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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 Dispute Resolution Services’ (DRS) dedicated neutrals better serve parties and other participants in the DRS forum by taking advantage of this valuable learning tool.

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Discovery Abuse in Customer Cases

By Nicole Iannarone¹ and Darlene Pasieczny²



Arbitration in the DRS forum is meant to provide a fair, inexpensive and efficient resolution to securities disputes. To achieve this outcome, FINRA rules mandate that “[t]he parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration.”³ When parties do not cooperate in discovery, arbitration may be unfair, unduly expensive and unnecessarily time-consuming. In recent years, discovery disputes have become alarmingly frequent and are reported by both claimants and respondents. According to DRS, after excluding Puerto Rico bond cases, motions to compel discovery were filed in 2,500 out of the 5,300 customer cases filed from 2018 through 2020—nearly half of customer cases. This statistic likely understates the full scope of the problem as it only documents disputes that required arbitrator intervention.

Parties have complained about boilerplate objections to the presumptively discoverable Document Production Lists (Lists) described in [FINRA Rule 12506](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code)⁴ and in response to additional discovery requests. Parties have also reported that documents are inappropriately withheld and not timely produced, sometimes until days before scheduled hearings, delaying cases and increasing costs. Reports of improper behavior in discovery have become so commonplace that the Securities and Exchange Commission’s (SEC) Office of the Investor Advocate announced in June 2021 that it is examining “the impact of discovery abuse on the cost, duration and disposition of FINRA customer arbitration cases.”⁵

However, discovery abuse is not a one-sided problem: both claimants and respondents have engaged in discovery misconduct. This article provides reminders and guidance to all arbitration participants⁶ about how discovery should proceed and highlights

some of the abusive practices that have occurred in recent years. It is not meant to be exhaustive, and parties and arbitrators are encouraged to review the [Customer Code](#), the [Arbitrator's Guide](#) and other DRS [training](#) regarding discovery rules and ways to address abusive discovery behavior.

Presumptively Discoverable Documents and Discovery in Customer Cases

A unique feature of DRS arbitration is that parties in customer cases are expected to produce a subset of documents without a request from the other side. In all customer cases in which a hearing is held—excluding simplified arbitration cases involving claims of \$50,000 or less (exclusive of interest and expenses)—parties are required to provide the opposing party with “documents that are presumed to be discoverable” and listed on either Document Production List 1 (Documents the Firm/Associated Persons Shall Produce in All Customer Cases) or Document Production List 2 (Documents the Customer Parties Shall Produce in All Customer Cases).⁷ Parties in simplified arbitration cases can use the Lists at the arbitrator’s discretion.⁸ In all cases, parties have the ability to request additional documents.⁹

Lists became applicable in then-NASD customer arbitrations when the SEC approved the [Discovery Guide](#) in 1999.¹⁰ The Lists were created as part of NASD’s efforts to standardize the discovery process and minimize disruptions caused by increasingly numerous and time-consuming discovery disputes.¹¹ In the 20-plus years since, NASD, and now FINRA, have enacted several major amendments to the Lists and guidance.¹² Stakeholder feedback and developments in technology helped shape many of these amendments. For example, the current 2013 version of the Discovery Guide clarifies that “documents” within the meaning of the Discovery Guide includes both hardcopy documents and electronic files, and that parties must produce electronic files in a reasonably useable format. Proposed changes to the Discovery Guide (which must ultimately be approved by FINRA and the SEC) first go through the National Arbitration and Mediation Committee (NAMC)¹³ for review and consideration by representatives of both public investors and

industry members to address party concerns. The basic principle underlying the Discovery Guide—that List documents are “presumptively discoverable”—has remained steadfast since the original 1999 Discovery Guide.

Under current FINRA rules, parties have 60 days after the answer to the statement of claim is due to respond to the Lists and 60 days after receiving additional discovery requests to respond to those requests. There are only three proper responses: (1) delivering all responsive documents to the opposing party; (2) identifying any documents that cannot be produced in 60 days, explaining why they cannot and stating when they will be produced; or (3) filing an objection and “specifically identify[ing] which document or requested information it is objecting to and why.”¹⁴

Forum participants have reported several types of behavior that do not live up to the expectation of cooperation in the forum: (1) objecting generally without the required specificity as to the grounds for objection; (2) withholding documents pursuant to an objection without specifically identifying what is being withheld; and (3) improperly delaying production. Each of these practices violates FINRA’s customer case discovery rules.

