Version: May 2015

Basic Arbitrator Training and Exam

Dear Arbitrator:

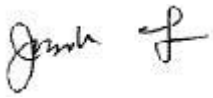
The following is a print version of the Basic Arbitrator Training. You may complete this course and exam either through this printable version (instructions below) or online, depending on your individual preference and/or computing environment. Most arbitrators will be able to review the material in eight hours.

After you have reviewed the course material, you may begin the exam. The exam consists of 25 multiple-choice questions, and you must answer at least 20 questions correctly (80 percent) to pass the course. If you do not pass the exam on the first attempt, you will have only **one** additional opportunity to retake it—for a maximum of two attempts.

You may complete the exam online or in a paper format. Please contact Luis Cruz at luis.cruz@finra.org or 212-858-4339 to request a paper version of the exam. You will have one hour to complete the exam and return it to Luis Cruz at the following fax number: **646-625-6028**. After grading your exam, FINRA will send you an email with the results and instructions on your next steps in completing the training requirements.

Please contact me at jisook.lee@finra.org or 212-858-5121 with any questions about the content of the course or exam.

Very truly yours,



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Additional Notice

FINRA Dispute Resolution attempts to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding concerning a rule in the Customer or Industry Code of Arbitration Procedure, the rule language prevails.

Introduction

These are dynamic times for securities arbitration. Whether a dispute concerns an investor, employee, or brokerage firm, arbitration is the most often used form of dispute resolution. Those selected as arbitrators have a unique opportunity to serve not only the parties before them, but also to contribute to the fair administration of justice. The arbitration process directly affects people's lives and livelihoods and generally involves significant amounts of money. Arbitrators' decisions often impact the reputations and employment of the parties.

The success of the entire arbitration process depends on skilled and conscientious arbitrators. This course is designed to help provide you with the skills to be a competent, fair, and just arbitrator. You should review the materials completely and thoroughly in preparation for serving in the critical role as an arbitrator for the Financial Industry Regulatory Authority Dispute Resolution (FINRA).

Confidence in the arbitration process will be achieved only when the system is fair in fact and appearance.
To quote an English jurist, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Dispute Resolution's Mission Statement

FINRA Dispute Resolution's mission is to have all of our constituents—the investing public, brokerage firms and their employees, and neutrals (arbitrators and mediators)—view FINRA as the preeminent provider of dispute resolution services. To accomplish this goal, it is our standing pledge to provide impartial arbitrators who are dedicated to delivering fair, effective dispute resolution services.

For more on FINRA and its services, see FINRA's Web site.

FINRA's Web site: http://www.finra.org/index.htm

Introduction

Welcome to Arbitration

FINRA administers the arbitration process neutrally as to all participants. To ensure that this goal is met, we strive to provide the parties with arbitrators who will bring fairness and integrity to the process.

There are three steps that you must complete in order to qualify as a FINRA arbitrator. First, you must complete this course and pass the exam at the end of this program. Second, you must successfully complete the online expungement training course. Third, you must complete the classroom portion of the training by attending (1) onsite training at a regional office or (2) live video training via WebEx.

In addition to this course, FINRA sponsors other continuing arbitrator education programs that you may access at our Web site, www.finra.org. We encourage you to become a proficient arbitrator and to maintain your skills. Failure to properly fulfill your role as an arbitrator may result in removal from the FINRA arbitrator roster.

This course will acquaint you with the arbitration process and present you with many of the issues you're likely to encounter as an arbitrator.

The individuals and firms named in this training are fictitious. Any similarity to real people or firms is purely coincidental.

www.finra.org : http://www.finra.org/index.htm

First, let's answer some questions you might have:

- What is arbitration?
- What is mediation?
- How do I fit into the arbitration process?
- What are the ethical considerations for arbitrators?
- What resources are available to me?
- How do I use this course?

What is Arbitration?

Arbitration is a method of resolving a dispute between two or more parties. These parties agree in advance to abide by the decision of the arbitrators, who are impartial persons committed to rendering a fair and impartial decision after all parties have had an opportunity to present their cases.

The arbitrators' award is final and binding, subject to court review only under limited circumstances. There is no appeal process within FINRA under the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes (collectively referred to as Codes or Code). However, the parties may file a motion to vacate the arbitration award in a court of competent jurisdiction. In short, arbitration is a quick, fair, and relatively inexpensive alternative to litigation. There is little wonder why the use of this process has skyrocketed since the late 1980s.

This sharp increase in arbitrations was also influenced by a U.S. Supreme Court decision (*Shearson v. McMahon*, 1987) that helped establish arbitration as the mandated procedure for resolving securities disputes. Prior to this decision, the binding nature of the arbitration agreement and the broad scope of an arbitrator's authority in securities cases were less clear.

Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes : http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

What is Mediation?

In addition to arbitration services, FINRA offers mediation as another method of resolving disputes. You will need to be aware of what mediation is, how it works, and how it relates to the arbitration process. We will provide further information on mediation at the classroom portion of the training. You can learn more about mediation on our Web site at www.finra.org.

Mediation is an informal and non-adversarial process in which an impartial person, the mediator, facilitates negotiations between disputing parties, helping them find a mutually acceptable solution. What also distinguishes mediation from arbitration (and court litigation) is that the mediator has no power to impose a solution and does not attempt to do so. Rather, the mediator helps the parties create a common solution to their common problems.

www.finra.org. : http://www.finra.org/index.htm

How FINRA's Mediation Process Works

Our mediation program is voluntary and nonbinding. Cases come to us when the parties agree to submit a pending arbitration case to mediation or to submit a matter not filed for arbitration, but involving issues that are appropriate for our dispute resolution forum. The parties select the mediator and decide when and where the mediation sessions will take place.

