and suffered compensable losses at each firm, but in different amounts.

Some laws provide for “joint and several liability,” which means that each respondent can be held responsible for the full amount of the award regardless of the degree of fault. As a result, the claimant may enforce the award against any or all of the parties. If there is more than one respondent, you should look to the parties for guidance on the applicable law.

The training materials have incorporated many changes, ranging from arbitrator conflicts, to motions, to deliberation and award. The Task Force members and participants hope that arbitrators will find the updated training to be a valuable resource as they serve in FINRA’s forum.

**Mr. Banks is a lawyer at Banks Law Office, P.C., in Portland, OR, where he represents investors in FINRA arbitrations. He is also a chair-qualified FINRA arbitrator, and is a member of FINRA’s National Arbitration and Mediation Committee. Mr. Banks served as the chairperson of the Task Force.*

Editor’s Note: For a limited time, FINRA is waiving the \$125 registration fee for the online Basic Arbitrator Training. Arbitrators may refresh their training at no cost. Interested arbitrators may contact [Jisook Lee](#) for a PDF version (electronic file which can be reviewed online or printed) of the updated training course to be emailed to them.

Endnotes:

- 1 *The NAMC makes recommendations to the FINRA Board on dispute resolution matters and includes representatives from the public, the securities industry and arbitrators and mediators serving in FINRA's Dispute Resolution forum. The majority of the NAMC's members, including its chair, are public representatives. Under the Codes of Arbitration Procedure, the NAMC has the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation and other dispute resolution matters to the Board. The NAMC also establishes and maintains rosters of neutrals composed of persons from within and outside of the securities industry. See Rule 12102 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rule 13102 of the Code of Arbitration Procedure for Industry Disputes (Industry Code).*
- 2 *The Task Force included a diverse group of representatives. Attorneys Patricia Cowart (Wells Fargo Advisors), Linda Drucker (Charles Schwab), Richard Paley (W.P. Carey) and Harry Walters (Citigroup Global Markets), provided industry perspectives. John Ohashi (Ohashi and Priver) offered an experienced arbitrator's point of view. Investors in smaller cases were represented by Jill Gross, professor of Pace Law School and director of its Securities Arbitration Clinic. Philip Aidikoff (Aidikoff, Uhl & Bakhtiari), Peter Mougey (Levin Papantonio) and Robert S. Banks, author of this article, served as investor counsel representatives. FINRA Dispute Resolution staff also played an active role in the process.*

Dispute Resolution and FINRA News

Case Filings and Trends

Arbitration case filings from January through June 2010 reflect a 25 percent decrease compared to cases filed during the same six-month period in 2009 (from 3,874 cases in 2009 to 2,919 cases in 2010). Customer-initiated claims decreased by 30 percent in 2010 from 2009.

From January through June 2010, the most common types of arbitration cases filed (listed in order of decreasing frequency) were: common stock, mutual funds, corporate bonds, preferred stock, annuities, options, limited partnerships and certificates of deposit. In 2010, the top two causes of action have been breach of fiduciary duty and negligence.

FINRA Annual Conference

The FINRA Annual Conference took place on May 26 – 28, 2010, in Baltimore, MD. Each year, FINRA hosts this conference to give compliance professionals, securities attorneys and other industry professionals the opportunity to compare regulatory and compliance solutions with financial services firm experts, peers, regulators, policymakers and other key industry mainstays.

Linda Fienberg, President of FINRA Dispute Resolution, and George Friedman, Executive Vice President and Director of FINRA Dispute Resolution, discussed recent securities arbitration trends and their implications for future arbitration activity. They also addressed overall developments in the legislative arena that could impact the future of securities arbitration, as well as rule changes that could affect parties.

Dispute Resolution and FINRA News continued

Update to Arbitration Award Online Web Page

FINRA has updated its website to include information about vacated awards. On rare occasions, a FINRA arbitration award is vacated by a court. If FINRA receives such notification and a copy of the order vacating an award, it will post the order directly behind the original award that appears on the [Arbitration Award Online page](#).

FINRA's Online Learning Courses for Industry Professionals

FINRA provides ongoing education to brokerage firms and its employees about new developments in the securities industry. Although these offerings are designed for individuals involved in the securities industry, arbitrators and mediators may find the following courses useful as they execute their arbitrator and mediator duties: [What to Expect Webcast Series](#), [Compliance Considerations for Social Networking Sites](#), [Variable Annuities](#) and [Senior Investor Issues in Diminished Decisional Capacity and Suitability Considerations](#).

