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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.

Voluntary Program to Reduce Extended List Arbitrator Appointments



By Anna Lyons, Case Administrator, FINRA Dispute Resolution

On February 1, 2012, FINRA Dispute Resolution (FINRA) introduced a pilot program that highlights the parties' option to reduce the likelihood of extended list appointments when:

- an arbitrator withdraws or is no longer available;
- no ranked arbitrators remain on the parties' initial ranking lists; and
- hearing dates are scheduled in a case.

FINRA constituents regularly complain about the appointment of "extended list" arbitrators, primarily because the parties do not select extended list arbitrators and because extended list arbitrators may only be challenged for cause. While parties have always been able to agree to modify certain provisions of the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes (Codes), this pilot highlights the parties' ability to stipulate to use the "short list option" to review a list of three arbitrators to select a replacement arbitrator. Use of the short list option requires the agreement of all the parties.

This article explains the current arbitrator selection process, provides a history of FINRA's efforts to reduce extended list appointments and describes the short list procedures.

Current Arbitrator Selection Process

FINRA uses its computer system, MATRICS, to generate randomly lists of arbitrators for parties to select their panel. For customer cases requiring three arbitrators, FINRA generates three lists of arbitrators, each containing 10 names: a chair-qualified public list, a public list and non-public list. FINRA attaches a copy of the disclosure report of each proposed arbitrator listed. Each separately represented party may strike up to four of the arbitrators from each list for any reason (and up to all 10 arbitrators on

Comments, Feedback and Suggestions

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the non-public list for cases administered under the all-public panel option) and rank the remaining names in order of preference. FINRA appoints the panel from among the names remaining on the lists that the parties return.

If no mutually acceptable arbitrators remain on the parties' lists, FINRA appoints a replacement arbitrator by extending the list and appointing the next arbitrator whose name MATRICS generated randomly.

Appointment of Replacement Arbitrators

When a sitting arbitrator withdraws or is removed from an established panel, FINRA first attempts to replace the arbitrator by going back to the original lists returned by the parties. For example, if the public chairperson leaves the panel, FINRA reviews the parties' previously returned lists of chair-qualified public arbitrators to see if any ranked arbitrators remain on the list. If so, FINRA contacts these arbitrators to serve on the case. If FINRA cannot appoint a replacement arbitrator using this method, staff appoints a replacement arbitrator by extending the list and appointing the next arbitrator whose name MATRICS generated randomly. Parties may only challenge arbitrators selected by this method for cause.

Prior Efforts to Reduce Extended List Appointments

In response to feedback from its constituents, FINRA has made several efforts over the years to minimize extended list appointments and to give parties greater control over the arbitrator selection process.

April 2007

In revising the Codes, FINRA also refined the arbitrator selection process. Contrary to the prior Codes, the revised Codes limited to four the number of strikes each separately represented party may exercise. The purpose of this change was to reduce the number of times staff appoints arbitrators through the list extension process.

As a result of the new limited strikes rule, FINRA appointed arbitrators whose names did not appear on the original lists in only 18 percent of the cases—reducing by over half the percentage of cases in which FINRA initially appointed arbitrators whose names did not appear on the original ranking list. In other words, the entire panel consisted of arbitrators selected by the parties in 82 percent of cases initially paneled under the revised Codes.

After a new pilot period, FINRA will consider whether to codify and expand the new “short list option” procedures.

September 2010

While recognizing that the limited strikes rule had lowered significantly the percentage of cases in which FINRA initially appoints arbitrators whose names did not appear on the original ranking list, constituents continued to express concern that this percentage remained too high. As a result of these concerns, FINRA increased from eight to 10 the number of proposed arbitrators available for review when parties choose arbitration panels.

Expanding the number of arbitrators on each list ensures that, in most cases, at least two proposed arbitrators will remain on each list of 10 potential arbitrators—thus significantly increasing the likelihood that the parties will get panelists they chose and ranked, as opposed to extended list appointments. Since the rule change became effective, staff has appointed arbitrators in the initial appointment process using the extended list in only three percent of cases.