Generally, the mediation process begins with a joint session where each party gets a chance to explain its side of the story. At some point the mediator usually divides the parties into separate, confidential sessions. In those separate sessions, or caucuses, the mediator reviews with each party and their counsel any strengths and weaknesses of the case, addresses the parties' real underlying interests, and explores options for resolution. Through these sessions, and additional joint sessions, the mediator helps the parties take a more realistic approach and find areas of common ground. Once an agreement is reached, the parties draft and sign a formal, written settlement agreement.

Mediation Sessions are Private and Confidential

Mediation is a private process. Nothing a party tells or shows a mediator in the private caucuses can be communicated by the mediator to the other party without the express permission of the party who gave the information. This confidentiality is the key to mediation's success because it allows for a full and frank dialogue between the mediator and the parties. With the exception of certain regulatory or reporting requirements, the mediator and FINRA must keep the entire mediation process and records fully confidential. As an arbitrator serving on a case, the parties may advise you that their case is also being mediated. However, you are not entitled to any information regarding the mediation and should definitely not ask any questions of the parties regarding their mediation case. An agreement to mediate should not be viewed as a sign of weakness on the part of any party.

How Mediation Relates to the Arbitrator's Role

For mediations that come to us from our arbitration docket, there should be no delay in the arbitration unless the parties agree otherwise. The mediation is designed to run concurrently with the arbitration case, so that no time is lost on the arbitration track. You will likely serve on an arbitration case where the parties are also mediating the case.

There are key points in the arbitration where it may be appropriate for the chairperson, who presides over the arbitration panel, to ask the parties if they are aware of or considered the mediation program. This 'interface' between arbitration and mediation has become common as parties and their representatives become more aware of mediation and its benefits.

How Do I Fit into the Arbitration Process?

As an arbitrator, you will hear and decide the parties' cases and, based on the evidence, render a fair, just, and impartial award.

Disputes you may be asked to rule on include:

- public customer disputes such as claims of unsuitable recommendations, excessive trading, misrepresentation, failure to execute, or lack of supervision; and
- employment disputes that arise out of the employment or termination of an associated person. Such cases may involve alleged discrimination.

The parties in these disputes will view you and the rest of the panel as judge and jury. In reality, you have more power than a judge, because your decisions cannot be overturned except under limited circumstances. Partly because of this power, it is critical that you are not only impartial in fact, but also impartial in appearance.

One careless gesture or offhand remark can lead to an impression of bias—which is one of the few grounds for which arbitration decisions can be overturned. Consequently, arbitrators must always be on guard and project and exhibit a high degree of seriousness, professionalism, and competency in all of their verbal and nonverbal communications.

Remember that arbitrators are independent contractors, not employees of FINRA. Arbitrators are not eligible to receive any unemployment benefits or any FINRA employee benefits.

This course, along with the classroom and online training programs, will help provide you with the competency to be an effective arbitrator.

What Are the Ethical Considerations for Arbitrators?

All arbitrators must read and comply with the ethical standards in the *Code of Ethics for Arbitrators in Commercial Disputes* (Code of Ethics). The Code of Ethics was developed by the American Bar Association and the American Arbitration Association to guide arbitrators in their dealings with parties who have disputes.
Arbitrators should refer to it regularly for guidance. The Code of Ethics is not a substitute for, nor does it supersede, applicable law or the Code.

The following are applicable Canons, which are a part of the Code of Ethics:

Canon I - An arbitrator should uphold the integrity and fairness of the arbitration process.
Canon II - An arbitrator should disclose any interest or relationship likely to affect impartiality or that might create an appearance of partiality.
Canon III - An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.
Canon IV - An arbitrator should conduct the proceedings fairly and diligently.
Canon V - An arbitrator should make decisions in a just, independent, and deliberate manner.
Canon VI - An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

Code of Ethics: http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525

The Code: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Here, we highlight the following three Canons for arbitrators to review.

What Are the Ethical Considerations for Arbitrators? (Continued)

Canon I of the Code of Ethics discusses the arbitrator's obligation to uphold the integrity and fairness of the arbitration process. Keep the following concepts in mind:

- Apprising FINRA of your general availability is fine. Soliciting appointments is not appropriate. Upon accepting an appointment, arbitrators should avoid entering into any financial, business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias. Attorneys, expert witnesses, or accountants who are arbitrators should be particularly mindful of this ethical consideration, and should review the ethical considerations of their profession. For example, an attorney or other professional shouldn't accept any engagement involving a party during the pendency of an arbitration and for a reasonable period of time after the matter is concluded. Likewise, an expert witness should disclose previous cases for which he or she was retained that involved any party, counsel, or witness.
- Arbitrators should strive to prevent abuse or disruption of the arbitration process.
- Arbitrators should accept an assignment only if they believe they can conduct the arbitration promptly.

Canon II of the Code of Ethics guides the arbitrator regarding disclosures that are likely to affect impartiality or might reasonably create the appearance of bias. An arbitrator has an obligation to disclose certain factors that might reasonably give rise to an appearance of partiality or bias. Not every disclosure gives rise to a challenge for cause. However, prompt, complete disclosure might permit a party to make a more informed decision.