Boilerplate and Vague Objections are Improper

According to the [Arbitrator’s Guide](#), “the parties and arbitrators should consider the documents described in the Lists presumptively discoverable.” This generally means that parties must produce documents, without objection, on the relevant List within the required timeframe. However, the presumption may be overcome if a document is protected from disclosure pursuant to a recognized privilege, or if it would be exceptionally costly to produce a List document and the document is neither relevant to any issue in the case nor likely to lead to the discovery of relevant information.¹⁵ In such instances, FINRA discovery rules provide flexibility and permit objection to production. If the parties cannot work out their own agreement, FINRA rules allow the panel to resolve the matter.

Meaningful Objection and Conferral

Objections should not, however, be the norm. Parties have reported that DRS arbitration is beginning to feel more like litigation in a court. In many instances, counsel provides a list of boilerplate or general objections that purport to apply to the party's response to all List documents or additional document requests. Parties also report that they are receiving responses to individual discovery requests that lack the required specificity. For example, some parties may object to a specific List document by stating only that they object to producing any documents because the request is "overly broad and unduly burdensome" with no further explanation.

Boilerplate and vague objections violate [FINRA Rule 12508](#) and are improper in the DRS forum. If a party believes a document on the Lists or sought through additional discovery should not be produced, the party must "specifically identify which document or requested information it is objecting to and why."¹⁶ Such specificity is necessary because the parties are expected to confer and determine if they can work through the objection.¹⁷ Meaningful conferral may help parties come to an agreement on narrowing part or all of a List item and minimize case disruption. Failure to attempt meaningful conferral prior to filing a motion to compel could be a violation of FINRA discovery rules and subject that party to sanctions.¹⁸ Parties should not, however, improperly object simply to require a conferral session and delay production. Such conduct increases costs, delays proceedings and violates FINRA rules.

Motions to Compel

If parties are unable to resolve an objection among themselves during conferral, the party seeking the information can file a motion to compel. In order for the panel to effectively review the objection and rule on a motion to compel, parties must provide specificity about the nature of the objection. The party making the objection must prove to the arbitrators that the requested document is neither relevant to the case nor likely to lead to relevant evidence. Although a party may object to producing a List document because of the cost or burden of producing it, that party must "demonstrate that the cost or burden is disproportionate to the need for the document" as part of its objection.¹⁹

Even if the party proves the cost or burden is disproportionate, that does not mean that the arbitrators will automatically exempt the documents from production. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, the panel should “consider whether there are alternatives that can lessen the impact” on the objecting party.²⁰ Thus, specific objections explaining why documents are being withheld must be provided in the party’s initial response to the List or additional discovery request so parties can (1) meaningfully confer to resolve the objection; and (2) seek the panel’s assistance through a motion to compel production if they cannot cooperatively resolve the objection.

Documents Withheld from Discovery Must be Identified

Parties also report that they are seeing a general statement, after a party objects to a particular document request, that “subject to these objections and the general objections stated above, any responsive documents will be produced” or similar words to that effect. This practice also violates FINRA discovery rules.

FINRA [Rule 12508\(a\)](#) requires that parties “specifically identify which document or requested information it is objecting to and why.” A general response that responsive documents will be produced subject to objections violates FINRA Rule 12508(a) because it is impossible for the opposing party to determine if any documents are being withheld based on an objection and, if so, which documents are being withheld. Absent direct and specific language as to whether documents are in fact being withheld based on an objection and which documents they are, the opposing party faces increased attorneys’ fees and hearing delays.

Confidential Information

Though FINRA rules require the production of List documents within 60 days of the answer to the statement of claim, and production of additional documents 60 days after they are requested, parties report that they often receive a response filed within the proper timeframe that simply states that documents will be produced at some unspecified date in the future. Others report that some counsel will not produce any documents unless there is a confidentiality agreement. Neither practice comports with FINRA discovery rules and can cause unreasonable delays and increased costs.

FINRA [Rules 12506](#) and [12507](#) require that if documents cannot be produced within the 60-day timeframe, the party must “identify and explain the reason that specific requested documents cannot be produced within the required time” and “state when the documents will be produced.” While confidentiality agreements may be appropriate to protect some of the documents being produced, the lack of such an agreement is not a reason to withhold an entire production. It is extremely unlikely that every responsive document contains confidential information; those that do not contain confidential information should be timely produced.

If a party believes a confidentiality agreement is warranted, that party should reach out to the opposing party to begin negotiations well before the 60-day production deadline. Such negotiations give parties time to agree and exchange relevant documents. If parties cannot reach an agreement, they should notify the panel of their attempts to resolve the issue before the 60-day production deadline. This gives the panel time to consider the request and issue a confidentiality order that balances the interests of all relevant parties.²¹

Documents Should be Produced Within the Required Timeframes

A related party concern is the late production of documents. Generally, absent a contrary order by the panel, parties have flexibility under FINRA rules to agree to extend discovery deadlines. However, parties have reported that they are receiving, for the first time, new documents responsive to the List or additional discovery requests, which were not previously produced, as late as part of the opposing party’s 20-day exchange production.²² In addition to potential discovery sanctions against the offending party, untimely production may require a postponement of the hearing so the opposing party can adequately review the new information. Delayed production of responsive documents increases costs and places parties in the difficult position of choosing between a delayed hearing or moving forward without time to fully evaluate the late-produced information.