The New “Short List Option”

On February 1, 2012, FINRA started offering a short list option. When a hearing is scheduled and no ranked arbitrators remain from the parties’ initial lists, or when no remaining arbitrators are able to serve, parties may stipulate to use the short list option to select a replacement arbitrator. FINRA will notify parties by letter of the option to stipulate to the short list to select a replacement arbitrator. FINRA will use the short list option to select a replacement arbitrator only when all parties agree. If all parties do not agree, FINRA will appoint a replacement arbitrator by using the method described earlier in this article to extend the list.

As stated earlier, if the parties agree to use the short list replacement option, FINRA will use MATRICS to generate randomly a list of three potential replacement arbitrators. FINRA will prescreen the arbitrators to confirm their availability for the scheduled hearing dates before sending the list to the parties for selection. Each side may strike one arbitrator from the list and rank the remaining arbitrators in order of preference within a prescribed number of days. FINRA combines each side’s list to find the highest-ranked replacement arbitrator.

Voluntary Program to Reduce Extended List Arbitrator Appointments *continued*

When a hearing is scheduled within five calendar days of an arbitrator's unavailability, the parties must stipulate to a postponement in order to use the short list option to select a replacement arbitrator. The postponement will allow FINRA to generate a list of three potential replacement arbitrators and for the parties to strike and rank arbitrators on the list. In the event a hearing is postponed to allow for the short list option, FINRA will charge a postponement fee in accordance with its rules, including any additional fee for postponements granted within three business days of the hearing date. Arbitrators may allocate the fees among the parties that agreed to the postponement, or the arbitrators may waive the fees.

After a pilot period, FINRA will consider whether to codify and expand these procedures.

Conclusion

The short list option should reduce further the number of extended list appointments and provide parties with more input in the arbitrator selection process.

Dispute Resolution and FINRA News



Case Filings and Trends

2011

In 2011, arbitration case filings reflected a 17 percent decrease compared to cases filed in 2010 (from 5,680 cases in 2010 to 4,729 cases in 2011). Customer-initiated claims decreased by 19 percent.

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

January to February 2012

Arbitration case filings from January through February 2012 reflect a 12 percent decrease compared to cases filed during the same two-month period in 2011 (from 838 cases in 2011 to 741 cases in 2012). Customer-initiated claims decreased by 19 percent through February 2012, as compared to the same time period in 2011.

From January through February 2012, the top two causes of action alleged remained breach of fiduciary duty and negligence.

FINRA Revises Its Arbitration and Mediation Web Pages

FINRA reorganized its [Arbitration and Mediation Web pages](#) to help investors and industry professionals more easily find information about FINRA Dispute Resolution. The content is now organized into five major categories:

- **FINRA Dispute Resolution** provides an overview of the dispute resolution process, options for investors and additional information about FINRA Dispute Resolution.
- **Arbitration** offers specific information about the arbitration process and procedures, including rules, fees and special procedures.

FINRA Annual Conference

FINRA's 2012 Annual Conference will take place in Washington, D.C., on May 21 – 23. During the event, financial services industry professionals and regulators exchange ideas on today's most challenging compliance and regulatory topics.

Please visit [FINRA's website](#) for more information about the conference.

- **Arbitrators** includes information for arbitrators, including case guidance and resources, responsibilities, administrative resources and training. Information on how to become an arbitrator is also available in this section of the website.
- **Mediation** includes an overview of the mediation process, including rule and fee information.
- **Mediators** provides information for mediators including case and administrative resources and responsibilities.

Increase in Meal Allowance for Arbitrators

On January 1, 2012, FINRA increased the meal allowance for arbitrators from \$20 to \$25 for expenses incurred on or after that date. Please review the updated [Guidelines for Arbitrator Reimbursement](#) for more information about arbitrator reimbursement.

SEC Rule Filings

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

On December 22, 2011, FINRA filed a proposed rule change with the Securities and Exchange Commission (SEC) to amend Rule 13204 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to preclude collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act or the Equal Pay Act of 1963 from being arbitrated under the Industry Code. The proposal would codify FINRA's interpretation of its class action rules expressly to exclude collective actions from being arbitrated in its forum.