Commonwealth Coatings Corporation v. Continental Casualty Company, 393 US 145 (1968), is the most frequently quoted case in this area. In *Commonwealth*, the court acknowledges that an arbitrator's business relationships may indeed be diverse especially in today's complex society. No matter how trivial the contact, it is better that the parties know about it up front rather than find out later in the proceeding at a time when they may seek to challenge certain decisions you have made. Remember, it is not up to you to determine the significance of the contact or disclosure. Your duty is to disclose!

Arbitrators have a duty to be diligent by informing themselves of the players in the arbitration and examining their relationships to provide disclosure. The parties, too, have an obligation to investigate their own records to identify possible conflicts and raise them as soon as they become known. The obligation to disclose is a continuing obligation that doesn't cease until the final decision is rendered.

Disclosures are not limited to relationships with the parties, counsel, or witnesses. Consider any relationships between or among arbitrators assigned to the same case as information to be disclosed to the parties. Focus on both past and present business relationships between you and the parties, counsel, witnesses, co-panelists, and the entities for which they work.

The arbitrator at issue should communicate a disclosure to the staff and repeat it in front of the parties at the beginning of the hearing. The parties should then acknowledge the information and state whether they have an objection to proceed with the case.

Canon II G provides guidance when a disclosure is made after the proceedings have begun. The Canon assists the arbitrator in determining if the arbitrator should withdraw or remain on the panel. The standards are:

- If all parties request that you withdraw—do so.
- If less than all parties request that you withdraw—do so unless either of the following circumstances exists:
  - An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law, established procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
  - In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and can decide the case impartially and fairly.

What Are the Ethical Considerations for Arbitrators? (Continued)

Consult with staff if you have any questions regarding withdrawal. Keep in mind that sometimes it is less expensive for you to step down in the middle of the proceeding than for the parties to institute a proceeding to vacate an award. On the other hand, this should be balanced by the significance of the disclosure, the disclosed circumstances or relationships, and prejudice to a party if you step down.

Canon III of the Code of Ethics gives guidance to arbitrators regarding communications with the parties. While you do not want to appear cold and aloof, casual conversation may cause a problem. A comment you believe to be insignificant might form the basis for a challenge of the final decision. Communications with the parties should be scrupulously avoided even after the proceedings are concluded.

While arbitrators enjoy quasi-judicial immunity, an arbitrator may waive this immunity by disclosing the content of discussions among arbitrators. Always assume someone is listening. Discussions on elevators, in restrooms, and in restaurants oftentimes can be overheard.

Ethical considerations, issues, and examples are examined throughout this course. Continually review the application of the Code of Ethics as you read through this course. You will see how ethical considerations impact all actions taken by an arbitrator. Failure to follow the Canons constitutes grounds for removal from FINRA's arbitrator roster.

What Resources are Available to Me?

The resources that can help you become an effective and just arbitrator include:

- **Materials**: The Code, the Arbitrator's Guide, and The Neutral Corner contain a wealth of rules,tips, guidelines, and other information. Becoming familiar with these materials will help you become a knowledgeable and effective arbitrator.
- **FINRA staff**: While staff will never advise you on the merits of a given case, they can provide information on the arbitration rules and procedures.
- **The other arbitrators on your panel**: These individuals may be your most valuable resource. Your co-panelists are sources of "second opinions"—which you'll need more often than you think.
- **This course material**: By the time you complete this course, you will be familiar with many of the issues you'll encounter as an arbitrator.
- **FINRA' s Web site (www.finra.org)**: Our Web site offers a vast amount of information to assist you on your cases. Arbitrators should review the following documents on our Web site: The Code and the Arbitrator's Guide, to ensure the most current editions are being referred to during an arbitration case.
- **Online training programs**: FINRA is proud to offer several, advanced arbitrator training courses online, conveniently available via the Web 24 hours a day, seven days a week. Arbitrators who successfully complete the online training programs will have this noted on their Arbitrator Disclosure Reports, which FINRA shares with the parties.

How to Use this Course

This course describes the phases in the arbitration process, starting with your being selected to serve on an arbitration panel and ending with the tasks you and the rest of the panel complete after the hearing. These high-level phases of the process, described in modules, include:

- preparing to conduct a fair and impartial hearing;
- conducting a fair and impartial hearing; and
- deciding the outcome of the case.

The modules, in turn, are divided into smaller tasks called lessons. At the end of each lesson, you'll have the chance to practice what you've learned by answering questions, and comparing your answers to the suggested answers provided.

In addition to the practice questions at the end of each lesson, this course also contains questions within the lessons. These questions and answers are not solely intended to test what you've learned but provide an opportunity to stop, think, and in some cases make an educated guess. These questions vary the pace and let you analyze or apply the information you are learning.

Throughout this course, you will see notes, which describe facts, rules, or regulations that will affect your role in the arbitration process. These notes also present suggested approaches to conduct an arbitration with maximum efficiency. The notes are integrated into this course in order to describe each major step in a typical arbitration.

Exam Protocol

When you have completed the course elements, you will be ready to begin the mandatory 25-question, multiple-choice exam. You must answer at least 20 questions correctly (80 percent) to pass the course. If you do not pass the exam on the first attempt, you will have only **one** additional opportunity to retake it—for a maximum of two attempts.

If you have questions about the content of the course, please contact Jisook Lee at (212) 858-5121 or jisook.lee@finra.org. If you have technical issues accessing your course, please contact our helpdesk at (800) 321-6273 for assistance.