You may review the full list of [online courses](#) that FINRA offers, including e-learning courses, webinars, webcasts and podcasts. Webcasts and podcasts are free to participants. FINRA charges a registration fee for its e-learning courses and webinars.

SEC Rule Filing

Attorney Representation of Non-Party Witnesses in Arbitration

On February 16, 2010, FINRA filed a proposed rule change (SR-FINRA-2010-006) with the Securities and Exchange Commission (SEC) to amend Rule 12602 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to provide that a non-party witness may be represented by an attorney at an arbitration hearing while the witness is testifying.

The SEC received comments asking, among other matters, that FINRA provide more guidance to arbitrators in the rule text. On June 14, 2010, FINRA filed an amendment to the proposal in response to the comments. The proposal would amend the text to state that, unless otherwise authorized by the panel, the attorney's role would be limited to the assertion of recognized privileges—such as the attorney client and work product privileges and the privilege against self-incrimination. This filing is awaiting SEC action.

Please visit our website for more information about [SR-FINRA-2010-006](#).

SEC Rule Approval

Expanded Arbitrator Lists

On July 9, 2010, the SEC approved proposed rule change (SR-FINRA-2010-022) to amend Rules 12403 and 12404 of the Customer Code and Rules 13403 and 13404 of the Industry Code to increase the number of arbitrators on each list generated by the Neutral List Selection System. The expansion is designed to increase the likelihood that all arbitrators appointed to a case will have been selected by the parties.

The amendments increase the number of arbitrators on lists to 10 from the current amount of eight for each type of arbitrator on a three-member panel—public, public chair-qualified and non-public. Lists of available arbitrators for cases involving less than \$100,000, which are heard by a single, chair-qualified public arbitrator, will also expand from eight to 10 names. While the rule change increases the number of arbitrators on each list by two, the number of available strikes will remain at four per party.

The amended rule will become effective in September 2010. FINRA will publish a Regulatory Notice in the near future, which will establish an effective date for these rules.

Please visit our website for more information about [SR-FINRA-2010-022](#) and to read the recent [press release](#) about this proposal.

Changes to the Arbitrator Disclosure Report

By Leslie Leutwiler, Associate Director, FINRA Neutral Management

FINRA recently made changes to the Arbitrator Disclosure Report (Disclosure Report) to aid the parties in the arbitrator selection process and create greater transparency in its dispute resolution forum.

Under [Rule 12408](#) of the Customer Code arbitrators have an ongoing obligation to disclose any direct or indirect financial or personal interest in the outcome of the arbitration. However, many arbitrators may be unaware of the need to disclose firms that are affiliated with firms with which they have a conflict. To address this situation, FINRA added a new conflict type—“Related Conflict With”—to the Disclosures/Conflict Information section of the Disclosure Report. The corresponding description of a related conflict will appear as “Conflict Due to a Merger/Acquisition.”

FINRA added related conflicts on Disclosure Reports to alert parties to the indirect interest that an arbitrator may have with a firm. For example, if an arbitrator has an account with ABC Securities, parties should be aware that XYZ Brokerage is affiliated with ABC Securities. Therefore, XYZ Brokerage would appear on the Disclosure Report as a firm with a “conflict due to a merger/acquisition” with ABC Securities.

Using the information provided by arbitrators, the forum’s computer system (MATRICS) is programmed to automatically print related conflicts on the Disclosure Reports. Current related conflicts cannot be removed or modified by staff. If, however, the

Changes to the Arbitrator Disclosure Report continued

underlying conflict becomes outdated—and the arbitrator notifies FINRA of this change—MATRICS will be updated accordingly and the related conflict will no longer appear on the Disclosure Report.

Finally, FINRA added two new sections to the Disclosure Report: “Cases Currently Assigned Involving Public Customers” and “Cases Currently Assigned Not Involving Public Customers.” These sections are intended to inform parties about other arbitration cases, if any, on which the arbitrator is currently serving. The information provided will include case numbers, the dates the arbitrator was assigned to each case, whether the arbitrator is serving as a panelist or as a chairperson and the names of the securities firms and associated persons who are parties in each case. Please note that the names of public customers are not included on the Disclosure Report.

Arbitrators should contact the [Department of Neutral Management](#) with any questions about their Disclosure Reports.

