

What's Inside

Arbitrator Recruitment Survey Results	5
Dispute Resolution News	7
Use of Social Media Sites	10
Questions and Answers	12
Mediation Update	15
Arbitrator Training	16

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.

Practice Tips for Successful Mediations

By Philip J. Glick, Esq.



I have been a mediator for several years, and serve on FINRA's roster. Although each mediation is different, I have found that there are several practices that are essential to a successful mediation—regardless of the parties and issues.

1. **Recognize that mediation can be an emotional experience.** Mediation is a human-to-human activity in which black letter law plays only one factor in reaching a settlement. During the course of a proceeding, the parties can experience a range of emotions that often overshadows the facts of the case.

To alleviate the parties' anxieties and concerns, the mediator should create a cooperative environment. To do so, I remind parties that since the goal of a mediation is to settle, each party must be prepared to consider compromise. Indeed, the parties must work together to resolve the dispute, not employ attack methods.

In some cases, an acknowledgement that perhaps a party could have handled an issue differently can mean a lot. For example, in one securities case, the claimants' initial damages were reduced after the respondent acknowledged that his company should have managed the account differently. Quickly, the claimants lowered their demand, and the case settled. In other cases I have been involved with, a total change in mood was evident after an apology, enabling a reasonable settlement.

2. **Be prepared.** I cannot emphasize enough the importance of being prepared for the mediation. Mediators must understand the facts and issues of the case and be prepared to discuss the merits of the case with an understanding of the legal issues.
3. **Require all necessary parties to attend the mediation.** All necessary parties should attend the mediation, especially those with settlement authority. If in-person attendance is not possible, ask the necessary

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parties to confirm that they will be available by telephone. A drawback to participating remotely, however, is that a party will not be able to take part in the emotional process of the mediation.

4. **Establish credibility with the parties.** Actively listening is an excellent way to establish credibility with the parties. When the mediator focuses his/her attention on the speaker, the speaker will have a positive first impression about the mediator. Therefore, when the mediator evaluates the case or suggests a solution, the parties will likely view the mediator as credible.

I have asked parties, after the settlement was reached, what they did or did not like about the mediation. In every case in which the parties liked the process, they said that I listened closely and they, therefore, respected my input. In one case, however, that settled after great acrimony, a party told me that I did not really listen to her. Although I listened to all of the parties, I had not sufficiently demonstrated via body language or comments that I was being attentive. The party's comment underscored that non-verbal cues are significant and can be powerful messages to parties during a mediation.

5. **Be patient.** Our natural tendency is to want to reach the bottom line quickly. I have learned, however, that most people need time to digest reality. This is especially true when they are being nudged from the solution they want, to an understanding that a proposed solution is a good deal. That shift may take minutes, hours or days. In a very difficult securities case, for example, the parties could not agree, and it looked like arbitration would be the only option. But the parties decided to wait a few days before asking the lawyers to proceed with arbitration. In two days, the respondent decided to increase his offer, and the parties settled the case.

There may be a period of deadlock where it seems no movement is possible. This is often part of the process. Sometimes a stand still is an indication that the parties are not ready to resolve the case. At that point, a delay may be warranted, whether for ten minutes, an hour or a week or more, while the parties refocus. The mediator should allow the parties to determine how much time they need.

6. **Ask the parties to submit statements of the case.** The parties' lawyers usually provide a statement of the case, identifying what they see as their clients' strengths and weaknesses. I have also benefited from reviewing the discovery produced by the parties. In one case there was a signed agreement that refuted a party's position in the litigation. When counsel and I discussed it, he realized that the other side would likely discover this vulnerability in time, so the parties chose to settle the matter instead of going to litigation.

One issue to consider is how to handle sensitive information. If the mediator is permitted to and discloses such information and there is no settlement, the mediator may inadvertently affect the outcome of any subsequent litigation or arbitration proceeding. I think the best way to handle this situation is to discuss it only with the party whose case is weakened by the discovery. That way, there is probably no impact on the case except that it may encourage the vulnerable party toward settlement. Of course, the mediator's first obligation is to honor his or her promise of confidentiality.