Module 1: Prepare to Conduct a Fair and Impartial Hearing

Introduction to Lesson: Determine Whether You Can Serve on a Panel

In this module you'll learn how FINRA arbitrators are selected and how to prepare for a hearing.
After completing this module, you'll be able to:

- determine whether you can serve on a panel;
- manage the prehearing process; and
- deliberate on specific motions.

To complete this module, you'll need about two and a half hours and the following materials, which may be reviewed online:

- The Codes of Arbitration Procedure
- Arbitrator's Guide

Because many of the rules in the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) are identical, this training focuses primarily on the Customer Code. Therefore, the course refers to the Customer Code (12000 series) only. Please refer to the 13000 series of FINRA's rules for comparable Industry Code provisions.

The Codes of Arbitration Procedure:
http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Arbitrator's Guide:
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/ArbitratorsReferenceGuides/

In this lesson, we'll review the composition of the hearing panels and how arbitrators are selected. Specifically, we'll discuss how you will:

- determine whether the logistics of the hearing will allow you to participate;
- determine whether the facts of the case allow you to be fair and impartial;
- investigate and make all relevant disclosures;
- review the case documentation; and
- comply with your ethical obligations to safeguard confidential information.

Before we consider these issues, we will first examine list selection.

Computerized List Selection

FINRA uses a computer system to generate, on a random basis, lists of arbitrators from its rosters for the selected hearing. Parties get a significant voice in the composition as they select the panel through a process of striking and ranking the arbitrators according to their preferences.

For a customer case requiring a panel of three arbitrators, FINRA provides each party with three lists, each containing ten names: one public list; one public chair-qualified list; and one non-public list. Each separately represented party may strike up to four names from each list. Additionally, investors—who choose the all-public panel option for selecting arbitrators—may select an all-public panel by striking up to all names on the non-public list.

Chairperson Roster

Under Rule 12400, public arbitrators are eligible for the chairperson roster if they have completed FINRA's Chairperson Training AND satisfy one of the following requirements:

- have a law degree and are a member of a bar of at least one jurisdiction, and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization (SRO) in which hearings were held; or
- have served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held.

The public arbitrators who are eligible under these criteria will be placed on the chairperson roster at the discretion of the Director of Arbitration. Arbitrators who are chair-qualified remain on the public roster as well but their names will appear on only one list in a particular case.

Once the parties have numerically ranked the arbitrators, staff again utilizes the computerized list selection system to consolidate the parties' preferences. Arbitrators are appointed according to the consolidated rankings. If you are contacted to serve on a case by FINRA staff, you should respond immediately!

Let's assume that you have been selected to serve on a case. The first call you will receive is from a FINRA staff member who will ask if you are able to serve on a panel. We'll review this process next.

Rule 12400: http:// www.finra.org/finramanual/rules/r12400

Rule 12402: http://www.finra.org/finramanual/rules/r12402

Rule 12403: http://www.finra.org/finramanual/rules/r12403

Determine Whether the Logistics of the Hearing Allow You to Participate

Depending on the nature of the case, FINRA will call panel members from the public sector or from the securities industry/non-public sector based on the parties' rankings.

During the initial call, FINRA will provide you with logistical information about the case and location. First and foremost, you should decide whether your schedule allows you to participate in the case. *Accept only those cases that you can properly conduct within the anticipated time limits*. Pursuant to Canon I of the Code of the Ethics, you should only accept an appointment if you believe that you can promptly conduct the arbitration.

Staff will provide arbitrators with details about the case, including the case name, case number, names of the parties, names of current lawyers or agents representing the parties, and the nature of the case. Based on these facts, arbitrators must decide whether they can remain impartial. If an arbitrator determines that a potential conflict exists after learning the above information, the arbitrator must advise staff immediately. Arbitrators should disclose any circumstance that might hinder – or even appear to hinder – their ability to render an objective determination.

Arbitrators should write down the case number when accepting an appointment as they will need this number when contacting FINRA to inquire about the case.

Determine Whether the Facts of the Case Allow You to Be Fair and Impartial

You have already confirmed your availability. Now you must consider the preliminary information provided by FINRA and determine whether you can be impartial.

When you initially applied to become an arbitrator, you provided FINRA with biographical information that was recorded on an Arbitrator Disclosure Report. This report will be sent to you each time you're appointed to a case. You must review it for accuracy and make any necessary updates promptly. For your convenience, you may review a Sample Disclosure Report.

In cases involving clear conflicts of interest with parties or counsel, you will not be asked to serve by FINRA. However, not all conflicts of interest can be identified from your profile. Other experiences and relationships may influence your ability to fairly hear a case. If you have any doubt about whether you can be fair or impartial, decline the appointment. Your impartiality extends to parties, counsel, agents, witnesses, panel members, and even the type of case involved.

Sample Disclosure Report:
https://www.finra.org/sites/default/files/ArbMed/p122952.pdf

Test Yourself

Assume that you are contacted to serve on a case involving Larry Smith. You recently read in a newspaper article that Mr. Smith had been indicted by a grand jury for fraud.

Should you accept an appointment to the case? Why or why not?

Question Feedback

If this knowledge makes you question Mr. Smith's veracity, decline the appointment. Even if you believe you could be impartial, you must still disclose these facts to FINRA and to the parties (we will discuss this process later in this section).

Test Yourself

FINRA asks you to participate in a case involving a retiree who lost money in stocks. You believe Certificates of Deposit are the only suitable investment for retirees.

Should you take the case? Why or why not?

Question Feedback

You should decline the appointment, because you are unable to be impartial on this issue.