Enforcing Discovery Rules in the DRS Forum

Cooperation in discovery is a two-way street. No party—claimant or respondent—should violate FINRA rules. DRS provides several points of intervention that may help all parties adhere to the discovery rules:

- During the Initial Prehearing Conference (IPHC), the panel and parties set the discovery schedule and discuss anticipated motions. During this discussion, the panel should remind parties of their obligations to cooperate in discovery and the panel's commitment to enforce FINRA discovery rules.
- If a document is not produced in response to a List, parties may request that the opposing party affirm in writing that a good faith search was conducted, describe the search and state that the requested document is not within the party's possession, custody or control. The party receiving that request must provide written affirmation (regardless of whether there is a pending order from the arbitrators to do so). Arbitrators may also order a party to provide such affirmations for additional discovery requests beyond those contained in the Discovery Guide.²³
- If a motion to compel is filed, the chairperson should inquire into the parties' efforts to resolve the discovery dispute. Arbitrators play a crucial role in enforcing discovery rules in the DRS forum and should be prepared to consider sanctions for impermissible behavior.
- In addition to sanctions that all parties can face for failure to cooperate in discovery, FINRA members and their associated persons may be subject to additional discipline for failing to cooperate in discovery. FINRA Rule 2010 requires that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." It is a violation of FINRA Rule 2010 for a member or associated person to "fail to appear or to produce any document in his possession or control" pursuant to FINRA arbitration rules.²⁴ FINRA members have been fined for violating discovery rules by, for example, failing to produce documents until after a hearing commenced²⁵ and failing to produce documents responsive to Lists or requests.²⁶

FINRA rules have required cooperation and mandatory document production—without objection—of certain documents in hearings for more than 20 years. These rules are crucial to ensure that DRS arbitration is fair, efficient and cost-effective. Recent reports of party misconduct in discovery threaten the forum’s viability and legitimacy. All participants within the DRS arbitration forum—parties, counsel, arbitrators and regulators—must ensure that rules developed cooperatively through stakeholder and regulator participation are followed.

Endnotes

- 1 Assistant Professor of Law, Drexel University Thomas R. Kline School of Law; Chair, FINRA National Arbitration and Mediation Committee (NAMC).
- 2 Partner, Samuels Yoelin Kantor LLP; public member, NAMC.
- 3 [FINRA Rule 12505](#).
- 4 There are no corresponding document production lists under the Code of Arbitration Procedure for Industry Disputes.
- 5 U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report on Objectives Fiscal Year 2022 at 31 (June 2021), available at <https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2022.pdf>.
- 6 This article is geared for the benefit of counsel and arbitrators. *Pro se* parties are also subject to the discovery rules. However, due to lack of legal knowledge and inexperience in the forum, it is important to consider the special challenges that unrepresented parties may have in discovery, which can result in unfair outcomes. Instead, early intervention, patience and guidance may be appropriate.
- 7 [FINRA Rule 12506\(a\)](#).
- 8 [FINRA Rule 12800\(d\)](#).
- 9 [FINRA Rule 12507](#).
- 10 See [FINRA Notice to Members 99-90](#).
- 11 *Id.*
- 12 See [FINRA Notice to Members 07-07](#) and Regulatory Notices [08-57](#), [09-74](#), [11-17](#), [13-40](#) and [17-03](#).
- 13 The [NAMC](#) makes recommendations to DRS regarding recruitment, qualification, training and evaluation of arbitrators and mediators. The NAMC also makes recommendations on rules, regulations and procedures that govern the conduct of arbitration, mediation and other dispute resolution matters before FINRA. NAMC members include investors, securities industry professionals and DRS arbitrators and mediators. A majority of the NAMC members and its chair are non-industry representatives. This diverse composition ensures a neutral approach in the administration of the DRS forum, promoting fairness to all parties.

