

# What FINRA Arbitrators and Mediators Should Know: Litigation Issues

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# Overview

- 1. Electronic Discovery: What Silicon Valley Did For All Of Us**
- 2. Arbitrators and Mediators (Neutrals) As Defendants: What Will Keep You Out Of Trouble and What Can Get You Into Trouble?**
- 3. Defending Neutrals: What Can FINRA Do For You?**

# 1. Electronic Discovery: What Silicon Valley Did For All Of Us

## ■ Today's electronic discovery topics:

- Electronic Discovery: Old Wine In New Bottles
- Electronic Discovery: How Is It Different?
- What Is Metadata?
- The Federal Approach to Electronic Discovery
- Subpoenas Requested By Parties

## Electronic Discovery: Old Wine In New Bottles

- Oversight of discovery is within the sound discretion of the Neutrals.
- FINRA's Discovery Guide does not distinguish between electronic and "paper" discovery.
- The fundamentals that apply to discovery of paper documents generally also apply to electronic documents.
- Beware: electronic documents, like paper documents, can be falsified.
- Electronic signatures are valid and enforceable.

## Electronic Discovery: How Is It Different?

- **The main difference between electronic and “paper” discovery is that the volume of electronic discovery is often much greater; therefore it presents increased costs for the parties and significant risks of abuse.**
  - Discovery requests should be limited by date and subject matter.
- **Many of the documents listed in FINRA’s Discovery Guide are stored electronically and parties might produce them electronically.**
- **Parties might request documents in a specific electronic format: as images (e.g., .pdf or .tiff files) or in their original electronic format (native files, e.g., Word, Excel, or Outlook files).**
- **Parties might request metadata.**