Discovery Orders and Deadlines for Document Production

By Michele Collins, Associate Director, FINRA Case Administration

FINRA strongly urges parties to work together to resolve discovery disputes on their own in accordance with FINRA Rules [12505](#) and [13505](#) of the Customer and Industry Codes, the [Discovery Guide](#) and [Notice to Members 03-70](#). When parties are unable to resolve discovery matters on their own, they may raise the issues in dispute with the arbitrators, who will issue a written discovery order that resolves all of the outstanding issues.

In some cases, the arbitrators’ written discovery orders do not include a specific date by which the parties must comply with the discovery rulings, resulting in long delays in producing documents. These delays may cause parties to seek a postponement of the evidentiary hearing.

To avoid delays, arbitrators should set a reasonable deadline for compliance when issuing discovery orders, and consider the following factors:

- proximity to the evidentiary hearing dates;
- number of documents at issue;
- difficulty in producing the ordered documents; and
- resources available to the party subject to the discovery order.

The timely exchange of documents and information is vital to the efficient, cost-effective resolution of disputes. Arbitrators play a big role in facilitating this process by providing a specific time for parties to comply with their discovery rulings.

Allocation of Forum Fees

When parties file a claim, counterclaim, third party claim or cross claim, they must remit a filing fee pursuant to [Rules 12900 through 12903](#) of the Code of Arbitration Procedure (Code). The amount of the filing fee is based on the amount in dispute and the number of arbitrators selected to hear a case. FINRA may temporarily waive fees if a party shows inability to pay the filing fee. However, the arbitration panel may still assess arbitration costs at the close of the case.

The total amount of forum fees arbitrators assess is based on the number of hearing sessions. A hearing session includes any meeting between the parties and arbitrators that lasts four hours or less. For example, if a hearing runs two full days, the parties would be billed for four hearing sessions.

At the close of the hearing, the arbitrators must determine how to assess forum fees against the parties. The arbitrators have discretion to allocate forum fees among the parties in a manner they deem appropriate. In deciding how to assess the forum fees, the arbitrators may consider the following factors:

- temporary waivers of filing fees or hearing session deposits because of financial hardship;
- actions by any party that may have prolonged the hearing;
- the legitimacy of arguments made or positions taken;
- disruptions or time delays caused during hearing sessions; and
- the ultimate merits of the case (*i.e.*, who prevailed or substantially prevailed).

Arbitrators **must** allocate forum fees at the end of the case. To prepare parties for the possibility that they may be responsible for fees, arbitrators should remind the parties of the costs they may be incurring throughout the course of the arbitration. FINRA also recently updated its [hearing scripts](#) to remind arbitrators to ask parties to address the assessment of forum fees in their closing arguments.

Question and Answer: Properly Handling Case Materials

Question: Do I need to take precautions to safeguard the confidentiality of case-related material?

Answer: Yes, arbitrators must absolutely take precautions to safeguard the confidentiality of case-related material. As an arbitrator, this is an important part of your responsibilities. Information that needs to be safeguarded includes, but is not limited to:

- Social Security numbers;
- individual taxpayer identification numbers;
- driver's license numbers;
- party and arbitrator addresses;
- banking and brokerage account numbers;
- criminal history information;
- fingerprint cards;
- expunged records;
- attorney-client communications; and
- medical records.

You can protect this sensitive information by taking the following steps:

- Do not leave case-related material out in the open where others can see it. Be sure to secure case material in a locked drawer when you are not working on the case.
- If you are serving on multiple cases, exercise extra caution to avoid sending information about one case to parties in another case.
- Verify that you are sending the correct order and enclosures to the intended recipients; confirm all email addresses and fax numbers before hitting the send button. Be sure to specify both a case number and case name when transmitting orders and rulings, even when transmitting them to FINRA.
- Keep FINRA apprised of your current contact information. For example, if you provide an incorrect fax number or neglect to update your information, FINRA may inadvertently send confidential information to an unauthorized person. You may update your contact information quickly and easily on our website using the [Arbitrator Information Update Form](#).
- Do not dispose of case materials in a regular trash receptacle. Shred all case-related documents. If you are unable to shred documents in your possession, you may return them to FINRA for proper disposal.
- At the conclusion of a hearing, you may leave behind case materials, which must be clearly marked to be shredded, **only** if the hearing is held at a FINRA office or in a Regus meeting room. For hearings that take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents remain in the room that are marked to be shredded. Regus will bill FINRA directly to shred the arbitrators' documents. Arbitrators should not expense these costs.