- 14 [FINRA Rule 12506\(a\)](#); [FINRA Rule 12508\(a\)](#).
- 15 The Discovery Guide specifically references only the following objections to List documents: undue burden, cost, privilege, and privacy/confidentiality. See [FINRA, Discovery Guide](#) at 1 (2013), (“A party may object to producing a document on a List because of the cost or burden of production.”); *id.* at 2 (“Parties should raise any objections to the production of documents, based on established privilege, in accordance with the time frames for objections set forth in the Customer Code.”); *id.* at 4 (discussing confidentiality and privacy objections); *id.* at 4 (“Parties are not required to produce documents that are otherwise subject to an established privilege”).
- 16 [FINRA Rule 12508\(a\)](#).
- 17 [FINRA Rule 12509\(b\)](#).
- 18 [FINRA Rule 12511](#).
- 19 [FINRA Discovery Guide](#) at 1 (2013).
- 20 *Id.*
- 21 [FINRA Discovery Guide](#) at 4 (2013).
- 22 [FINRA Rule 12514](#).
- 23 [FINRA Discovery Guide](#) at 5 (2013).
- 24 [FINRA IM-12000\(c\)](#), Failure to Act Under Provisions of Code of Arbitration Procedure.
- 25 See FINRA Letter of Acceptance, Waiver and Consent No. 2013036797001, available at https://www.finra.org/sites/default/files/fda_documents/2013036797001_FDA_JG41372%20%282019-1563050957458%29.pdf.
- 26 See FINRA Letter of Acceptance, Waiver and Consent No. 2015046355401 at 8, available at https://www.finra.org/sites/default/files/fda_documents/2015046355401_FDA_DM932696%20%282019-1563176961596%29.pdf (finding firm “failed to implement adequate controls and procedures to ensure that all responsive documents were identified and produced to the claimants in the seven matters” among other conduct, resulting in a \$1,575,000 fine); FINRA Letter of Acceptance Waiver and Consent No. 2017056561102 at 7, available at https://www.finra.org/sites/default/files/fda_documents/2017056561102%20Network%201%20Financial%20Securities%20Inc.%20CRD%2013577%20AWC%20sl%20%282020-1600042775356%29.pdf (“Network 1 failed to produce required discovery to Customer B in the arbitration, and this interfered with Customer B’s ability to prove his allegations in the arbitration” among other conduct, resulting in censure and \$60,000 fine).

DRS and FINRA News

Arbitration Case Filings and Trends



[Arbitration case filings](#) from January through August 2022 reflect a 17 percent decrease compared to cases filed during the same eight-month period in 2021 (from 2,069 cases in 2021 to 1,716 cases in 2022). Customer-initiated claims decreased by 20 percent through August 2022, as compared to the same time period in 2021.

Results of Independent Counsel's Report on Arbitrator Selection Process

In February 2022, FINRA's Audit Committee [engaged Lowenstein Sandler LLP to provide an independent review and analysis](#) in connection with a Fulton County, Georgia Superior Court decision vacating an award in FINRA Case 17-1077, *Leggett v. Wells Fargo Clearing Services, LLC*, in favor of respondent Wells Fargo Clearing Services, LLC. On June 29, 2022, FINRA released Lowenstein's [report](#), which found no evidence of an improper agreement to remove certain arbitrators from cases. The report also notes that FINRA personnel generally adhered to the policies and procedures and that their actions during the relevant arbitration were intended to be fair and reasonable at each step. FINRA will promptly implement the report's [recommendations](#) to provide greater transparency to the arbitrator-selection process.

For more information, please see FINRA's [news release](#) and the statement from FINRA's [Audit Committee](#).

Recent Court of Appeals of Georgia Decision

On August 2, 2022, the [Court of Appeals of Georgia](#) reversed the Fulton County, Georgia Superior Court decision that vacated the award in [FINRA Case 17-1077, *Leggett v. Wells Fargo Clearing Services, LLC*](#) and confirmed the award.

Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information

On July 29, 2022, FINRA filed with the SEC a proposed rule change to amend the Customer Code and the Code of Arbitration Procedure for Industry Disputes (Industry Code) to modify the current process relating to the expungement of customer dispute information.

The comment period expired on September 6, 2022. Please see [SR-FINRA-2022-024](#) for more information.

Regulatory Notice 22-15: Arbitration of Sexual Assault and Sexual Harassment Claims

FINRA amended the Industry Code to align it with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The amendments also made a conforming change to FINRA Rule 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4).

These changes became effective immediately. Please see [Regulatory Notice 22-15](#) for more information

COVID-19 Impact on Arbitration and Mediation Hearings

[All DRS hearing locations are open](#) for in-person proceedings.

Vaccination Requirement for In-Person Participants (Except in Florida Hearing Locations)

Effective **August 22, 2022 through December 31, 2022**, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, court reporters, witnesses and others, **must be fully vaccinated** to attend DRS arbitration hearings or mediation sessions (hearing). An exception will be made for in-person participants who attest that there are circumstances preventing them from being

vaccinated. In-person participants who are not fully vaccinated must take a negative PCR or antigen test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing.

DRS no longer requires parties to submit daily health attestations. Instead, each day at the start of the hearing, the arbitrators will ask in-person participants to attest that all of the statements in the [Health Self-Assessment](#) are true. In-person participants must review the online Health Self-Assessment before appearing at the hearing. If someone is unable to attest that all the statements are true, they cannot enter FINRA facilities or participate in a FINRA-sponsored hearing in person.