7. **Look for the unexpected.** The key to settlement may be something that is not even in the case. For example, I mediated a construction case in which a subcontractor sued a contractor because of a disagreement over which party was responsible for damage to a building. They respected each other's work, and settled in large part based upon their willingness to join forces on a new project that was not part of the case.

Although it is not always possible, the best settlements are the ones where a new opportunity arises and becomes part of the parties' solution. Both parties benefit from the new transaction and put the old dispute behind them.

8. **Finalize the settlement.** After a case settles, I initiate the process by writing a very short bullet point memo of the essential elements—such as dismissal with prejudice, mutual releases, amount to be paid, who pays and when payment is due. I then ask the parties to finalize the deal by completing a written settlement agreement and signing it. In FINRA cases, only the parties' representatives should draft a settlement agreement.

9. Above all, remain optimistic. The parties chose mediation to settle the case, and with few exceptions, they will resolve the case with gentle encouragement.

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

Philip Glick retired as general counsel of a major commercial financial services company before embarking on a career as a mediator and arbitrator. Mr. Glick is a certified mediator for FINRA, Resolute Systems, LLC and the circuit courts of Cook, Lake, DuPage, McHenry and Will Counties, IL. Mr. Glick is a member of the Board of Directors of The International Academy of Dispute Resolution, an at-large member of the Association of Attorney Mediators and a member of the dispute resolution sections of several bar associations, including the ABA and the Illinois State Bar Association. Mr. Glick also serves as an arbitrator for FINRA and several Illinois circuit courts. Mr. Glick graduated from Loyola School of Law and has completed courses in mediation at DePaul and Northwestern Law Schools.

Arbitrator Recruitment Survey Results

By Erroll E. Angara, Arbitrator Recruitment Manager, FINRA Dispute Resolution



In April 2011, FINRA surveyed 500 of its most recently approved arbitrators to learn what motivated them to join the roster. More than 250 arbitrators responded to the survey. Because FINRA's mission to recruit fair-minded professionals to resolve securities disputes is an ongoing process, we track our progress by asking new applicants how they heard about FINRA and what prompted them to apply. Their responses help us to assess the success of our initiatives and to develop recruitment strategies. (See [Volume 1, 2011](#) of *The Neutral Corner*, for an overview of our Arbitrator Recruitment Program.)

From this year's survey, we learned that:

- **83 percent** enjoy the opportunity to share their technical expertise and to learn new skills from other professionals;
- **62 percent** enjoy the community involvement and public service in the arbitrator role;
- **61 percent** serve for the purpose of supporting FINRA's mission of investor protection;
- **49 percent** are committed to a non-judicial dispute resolution process; and
- **47 percent** believe that serving as a neutral will help them build their network and become better in their profession.

Arbitrators also provided commentary as part of the survey. From these responses, we learned that many arbitrators heard about our program by word of mouth—from friends, colleagues, active FINRA neutrals and FINRA staff. Several responders are retired securities professionals who believe their experience in the industry would serve them well as arbitrators. Some responders reported that they have experience with other alternative dispute resolution forums.

Based on the feedback we received, FINRA will explore additional recruitment strategies including:

- building stronger relationships with professional and other dispute resolution organizations; and
- partnering with charity/volunteer organizations to learn about their volunteers, seeking ways to educate them about our program and engaging them in the dispute resolution process.

We thank those of you who responded to our survey, and appreciate your willingness to assist us in developing effective strategies to recruit the best neutrals to resolve parties' securities disputes. The diversity of backgrounds and experiences that you bring to FINRA, as well as your commitment to the dispute resolution process, enhances the forum's ability to deliver fair and equitable dispute resolution services to a broad range of constituents.

If you know someone who may be interested in joining our roster of arbitrators, please contact our [recruitment manager](#).

