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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.

Year End Message



As we approach the end of 2012, we would like to extend a heartfelt thanks to our arbitrators and mediators. FINRA Dispute Resolution's role as the pre-eminent provider of securities-related dispute resolution services depends on the talented and dedicated arbitrators and mediators on its roster. Each of you is an integral part of the dispute resolution process at FINRA, and we thank you for your service. We would not be the forum of choice without your efforts, and we value the commitment and skill you bring to the process. We look forward to continuing our mission with you in 2013.

The end of 2012 is also a time to say goodbye to two key members of Dispute Resolution's senior management team. After 14 years of dedicated service to FINRA Dispute Resolution, George H. Friedman will retire effective December 31, 2012. As executive vice president and director of Arbitration, George has been instrumental in many important forum initiatives, including the Code of Arbitration Procedure rewrite; the all public arbitration panel option; implementation of MATRICS and the DR Portal; and the revised Discovery Guide, to name a few.

As 2012 closes, we also say goodbye to Dorothy Popp—vice president and director of Operations. During her 17 years with the forum, Dorothy has made significant contributions to the success of the forum including spearheading the business process re-engineering project; the development of MATRICS; and the successful merger of NASD and the NYSE's dispute resolution programs.

Please join the FINRA Dispute Resolution staff in thanking George and Dorothy for their tremendous contributions to the forum. We will miss them greatly and wish them happiness and health as they embark on this new chapter of their lives.

Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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Removal of Arbitrators From FINRA's Neutral Roster



By Linda Fienberg, President, FINRA Dispute Resolution, and Barbara Brady, Vice President and Director of Neutral Management, FINRA Dispute Resolution

Introduction

In the [October 2007 issue](#) of this newsletter, we addressed FINRA Dispute Resolution's procedures for removing arbitrators from the roster. The relative finality of arbitration decisions dictates that the forum evaluate regularly, and remove when necessary, arbitrators from its roster. It is also for this reason that we have a rigorous application process, extensive background verification procedure and significant arbitrator training requirements.

We recently updated our procedures in response to questions about the forum's arbitrator removal process. In this article, we examine the arbitrator removal procedures and highlight the enhancements that went into effect on November 1, 2012.

When the Removal Procedures Apply

This article outlines FINRA's procedures when investigating and evaluating instances of alleged arbitrator misconduct, poor performance or inappropriate demeanor or behavior (collectively referred to as "performance issues"), which could result in removal from the neutral roster. The procedures do **not** apply to arbitrators we remove from the roster for reasons including, but not limited to:

- the forum's inability to locate an arbitrator using current contact information;
- an arbitrator's failure to successfully complete mandatory training requirements within a reasonable period of time;
- an arbitrator's request for removal from the roster; or
- an arbitrator's ineligibility to serve based on arbitrator classifications as defined in FINRA's Code of Arbitration Procedure.

The procedures discussed in this article also do not apply to arbitrators we remove for reasons articulated in the [Disqualification Criteria](#) for Temporary and Permanent Removal of Arbitrators.

Most significantly, we are taking this opportunity to emphasize again that arbitrators will never face repercussions or adverse action from FINRA for the awards they render.

Who Decides Arbitrator Removals

Several levels of FINRA staff are involved when we evaluate the possible removal of an arbitrator because of performance issues. The process begins with a review and determination by the appropriate regional director. The initial review by the regional director is followed by reviews and determinations by the following FINRA Dispute Resolution senior staff members: the vice president/director of Neutral Management, the senior vice president/director of Mediation (if the arbitrator is also a mediator), the senior vice president/director of Case Administration and the president/director of Arbitration.

Following these reviews, we forward the recommendation concerning an arbitrator's possible removal to two public members of the National Arbitration and Mediation Committee (NAMC).¹ The two-member review team is comprised of the NAMC's chairperson and the chairperson of the NAMC's Neutral Roster Subcommittee (both of whom are public). A decision of the NAMC review team to remove an arbitrator must be unanimous.

Arbitrator Removal Process and Enhancements

FINRA's arbitrator removal process endeavors to examine closely each allegation concerning arbitrator performance issues to determine whether removal is appropriate. Over the years, FINRA has fine-tuned the process. Below is an outline of FINRA's current removal procedures and recent enhancements.

Investigating Possible Arbitrator Performance Issues

Issues concerning alleged performance issues come to FINRA's attention in several ways including party and peer evaluations, correspondence from constituents and staff evaluations. Accordingly, we continue to strongly encourage parties, arbitrators and staff to frequently evaluate arbitrators.