Testing Requirement for In-Person Participants (Florida Hearing Locations Only)

Effective **August 22, 2022 through December 31, 2022**, for cases with in-person arbitration hearings or mediation sessions (hearing) in Florida, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, court reporters, witnesses and others, must take a negative PCR or antigen test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing. Alternatively, in-person participants in Florida can attest that they are fully vaccinated. Arbitrators may request reimbursement for at-home COVID tests from their insurance providers or, in the alternative, request reimbursement from DRS for up to \$15 per COVID test. For all other in-person participants, all costs associated with COVID testing are the responsibility of the parties or individuals that incurred them.

As in other hearing locations, DRS no longer requires participants to submit daily health attestations. Each day at the start of the hearing, the arbitrators will ask in-person participants to attest that all of the statements in the below [Health Self-Assessment](#) are true. In-person participants must review the online Health Self-Assessment before appearing at the hearing. If someone is unable to attest that all the statements are true, they cannot enter FINRA facilities or participate in a FINRA-sponsored hearing in person.

Safety Protocols for In-Person Hearings

DRS is committed to taking measures to ensure each hearing is safe for the hearing participants. DRS is reviewing the Centers for Disease Control and Prevention (CDC) guidance and consulting with public health experts to determine the appropriate safety protocols at each hearing venue. Details on the exact safety protocols will be sent to parties and arbitrators before scheduled hearing dates. These protocols may include:

- hand sanitizer provided in each room;
- masks worn over the nose and mouth at all times by in-person participants, except as described below:
 - arbitrators, while actively speaking;
 - counsel or representatives, while actively speaking on the record;
 - witnesses, while testifying; and
 - parties, while actively speaking on the record;
- masks provided for participants who do not have them;
- Plexiglas dividers and face shields for individuals who must remove their mask for an extended period of time (e.g., a testifying witness); and
- information provided on best practices when traveling to and attending the hearing.

Virtual Arbitration Hearing Statistics

Since the postponement of in-person hearings through August 31, 2022, 1,012 arbitration cases have conducted one or more hearings via Zoom (432 customer cases and 580 industry cases).

Through August 31, 2022, DRS received 1,304 motions for Zoom hearings:

- 603 contested motions
 - 427 customer contested motions
 - 259 granted
 - 161 denied
 - 7 open

- 176 intra-industry contested motions
 - 130 granted
 - 44 denied
 - 2 open
- 701 joint motions (306 in customer cases and 395 in industry cases).

The virtual arbitration hearing statistics are now available on the Dispute Resolution Statistics page.

Pilot Program for Prehearing Conferences by Zoom

All prehearing conferences will be held via Zoom with video. As always, the panel may order, or the parties may agree, that a prehearing conference be held another way.

Arbitrators and parties should go to the [DR Portal](#) for the link to join their prehearing conferences. More information is available on the [Prehearing Conferences](#) webpage, including questions and answers about using the DR Portal.

Register for the DR Portal Today

If you have not already done so, we strongly encourage arbitrators and mediators to register for the DR Portal. The DR Portal allows you to:

- file case documents including the electronic Oath of Arbitrator and Checklist, IPHC Scheduling Order, Motion to Dismiss Order, Postponement Orders, Order, Award Information Sheet and Arbitrator Experience Survey;
- access information about assigned cases, including case documents, upcoming hearings and arbitrator payment information;
- schedule hearings;
- update profile information;
- view and print the disclosure report;

DR Portal Help

If you have any questions about logging into the DR Portal, please contact the FINRA Gateway Call Center at (301) 590-6500. If you have any other technical difficulties using the DR Portal other than issues logging in, please contact the DR Portal Help Desk at (800) 700-7065.

- update the last affirmation date on the disclosure report; and
- review list selection statistics to see how often your name has appeared on arbitrator ranking lists sent to parties and how often you have been ranked or struck on those lists.

DR Portal registration is reflected on the disclosure reports that parties review when selecting arbitrators and mediators.

DR Portal Fee Enhancements

The DR Portal for parties has been updated to provide additional fee information. A “Fees” tab has been added to each case displaying the case fees and payments allocated to parties, as well as other accrued fees that have not yet been assessed. There are two sections under the Fees tab: (1) Estimated Case Fees and (2) Assessed Fees and Payments.

- **Estimated Case Fees** – For cases filed on or after June 4, 2022, this section displays an estimate of the fees currently owed on the case that have not yet been assessed to individual parties. Once these fees are assessed to specific parties, the estimated fee will be removed from this section and will be displayed under the “Assessed Fees and Payments” section for the assessed party.
- **Assessed Fees and Payments** – For all cases, this section displays the fees that have already been assessed and payments that have been credited to each party. Only parties that have fees assessed against them or were credited with payments will be listed in this section.

