



THE NEUTRAL CORNER

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Our Mission

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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Prohibited Independent Research in the Age of Artificial Intelligence: Don't Do It

By Jennifer LaMont, Regional Manager, FINRA Southeast Region

With increased accessibility to artificial intelligence (AI) tools, it is important to remember that arbitrators are prohibited from conducting any independent legal research when serving on a case.¹ AI tools, like ChatGPT, have been trained with large datasets of textual information and can perform a wide range of language-related tasks. AI tools allow users to ask questions and receive responses from a computer program that mimics live human conversations, drafts documents based on input data and analyzes large amounts of information. Using AI tools results in prohibited independent research.

Arbitrators should only seek clarity on legal issues by requesting additional information from the parties on their cases. For example, if a party cites cases in its motion or brief, and the arbitration panel wants to review the cited cases, the panel should ask the parties to provide copies of the full court

1. While FINRA's [Codes of Arbitration Procedure](#) do not address the topic of independent research, guidance on this topic can be found in the FINRA DRS [Basic Arbitrator Training](#), the [Arbitrator's Guide](#) and the [Fall 2021 Neutral Workshop](#).

opinions. Similarly, if a prevailing party requests attorneys' fees, but the panel is unsure about its authority to award them, the panel should ask the parties to submit briefs on the issue. Arbitrators should only review and consider materials the parties provide.

Potential Consequences

Conducting independent research can jeopardize the finality of an arbitration award and result in a motion to vacate the award.² It may also result in an arbitrator's removal from the FINRA roster. Parties must be confident that arbitrators are basing their decisions solely on the information the parties provide.

Accuracy and Reliability Issues Associated With AI Tools

While AI tools may be leveraged to increase efficiencies, they also raise concerns about accuracy, privacy, bias and intellectual property, among others. One risk involves the accuracy and reliability of AI. AI tools rely on the data in their datasets, the information they are trained on and information they can access—such as through internet searches—to provide answers to queries. AI tools may “hallucinate”³ (*i.e.*, make up an answer) or produce an answer that skews only toward the information available in their datasets, resulting in a biased answer.⁴

Data Privacy Concerns and Preserving Confidentiality

Another significant risk associated with the use of AI tools is that any information entered into publicly available AI tools could be stored and used to train their models, or for other purposes, depending on the AI tool's terms of use and user account settings. There could be privacy concerns if confidential information is entered into AI tools, because that information could potentially become an output of a query made by someone unrelated to the arbitration.

Further, the location where data is stored may be another issue with AI tools. Information input by users is typically stored on an external server and may be

subject to terms and conditions that do not guarantee the confidentiality of the information provided.

Arbitrators have a duty of confidentiality and an ongoing responsibility to maintain the ethical standards of the forum. The [Code of Ethics for Arbitrators in Commercial Disputes](#) provides that the “arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”⁵ For arbitrators, inputting any information in connection with an arbitration case into AI tools like ChatGPT, for any reason, is a breach of confidentiality and should be avoided. The only way for an arbitrator to maintain confidentiality is to completely refrain from adding any case-related information into AI tools.

DRS and FINRA News

Arbitration Case Filings and Trends

Arbitration case filings from January through May 2024 reflect a 26 percent decrease compared to cases filed during the same five-month period in 2023 (from 1,444 cases in 2023 to 1,066 cases in 2024). Customer-initiated claims decreased by 10 percent through May 2024, as compared to the same time period in 2023.

Proposed Rule Change to Amend FINRA Rule 12800 (Simplified Arbitration) to Clarify and Amend the Applicability of the Document Production Lists

On May 13, 2024, FINRA filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend the FINRA Code of Arbitration Procedure for Customer Disputes to clarify and, in some instances, amend the applicability of the Document Production Lists to simplified customer arbitrations administered under FINRA Rule 12800.

Please see [SR-FINRA-2024-008](#) for more information. The comment period expired on June 18, 2024.

Rule Change Retiring the FINRA Rule 10000 Series (Code of Arbitration Procedure)

On April 17, 2024, FINRA filed with the SEC a rule

2. See [Fall 2021 Neutral Workshop on FINRA.org](#)

3. “Hallucination” is a term used to describe when an AI tool produces an output that is inaccurate.