While we continue to closely examine these evaluations, we are enhancing the process by requiring staff to confer with persons who may have information about an arbitrator's performance (*e.g.*, parties' representatives and other arbitrators) and to document the feedback. Whenever possible, we will conduct our review and investigation without revealing the source of the complaint.

The forum does not—and never has—reviewed an arbitrator's award history when considering an arbitrator's removal from the roster.

When the allegations concern an arbitrator's conduct at the hearing or pre hearing, a FINRA staff member listens to the hearing tapes. We are enhancing the process by requiring that a second staff member—from a different region or department—listen to relevant portions of the hearing recording. The second reviewer must also review the documents pertinent to the investigation. At least one member of Dispute Resolution's senior staff will also listen to relevant portions of the recording during the investigation and review the relevant documentation.

Communication Between FINRA and An Arbitrator Prior to That Arbitrator's Removal

FINRA has always considered the unique circumstances involved in each investigation. Going forward, we will determine, on a case-by-case basis, whether to consult with the arbitrator prior to removal.

For example, if an arbitrator reportedly fell asleep during a hearing—and it appears from the arbitrator's service history to be the first such occurrence—the case administrator will call the arbitrator to discuss the situation. There may be an underlying medical issue, the arbitrator may be jetlagged or simply may not have had a good night's sleep that would account for this behavior.

Review of Information When Considering an Arbitrator's Possible Removal From the Roster

We are enhancing our procedures by reviewing a broader range of information when considering an arbitrator's removal because of alleged performance issues. We will expand our review to include relevant documents about the arbitrator's service in prior cases, and will identify and record the documents considered during our review.

Counseling Arbitrators in Lieu of Removal

If we determine that arbitrator counseling—rather than removing the arbitrator—is the most appropriate response to negative performance feedback, our process has been for a staff member to counsel the arbitrator. We are enhancing our process by now requiring that two staff members participate in counseling the arbitrator. Staff will record the details of the counseling in the arbitrator's file.

Arbitrator Removal Letters After All Motions to Vacate (and Appeal Remedies) Have Been Exhausted

We also are adjusting the timing of our notice to arbitrators concerning removal from our roster. Previously, the forum would send a removal notice to the arbitrator after the arbitrator's last open case closed. Now, we will not send a removal notice until all motions to vacate (and subsequent appeals) have been exhausted—or until the time expires for motions to vacate or appeals—for all awards rendered by the arbitrator during the prior 12-month period.²

Conclusion

FINRA understands the importance of the arbitrator's role in dispute resolution and has adopted numerous steps to ensure the quality of its roster. However, situations arise that require FINRA to remove an arbitrator from the roster. We will adhere to the procedures discussed in this article when we consider whether to remove an arbitrator.

Endnotes

- 1 The NAMC is an oversight committee that recommends rules, regulations, procedures and amendments relating to arbitration, mediation and other dispute resolution matters to the FINRA Board. Pursuant to Rule 12102 of FINRA's Code of Arbitration Procedure, another function of the NAMC is to "establish and maintain rosters of neutrals composed of persons from within and outside of the securities industry."
- 2 The 12-month look-back period will begin from the date the arbitrator's last pending case closed.

What Happens After Arbitrators Submit a Disciplinary Referral?



By Jeffrey Smith, Manager, FINRA Office of Fraud Detection and Market Intelligence

FINRA arbitrators must be impartial. However, impartiality does not require arbitrators to ignore misconduct they observe during an arbitration or the alleged conduct of the party that precipitates a case.

Under [Rule 12104](#) of the Code of Arbitration Procedure, at the conclusion of a case, any arbitrator may refer to FINRA for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of FINRA rules, the federal securities laws or other applicable rules or laws. These referrals allow FINRA to investigate whether alleged misconduct by firms or their associated persons may be considered for additional review from a regulatory standpoint.

Referral Process

To make a referral, an arbitrator may complete the [Arbitrator Disciplinary Referral Form](#) at the conclusion of the arbitration. The form contains only a few required fields to complete and offers ample space to describe the activity to be reviewed; arbitrators may also attach documents to provide more detail. Arbitrators should include only the facts and circumstances that underlie the decision to make the referral for disciplinary investigation. Arbitrators should not describe the basis of their award in the underlying arbitration case.¹ FINRA Dispute Resolution staff will forward the referral to the Office of Fraud Detection and Market Intelligence's Central Review Group.