Parties may review the [User Guide for Arbitration and Mediation Case Participants](#) for information about using these new portal features. Parties may also email drportalhelp@finra.org or contact DR Portal Help at (800) 700-7065 with any questions.

2022 Demographic Survey

In November, DRS will once again conduct a demographic survey of DRS' arbitrator and mediator rosters. As in previous years, the survey will be administered by a third-party consultant.

Participation in the survey is voluntary and all responses will be anonymous and confidential.

As part of its ongoing recruitment campaign, DRS continues to seek individuals from varied backgrounds to serve as arbitrators. The data from this annual survey helps us track our progress toward enhancing the diversity of the roster and helps to determine future recruitment events.

The results of past demographic surveys are published on our [website](#). Thank you to those who have previously participated in the survey. Please look out for an email from DataStar (surveystar.com) in November with instructions to complete the 2022 survey.

Updated Initial Prehearing Conference Script

Based on feedback and suggestions from arbitrators, the NAMC, the Zoom Task Force and DRS staff, DRS made the following enhancements to the IPHC Script:

- There is a separate IPHC Script for Single Arbitrator Cases.
- The IPHC Scripts have an expanded discovery section.
- The IPHC Scripts have new sections that cover:
 - virtual and hybrid hearings;
 - hearing exhibits; and
 - expungement requests.

You can find the IPHC Scripts on the [Forms and Tools](#) page of DRS' website. If you previously saved a copy of the IPHC Script, please be sure to replace it with the two new versions.

Coming Soon: An updated IPHC Scheduling Order will be available on the DR Portal this fall. It will correspond to the updated IPHC Scripts and be easier to complete.

Arbitrator Travel Policy and Business Mileage Rate

DRS updated its [Arbitrator Travel Policy](#) to raise meal allowances. Notable changes are as follows:

- The daily meal allowance for Category A and D arbitrators has increased to \$30.
- The daily meal allowance for Category B and C arbitrators has increased to \$125 (\$185 for Puerto Rico).
- Receipts are now only required for individual meal expenses greater than \$75.

Additionally, the business mileage rate was increased to \$.625 per mile, from \$.585 per mile, effective July 1, 2022. Please review the [Expense Reimbursement](#) page for more information about DRS' arbitrator expense reimbursement.

Mediation Update

October is Mediation Settlement Month



DRS' Mediation Department is offering its annual reduced program during [Mediation Settlement Month](#). The program encourages parties to experience the benefits of mediation for the first time and reinforces its value and effectiveness for those who have mediated previously. Additionally, this program helps participating mediators gain visibility in the forum.

To participate in the program, parties must agree to mediate by October 31, 2022, and conduct the mediation by December 31, 2022.

This year, the program will have a new flat fee structure. The fees will be assessed equally between the parties, unless otherwise agreed upon:

Amount in Controversy	Flat Fee	Mediation Hours
\$.01-\$25,000	\$250	6
\$25,000.01-\$100,000	\$500	8
Over \$100,000 and Unspecified	\$1,000	10

Here are some additional guidelines for participating in Mediation Settlement Month:

- Parties can mediate telephonically, by Zoom or in person.
- Mediation hours are inclusive of two hours of mediator study time.
- Any time beyond the mediation hours listed above is billed at the mediator's regular hourly rate. Mediators must advise parties before they exceed the included hours and move into regular hourly billing.
- [Mediation Filing Fees](#) will be reduced by 50 percent for all cases, and DRS will not collect an administrative fee from the mediator's payment.

Once parties have agreed to participate, DRS will send a randomized list of mediators to parties and schedule the mediation session promptly.

Mediation staff will be reaching out to mediators to solicit participation in the program. Please contact DRS' [Mediation Department](#) with any questions.

We anticipate another successful Mediation Settlement Month and look forward to your participation!

Mediator List Pilot Program

On August 1, 2022, DRS' Mediation Department initiated a new list pilot program. Parties may still choose a pre-selected mediator, but now they can request an expanded list based on their specific needs.

Under the list pilot program, parties may choose from the following three list options:

1. **Randomized Virtual Option**

The randomized virtual list option provides parties with a randomized list of 20 mediators who are available to mediate virtually in the parties' hearing location time zone. This option provides mediators the opportunity to use Zoom to mediate outside their current physical location.

This is the default option that will be used if the parties do not advise of a different agreement.

2. **In-Person Option**

The in-person list option provides parties with a randomized list of 20 mediators who are available to mediate in person in the parties' hearing location. This list includes mediators who are willing to travel to this location. Parties may request local mediators for a more cost-effective option.