Dispute Resolution and FINRA News

Case Filings and Trends



Arbitration case filings from January through September 2011 reflect a 13 percent decrease compared to cases filed during the same nine-month period in 2010 (from 4,279 cases in 2010 to 3,711 cases in 2011). Customer-initiated claims decreased by 17 percent through September 2011, as compared to the same time period in 2010.

From January through September 2011, arbitration cases filed identified the following securities (listed in order of decreasing frequency): common stock, mutual funds, preferred stock, annuities, options, corporate bonds, variable annuities, 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.

Third Annual Securities Dispute Resolution Triathlon

The Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and FINRA Dispute Resolution hosted the Second Annual Securities Dispute Resolution Triathlon (Triathlon) on October 15 – 16, 2011, in New York City. The Triathlon provided students from law schools around the country an opportunity to build their advocacy skills in the three key areas of dispute resolution: negotiation, mediation and arbitration. By combining these skills in a single event, the competition tested student advocacy skills in a comprehensive and realistic securities dispute resolution experience.

More than 90 FINRA neutrals volunteered as judges, mediators and arbitrators during the event, and provided the competitors with feedback to build their advocacy skills.

This year's Triathlon winners are:

Overall Triathlon Winner:	Pace University School of Law
Advocate's Choice Award:	Texas Wesleyan University School of Law
Negotiation:	Florida International University College of Law
Mediation:	William and Mary School of Law
Arbitration:	Pace University School of Law

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

Regulatory Notice 11-39: Social Media Websites and the Use of Personal Devices for Business Communications

In January 2010, FINRA issued [Regulatory Notice 10-06](#), providing guidance on the application of FINRA rules governing communications with the public to social media sites and reminding firms of the recordkeeping, suitability, supervision and content requirements for such communications. Since its publication, firms have raised additional questions regarding the application of the rule. [Regulatory Notice 11-39](#) responds to these questions by providing further clarification concerning application of the rules to new technologies. It is not intended to alter the principles or the guidance provided in *Regulatory Notice 10-06*.

SEC Rule Filing

Update to the Proposed Rule Change Relating to Disciplinary Referrals Made During an Arbitration Proceeding

Currently, [Rules 12104\(b\)](#) of the Code of Arbitration Procedure for Customer Disputes and [13104\(b\)](#) of the Code of Arbitration Procedure for Industry Disputes provide that an 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 but only at the conclusion of an arbitration.

To broaden the arbitrators' authority to make referrals, on July 7, 2011, FINRA filed with the Securities and Exchange Commission (SEC), an amendment to a pending proposal to permit arbitrator referrals to the Director of Arbitration during the hearing phase of an arbitration.¹ The amendment responds to the comments the SEC received on the original proposal, and replaces the original proposal in its entirety.

Among other things, the amended proposal would:

- amend [Rules 12104](#) and [13104](#) of the Customer and Industry Codes to permit an arbitrator to refer to the Director any matter or conduct that has come to the arbitrator's attention during a hearing, which the arbitrator has reason to believe poses a serious, ongoing, or imminent threat likely to harm investors unless immediate action is taken;

- require an arbitrator to wait until the case concludes to make the referral if the case is nearing completion and, in the arbitrator’s judgment, if investor protection will not be materially compromised by this delay;
- require the Director of Arbitration to disclose the mid-case referral to the parties; and
- permit a party to request that the referring arbitrator(s) recuse themselves, as provided in the Code.

The proposed rule change would continue to permit arbitrators to make post-case referrals. However, FINRA proposes to remove the term “disciplinary” from the rule to ensure that the scope of potential referrals is not limited to disciplinary matters.

The comment period ended on August 19, and the SEC is reviewing the comments. Please visit our website for more information about [SR-FINRA-2011-036](#).

Endnote

- 1 FINRA filed an initial proposal on July 12, 2010, and received several comments. FINRA, evaluated the comments and filed an amendment replacing the new proposal in its entirety on July 7, 2011.