FINRA Review

The Central Review Group assesses the severity of the allegations and determines whether further investigation is necessary. The group immediately escalates matters concerning egregious misconduct, such as misappropriation, forgery or other abusive practices, to senior

management for review. After the initial assessment, FINRA either closes the matter without further action, or assigns it to the appropriate FINRA district office for further investigation.

Recently, FINRA conducted an investigation based on information in a disciplinary referral. Although the claimants did not allege forgery in the statement of claim, they alleged at the hearing—for the first time—that their signatures on certain transaction documents were forged. The arbitration panel noted this activity as the basis of the referral and provided the specific dates of testimony given by certain witnesses. FINRA investigated the allegations and ultimately fined the registered representative \$5,000 for certain accommodation forgeries.

Depending on the severity of the conduct, a member firm or associated person may face additional, non-monetary sanctions including suspension, expulsion from membership or permanent bar from the industry.

Conclusion

Arbitrator referrals are very important to FINRA's ability to regulate the securities industry. Detailed referrals enable FINRA to promptly and thoroughly investigate individuals and firms when arbitrators believe a disciplinary referral is warranted. Please contact [Todd Saltzman](#), Deputy Director of FINRA Case Administration, if you have any questions about the arbitrator referral process.

Endnote

- 1 More information about completing a disciplinary referral form is set out in "Writing a Disciplinary Referral" by Jeffrey Bloom in [Volume 4—2008](#) of this publication.

Dispute Resolution and FINRA News



Director of Arbitration

Effective January 1, 2013, the president of FINRA Dispute Resolution, Linda D. Fienberg, will also assume the role of Director of Arbitration, as identified in [Rule 12100\(k\) of FINRA's Code of Arbitration Procedure](#).

Case Filings and Trends

January to November 2012

Arbitration [case filings](#) from January through November 2012 reflect an 8 percent decrease compared to cases filed during the same 11-month period in 2011 (from 4,358 cases in 2011 to 4,020 cases in 2012). Of the total cases filed through November, 2,420 (60 percent) were customer-initiated claims. The remainder of the cases, 1,600 (40 percent), were intra-industry claims.

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

FINRA Dispute Resolution to Administer Arbitration Claims Between Investors and Non-Member Investment Advisers on a Voluntary Basis

FINRA has required investment advisers (IAs) to arbitrate investor and industry disputes when the IA is dually registered with FINRA and the dispute arises in connection with the IA's business activities as a FINRA member or associated person (*see* FINRA [Rules 12200](#) and [13200](#)). Now, FINRA will accept disputes between investors and IAs who are not FINRA members, based on post dispute agreements to arbitrate, provided certain conditions are met.

FINRA Dispute Resolution has received inquiries from lawyers who represent investors and those who represent IAs who are not FINRA members about the availability of FINRA's arbitration and mediation forum to resolve their disputes. In response to these inquiries, FINRA offers the following guidance:

With respect to arbitration, FINRA will accept these disputes on a voluntary, case-by-case basis if the parties meet the following conditions:

- The IA and investor submit a post-dispute agreement to arbitrate.
- The IA or other parties agree to pay all arbitration surcharge fees.
- The investor files a special written [submission agreement](#) to submit the dispute to FINRA Dispute Resolution.

FINRA will also accept industry disputes between non-member IAs and their employees on a voluntary, case-by-case basis if the parties meet the above conditions.

With respect to mediation, FINRA will offer mediation services for any IA disputes on a voluntary basis. Mediation can be faster and less expensive than arbitration or litigation. If the parties agree to mediate, they will not give up any right to arbitrate or litigate if they cannot reach a satisfactory settlement.

Please visit our [website](#) for more information about this new program.

California State Bar Rules for Arbitrators and Mediators

FINRA recently sent a reminder letter to arbitrators and mediators available to hear cases in California that they must be on active status to serve as an arbitrator or mediator in California cases **if they are members of the California State Bar**. Rule 2.30 of the Rules and Regulations of the California State Bar prohibits an inactive member from working as a private arbitrator, mediator or other dispute resolution provider, law clerk, paralegal, real estate broker or CPA. Specifically, Rule 2.30 states that “no member practicing law, or occupying a position where he or she is called upon in any capacity to give legal advice or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

If you are an attorney admitted in California, and are on active status with the State Bar, you need not take action. If you are on inactive status with the State Bar, or if your current bar status differs from what is reflected on your Arbitrator and/or Mediator Disclosure Report, please notify [Neutral Management](#) and include “California Bar Requirement” in the subject line of your email.