Make All Relevant Disclosures

You've determined that you can remain impartial on a case. Now you must disclose all facts that could provide an appearance of bias.

Arbitrators will nearly always have contacts within their field of expertise. In fact, your knowledge and experience are valuable tools that you bring to the process. What you can determine, though, is whether your experience allows you to remain impartial about the issues and participants in a case. If you decide you can serve impartially, you still must disclose the facts you considered. We will review disclosures you'll make as an arbitrator.

Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Disclosure includes any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision. When making disclosures, arbitrators should consider all aspects of their professional and personal lives and disclose all ties between the arbitrator, the parties and the matter in dispute, no matter how remote they may seem. If you need to think about whether a disclosure is appropriate, then it is: MAKE THE DISCLOSURE.

It cannot be emphasized enough that arbitrators must disclose each and every fact—from the point of view of any participant—that might affect their objectivity. Rule 12405 requires each arbitrator to disclose any circumstances that might preclude an impartial determination or create an appearance of partiality or bias.

Listed below are the various participants you should review for conflicts and the types of disclosures required by Rule 12405.

Participants	Issues to Disclose
Parties	Direct or indirect financial interest in the outcome of the hearing.
Attorneys or representatives	Direct or indirect personal interest in the outcome of the hearing.
Potential witnesses disclosed by the parties	Existing or past financial, business, or professional relationships.
Other arbitrators on the panel	Existing or past family or social relationships.

In addition to the categories listed previously, FINRA will forward to you questions that you must answer before the Initial Prehearing Conference (IPHC). These questions are located in the Arbitrator Disclosure Checklist, which is sent with the Oath of Arbitrator (Oath). You must review and sign the Oath every time you serve on a new case.

Rule 12405: http://www.finra.org/finramanual/rules/r12405

Oath of Arbitrator:
https://www.finra.org/sites/default/files/Oath_of_Arbitrator_Checklist_082014_FINAL.pdf

Make All Relevant Disclosures (continued)

For example, one of the additional questions you are asked is whether any member of your immediate family has been employed by a brokerage firm. Please take a moment to review the Checklist and the Oath now.

The term "immediate family member" means: (i) a person's parent, stepparent, child or stepchild; (ii) a member of a person's household; (iii) an individual to whom a person provides financial support of more than 50 percent of the individual's annual income; or (iv) a person who is claimed as a dependent for federal income tax purposes.

Remember, answering one of the questions affirmatively and disclosing the facts behind it does not necessarily mean you will be removed from a case. However, failing to disclose a fact may result in having your decision overturned—after significant expenditures of time and money. It may also result in your disqualification from FINRA's arbitrator roster.

Do not feel personally offended if a party challenges you about a disclosure that you made. The parties seek and deserve fairness and the appearance of fairness. Challenges are rarely based on the ability or competence of an arbitrator.

Test Yourself

At a bar association dinner, you shared a table with one of the expert witnesses identified in the pleadings. You did not, however, speak with the person during the dinner.

Should you disclose this contact? Why or why not?

Question Feedback

Disclose the information. Although few people would see a conflict or appearance of bias in this situation, the parties have the right to judge partiality.

Test Yourself

A member of your church is employed as a secretary by the attorney for the respondent in the case.

Should you disclose this information? Why or why not?

Question Feedback

Disclose the information, including the amount of contact you have with this individual. When in doubt, disclosure is the rule.

Test Yourself

The claimant in the case is named Edna Buckner. You've never liked your Aunt Edna and you are still bitter that Boston Red Sox first baseman Bill Buckner allowed a ball to go through his legs in a World Series game.

Should you disclose this information? Why or why not?

Question Feedback

You wouldn't have to disclose these facts—unless they would impair your objectivity in the case. This question emphasizes the fact that you should disclose any fact upon which a reasonable impression of partiality can be made.

Duty to Investigate

Disclosure is so important that in addition to disclosing known relationships, you must also make a reasonable effort to inform yourself of potential conflicts involving your employers, partners, business associates and family members. Logically, it is not possible to be influenced by a relationship that you are not aware of. Therefore, why do you have a duty to investigate and disclose such potential conflicts?

Rule 12405 requires arbitrators to make a "reasonable" attempt to uncover potential conflicts. The integrity of the arbitration process is based on fair and impartial arbitrators. Though lack of knowledge may preclude actual bias, it does not always prevent a reasonable appearance of partiality.

For example, in the legal profession an attorney must attempt to identify whether his or her firm has engaged in business with one or more of the parties or representatives of the parties. In the securities field, an owner of a brokerage firm must investigate whether his or her firm conducted business with the participants or traded in the securities involved.

Now try your hand at a couple of exercises.

12405: http://www.finra.org/finramanual/rules/r12405

Test Yourself

Arbitrator Bill Lee is a member of the law firm Stone, Greer & Dawson. Mr. Lee accepted an arbitration involving Atlas Securities, which is a subsidiary of Alltime Corporation. Mr. Lee is unaware that another partner of Stone, Greer & Dawson handled a case for Alltime Corporation five years ago. Must Mr. Lee research whether his law firm ever represented Alltime Corporation? If it did five years ago, does he have a duty to disclose this fact?

Question Feedback

Yes. Mr. Lee must disclose the past financial interest his law firm had in the parent company of one of the parties.

Test Yourself

Does Mr. Lee have an obligation to investigate the clients of other members of the law firm?

Question Feedback

Yes. Mr. Lee has the duty to make a reasonable effort to inform himself of his firm's former clients.