The notice was published in the *Federal Register* on January 5, and the comment period ended on February 1. On February 22, FINRA filed an extension through April 10 for the SEC to act on the proposed rule change.

Please visit our website for more information about [SR-FINRA-2011-075](#).

Mediator Selection

On February 9, 2012, FINRA filed with the SEC a proposal to amend the Code of Mediation Procedure to provide the Director of Mediation with discretion to determine whether parties to a FINRA mediation may select a mediator who is not on FINRA's mediator roster.

The notice was published in the *Federal Register* on February 22, and the comment period ended on March 20. Please visit our website for more information about [SR-FINRA-2012-011](#).

Simplified Arbitration

On February 9, 2012, FINRA filed with the SEC a proposal to amend the Codes of Arbitration Procedure for Customer Disputes and for Industry Disputes to raise the limit for simplified arbitration from \$25,000 to \$50,000.

The notice was published in the *Federal Register* on February 22, and the comment period ended on March 20. Please visit our website for more information about [SR-FINRA-2012-012](#).

SEC Approval

Whistleblower Claims in Arbitration

On March 12, 2012, the SEC approved FINRA's proposed rule change ([SR-FINRA-2011-067](#)) to amend Rule 13201 of the Industry Code. The amendment provides that disputes arising under a whistleblower statute that prohibits the use of a predispute arbitration agreement are not required to be arbitrated in the FINRA forum. The amendment aligns Rule 13201 with statutes, such as The Dodd-Frank Wall Street Reform and Consumer Protection Act, which invalidate predispute arbitration agreements for whistleblower claims.

FINRA will publish a *Regulatory Notice* in the near future. The rule will become effective 30 days after publication and is retroactive.

Arbitrator Electronic Expense Reimbursement Pilot Program



By Paul Milligan, Associate Director, FINRA Dispute Resolution

FINRA is currently conducting a pilot program to test the effectiveness of an automated expense reimbursement system for arbitrators. FINRA deployed the system, known as Concur, for its employees in August 2011 with overwhelming success. Thanks to the success and design of the system, FINRA decided to test its use for Travel and Expense (T&E) reporting for FINRA arbitrators, even though arbitrators are not FINRA employees.

FINRA asked approximately 50 arbitrators across the country to test the expense reimbursement system and share feedback about the testing experience. The pilot is in progress and we expect to continue testing for three to six months. FINRA will use the feedback to determine future deployment and availability to all arbitrators.

Currently, arbitrators submit their T&E reports by mail, with original receipts attached, to the appropriate Dispute Resolution regional office. In the Concur system, arbitrators will be able to submit their T&E reports and attachments electronically. By submitting expenses electronically through Concur's comprehensive and user-friendly system, arbitrators can:

- eliminate the current paper-intensive manual process. Receipts and other pertinent information are easily uploaded into the tool and attached directly to the expense report;
- experience a faster, more organized and streamlined process, thus a more timely reimbursement process; and
- track the status of their expense reports.

We look forward to making this option available to all arbitrators and providing a more efficient T&E reporting alternative to submitting expense reports. We will provide more information to arbitrators when the pilot concludes.



Questions and Answers

Expungement

Question: An arbitration panel held an expungement hearing pursuant to Rules 12805 and 13805 of the Customer and Industry Codes and determined to grant expungement based on the requirements outlined in FINRA Rule 2080. Under Rule 2080, the arbitration award directing expungement must contain at least one of the following findings:

1. the claim, allegation or information is factually impossible or clearly erroneous;
2. the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
3. the claim, allegation or information is false.

Does the panel need to provide additional information on the [Award Information Sheet](#) to grant expungement?

Answer: Yes. The panel must provide a written explanation of the reasons for its finding that one or more Rule 2080 grounds for expungement apply to the facts of the case. The basis for an award of expungement should be clear, detailed, and inclusive. The panel may also reference witness testimony, settlement documents, pleadings and party submissions to provide further support for the expungement award.

