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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.

Seven Steps to a Successful Telephonic Mediation

By Christopher Kauders*



I have successfully mediated several thousand cases in Boston and elsewhere over the past 26 years, including many disputes in the [FINRA telephonic mediation program](#).

Some mediators and advocates may be uncomfortable with telephonic mediation, expecting to feel disconnected without any visual cues. But mediators and attorneys can quickly learn to function comfortably and effectively on the phone, as I can attest, being partially sighted and relying heavily on my beloved seeing-eye dog, Wally, to guide me through traffic every day.

If Wally could speak, he would agree that telephonic mediation is not only convenient, but effective. I encourage mediators and parties to try telephonic mediation and follow these seven steps for a successful mediation:

1. **Preliminary Call.** Soon after the mediation session is scheduled, the mediator should call the attorneys and any *pro se* parties together to prepare them for the mediation. This initial conference gives participants a chance to tell the mediator what memoranda and exhibits to expect prior to the mediation. Equally important, this preliminary call gives everyone an opportunity to exchange the types of pleasantries that would be typical before discussions start in a face-to-face mediation.

During the relaxed preliminary conversation, participants can become acquainted, making note of the other party's choice of words, speaking speed and breathing patterns. People tend to speak and breathe faster when they are excited or aggravated, and these auditory cues can be as helpful as visual ones.

2. **Second Call Prior to Mediation.** After the mediator has reviewed all written submissions, it is helpful to initiate a second call with participants a few days before the mediation. This provides another opportunity to establish rapport and to discuss essential or sensitive

Year End Message

As we approach the end of 2017, we would like to extend a heartfelt thanks to our arbitrators and mediators. We value the expertise and skill you bring to the process and appreciate your dedicated service. Without you, we could not provide the high level of service that parties have come to expect at FINRA.

As a forum, we continue to look for ways to enhance the dispute resolution experience for all participants. Whether it relates to technology, the case management process or compensation, we welcome your suggestions for ways to improve the forum.

We look forward to working with you in 2018. Have a wonderful holiday season.

We Want to Hear From You

The Neutral Corner strives to provide useful and timely information to FINRA arbitrators as they serve in our forum. To ensure we are responsive to what you want to see in this publication, we invite you to share your suggestions and comments. Please feel free to suggest training topics and ways we can improve this publication. Please submit your suggestions to [Neutral Management](#). We look forward to hearing from you.

issues. This meeting also gives parties a chance to go off-line and speak confidentially to the mediator about any concerns before the mediation.

Establishing rapport and highlighting important issues prior to the session helps everyone focus on key issues. Participants may otherwise lose patience and the ability to work constructively through lengthy telephonic sessions. Ultimately, this prep meeting will streamline the mediation and shorten the length of the telephonic session.

3. **Mediation Session.** At the scheduled time, the conference operator will call the mediator and all other parties to convene the first joint session where the parties state their positions. Thereafter, one side is put on hold while the mediator starts the first confidential session with the other party.

It may take time for some participants to genuinely believe that their conversations with the mediator are confidential. Unlike a face-to-face mediation where parties can see that they are alone in the room with the mediator, there is no visual confirmation on the telephone. But soon, the mediator will hear a more relaxed quality in the parties' voices as they adjust to the telephonic pattern of alternating communication where one party goes on hold while the other party talks to the mediator in a confidential session.

In some cases, parties are not represented by an attorney and, instead, choose to go forward *pro se*. Mediators and experienced counsel should not be dismissive or condescending when *pro se* parties make arguments during the session. Like any other party in a mediation, *pro se* parties devote significant time and emotional energy to understanding and making legal arguments. Any hint of derision can derail the process by instilling fear and distrust in a *pro se* party.

4. **Private Conversations Between Client and Counsel.** There will be times when counsel and their client need to confer privately. This often happens after the mediator has presented a revised position from one side to the other. The party hearing this information usually needs time to strategize and formulate a response without the mediator listening.

The mediator will not be able to detect body language or other visual cues when counsel and client wish to speak privately. Therefore, the mediator should advise participants during opening comments that it is customary to ask to place the mediator and the other parties on hold while counsel and client speak privately.

5. **Negotiation Phase.** When clarifying the negotiating position of one party, the mediator should always restate and confirm the party's latest position before putting the party on hold. This enables the mediator to state with certainty the terms of any offer or counter-offer that will be conveyed to the other side.