4. See [Key Challenges and Regulatory Considerations](#)

5. See [Code of Ethics for Arbitrators in Commercial Disputes](#) at 26.

change for immediate effectiveness to retire the FINRA Rule 10000 Series (Code of Arbitration Procedure). The FINRA Rule 10000 Series moved to the retired rules section of the FINRA Manual on May 17, 2024.

Please see [SR-FINRA-2024-005](#) for more information.

Amendments to the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations

On January 11, 2024, the SEC, acting through authority delegated to the Division of Trading and Markets, approved a rule change that would prohibit compensated non-attorney representatives from representing parties in the DRS forum. On January 19, 2024, FINRA received notice that, pursuant to Rule 431 of the Commission's Rules of Practice, 17 CFR 201.431, the SEC will review the delegated action, thereby staying the Approval Order.

On April 8, 2024, the SEC published an Order Scheduling Filing of Statements on Review stating that on or before May 8, 2024, any party or other person may file a statement in support of, or in opposition to, the action made pursuant to delegated authority. On May 8, 2024, FINRA filed a statement in support of the Approval Order. The Approval Order remains stayed pending further order of the SEC.

Please see [SR-FINRA-2023-013](#) for more information.

Confidentiality Requirements for Suspicious Activity Reports

In March 2024, DRS published [guidance](#) on its website to remind parties and their representatives, arbitrators and mediators that the unauthorized disclosure of a Suspicious Activity Report (SAR) is a violation of federal law that may be punishable by civil and criminal penalties.

This guidance also provides arbitrators with information on steps they can take to resolve SAR confidentiality concerns that arise during an arbitration proceeding without violating the strict prohibitions on disclosing SAR Information. Arbitrators who are

presented with SAR confidentiality concerns should carefully review this guidance and **immediately** contact the FINRA staff member assigned to the matter.

Updated Arbitrator's Guide

The [Arbitrator's Guide](#) has been updated to clarify when arbitrators may award attorneys' fees. Specifically, the Guide clarifies that attorneys' fees may be granted if the parties' contract includes a clause that provides for attorneys' fees, as long as that clause does not violate FINRA rules or any other applicable law. The guidance reinforces that arbitrators may ask parties questions and request briefs if they need additional information but must not conduct independent research.

DR Portal Focus Groups

In March 2024, DRS held focus groups to discuss the DR Portal (Portal Focus Group), including the anticipated DR Portal mobile app. Four Portal Focus Group sessions were held between March 5 and March 14, 2024: two sessions with party counsel and their support staff; and two sessions with neutrals who regularly use the DR Portal.

Portal Focus Group Summary

Overall, counsel and neutrals felt that the DR Portal is very usable and useful. Most found working with electronic documents to be manageable once they got used to it.

There were no stand-out "must fix" issues raised, but neutrals provided the following suggestions for enhancements:

- ▶ search feature to help locate specific cases or documents;
- ▶ "Add to Calendar" feature for all hearing types, not just Zoom hearings; and
- ▶ specific DR Portal training.

DR Portal Mobile App

Regarding the upcoming DR Portal mobile app, neutrals said they would use the DR Portal on their mobile devices to some or great extent, and they were excited about the ability to log in using biometric data (e.g., fingerprint, face recognition).

If you have any portal suggestions you would like to share with DRS, please send them to drportalfeedback@finra.org.

Register for the DR Portal Today

DRS strongly encourages arbitrators and mediators to register for the [DR Portal](#). It allows you to:

- ▶ file case documents, including the electronic Oath of Arbitrator and Arbitrator Disclosure Checklist, the Initial Prehearing Conference Scheduling Order, general orders, dismissal and postponement orders, the Award Information Sheet and the 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 Arbitrator Disclosure Report (ADR);
- ▶ update the last affirmation date on the ADR; and
- ▶ review list selection statistics to see how often their name has appeared on arbitrator ranking lists sent to parties and how often they have been ranked or struck on those lists.

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

DR Portal Help

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

Practising Law Institute (PLI) Securities Arbitration 2024

[PLI's Securities Arbitration 2024](#) program provides an opportunity to hear about the latest developments directly from DRS leadership, arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. PLI's faculty will provide practical tips for arbitrating and mediating securities cases. They will consider ethical challenges in the FINRA forum as well as how ethical obligations impact diversity, equity and inclusion. Faculty will also talk about how arbitrations have changed with the new standard of care, Regulation Best Interest or Reg BI. Finally, they will look at the latest hot topics and future trends in securities arbitration for 2024.