Below are examples of the relevant portions of written explanations in awards ordering expungement under Rule 2080 (with the names of the parties redacted):

Standard 1 of Rule 2080: the claim, allegation or information is factually impossible or clearly erroneous.

The great preponderance of the evidence presented shows that Claimant visited [Firm] and its broker [Associated Person] in or around December 1999, not in December 2001 as alleged by Claimant. Thus, Claimant's version of the facts is clearly erroneous. Also, documents produced by Respondents as exhibits to their pleading clearly show Claimant's failed attempt in 1999 (not 2001) to open an account with Respondents. Claimant would have the Arbitrator believe that

Respondents' documents, some prepared in the Bardstown, Ky. branch office of [Firm] and some generated or prepared at the company headquarters, were improperly or fraudulently back dated to reflect a 1999 date rather than the 2001 date asserted by Claimant. Further, Claimant provides no evidence besides her oral testimony that the events alleged in the claim occurred in 2001, and not (as documentary evidence clearly shows) in 1999. The Arbitrator finds Claimant's version of the events not credible. The Arbitrator finds Claimant's allegations and version of events not supported by the evidence, and therefore, factually impossible. For these reasons, expungement of [Associated Person's] record is appropriate. (FINRA Case No. 11-01822)¹

Standard 2 of Rule 2080: the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds.

Evidence was presented at the expungement hearing that led the Panel to believe that [Associated Person 1] was not involved in the alleged sales practice violation that was the subject of the filing of the Statement of Claim by Claimants. The account that [Associated Person 1] had with Claimants had been closed for over a year before Claimants entered into transactions with [Associated Person 2] and [Associated Person 1] had no knowledge that Claimants were even doing business with [Associated Person 2]. Therefore, [Associated Person 1] was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds. The Panel reviewed the settlement agreement, and considered the amounts paid to any party and considered any other relevant terms and conditions of settlement. The Panel concluded that [Associated Person 1] should be granted expungement of the charges set forth by Claimants. (FINRA Case No. 10-02298)

Standard 3 of Rule 2080: the claim, allegation or information is false.

The two issues raised by Claimant were that of IRA custodial fees and illiquidity of investment. Claimant's signature and/or initials were present on papers making both of these issues very clear. While Claimant might have been unhappy, there was no wrongdoing on the part of [Associated Person]. In fact, [Associated Person] went out of her way to fix problems created by Claimant. [Associated Person's] Exhibit #2(6(c)) acknowledges there is no public market for this investment as does [Associated Person's] Exhibit #3. [Associated Person's] Exhibit #4 outlines custodial fees. Claimant agrees that he read and signed these documents. (FINRA Case No. 10-04839)

Motions in Limine

Question: I served on a case in which a party filed a motion in limine that included a request to dismiss one of the claims. How should arbitrators handle these types of requests?

Answer: A motion in limine is a request for the arbitrators to rule on the admissibility of evidence in advance of the hearing. Parties may try to include other issues for ruling when filing motions in limine, including requests to dismiss one or more of the alleged claims. Arbitrators should treat any requests for dismissal of claims as motions to dismiss and respond to them in accordance with FINRA's [motion to dismiss rules](#). As with all motion practice, arbitrators should be alert to the possible misuse of motions as tactics to delay the hearing.

Endnotes

- 1 Parties, as well as other users, can access FINRA awards, including those ordering expungement, through FINRA's [Arbitration Awards Online database](#). Users can search terms such as "expungement" and "Rule 2130" for expungement awards issued prior to August 17, 2009 and "Rule 2080" for expungement awards issued on and after August 17, 2009. Users can also narrow their search using a set of date ranges for the award.

Mediation Update



Mediation Case Statistics

In 2011, FINRA's Mediation Program experienced a decrease in mediation cases consistent with the decline of arbitration cases filed. Parties initiated 659 mediation cases, a 19 percent decrease from 2010. During this same time period, FINRA also closed 783 mediation cases, a 17 percent decrease from 2010. Approximately 80 percent of these cases concluded with successful settlements, with an average case turnaround time of 98 days.

From January through February 2012, parties initiated 106 mediation cases. FINRA also closed 128 mediation cases during the same two-month period. Approximately 79 percent of these cases concluded with successful settlements, and the average case turnaround time was 101 days.