# What Is Metadata?

- **Metadata is data about data.**

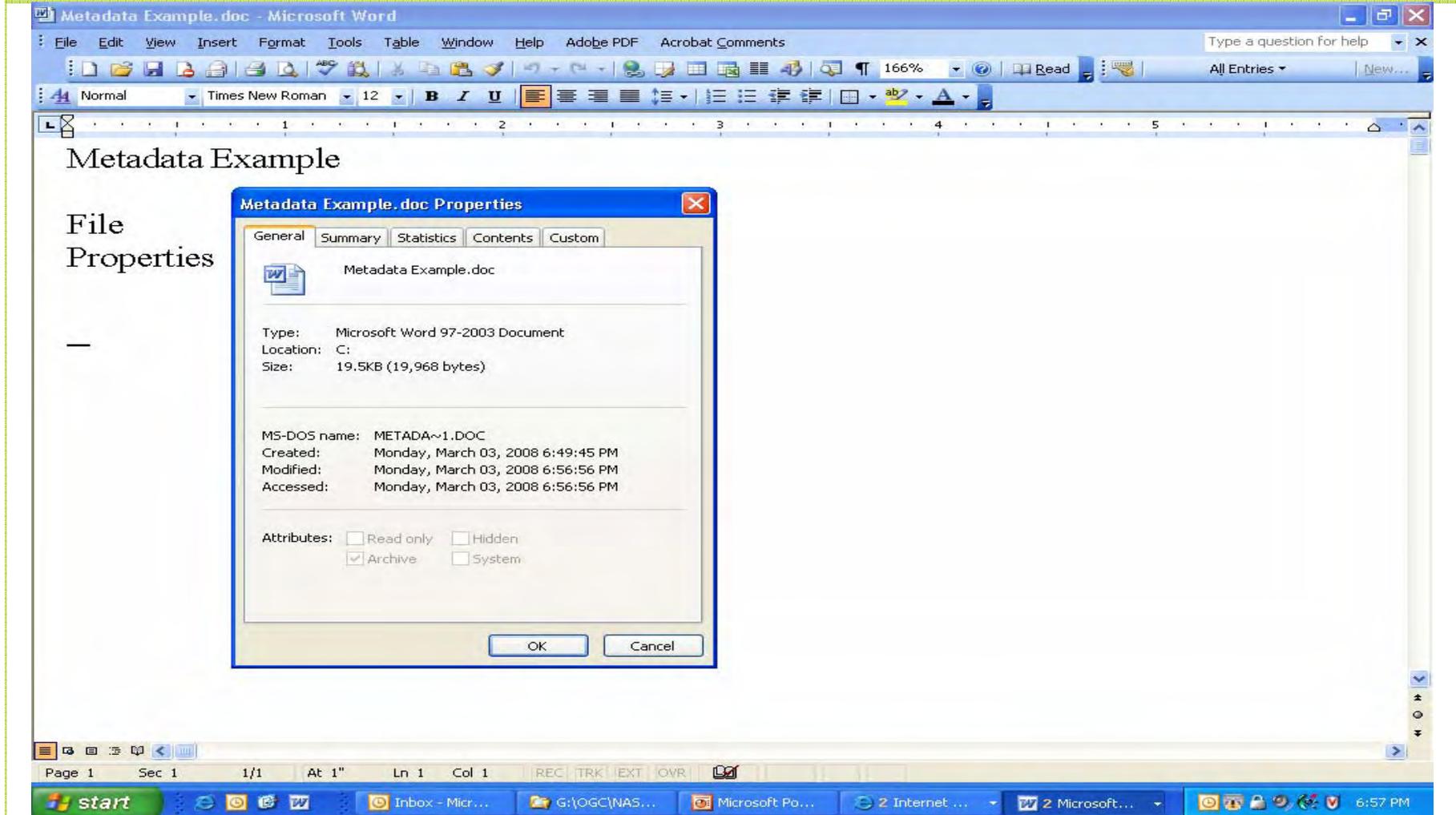
- **File system data:**

- This includes original author, company or firm name, creation date, last modified date, title, file path, size, and editing time.