The program will be held in person on September 12 from 9 a.m. to 5 p.m. Eastern Time. Attendees can also watch the program as a live broadcast or view a recorded version at a later time. CLE credit will be available. FINRA arbitrators and mediators will receive a 25 percent discount when registering with this [link](#) or by using this discount code: **PPS3 FINRA**.

Mediation Update

Mediation Case Filings and Trends

From January through May 2024, parties initiated 219 mediation cases, a decrease of 31 percent from the same period in 2023. FINRA closed 236 cases during this time. Approximately 87 percent of these cases concluded with successful settlements.

FINRA Mediator Summit

Attention DRS Mediators, please save the date for DRS Mediation's first Mediator Summit (Summit) on October 15, 2024. This event will take place in person at our New York City office and virtually. The Summit will feature a variety of panels and networking opportunities. A formal invitation with more details will be sent to DRS' mediators in the next few months.

FINRA's Mediation Program for Small Arbitration Claims

FINRA offers parties in active arbitration cases [free or low-cost virtual mediation](#) for claims of \$100,000 or less. Deficient or inactive arbitration claims and customer expungement cases do not qualify for mediation in this program. Participation by parties is voluntary.

The program offers virtual mediation at the following rates:

- ▶ No cost for arbitration claims of \$25,000 or less.
- ▶ \$50 per hour for cases with claims of \$25,000 to \$50,000 to cover reduced mediator fees.
- ▶ \$100 per hour for cases with claims of \$50,000 to \$100,000 to cover reduced mediator fees. In this claim range, parties will receive a short list of three mediators to select from.

FINRA waives any filing fees for cases mediated through this program.

Please contact the [Mediation Department](#) if you have any questions about the program.

Mediator Disclosure Updates

Mediators can update their profile anytime through the [DR Portal](#). Keeping mediator disclosures report up to date—including the number of cases mediated, success rates and the types of cases mediated—helps parties during selection. References who can attest to a mediator's skills and mediation style also help parties choose the most appropriate mediator for their case. Remember to include a cancellation policy if applicable.

Early this year, Mediation staff started contacting mediators on the roster with our yearly mediator questionnaire. This also gave mediators an opportunity to provide any updates.

Become a FINRA Mediator

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

Questions and Answers

Motion to Dismiss Order

Question

The motion to dismiss order form on the DR Portal contemplates that ruling on a motion to dismiss may be deferred. However, there seems to be no information in the Codes of Arbitration Procedure (Codes) relating to deferral. Under what circumstances may an arbitration panel defer ruling on a motion to dismiss?

Answer

While arbitrators are encouraged to return orders and decisions to DRS as soon as possible, a panel has discretion to defer ruling on a motion to dismiss when it believes doing so is appropriate. For example, if information or testimony will be available later, such as after additional discovery has been conducted or even at the evidentiary hearing, the panel may defer ruling on a motion to dismiss if they believe the additional information or testimony will help them make a more informed ruling.

BrokerCheck Reports

Question

If an arbitrator wants to see a party's BrokerCheck report during an arbitration, why does the arbitration panel have to order the registered representative to produce their BrokerCheck report when the panel could easily view it on the FINRA website?

Answer

Although a registered representative's BrokerCheck report is easily viewable on FINRA's website, arbitrators are not permitted to conduct independent research during an arbitration. Ordering the registered representative seeking expungement (or the party seeking expungement on a registered representative's behalf) to provide a current copy of the BrokerCheck report ensures that the BrokerCheck report is part of the record and only documents and information in the record are considered in rendering the award.

Chairperson Mentorship Program

Question

I have been a mentor to new chairpersons through DRS' Chairperson Mentorship Program. So far, I have not done anything in this role. How do new chairpersons avail themselves of the benefits of this program?