Test Yourself

Before the arbitration hearing session begins, you note in the pleadings that one of the stocks at issue is IntellEct. Before you accept the appointment, what steps must you take?

Question Feedback

You must conduct reasonable research into whether your firm has a relationship with IntellEct. If your firm does, you must disclose that fact to FINRA.

Duty to Investigate (Continued)

Disclosure is a continuing obligation—not only throughout the prehearing process but also during the hearing. At each stage of the process, identify and disclose potential conflicts, and repeat previously disclosed potential conflicts for new counsel. Remember that some parties don't obtain counsel until shortly before a hearing, and parties generally don't identify witnesses until three weeks before a hearing.

Now let's assume that you have reviewed the preliminary information provided by FINRA, confirmed your availability, and investigated and disclosed all potential conflicts of interest or appearances of partiality. If you are selected for the panel, FINRA will send you the case documentation.

Review the Case Documentation

After you are appointed to a panel, FINRA will send you a case packet with all the pleadings, including:

- claims;
- answers;
- cross claims or counterclaims;
- third party claims;
- Submission Agreements; and
- motions and responses (if they are included in the pleadings).

The pleadings may reveal new information about the parties or other entities related to the case. Read through the documents to determine if you have additional conflicts that require disclosure, and to understand each party's position. Read the pleadings very carefully a few days prior to any prehearing conference or hearing to refresh your recollection of the facts and issues of the case. Although many cases settle or are postponed shortly before the prehearing conference or hearing, you must nonetheless be fully prepared.

The pleadings consist of several important documents. You should be very familiar with the contents of each of those documents. The claim is the document prepared by the party bringing the arbitration (the claimant), or the claimant's representative. Generally, the claim outlines, in chronological order, a series of facts that the claimant asserts as a basis to recover damages. Often, the claim will outline "a legal basis" for recovery, and the specific damages that the claimant is seeking.

The respondent or the respondent's representative generally responds to the assertions made by the claimant in the form of an answer. Sometimes the respondent will file a counterclaim against the claimant; that is, the respondent will make a claim against and seek damages from the original claimant.

The documents may also contain a cross claim where a respondent alleges wrongdoing against a co-respondent. Also, parties may assert third party claims where recovery is sought against parties other than those already named in the arbitration. Many of these documents will contain exhibits that will, according to the party filing the exhibit, support its position. These documents are the first step in the arbitration process.

As you review these documents, it is critical to remember that no facts have been proven in the case, and that additional information and clarification will be forthcoming in the arbitration proceeding. You must keep an open mind and not come to any conclusions until the end of the case.

In your role as an arbitrator, you must not conduct an independent investigation into the issue before you. It is the parties' responsibility to provide you with the necessary information.

Challenges and Disqualification

Parties are permitted to challenge the appointment of an arbitrator to their case. Parties may challenge the arbitrator directly by filing a Motion to Recuse. Alternatively, a party's challenge may be made directly to FINRA in the form of a Challenge for Cause or by filing a Director's Authority to Remove request. Each method is addressed separately below.

Motions to Recuse

In the event that all parties ask an arbitrator to recuse (*i.e.*, "withdraw") from the panel, the arbitrator should honor the request and recuse. Recusal under these circumstances is required under the Code of Ethics.

If fewer than all parties request that an arbitrator recuse him or herself from the panel, an arbitrator should do so unless, after carefully considering the matter, the arbitrator determines that the reason for the challenge is not substantial, and the arbitrator can nevertheless act and decide the case impartially and fairly. FINRA Rule 12406 provides that requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.

Arbitrators should not feel offended if they are asked to recuse themselves from a case since such requests are generally not based on the ability or competence of an arbitrator.

In some instances, an arbitrator may voluntarily choose to withdraw from a case. When in doubt, arbitrators should consult with FINRA staff. Even if the case has already proceeded, it may be less expensive for the parties if an arbitrator steps down in the middle of the proceeding than for the parties to complete the proceeding and file a motion to vacate the award. However, whether arbitrators choose to step down should be balanced by the significance of the disclosure, the disclosed relationships and the prejudice to the parties.

Code of Ethics: http://www.finra.org/ArbitrationAndMediation/Arbitrators/Responsibilites/CodeofEthics/index.htm
FINRA Rule 12406: http://www.finra.org/finramanual/rules/r12406

Challenges for Cause Before the First Hearing Session Begins

In accordance with FINRA Rule 12407(a), a party may file a challenge for cause to remove an arbitrator from the case before the first hearing session begins. Once a party files a challenge for cause, all opposing parties are entitled to submit a response. FINRA staff, on behalf of the Director of Arbitration, will review the challenge for cause and responses filed, if any, to determine whether to remove the arbitrator.

The rule provides that a challenge for cause to remove an arbitrator will be granted where it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer will be resolved in favor of the customer.

FINRA Rule 12407(a): http://www.finra.org/finramanual/rules/r12407

Director's Authority to Remove an Arbitrator After the First Hearing Session Begins

According to FINRA Rule 12407(b), after the first hearing session begins the Director may remove an arbitrator based only on information required to be disclosed that was not previously known by the parties. The limitation on disclosing information not previously known to the parties prevents parties from raising challenges late in the process that should have been raised at the outset.

FINRA Rule 12407(b): http://www.finra.org/finramanual/rules/r12407

Ethical Obligations Regarding Information Security

Documents and information in FINRA's arbitration case files are confidential. Arbitrators have an ethical duty to keep confidential all information obtained in connection with an arbitration or mediation. Information that needs to be safeguarded includes, but is not limited to:

- Social Security numbers;
- individual taxpayer identification numbers;
- driver's license numbers;
- party and arbitrator addresses;
- brokerage, bank or other financial account numbers;
- criminal history information;
- fingerprint cards;
- expunged records;
- attorney-client communications; and
- medical records.