Feedback from Mediation Surveys

At the conclusion of each FINRA mediation case, FINRA provides parties with a survey to evaluate the services of the staff and the mediator. FINRA uses these mediation surveys to review the impact of mediation on the settlement of arbitration cases and to enhance the mediation program.

Overall, parties express satisfaction with their experience with FINRA's mediation program, particularly with the cost savings and the clarification of issues that mediation provided. The parties are also very satisfied with the FINRA mediators. In particular, the parties comment routinely on the mediators':

- tireless efforts and encouragement during and after a mediation session;
- expertise and judgment in the securities industry; and
- ability to understand issues and explain the issues to both sides.

Feedback from mediation participants provides an excellent resource that the mediation program uses to ensure the quality of its services. In the next few issues of *The Neutral Corner*, FINRA will examine survey results from the past two years and present some sample responses with anecdotal comments to help mediators enhance their practice skills and improve the parties' overall mediation experience.

Mediation Outreach

On March 20, staff participated in a panel discussion on Encouraging Mediator Diversity: Tips for Becoming a Mediator and Developing a Successful Practice. The panel discussion was sponsored by the Diversity Committee of the NYSBA Dispute Resolution Section, the Metropolitan Black Bar Association and the New York County Lawyers Association Arbitration and ADR Committee.

Regional Updates

Northeast Region

On February 6, the Northeast Regional Office spoke at the New York County Lawyer's Association program, "13th Annual FINRA Speaks and Listens at NYCLA" about recent FINRA Dispute Resolution initiatives.

Southeast Region

On January 26, the Southeast Regional Office met with representatives of the University of Miami's Investor Rights Clinic as part of the region's ongoing efforts to support local securities clinics.

On March 12, the Southeast Regional Office met with the Palm Beach County Bar to update members about recent dispute resolution issues.

Arbitrator Training



Neutral Workshop—Embracing 2012

The [February 17 Neutral Workshop](#) provides updates on ongoing and emerging topics that affect FINRA neutrals.

Workshop faculty, Linda Fienberg, George Friedman and Barbara Brady discuss the following topics:

- case filings, the Customer Option Rule, and expanded arbitrator selection lists;
- revisions to the Discovery Guide;
- enhancements to Dispute Resolution’s technology and Internet applications;
- appointment of chair-qualified public arbitrators in promissory note disputes;
- changes to the Arbitrator Disclosure Checklist and the Arbitrator Application;
- arbitrator training; and
- a proposal for expungement in “in re” procedures.

The following links are referenced during the workshop:

- [Dispute Resolution Statistics](#)
- [FINRA Arbitration Awards Online](#)
- [Regulatory Notice 10-37](#)
- [Regulatory Notice 11-17](#)
- [Discovery Guide \(2011\)](#)
- [Regulatory Notice 11-22](#)
- [Neutral Workshop Audio Files](#)
- [FINRA Arbitrator Training Online Learning Courses](#)

- [Your Duty to Disclose Training Materials](#)
- [The Neutral Corner, Volume 4—2011](#)
- [Guidelines for Arbitrator Reimbursement](#)

Please send any questions or comments to [FINRA DR Call-In Workshop mailbox](#).

Note: FINRA’s neutral workshops are pre-recorded, which allows neutrals to pause and playback the audio file.

Updated Arbitrator’s Guide

FINRA has updated the Arbitrator’s Guide to include an FAQ section on simplified cases. Please review the [Arbitrator’s Guide](#) for the most current arbitration case guidance.

Written Materials for Arbitrator Training Courses

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

Arbitrators who want to complete an arbitrator training course for credit and inclusion on the Arbitrator Disclosure Report should visit the [Required Basic Arbitrator](#) or [Advanced Arbitrator Training](#) pages and log into the [Learning Management System](#) to complete the course. Registering in the Learning Management System allows FINRA to track an arbitrator’s completion of a course.

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The Neutral Corner is published by
FINRA Dispute Resolution in conjunction
with FINRA Corporate Communications.
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