3. **Bespoke Request Option**

With the bespoke option, parties can request specific mediator attributes (self-reported based on the mediation survey sent in January 2022). The mediator roster can be filtered by actual location, language, diversity, rates, reduced-fee program participation and securities skills and expertise (e.g., churning or employment issues). Mediation administrators will work directly with the parties to ensure that the requests are included on the bespoke list.

This list pilot program is intended to provide parties with more options and control over the mediator selection process, while providing qualified mediators a greater opportunity to be selected by the parties.

Please contact DRS' [Mediation Department](#) with any questions.

DRS' Mediation Program for Small Arbitration Claims

DRS expanded the [Mediation Program for Small Arbitration Claims](#) by increasing the maximum amount in controversy from \$50,000 to \$100,000 and making available all virtual platforms (telephonic and video) for these mediations. With these changes, the program is able to provide more parties the benefit of an expedient and cost-effective option for resolving small claims while also introducing parties to qualified, but underutilized diverse mediators on our roster.

The program offers virtual mediation at these costs:

- no cost for arbitration claims of \$25,000 or less;
- \$50 per hour for cases with claims between \$25,000 and \$50,000 to cover reduced mediator fees (DRS collects this fee and divides it equally between the parties); and
- \$100 per hour for cases with claims between \$50,000 and \$100,000 to cover reduced mediator fees (DRS collects this fee and divides it equally between the parties).

Virtual mediation offers parties the option to participate in a mediation from their own homes. It also provides mediators with additional opportunities to mediate in hearing locations across the country, regardless of the mediator's home base. To help facilitate efficient virtual mediations, DRS developed the [Guide for Using Breakout Rooms in Mediation](#).

When parties mediate through this program, DRS waives all mediation filing fees. Please contact the Mediation Department if you have any questions about this program.

Mediation Case Filings and Trends

From January through August 2022, parties initiated 596 [mediation cases](#), an increase of 81 percent from the same period in 2021. DRS closed 532 cases during this time. Approximately 91 percent of these cases concluded with successful settlements.

Keep It Current

Keeping your mediator disclosure report up to date—including the number of times you have mediated cases, your success rate and the types of cases you have mediated—matters to parties when selecting a mediator. References who can attest to your skill and mediation style help parties select the right mediator for their case. Please add references to your disclosure report, so parties may consider them during mediator selection. If you have a cancellation policy, please include it in your disclosure report. You can update your mediator profile anytime through the [DR Portal](#).

Mediator Training Opportunities

Occasionally, DRS receives information about mediator training that we think would be of interest to our mediators. We will post information and links to these training opportunities on the [Resources for Mediators](#) page on our website.

Become a DRS Mediator

Do you have experience working as a mediator? Consider joining the DRS mediator roster. Please email the [Mediation Department](#) for more information.



Questions and Answers

Prehearing Conferences by Zoom

Question Will I receive a reminder about Zoom prehearing conferences?

Answer The **DR Portal** sends automatic reminders three days before the prehearing conference. Arbitrators are responsible for adding the meetings to their calendars and managing any scheduling changes throughout the case.

If you aren't sure whether your calendar is up to date, you should make it a habit to check the DR Portal, which is the gold source for all case-related activity. On the Home page, you will see "Upcoming Arbitration Hearings" under "My Current Arbitration Cases." There, you will find all the information you need to avoid missing a hearing session—including, if applicable, invites for Zoom meetings.

To download a Zoom meeting invite, look in the Location column for "+ Zoom Meeting..." Click on it to see the details for the Zoom Meeting. Click on "Add to Calendar" to download the calendar file. Once the file downloads, open it and accept the invite to add it to your calendar.

Receiving Exhibits for Hearings by Zoom

Question The hearing in my case will be via Zoom. When there's an in-person hearing, I receive the exhibits from the parties during the hearing. I like having physical copies that I can write on. For Zoom hearings, when will I receive the exhibits? Will they only be provided electronically?

Answer The panel should discuss exhibits with the parties if the hearing will take place by Zoom. The order should provide answers to the following questions:

- How many days before the first scheduled hearing should the exhibits be filed on the DR Portal?
- How many days before the first scheduled hearing should DRS staff forward the exhibits to the panel?

- Does the panel want to receive hard copies of the exhibits? If so, should the copies be mailed by the parties directly to the arbitrators or mailed to DRS staff to forward to the arbitrators?

Even when there is an in-person hearing, parties should file exhibits on the DR Portal after the final hearing for recordkeeping purposes. The panel should issue an order with a due date for filing exhibits that is shortly after the final hearing. This will allow DRS staff to access the exhibits when drafting the Award to review any referenced information and ensure the record is complete.

Forms Available on the DR Portal

Question What forms are available on the DR Portal?