Arbitrators must exercise caution when using, transporting, storing and ultimately disposing of case materials. These actions must be handled in a manner that preserves the confidentiality of the information. Arbitrators can protect confidential information by taking the following precautions:

- Do not leave case-related material out in the open where others can see it. Arbitrators should secure case material in a locked drawer when they are not being used.

- Do not leave case-related material unattended in a car for an extended period. If you anticipate that you will be away from your car for more than a short time, you should take the materials with you. However, you may want to leave materials in your car trunk—and lock the doors and windows—if you know you will be away from your car briefly.

- Be cautious when reviewing case materials in public. Do not allow third parties to read the materials over your shoulder.

- Be aware of your surroundings when participating in prehearings or hearings by conference call to ensure that others cannot eavesdrop. This is particularly important if you are participating by cell phone in a public area (*i.e.*, a train, a courthouse corridor, etc.)

- Exercise extra caution when serving on multiple cases to avoid sending information about one case to parties in another case.

- Verify that the correct order and enclosures are being sent to the intended recipients; arbitrators should confirm all email addresses and fax numbers before hitting the send button. The case number and case name should be specified when transmitting orders and rulings, even when transmitting them to FINRA.

- Keep FINRA apprised of current contact information. For example, if an arbitrator provides an incorrect fax number or neglects to update contact information, FINRA may inadvertently send confidential information to an unauthorized person. Arbitrators may update their contact information quickly and easily on FINRA's website using the DR Portal.

DR Portal: http://www.finra.org/arbitration-and-mediation/dr-portal

- Do not use shared email accounts to receive or send case-related information. Only arbitrators assigned to the case should have access to case-related information. Individuals who are not involved with a particular matter are not authorized to view any correspondence or materials related to a FINRA arbitration case. Accordingly, no one other than the arbitrator should have access to the arbitrator's email account containing such information.

- Any time the hearing room is not occupied it should be locked and/or secured. Thus, hearing rooms should be locked or secured during a short term recess, lunch breaks and of course overnight.

- Do not dispose of case materials in a regular trash receptacle. Arbitrators should shred all case-related documents. If arbitrators are unable to shred documents in their possession, they may return them to FINRA for proper disposal.

- Consider leaving behind case materials at the conclusion of a hearing ***only*** if the hearing is held at a FINRA office or in a Regus meeting room. When leaving materials behind, clearly mark them to be shredded. For hearings that take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents remain in the room that are marked to be shredded. Regus will bill FINRA directly to shred the arbitrators' documents. Arbitrators should not expense these costs.

- Encourage the parties to take their respective materials with them for hearings in all other locations. Likewise, arbitrators should take their copies of the case materials with them when they leave and either shred them at home or return them to FINRA for proper disposal.

If arbitrators believe that the confidentiality of sensitive information has been compromised or have any questions about safeguarding case-related material, they should contact their case administrator immediately. For more information, listen to the July 21, 2010 neutral workshop on Information Security.

July 21, 2010 neutral workshop on Information Security:
http://www.finra.org/ArbitrationMediation/Neutrals/Education/P009530

Test Yourself

Assume that the claimant has listed Dr. John Davis as an expert witness. You went to school with a John Davis and want to know if it is the same person. What should you do?

Question Feedback

You should contact FINRA and ask them to investigate.

Test Yourself

When you are contacted to sit on a panel, FINRA informs you that the respondent's attorney is Tom Belcher. Mr. Belcher is the attorney in another one of your arbitration cases that has been stayed by the court for the last year. Can you accept an appointment to the panel? If so, should you disclose the fact that you are an arbitrator on the first case?

Question Feedback

You can accept the appointment as long as your experience in the previous case allows you to remain fair and impartial.

Yes, contact FINRA, which will request that you explain the facts in writing and reaffirm that you can render a fair and just award. Always be specific, detailed, and complete in your disclosures.

Lesson Summary: Determine Whether You Can Serve on a Panel

In this lesson, you learned how you will be selected as a panel member. You also learned the importance of disclosure. Specifically, you learned how to:

- determine whether the logistics of the hearing allow you to participate;
- determine whether the facts of the case allow you to be fair and impartial;
- investigate and make all relevant disclosures;
- review the case documentation; and
- comply with your ethical obligations to safeguard confidential information.

In the next lesson, we'll review issues related to managing the prehearing stage, including your role in facilitating the discovery process.

Introduction to Lesson: Manage the Prehearing Process

The arbitrators will be appointed after all answers are filed or due. Subsequent to their appointment, the Director of Arbitration (Director) will schedule an Initial Prehearing Conference (IPHC), pursuant to Rule 12500, with all parties and their representatives. The purposes of the IPHC include scheduling evidentiary hearing dates, as well as facilitating discovery requests and other motions, so that the actual hearing may proceed expeditiously.

Specifically, the panel may address issues that include, but are not limited to, the following:

- evidentiary hearing dates;
- FINRA Mediation Program;
- discovery issues;
- subpoenas/orders;
- legal memoranda or briefs; and
- any other issues.

Remember that you should strive to schedule hearing dates within nine months or less after the IPHC. There may be times when this is not feasible; however, the commencement of hearings more than nine months after the IPHC should be the exception.