For hearings in all other locations, you should encourage the parties to take their respective materials with them. Likewise, you should take your copies of the case-related materials with you when you leave and either shred them at home or return them to FINRA for proper disposal.

Mediation and Business Strategies

2010 Case Statistics

From January through April 2010, parties initiated 298 mediation cases, a 106 percent increase from the same time period in 2009. During this same period, FINRA closed 262 cases, a 66 percent increase from 2009. Approximately 85 percent of these cases concluded with successful settlements, a five percent increase from the settlement rate at which cases have historically settled through FINRA mediation. This higher settlement rate is due in part to a group of related cases that settled as a multi-case mediation coordinated by FINRA. The case turnaround time during this four-month period averaged 88 days, a 15 percent improvement from the same period in 2009.

Mediation Outreach Efforts

In March, Mediation Department representatives lectured on securities mediation at St. John's University Law School and the New York University Law School Mediation Clinic.

Dispute Resolution Triathlon

We invite you to serve as a judge, mediator or arbitrator for the Dispute Resolution Triathlon—presented by FINRA and the Hugh L. Carey Center for Dispute Resolution of St. John's University School of Law.

When does the event take place?

October 2 – 3, 2010
St. John's University School of Law
Manhattan Campus
101 Murray St.
New York, NY 10007

What is the Dispute Resolution Triathlon?

The Triathlon is a competition where student teams from participating law schools will have an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute.

Who can participate?

Local FINRA neutrals are invited to volunteer as judges, mediators and arbitrators in this event. Attorneys who serve as judges or neutrals during the Triathlon will be eligible to receive Continuing Legal Education (CLE) credit by St. John's University School of Law. Please contact FINRA's [Mediation Department](#) if you would like to be a judge or neutral for this event.

Please visit the St. John's University School of Law [website](#) for more information about this upcoming event.

Arbitrator Training and Regional Updates

Limited Time Offer!

For a limited time, FINRA is waiving the normal tuition fees for its mandatory [Basic Arbitrator Training Program](#) and its [advanced arbitrator training](#) courses. We encourage arbitrators to supplement their knowledge of securities dispute resolution by taking advantage of this offer.

Live Video and Classroom Training

FINRA provides the option to complete the classroom segment of its required Basic Arbitrator Training Program by WebEx. Over the next three months, FINRA will conduct the following WebEx training sessions. (All training start times are **Eastern Time**.)

July 28, 2010	1:00 p.m. – 5:00 p.m.
August 18, 2010	9:30 a.m. – 1:30 p.m.
August 24, 2010	1:00 p.m. – 5:00 p.m.
September 14, 2010	2:00 p.m. – 6:00 p.m.
September 22, 2010	1:00 p.m. – 5:00 p.m.

Please send an email to ArbitratorTraining@finra.org to register for a live video training.

FINRA continues to conduct in-person training sessions in each regional office—Boca Raton, Chicago, Los Angeles and New York City—for arbitrators who prefer this method of training.

Northeast Region

Regional Update

On June 9, 2010, Katherine Bayer, Regional Director for the Northeast Region, spoke at the New York City Bar program, *Securities Arbitration and Mediation Hot Topics 2010*.

Midwest Region

- **August 11, 2010**—Chicago, IL

If you are interested in attending this in-person training, please contact Deborah.Woods@finra.org or (312) 899-4431.

Southeast Region

- **September 24, 2010**—Boca Raton, FL

If you are interested in attending this in-person training, please contact Lanette.Cajigas@finra.org or (561) 447-4911.

Arbitrator Tip

Confirm Damage Requests at the Close of the Hearing

At the close of the hearing, arbitrators should ask the parties to restate their respective claims. For parties requesting damages, arbitrators should also ask for a summary of their final request for damages. This ensures that the request is accurately captured on the record, and that all parties and arbitrators are aware of the amount of final damages requested. Please review Section T of the [Hearing Script](#) for further guidance, which states:

We realize that at the time the claim was initiated the parties may not have had all of the information needed to accurately or completely calculate their claims. Therefore, at this point, we ask that the parties restate their respective claims. For parties requesting damages, please provide us with a summary of your final request for damages. You may present your final damage request as a range, as opposed to a specific monetary amount.

When completing the [Award Information Sheet](#) at the end of a case, arbitrators must correctly answer Question 10, which specifically asks whether any party's final damage request presented at the hearing differed from what was requested in its initial pleading. Question 10 also corresponds to Section T of the Hearing Script.

Please contact your assigned case administrator if you have any questions about this procedure.

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