If you are an arbitrator or mediator available to hear cases in California but you have NEVER been a member of the California State Bar, you can ignore this notice.

For further information about Rule 2.30, please contact the State Bar of California:

Djinna M. Gochis
Assistant Chief Trial Counsel
The State of California
1149 South Hill Street
Los Angeles, CA 90015-2299
(213) 765-1000

Electronic Prehearing Conference Order

An electronic version of the [Prehearing Conference Order](#) is available on our website. Arbitrators can now complete the order online and email it to the appropriate regional office. FINRA also provides electronic versions of the [Initial Prehearing Conference Scheduling Order](#) and [Order on Request for Direct Communication](#)—providing a convenient and efficient way to transmit orders and keep the case moving forward.

Results of the Fourth Annual Securities Dispute Resolution Triathlon

On October 13 -14, 2012, FINRA and the Hugh L. Carey Center for Dispute Resolution of St. John’s University School of Law held the Fourth Annual Securities Dispute Resolution Triathlon. The triathlon provided student teams from participating law schools an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute.

Over 70 volunteer neutrals and 18 teams of aspiring lawyers from 16 schools, from as far as Texas, participated in this year's event.

This year's triathlon winners are:

- **Negotiation:** Brooklyn Law School
- **Mediation:** Cornell University School of Law
- **Arbitration:** South Texas College of Law
- **Advocate's Choice:** Syracuse University College of Law
- **Overall Winner:** Texas Wesleyan University School of Law

Competitors voted for Syracuse University as the team that demonstrated the most skill, competence and professionalism.

For more information about the triathlon, please visit the St. John's University [website](#).

SEC Approval

Proposal to Amend Dispute Resolution's By-Laws to Facilitate Re-classification of Mediators

On November 2, 2012, the SEC approved FINRA's proposed rule change (FINRA-2012-040) that would amend the By-Laws of FINRA Dispute Resolution, Inc. (By-Laws) to clarify that services provided by mediators, when acting in such capacity and not representing parties in mediation, should not cause the individuals to be classified as industry members under the By-Laws. The proposal would create an exception for any services provided by mediators in the capacity as a mediator of disputes involving a broker or dealer and not representing any party in such mediations, so mediators may be eligible to serve as public members of the NAMC if they are not otherwise disqualified from being classified as public members. The amendments are effective on January 22, 2013.

Please see [Regulatory Notice 12-57](#) or visit our website for more information about [SR-FINRA-2012-040](#).

Log On and Log In: The FINRA Dispute Resolution Portal



By Kristina Zvetkov, Corporate Intern, FINRA Dispute Resolution

In October, FINRA launched a new self-service portal for neutrals: the FINRA DR Portal. The DR Portal—a secure website that provides entitled users easy access to their information and self-service capabilities—allows active arbitrators and mediators to view information about their assigned cases online and to view and update their profile information.

Viewing Assigned Case Information

On the homepage of the portal, you will see a list of your assigned cases and information such as case number and caption, name of the assigned staff, names of the parties and their counsel, names of your co-arbitrators and the date and location of upcoming hearings.

When you select “Cases,” you will see a list of all cases you have served on—regardless of whether the case resulted in an award. By selecting a case on this list, you can view information specific to that case including case and hearing information. Additionally, you can access payment information allowing you to see how much you earned serving on a particular case.

FINRA DR Portal Homepage:

The screenshot shows the FINRA Dispute Resolution Portal interface. At the top right, it says "Welcome John Smith (A12345) Public Arbitrator, Mediator" with links for "Home", "FINRA.org", and "Sign-Out". The navigation bar includes "Home Dashboard", "Cases All Cases", and "Profile View & Update".

I want to...

- view my profile
- view my Arbitrator Disclosure Report
- view my Mediator Disclosure Report
- change password

Resources

- FINRA Learning Mgmt System
- Arbitration Awards Online

My Current Arbitration Cases

ID	Case Name	Status	Filed on Date	Role	DR Staff
11-99999	John Doe vs. ABC Securities	Open	08/29/2011	Chair	T. Thompson
10-99999	Jane Jones vs. XYZ Corp.	Open	01/13/2010	Chair	B. Williams

Upcoming Arbitration Hearings

No upcoming arbitration hearings.

My Current Mediation Cases

ID	Case Name	Status	In Agreement Date	DR Staff
12-99999	John Blue vs Acmebank	Open	09/21/2012	J. James

Upcoming Mediation Sessions

No upcoming mediation sessions.