Answer In the DR Portal, arbitrators can draft an IPHC Scheduling Order, Motion to Dismiss Order, Postponement Order or Order. For convenience, much of the case information is automatically populated on the form.

Once an order is drafted, you can share it with your co-panelists to make sure it captures the panel's decisions, before submitting it on the DR Portal. First, save the draft. Then, in the "Drafts & Submissions" tab, find the draft in the "My Submissions" section and click "Share."

IPHC Scheduling Order

The IPHC Scheduling Order corresponds to the IPHC Script and helps the panel address all the preliminary issues that are important in an arbitration case. If you don't use the IPHC Scheduling Order, you may forget to address an issue or provide information to help parties better meet the panel's expectations. For example, in addition to providing the dates and times for hearings, the IPHC Scheduling Order provides an explanation of fees that may be incurred for a postponement or a late cancellation.

Motion to Dismiss Order

A Motion to Dismiss Order helps the panel provide essential information about the panel's decision on the motion to dismiss. If you don't use the Motion to Dismiss Order, you may not be in compliance with FINRA [Rule 12504/13504](#) or may forget important information, such as an explanation of the decision and the parties' options to raise the request again. Additionally, when all the claims are dismissed before a hearing is held, the Motion to Dismiss Order takes the place of the Award Information Sheet (also available in the DR Portal) and provides details that must be included in the panel's Award

Postponement Order

A Postponement Order helps the panel address all issues related to postponing a hearing session. If you don't use the Postponement Order, you may forget to address related issues like deadlines for hearing exhibits, postponement-related fees, prehearing briefs or witness lists.

Order

An Order helps the panel address all other party requests or matters raised sua sponte (*i.e.*, when the panel acts on its own accord). For example, you can use an Order to provide a ruling on scheduling made after the IPHC, a ruling on a discovery-related order (perhaps, with a signed version of the parties' draft order attached) or a ruling on sanctions. The Order is general enough to accommodate different situations, but it still includes essential information about the panel's decision, such as how the decision was reached and the compliance date. However, the Order should never be used as a substitute for the Award Information Sheet.

Education and Training

Practising Law Institute Securities Arbitration 2022



The [Practising Law Institute's \(PLI\) Securities Arbitration 2022](#) program provided an opportunity to hear about the latest developments and topics directly from DRS leadership, arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. PLI's faculty provided practical tips for arbitrating and mediating securities cases. They also considered ethical challenges as clients and brokers age and explored how diversity and inclusion are being prioritized in DRS arbitrations. Finally, they discussed the latest hot topics and future trends in securities arbitration for 2022.

The program was held in person on September 8, 2022. A recording of the program is available on PLI's website. Arbitrators and mediators can still receive a 25 percent discount for the program by entering this discount code when registering: NNH2 FINRA.

American Bar Association 2022 Dispute Resolution Mediation Week: October 19 – 23

[Mediation Week 2022](#) provides a robust week of programming to educate lawyers, dispute resolution professionals, students and the public about mediation and related forms of collaborative problem solving. Mediation Week recognizes the importance of the work of neutrals, advocates and policy makers and celebrates the strides made in institutionalizing mediation as one of several dispute resolution processes. Interested DRS arbitrators and mediators are invited to use the following discount code: CEDR2022.

American Bar Association 2022 Dispute Resolution Mediation & Advocacy Skills Institute: December 1 – 3

The theme for this year's program is "Learning From the Past, Building for the Future." This [three-day virtual program](#) features an opportunity to learn from some of the leading social, behavioral and legal authorities in the field. Panels will explore new mediation advancements that build on pandemic-era discoveries and innovations in techniques, delivery and technology. DRS arbitrators and mediators are invited to use the following discount code: CEMED22.

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 during the arbitrator selection process. Giving parties the most current and complete information helps them make informed decisions when selecting their panel. Arbitrators should log in to the [DR Portal](#) to update their disclosure reports.

Last Affirmation Dates on Arbitrator Disclosure Reports

In 2017, DRS enhanced arbitrator disclosure reports by publishing the date that arbitrators last affirmed the accuracy of their disclosure reports. The affirmation date appears prominently at the top of the disclosure report that parties review during the arbitrator selection process. Parties may consider the affirmation date when making decisions about ranking and striking arbitrators.

In order to provide parties with the most current arbitrator information, DRS is asking arbitrators to review their disclosure reports regularly and affirm the information in the disclosure report. Arbitrators can affirm their disclosures and refresh the affirmation date by submitting an update through the DR Portal or by submitting an Oath of Arbitrator when assigned to a case. Even if you do not have any changes, you can update the affirmation date by affirming the information on your disclosure report and submitting an update form through the DR Portal. If you would like to register in the DR Portal or need to reactivate a dormant account, please send an email to the Department of [Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

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