Answer

DRS established a Chairperson Mentorship Program for newly qualified chairpersons. The mentors in the program are FINRA arbitrators with substantial chairperson experience who have agreed to be available to new chairpersons to answer any questions they may have in their new role. When an arbitrator is added to the chairperson roster, DRS will send them the Chairperson Mentorship Contact List, which

includes names, email addresses and phone numbers of available mentors in each region. New chairpersons may contact any of the arbitrators on the list, not just those who serve in the same region. If you have any questions about this program, please contact [Neutral Management](#) or the case administrator assigned to your case.

Arbitrator Tip: Record the Hearing

[Rules 12606](#) and [13606](#) of the Codes provide that DRS will "make a tape, digital, or other recording of every hearing." They also instruct DRS to provide a copy of the recording to any party upon request. Arbitrators play a critical role in accomplishing this important directive.

To properly record the hearing, the [Hearing Procedure Script](#) provides the following tips:

- ▶ There are no "off the record" conversations between the parties and arbitrators. Record the entire proceeding.
- ▶ Test the recorder before the hearing begins.
- ▶ State the date, case name and number at the beginning of each hearing day.
- ▶ How to Record: Press the REC button to begin recording. If a recorder is being used, the REC indicator will be lit and steady while recording. If Zoom is being used, there will be a REC indicator at the top of the screen while recording.
- ▶ How to Stop Recording: Press the STOP button to stop recording when the hearing adjourns for breaks, executive sessions and at the end of the day.
- ▶ Remember to press the REC button to resume recording after breaks and executive sessions.
- ▶ On the last day of the hearing, for hearings held outside of FINRA's offices, all digital recorders and memory cards should be returned to the DRS staff assigned to the case or the hearing facility that provided the recorder.

Why Is It So Important?

Failing to record an arbitration proceeding properly

can have significant consequences. Consider the effects on parties, arbitrators and FINRA if the record is incomplete.

A party might need to access recorded testimony to impeach the credibility of a witness or to challenge a witness's testimony at the hearing. An accurate record may also be vital in a subsequent action to confirm, modify or vacate an award. For a panel, a complete record can help them resolve disputes regarding key testimony, particularly in cases where there was a lengthy gap between hearing sessions. FINRA staff may also need to access the record to review arbitrator evaluations and disciplinary referrals.

Consequences of Recording Private Conversations

Conversely, recording the proceedings when conversations should be off-the-record—during a recess, executive session or deliberation—could also have negative consequences. During these private conversations, arbitrators generally feel free to speak openly about the merits of the case with their co-panelists knowing that the parties are out of the room, and their conversations will not be recorded. Unfortunately, if arbitrators forget to turn the recorder off, their candid conversations will be recorded. If parties request copies of the recordings, they may also receive the arbitrators' private conversations. Parties may consider it as part of the record and use this information in support of a motion to vacate.

Recording private sessions may weaken the finality of an arbitration award. Further, it reveals the deliberative process that should remain private. To avoid these unintended consequences, arbitrators should make sure that the recorder is turned off before engaging in any private conversations. Arbitrators should also consider leaving the hearing room to deliberate outside the range of the recorder.

Additional Tips

In addition to reviewing the hearing script, arbitrators can affix a reminder note (facing the arbitrators) to the digital recorder. The panel can also designate an arbitrator to "double check" that the assigned arbitrator turns the digital recorder on and off at

appropriate times. If the recorder is accidentally left on when it should not have been, arbitrators should notify DRS staff immediately.

The Codes require a complete record of arbitration hearings. Arbitrators have an obligation to operate the digital recorder competently. If you have any questions about the recorder, please contact your case administrator.

Arbitrator Disclosure Reminder

As a reminder, arbitrators should review their arbitrator disclosure reports (ADRs) regularly to ensure all information is accurate and current. Even if arbitrators are not currently assigned to cases, their ADRs may be sent to parties during the arbitrator selection process. Providing parties with the most current and complete information helps them make informed decisions when selecting their panel. Complete disclosures also minimize arbitrator challenges and delays to the case. Arbitrators should log in to the [DR Portal](#) to update their ADRs.

Last Affirmation Dates on ADRs

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

To provide parties with the most current information, DRS asks arbitrators to review their ADRs regularly and affirm the information. Arbitrators can affirm their disclosures and refresh the affirmation date by submitting an update through the DR Portal or by submitting an Oath when assigned a case. Even if there are no changes, arbitrators can update the affirmation date through the DR Portal.

If you need to register for the DR Portal or 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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