Use of Social Media Sites

By Barbara L. Brady, Vice President and Director of Neutral Management, FINRA Dispute Resolution



Americans are increasingly using social media websites, such as weblogs (blogs) and social networking sites, for business and personal communications. According to a report by the [Pew Internet and American Life Project](#), 65 percent of American adults who use the Internet logged onto a social networking site in 2011, up from 29 percent in 2008. Other studies have shown that use of social media sites by businesses to communicate with customers and the public has grown significantly in the past few years.¹

Social networking sites, such as Facebook, Twitter and LinkedIn, typically include both static content and interactive functions. The static content remains posted until changed by the individual who established the account on the site. Generally, static content is accessible to all visitors to the site. Examples of static content typically available through social networking sites include profile, background or wall.² Social networking sites also contain non-static, real-time communications, such as interactive posts commonly found on sites such as Twitter and Facebook.

“Blogging” is also another means of electronic communication that is accessible to all visitors to the blog site. [Merriam-Webster’s Online Dictionary](#) defines “blog” as a “website that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Historically, some blogs have consisted of static content posted by the blogger.

An article in [Volume 2, 2010](#) of *The Neutral Corner* referred to the Florida Supreme Court Judicial Ethics Advisory Committee’s [Opinion Number 2009-20](#) on the use of social networking sites by judges. In the opinion, the Committee determined that while a judge may post comments and other materials on his or her page on social networking sites, a judge may not add lawyers who appear before the judge as “friends” on a social networking site, or permit such lawyers to add the judge as their friend. FINRA believes this advice is also applicable to the neutrals—arbitrators and mediators—who serve in the FINRA Dispute Resolution forum.

Neutrals should not invite parties or attorneys who appear before them to be “friends” on a social networking site, or permit parties or their attorneys to add the neutral as a “friend.” FINRA also cautions its neutrals to be aware of the potential conflicts that may arise when using social networking sites since using these sites may undermine the perception of a neutral’s impartiality. Finally, when blogging, neutrals should remember their duty to be impartial and fair, as well as to preserve the integrity and confidentiality of the arbitration process. FINRA neutrals who maintain blogs primarily related to securities or finance-related matters should disclose the existence of their blogs on their FINRA disclosure report so this information can be provided to parties. (Please see the notice for [Regulatory Notice 11-39](#) on social media websites on page 8. See also the information on page 16 regarding the availability of FINRA’s three-part podcast series on [Social Media and Personal Electronic Devices](#).)

Neutrals may update their disclosure reports online by using the [Arbitrator Information Update Form](#) or [Mediator Information Update Form](#).

Endnotes

- 1 See Sharon Gaudin, Business Use of Facebook, Twitter Exploding, Computerworld (Nov. 9, 2009).
- 2 The wall is the section of the page owner’s profile where others can post messages. The wall is a public writing space, so others who can view the profile can also see what has been written on the wall.



Questions and Answers

Evaluate Before Accepting an Arbitration Assignment

Question: FINRA recently contacted me to serve on a case in which a customer brought a claim against a broker-dealer involving a structured product. I served as an arbitrator in a mock arbitration set up by the same broker-dealer, using a similar fact pattern as the claim brought by the claimant in the arbitration case. Should I accept the case?

Answer: No. Arbitrators must exercise discretion in accepting appointments. Arbitrators should thoroughly review and consider all aspects of the case—parties, counsel, products, claims, etc.—before accepting a case and affirming that they can be objective and impartial. Arbitrators may be tempted to accept a case in their zeal to serve the forum; however, they must exercise judgment, discretion and common sense when evaluating whether they should accept a case. Arbitration proceedings and awards must be free of all taint or even a perception of taint, and arbitrators can do their part by not only making timely and proper disclosures, but also by exercising good judgment before accepting, or not accepting, appointments. For a detailed review of arbitrator disclosure, see [Volume 4, 2011](#) of *The Neutral Corner*.

As demonstrated in more detail in the next question, arbitrators should also decline appointments if they do not believe that they can conduct the arbitration promptly.