After each private conversation, the mediator should immediately provide the party who was on hold a quick review of the mediator's understanding of the parties' prior positions and then announce the other party's new position. Similar to an auctioneer, the mediator should establish a consistent rhythm for communicating revised offers and demands, and should restate the latest offers for clarity.

6. **Listening for Pauses.** Confusion is not easily detected over the phone. Unusually long silences, however, might indicate that clarification is needed. In telephonic mediation, silence does not imply consent. The mediator and participants should be prepared to seek clarification and ask the other participants if there are any concerns. Mediators must convey audio cues that they are actively listening and are committed to understanding any obstacles to settlement.
7. **Settlement.** If a settlement is reached, the mediator should instruct the operator to convene a new joint session. During the session, the mediator should then announce the terms of the settlement to all parties. The mediator should also obtain an agreement by the participants as to which party will memorialize the terms of the settlement and distribute them to all parties and notify FINRA.

If you are committed to fine-tuning the skills required for telephonic mediation, you may find that you prefer this format to resolve many disputes. Settling disputes from the comfort of your office can be a convenient and time-saving alternative that proves to be just as effective as in-person mediation.

**Christopher Kauders is a Boston-based mediator and arbitrator and FINRA mediator who also frequently lectures on the subjects of mediation and arbitration. You can learn more about him at <https://www.pretrialsolutions.com/>.*

Office of Dispute Resolution and FINRA News

Case Filings and Trends



[Arbitration case filings](#) from January through November 2017 reflect an eight percent decrease compared to cases filed during the same 11-month period in 2016 (from 3,393 cases in 2016 to 3,137 cases in 2017). Customer-initiated claims decreased by 14 percent through November 2017, as compared to the same time period in 2016.

Hurricane Maria Update: Guidance for Cases Venued in Puerto Rico

Effective October 21, 2017, FINRA Office of Dispute Resolution (ODR) lifted the stay for all [cases venued in Puerto Rico](#). We resumed scheduling in-person hearings in Puerto Rico for dates on or after December 4, 2017. FINRA ODR personnel traveled to Puerto Rico, visited the hearing locations, met with staff at the hearing locations and surveyed the surrounding areas. As a result, FINRA ODR determined that conditions in Puerto Rico have improved sufficiently for in-person hearings to proceed in Puerto Rico.

While the situation in the area where FINRA ODR conducts hearings has improved, at times, there is a limited supply of hotel sleeping and meeting rooms. Accordingly, until the supply of rooms normalizes, FINRA ODR will reserve hearing rooms and sleeping rooms for arbitrators approximately 6-8 weeks prior to the date of the in-person hearings to ensure sufficient rooms. For the same reason, parties and their counsel are strongly encouraged to make hotel reservations as soon as they receive notice from FINRA ODR of the location of the hearing. The demand on meeting space and sleeping rooms is likely to continue through the first quarter of 2018.

Finally, the parties and their counsel are asked to notify FINRA ODR as soon as possible if they resolve their disputes, so FINRA ODR can cancel reservations.

Portal Reminder

We strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

- viewing and updating profile information;
- viewing and printing the disclosure report;
- accessing information about assigned cases, including upcoming hearings and payment information;
- scheduling hearings;
- viewing case documents;
- filing case documents like the electronic Oath of Arbitrator and Disclosure Checklist;
- reviewing list selection statistics to see how often an arbitrator's name has appeared on arbitrator ranking lists sent to parties and how often an arbitrator has been ranked or struck on those lists; and
- updating the last affirmation date.

FINRA encourages all arbitrators to register. Portal registration will be noted on the arbitrator disclosure report that parties review when selecting arbitrators. Registering in the portal is more important than ever. In April 2017, use of the portal became mandatory for all parties (except for *pro se* investors).

Demographic Survey

Thank you to those who participated in the 2017 demographic survey of the neutral roster. As in previous years, the survey was administered by a third-party consulting firm and participation in the survey was voluntary.

FINRA has embarked on a [campaign](#) to recruit individuals from varied backgrounds to serve as arbitrators. The data received from this annual survey helps us track our progress in enhancing the diversity of the roster and helps to inform future recruitment events. We are not attempting to assess the quality of the roster or the awards arbitrators make. All responses are anonymous and confidential. Therefore, results cannot affect your chances of being selected to serve on cases.