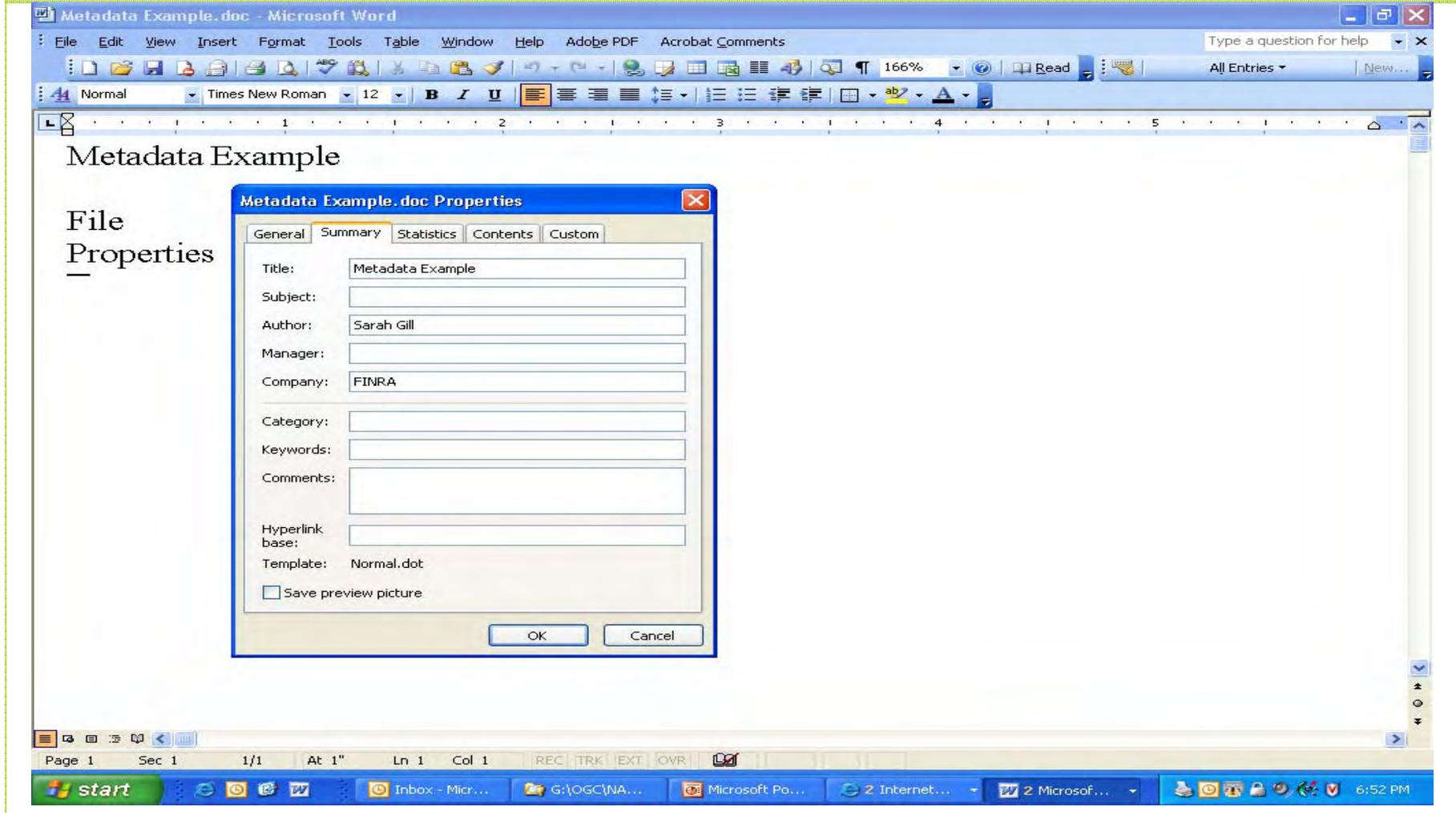
- **Embedded data:**

- Metadata can also reveal surprises, such as changes to a document, order of changes, author of changes, reviewers' names, hidden comments, redactions, Excel calculations, and hidden cells.

# Metadata Example 1



# Metadata Example 2



## The Federal Approach To Electronic Discovery

- **In 2006, Congress amended the Federal Rules of Civil Procedure to add requirements relating to electronic discovery.**

- While these rules do not apply to FINRA arbitrations and mediations, they are informative because they address issues that arise in arbitration cases.

- **The goals of the electronic discovery amendments include:**

- Get the court involved early to avoid difficulties that can arise if electronic discovery issues are not discussed in advance of discovery.
- Require parties to discuss electronic discovery issues at the case planning conference and
  - develop a protocol for inadvertent waiver of privilege,
  - preserve evidence,
  - designate the form of production,
  - determine the scope of electronic searches, and
  - address cost and burden issues.

# Subpoenas Requested By Parties

- **FINRA's new subpoena rule, effective April 2, 2007, provides that only arbitrators may issue subpoenas in FINRA's arbitration forum (FINRA Code of Arbitration Procedure, Rules 12512 and 13512).**
- **Consider carefully the scope of the proposed request for documents.**
  - Parties should limit document requests with date parameters and by subject matter, so that no one is producing documents that are not relevant.
    - A request for all of a person's documents would include all of the person's emails, calendar entries, contacts, drafts. This could involve many records unrelated to the dispute between the parties.
    - Requests for all examination files for a firm or registered representative can involve thousands of documents and require a lot of time to collect and produce. This is also true for requests for Forms U-4, U-5, and BD.
  - Document requests should be clear enough that a person who is not a lawyer and not involved with the case will understand them.
    - Form definitions can confuse rather than clarify what the party seeks.
- **Regarding the response deadline:**
  - Ask yourself how long it would take you to collect, review, and produce the documents if you received the subpoena.
  - Note that parties do not always serve subpoenas immediately.

## 2. Neutrals As Defendants: What Will Keep You Out Of Trouble?

- **Review your arbitrator disclosure report before every case. Ensure that it includes the most recent information you submitted, and that this information is still current and accurate.**
- **Speak with ALL parties or counsel or NO party or counsel.**
- **During proceedings, leave the recorder on when parties or counsel are present, even if they ask to go “off the record.”**
  - Having a record of all conversations with all parties and counsel will protect you.
  - However, do not forget to turn off the recorder during executive sessions!
  - Be careful about speaking in bathrooms, hallways, elevators...
  - Do not share cabs with parties, counsel, or witnesses.
- **After the case ends, do not discuss it with anyone.**
  - If a person calls you about a case, end the conversation immediately and report the call to the case administrator.
    - Neutrals’ statements about a case come back to haunt them (e.g., in a motion claiming bias).
  - Never fall for the following plea from a party or counsel, “If you just answer a few questions, I will not have to depose you.”
  - Remember the Code of Ethics (III.B, III.C, and VI.C).
  - Do not discuss a case with the media.
- **Do not enter into business relationships with parties or counsel that could create the appearance that you are biased (Code of Ethics I.C).**
- **Stay alert and do not multitask (e.g., checking Blackberry).**

## Neutrals As Defendants: What Can Get You Into Trouble?

### ■ Incomplete disclosures can get you into trouble.

- You have an ongoing duty to disclose pertinent information.
- Include relationships with parties, their attorneys, and anyone else related to the case.
- Include any conditions that could affect your ability to hear the case.
- Tell staff in advance about any conditions that could affect your ability to hear the case.