Arbitrator Withdrawals Prior to Scheduled Hearing Dates

Question: I have an opportunity to participate in a lucrative business venture. Unfortunately, the opportunity coincides with an upcoming arbitration hearing that is scheduled two weeks from now. Are there any issues to consider before withdrawing from the arbitration case?

Answer: Yes. FINRA Dispute Resolution strongly discourages arbitrators from withdrawing from service absent an emergency. The business opportunity referenced above does not constitute an emergency that would justify withdrawing from serving at a previously scheduled hearing. As stated in the [Initial Prehearing Conference Script](#), arbitrators promise to avoid causing postponements, and pledge to be prepared and on time for all conferences and hearings. The [Code of Ethics for Arbitrators in Commercial Disputes](#) (Code of Ethics) also provides standards of ethical conduct for the guidance of arbitrators. Although the Code of Ethics is not part of the FINRA Code of Arbitration Procedure, FINRA Dispute Resolution adopted the Code of Ethics and requires arbitrators to abide by its standards and principles.

Canon I of the Code of Ethics provides that arbitrators are ethically obligated to preserve the integrity and fairness of the arbitration process. This duty begins when arbitrators accept appointment to a panel and continues throughout all stages of the proceeding, and in some instances, even after the arbitration ends. Canon I also states that arbitrators should accept case appointments only if they are available to conduct the arbitration promptly, and arbitrators should make reasonable efforts to prevent abuse or disruption of the arbitration process.

Failure to comply with these guidelines not only violates the ethical responsibilities of arbitrators to the parties and the arbitration process, but it also causes costly procedural delays. These delays, caused by an arbitrator's last-minute withdrawal from a case, ultimately undermine the arbitration process and FINRA's ability to provide fair and efficient dispute resolution services to parties.

Disposal of Case-Related Materials

Question: Once hearings are over, and the panel has rendered an award, should the arbitrators keep the case materials and their notes?

Answer: Chairpersons, more so than panelists, are encouraged to maintain the case materials and their notes for ninety (90) days after the award is rendered, in the event there are post-award activities requiring the chairperson's attention.

When discarding materials and notes, whether it is immediately after the award is rendered for non-Chair panelists or 90 days after the award is rendered for chairpersons, arbitrators **MUST NOT** dispose of case materials in a regular trash receptacle. You must shred all case-related documents. If you are unable to shred documents in your possession, you can return them to FINRA for proper disposal.

Mediation Update



From January through September 2011, parties initiated 515 mediation cases. FINRA also closed 572 mediation cases during the same nine-month period. Approximately 80 percent of these cases concluded with successful settlements, and the average case turnaround time was 99 days.

Mediator Disclosures

We remind mediators to regularly update their Mediator Disclosure Reports. Parties rely on these disclosure reports for current and accurate information when selecting a mediator.

Disclosure reports also serve as valuable marketing tools because FINRA sends them to the parties with the list of potential mediators. Therefore, it benefits mediators to keep all aspects of their disclosure reports current, including the number of cases mediated, the types of mediations they conduct and their settlement percentage rate.

Mediator Cancellation and/or Travel Policy

FINRA has added a new section on the Mediator Disclosure Report to provide information about a mediator's cancellation and/or travel policy. If mediators use a cancellation and/or travel policy in their practice, they should disclose the policy on their disclosure reports.

By including this information in the disclosure report, parties will be aware of all potential costs involved with the mediator assignment. The Cancellation and/or Travel Policy information will be included in the Mediator Background Information section of the disclosure report.

Mediators may update or request a copy of their disclosure report on the [Mediator Information Update Form](#).

Arbitrator Training

FINRA Podcasts



FINRA provides ongoing education to brokerage firms and their employees about new developments in the securities industry. Although these offerings are designed for individuals involved in the securities industry, on occasion we highlight trainings that arbitrators and mediators may find valuable. FINRA recently released a three-part podcast series on [Social Media and Personal Electronic Devices](#). Review the list of other podcasts available—for free—on our website to learn more about FINRA and the securities industry.

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