We look forward to publishing the 2017 results early next year. For now, you may review the results of the 2015 and 2016 demographic surveys on our [website](#).

NYCLA Program: 19th Annual FINRA Listens...and Speaks

On Monday, February 5, 2018, at 5 p.m. Eastern Time, the [New York County Lawyers' Association](#) (NYCLA) will present the "19th Annual FINRA Listens...and Speaks" program. The program will be moderated by FINRA arbitrator, Martin L. Feinberg. FINRA's Northeast Regional Director, Katherine Bayer, will discuss recent initiatives such as the amended non-public arbitrator definition, expanded expungement guidance, the new online Oath of Arbitrator and Disclosure Checklist and more. Ms. Bayer will also be available to answer questions from the audience.

The event is free and will take place at NYCLA located at 14 Vesey Street in New York, NY. If you have any questions about the event, please contact NYCLA at (212) 267-6646.

SEC Approval

Amendments to the Non-Public Arbitrator Definition

The Securities and Exchange Commission (SEC) approved a rule change to revise the non-public arbitrator definition. Specifically, the proposal amended [Rule 12100](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and [Rule 13100](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code, together the Codes), to

define a non-public arbitrator as someone who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under the Codes.

The amendments became effective October 9, 2017. Arbitrators who were ineligible because they no longer qualified as a public arbitrator under the previous definition may now serve on the roster as a non-public arbitrator. If this amendment affects your status on the roster and you are interested in becoming active again, please contact [FINRA](#).

Please review [Regulatory Notice 17-29](#) for more information.

Regulatory Notices

Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information

FINRA seeks comment on establishing a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide an associated person's request for expungement of customer dispute information. The arbitrators from this roster would decide expungement requests where the underlying customer-initiated arbitration is not resolved on the merits or the associated person files a separate claim requesting expungement of customer dispute information. FINRA also proposes additional changes to the expungement process that would apply to all requests for expungement of customer dispute information. The comment period expires February 5, 2018.

Please review [Regulatory Notice 17-42](#) for more information.

Expanding Options for Customers in Disputes Involving an Inactive Firm or Associated Person

When respondents are no longer in business, recovery of arbitration awards against them often is unavailing. Accordingly, FINRA is proposing to amend the Customer Code to expand a customer's options to withdraw a claim if a firm or an associated person becomes inactive before a claim is filed or during a pending arbitration. In addition, the proposed

amendments would allow customers to amend pleadings, postpone hearings and receive a refund of filing fees under these situations.

The comment period expired December 18, 2017. Please review [Regulatory Notice 17-33](#) for more information.

Non-Attorney Representatives in Arbitration

The FINRA Codes of Arbitration and Mediation Procedure permit non-attorneys to represent clients in securities arbitration and mediation subject to certain exceptions. FINRA is conducting a review of the efficacy of continuing to allow such representation. The Notice outlines FINRA's review of compensated non-attorney representatives' (NAR firms) activities at the forum and seeks responses to questions about parties' experiences with NAR firms.

The comment period expired December 18, 2017. Please review [Regulatory Notice 17-34](#) for more information.

Mediation Update

Mediation Statistics



From January through November 2017, parties initiated 584 mediation cases, an increase of five percent for the same period in 2016. FINRA also closed 675 cases during this time. Approximately 83 percent of these cases concluded with successful settlements.

Mediation Settlement Month

During this year's [Mediation Settlement Month](#), FINRA mediators graciously offered their services at reduced rates. The reduced costs encouraged parties to mediate and encouraged parties, who have not tried mediation, to participate in the program. The parties appreciated resolving their disputes quickly and efficiently.

We would like to thank the participating mediators for making themselves available and for contributing their skill and expertise to make this year's Mediation Settlement Month another great success.

Mediation Settlement Day

On October 18, 2017, FINRA held a kick-off event for Mediation Settlement Day at New York Law School. This year's theme was Diversity and Inclusion in Dispute Resolution. As part of the event, three FINRA mediators participated in a speed networking reception: Marcia Adelson, Cheryl Agris and Alida Camp. This event helped them get their names out to the larger mediation community. Likewise, practitioners were able to meet mediators they have not worked with previously. More than 150 guests attended the reception. FINRA looks forward to hosting similar events in the future.