### ■ Conducting your own investigation regarding facts or law relating to a case can get you into trouble.

- If parties argue about a point of law, and the panel determines the point is worth pursuing, ask the parties to brief the issue. Provide deadlines, page limitations, and require the parties to attach in full any referenced cases.

### ■ Ignoring a notice of a bankruptcy filing by a party can get you into trouble.

- If a party has properly filed for bankruptcy in a bankruptcy court, an automatic stay precludes claims against that party from continuing.

## Top Reasons Why Arbitrators Are Wrongly Sued At The Beginning Of An Arbitration Case

- **Parties (even when represented by counsel) sometimes sue arbitrators because they incorrectly believe they MUST name the arbitrator, rather than the forum, to obtain relief.**
- **Even if arbitrators do everything right, parties sometimes sue arbitrators to:**
  - move the case to a court,
  - delay or expedite a hearing,
  - try to disqualify an arbitrator, or
  - appeal or stay a ruling (joining or severing a party, preserving privilege).

## Top Reasons Why Arbitrators Are Wrongly Sued Or Receive Subpoenas For Testimony After Issuing An Award

- A party is not satisfied with the outcome of the arbitration.
- The arbitrator failed to disclose a potential conflict.
- A party claims the arbitrator was biased.
- The hearing tapes are not audible.
- A party (even when represented by counsel) incorrectly believes she **MUST** name the arbitrator in a motion to vacate, modify, or confirm the award.
- A party is suing his counsel for malpractice and subpoenas the arbitrator for testimony about the conduct of counsel.

### 3. Defending Neutrals: What Can FINRA Do For You?

- **FINRA provides legal representation for FINRA Neutrals who are sued, subpoenaed, or subjected to a bar complaint or inquiry, when the action arises from their service as a FINRA Neutral.**
- **FINRA maintains insurance for defending such matters.**
- **Contact us immediately if you are served with a petition, complaint, motion, subpoena, or bar complaint or inquiry relating to your role with FINRA Dispute Resolution.**
  - Do not discuss the case with anyone except a litigation attorney from FINRA's Office of General Counsel (OGC).
  - OGC's main number is 202-728-8294; ask to speak with a litigation attorney.
  - We might only have a few days before the response deadline, so please contact us immediately.

## What Happens If You Are Sued Based On Your Role As A FINRA Neutral?

- **Arbitral immunity protects “the decision-making process from attack by dissatisfied litigants.”** *Olson v. NASD, Inc.*, 85 F.3d 381, 382 (8th Cir. 1996).
  - Arbitrators, like judges, are independent decision makers and are immune from civil liability for actions that are within the scope of their arbitral duties.
  - This also applies to mediators.
- **Do not ignore a complaint or other legal document now that you are familiar with the immunity doctrine!**
  - Even though you are immune, we still have to file a response on your behalf.

## Scope of Arbitral Immunity

- **The scope of arbitral immunity is broad and includes administrative tasks that are closely related to the arbitration.**
- **Courts have extended immunity for the following:**
  - blank hearing tapes,
  - lost evidence,
  - “unfair” arbitrations,
  - failure to disclose conflicts, and
  - negligence.
- **If a party believes the arbitration award should be vacated (e.g., because the arbitrator was biased), the party can file in court a motion to vacate the arbitration award.**
  - FINRA has no authority to vacate an arbitration award.

## What If A Party Subpoenas A Neutral For Testimony?

### ■ Testimonial immunity:

- Generally, courts will not require arbitrators to testify for the purpose of contradicting or clarifying an award.
- Courts have required arbitrators to testify about possible bias and disclosure issues.
  - But the requesting party must first present clear evidence of impropriety by the arbitrator.

### ■ Courts are more likely to remand an award to the arbitrators for clarification than to require arbitrator testimony.

### ■ Courts are more likely to require a Neutral's testimony if the Neutral discussed the proceedings "off the record" with one party or in an affidavit requested by one party.