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Updating Your Profile

Prior to the launch of the DR Portal, neutrals updated disclosure information by submitting the Arbitrator or Mediation Information Update Form online or sending an update to FINRA by mail, fax or email. Using these methods, you could not view your entire disclosure report online. Instead, you needed to request a copy of your disclosure report from FINRA. The DR Portal allows you to view your current information as well as your entire disclosure report online while you make changes.

The DR Portal homepage displays a list of sections that correlate to your disclosure report and shows you what appears in your profile. From this list, you can choose the section you want to update. You can add new information in any of the sections; however, you generally cannot delete information. For example, you cannot delete brokerage accounts; instead, you can indicate whether an account is no longer active.

To ensure arbitrators are properly classified as “public” or “non-public,”¹ FINRA will ask you to affirm your classification. On your first visit to the update section of the DR Portal, you will be required to answer a series of questions related to your classification. On subsequent visits, you will be required to affirm or modify your previous answers to these classification questions. However, you will not be required to answer the same questions each time you make an update to your profile.

Next Steps

Since October, we have been sending out personalized invitation emails to neutrals—on a limited basis—to register with the DR Portal. In the upcoming weeks, we will increase the volume of invitations, and we hope to send all invitations out in the next few months. With over 6,400 neutrals on the roster, it may take some time for you to receive your invitation to enroll in the portal.

You must use your personalized invitation to register with the portal; the invitation cannot be shared. If you have not received your invitation and would like to register with the portal, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

Although participation is not mandatory, FINRA encourages all neutrals to take advantage of the DR Portal's capabilities to enhance your experience as you serve in FINRA's forum.

Conclusion

The goal of the DR Portal is to create a faster and more effective way for neutrals and FINRA to share information. Looking ahead, FINRA plans to expand the DR Portal to give it even more capabilities. Future releases will allow parties and neutrals to access case data, submit and retrieve documents and correspondence, and schedule hearings. We are excited about the new DR Portal and believe it will enhance your ability to serve in our forum.

Endnote

- 1 Definitions for "public" and "non-public" arbitrators are contained in [Rules 12100\(p\) and 12100\(u\)](#) of the Code of Arbitration Procedure.



Question and Answer

Representation of Parties

Question: Can parties be represented by a non-attorney during a FINRA arbitration hearing or mediation?

Answer: Yes. FINRA [Rules 12208](#) and [13208](#) of the Codes of Arbitration Procedure permit parties to be represented by a non-attorney, unless state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity, or the person is currently suspended from the practice of law or disbarred. Rules 12208 and 13208 also allow parties to appear in an arbitration or mediation pro se or to be represented by an attorney admitted to practice and in good standing in any jurisdiction, unless state law prohibits such representation.

Mediation and Business Strategies Update



2012 Mediation Case Statistics

From January through November 2012, parties initiated 530 mediation cases. FINRA also closed 699 mediation cases during the same 11-month period. Approximately 79 percent of these cases concluded with successful settlements.

Annual Membership Fee

If you have not submitted your annual \$200 membership renewal fee, you may still remit your membership fee and remain active on FINRA's mediation roster. Please contact [Marilyn Molena](#) if you have questions regarding the status of your membership.

Mediation Settlement Month

FINRA hosted its annual Mediation Settlement Month event during October, offering incentives to promote mediation and to educate potential parties about the benefits of the program. The majority of mediators on FINRA's roster agreed to reduce their normal fees for Mediation Settlement Month, allowing FINRA to offer substantial savings to parties. This year, over 75 mediation cases were filed during Mediation Settlement Month.

Mediation Settlement Day

The 12th annual Mediation Settlement Day took place on October 18, 2012, with a kick-off event on October 17, at the New York City Bar Association. Mediation Settlement Day is an annual event designed to raise awareness about the benefits of mediation and to provide resources to parties. This event brings together over one hundred public service organizations, community-based programs, schools, court programs and bar organizations to help promote awareness and use of mediation. This year's Frontline Champion Award went to FINRA arbitrator/mediator, Roger M. Deitz, Esq. This award recognizes individuals who have made a meaningful impact on the field of mediation and helped others through their commitment to the effective practice of mediation.

Mediation Outreach

This fall, mediation staff visited New York University Law School and St. John's University Law School to discuss FINRA's mediation program.

On November 20, 2012, mediation staff updated members of the Mediation Committee for the New York State Bar Association on FINRA's mediation program.

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