Mediation Program for Small Arbitration Claims

The [telephonic mediation program](#) remains available to parties in active arbitration cases with claims of \$50,000 or less.

The program offers free or low cost mediation (depending on the claim amount) with a FINRA mediator. It provides parties, many who find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute. Parties and mediators report satisfaction with the process, and the settlement rate for cases in the program has averaged 80 percent, which is consistent with the settlement rate for all cases over the lifetime of FINRA's Mediation Program.



Questions and Answers

Preliminary Fee Assessments

Question Should arbitrators assess fees on a preliminary basis or wait until the end of the case?

Answer Arbitrators should assess fees as they accrue. Because there could be a long gap between a prehearing conference or discovery-related event and the conclusion of the case, it would be helpful to preliminarily assess the fees while the information is fresh. Knowing the fees upfront can also help parties during settlement negotiations. And if the parties settle, preliminary fee assessments can help facilitate refunds quickly.

Arbitrators may be reluctant to preliminarily assess fees because they want to see how the case unfolds. Keep in mind that the preliminary assessment is just that. The assessments can be modified later.

Reducing Award Turnaround Time

Question Parties are anxious to find out the result of their case after the hearing. What can arbitrators do to expedite the award?

Answer While we encourage arbitrators to make thoughtful decisions, after thorough deliberation, you should do your best to submit the [Award Information Sheet](#) (AIS) promptly and review the draft award as soon as possible. Here are some time-saving tips to facilitate the award process and get the final decision to the parties:

- Before the hearing, review the AIS to determine what information you will need to provide at the end of the case. During the hearing, keep a list of important issues considered and decided, including amendments, jurisdiction, settlements, exclusion of witnesses or evidence, dismissal of claims and due notice to non-appearing parties. This will help you complete the AIS.
- Deliberate immediately at the end of the hearing, if possible, when the evidence is fresh.

- If you need an additional deliberation session, ask FINRA staff to schedule a meeting with your co-arbitrators.
- Provide complete responses to all questions on the AIS. By answering all of the questions, the panel ensures that it has considered all necessary items to enter an award. For awards recommending expungement, ensure you received the BrokerCheck® report for the party seeking expungement, and the settlement agreement and customer notice (if applicable).
- Submit the AIS as soon as practicable after the hearing concludes. The case administrator might also have additional questions for the panel while preparing the award. Again, completing the AIS while the information is fresh is very helpful.
- Finally, carefully review that the award is accurate, sign it and return it to FINRA promptly. Remember that you can sign the award electronically by uploading the award in the DR Portal.

Education and Training

Fall 2017 Neutral Workshop—Motions to Vacate



What is a motion to vacate? How can arbitrators minimize the likelihood of a motion to vacate after issuing an award? Find out more about this important topic by watching the latest neutral workshop hosted by Mara Weinstein, ODR Neutral Recruiter and Trainer. Mara [moderates a panel](#) with FINRA arbitrators, Olivia Farrar and Jeff Jury, and FINRA Associate General Counsel, Terri Reicher, to provide tips on what you can do as an arbitrator to help avoid motions to vacate and bring finality to the award.

Arbitrator Disclosure Reminder



As a reminder, arbitrators should review their disclosure reports regularly to ensure that all information is accurate and current. Even if arbitrators are not currently assigned to cases, their disclosure reports may be sent to parties in their hearing locations during arbitrator selection. Parties should have the most current and complete information about an arbitrator to make an informed decision when selecting arbitrators. Arbitrators should log into the [DR Portal](#) to update their disclosure reports.

In September, FINRA enhanced arbitrator disclosure reports by publishing the date arbitrators last affirmed the accuracy of their disclosure reports. Arbitrators can affirm the accuracy of their disclosure reports and refresh the affirmation date by submitting an update through the DR Portal.

The affirmation date appears prominently at the top of the disclosure report that parties review during the arbitrator selection process. Parties may consider the last affirmation date as a factor when choosing arbitrators. Therefore, arbitrators are encouraged to review and affirm regularly the accuracy of their disclosure reports using the DR Portal. Even if there are no changes, arbitrators can affirm the information and update the affirmation date on their disclosure reports by submitting an update through the DR Portal.

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The Neutral Corner is published by
FINRA Dispute Resolution in conjunction
with FINRA Corporate Communications.
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17_0370.1—12/17



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17_0370.1-12/17