- This type of communication would also violate the Code of Ethics (III.B, III.C, and/or VI.C).

## Conclusion

- **When in doubt, contact FINRA Dispute Resolution or a litigation attorney in FINRA's Office of General Counsel.**
- **Other excellent resources are FINRA's Code of Arbitration Procedure, FINRA's Discovery Guide, and the AAA/ABA Code of Ethics for Commercial Arbitrators.**
  - These materials are available from FINRA's website, at <http://www.finra.org/ArbitrationMediation/Arbitration/CodeofArbitrationProcedure/p009566>, <http://www.finra.org/ArbitrationMediation/Arbitration/DiscoveryGuideforArbitrationProceedings/index.htm>, and <http://www.finra.org/ArbitrationMediation/ResourcesforArbitratorsandMediators/p009525>.

# APPENDIX



# Electronic Discovery Resources

- Rachel Glasgow, *Electronic Discovery*, <http://www.finra.org/ArbitrationMediation/ResourcesforArbitratorsandMediators/GeneralInformationandReference/TheNeutralCorner/P037817>
- Barbara J. Rothstein, Ronald J. Hedges, & Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf)
- Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 Nw. J. of Tech. & Intell. Prop. 171 (2006), <http://www.law.northwestern.edu/journals/njtip/v4/n2/3>
- Thomas Y. Allman & Courtney Ingrassia Barton, *E-Discovery Case Law—Since the New Rules*, In-House Litigator, J. of the Comm. on Corp. Counsel, ABA, Section of Litigation (Winter 2008)
- *Embedded Information in Electronic Documents: Why Meta Data Matters* (2007), [http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI\\_MetaData.pdf](http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_MetaData.pdf)
- *Records Management - The Complexity of Metadata* (2006), [http://www.edrm.net/wiki/index.php/Records\\_Management\\_-\\_The\\_Complexity\\_of\\_Metadata](http://www.edrm.net/wiki/index.php/Records_Management_-_The_Complexity_of_Metadata)
- *Williams v. Sprint*, 230 F.R.D. 640 (D. Kan. 2005) (discusses producing in native format, with metadata intact)

## Arbitral Immunity – Sample Cases

- *New England Cleaning Servs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999)
- *Austern v. Chicago Bd. of Options Exch., Inc.*, 898 F.2d 882 (2d Cir. 1990)
- *Cahn v. Int'l Ladies' Garment Union*, 311 F.2d 113 (3d Cir. 1962)
- *Shrader v. NASD*, 54 F.3d 774 (4th Cir. 1995)
- *Hawkins v. NASD, Inc.*, 149 F.3d 330 (5th Cir. 1998)
- *Corey v. New York Stock Exch., Inc.*, 691 F.2d 1205 (6th Cir. 1982)
- *Int'l Med. Group, Inc. v. American Arbitration Ass'n*, 312 F.3d 833 (7th Cir. 2002)
- *Honn v. NASD*, 182 F.3d 1014 (8th Cir. 1999)
- *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987)
- *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155 (10th Cir. 2007)
- *Brandon v. MedPartners, Inc.*, 203 F.R.D. 677 (S.D. Fl. 2001)

## Testimonial Immunity – Sample Cases

- *JCI Communications, Inc. v. International Brotherhood of Electrical Workers, Local 103*, 324 F.3d 42 (1st Cir. 2003)
- *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2nd Cir. 1978)
- *Hoelt v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003)
- *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391 (5th Cir. 2003)
- *International Union United Auto Workers v. Greyhound Lines*, 701 F.2d 1181 (6th Cir. 1983)
- *Local P-9 v. George A. Hormel & Co.*, 776 F.2d 1393 (8th Cir. 1985)
- *NLRB v. Macaluso, Inc.*, 618 F.2d 51 (9th Cir, 1980)
- *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096 (9th Cir. 2003)
- *Sheldon v. Vermonty*, 269 F.3d 1202 (10th Cir. 2001)
- *O.R. Sec., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742 (11th Cir. 1988)
- *Sperry Int'l. Trade, Inc. v. Government of Israel*, 602 F. Supp. 1440 (S.D.N.Y. 1985)
- *R.D. Mgmt. Corp. v. Phila. Indem. Ins. Co.*, 302 F. Supp. 2d 728 (E.D. Mich. 2004)