Rule 12500: http://www.finra.org/finramanual/rules/r12500

Direct Communication Rule

The IPHC also introduces to the parties the option to proceed under Direct Communication Rule 12211. The rule allows parties in an arbitration to communicate directly with the arbitrators—if all parties and arbitrators agree to do so. The rule and its guidelines are provided in the IPHC Script and should be discussed during the conference.

To learn more about the Direct Communication Rule, you may register for our separate course on this rule on the Advanced Arbitrator Training page.

Rule 12211: http://www.finra.org/finramanual/rules/r12211

IPHC Script: https://www.finra.org/sites/default/files/iphc_script_800February_18.pdf

Advanced Arbitrator Training:

http://www.finra.org/ArbitrationMediation/Neutrals/Education/ArbitratorTraining/VoluntaryTraining/index.htm

Senior or Seriously Ill Parties

The IPHC will also be the time to discuss whether the case should proceed on an expedited basis because of senior or seriously ill parties. If the parties advise you that there are very ill or senior parties or essential witnesses, the panel should make every attempt to select dates that will expedite the process and provide a reasonable amount of time for case preparation.

Manage the Discovery Process

In some cases, the full panel and parties will resolve any discovery issues during the IPHC. Generally, though, FINRA will appoint the chairperson of the panel to manage the discovery process.

There may be times when you are asked to help facilitate the discovery process. This may occur when:

- the chairperson is unavailable;
- the chairperson requests the full panel; or
- the discovery dispute arises at the evidentiary hearing.

If you are selected, one of your primary goals is to encourage the parties to be ready for the hearing on the scheduled dates.

The steps you'll take will vary by case:

- In some cases, the parties voluntarily exchange documents and information. You'll take no action until the hearing.
- In other cases, you'll facilitate the discovery process. After gathering the facts involved in a discovery dispute—either through written papers, a prehearing conference, or both—you will decide if and when the parties exchange documents and information.

In this lesson, we'll look at situations when you'll need to rule on discovery issues to provide all parties with a fair opportunity to prepare their cases. Specifically, we'll review:

- document production lists;
- ruling on requests based on the papers;
- scheduling a prehearing conference; and
- conducting a prehearing conference.

We'll begin our review by looking at document exchange under “Using the Document Production Lists” in the Discovery Guide.

Document Production Lists for Use in Customer Arbitrations

The Discovery Guide and Document Production Lists (Lists) supplement the discovery rules 12505-12511 in the Code. The Code and the Discovery Guide work together to streamline the exchange of essential documents among the parties in customer cases without staff or arbitrator intervention.

The Discovery Guide contains two Lists of presumptively discoverable documents: one for firms/associated persons to produce and one for customers to produce. The Discovery Guide, including the Lists, serves as a guide for the parties and the arbitrators. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and the arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that the parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules.

Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, the parties must either produce to all parties all documents in their possession or control that are described in the Lists, identify and explain the reasons that specific documents in the Lists cannot be produced within the required time, or object to the production of specific documents. Parties must respond to all other document requests within 60 days from the date a discovery request is received.

Now, let's look at how you'll facilitate the discovery process by ruling on the parties' motions and responses, also known as the papers.

Rules 12505-12511: http://www.finra.org/finramanual/rules/r12505

Discovery Guide: http://www.finra.org/arbitration-and-mediation/discovery-guide

The Code: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Rule on Requests Based on the Papers

As we discussed in the introduction, the purpose of arbitration is to provide a quick, fair, and relatively inexpensive method of resolving disputes. These objectives can only be reached through proper management by the arbitrators.

At any time, a party may contact FINRA about discovery problems it is encountering. Most discovery requests and motions allege that the opposing party did not produce requested documents and information. Rules 12506 and 12507 of the Code require parties to produce documents or file a written objection within 60 days of receiving a request.

Not every request for documents is proper. It will be your job to deny improper requests and make sure there is compliance with proper requests. Rule 12503 authorizes the selected arbitrator, usually the chairperson, to act on behalf of the panel with respect to ordering the production of documents.

Under Rule 12503, a party may file a written motion by serving it directly on each party, at the same time and in the same manner. Motions must also be filed with FINRA with additional copies for each arbitrator. Parties have 10 days from receipt of a written motion to respond unless the moving party agrees to an extension or the Director or panel decides otherwise. Parties have 5 days from the receipt of a response to a motion to reply to the response unless the responding party agrees to an extension of time, or the Director or the panel decides otherwise. Written motions must be served at least 20 days before a scheduled hearing, unless the panel decides otherwise.

Occasionally, a party may attempt to contact you directly about a discovery dispute. Do not speak with a party about the case. Refer the caller to FINRA staff. *Ex parte* communication (arbitrator communication with only one party without the presence of the other parties) is prohibited. We will discuss this important issue later.

Under some circumstances, you can rule on a discovery request based exclusively on the motion and responses submitted without a formal conference. If you are unable to make an informed ruling based solely on the papers, contact FINRA staff and request that a prehearing conference be scheduled with the parties.

You may request a prehearing conference if you determine a discussion with the parties would help you clarify and resolve the issue. A ruling on the papers, however, might be more economical and expeditious. Remember, you can also request more information in writing from the parties prior to making a decision.

Rule 12506: http://www.finra.org/finramanual/rules/r12506

Rule 12507: http://www.finra.org/finramanual/rules/r12507

Rule 12503: http://www.finra.org/finramanual/rules/r12503

Common Discovery Requests

While discovery disputes occur frequently, the same issues often repeat themselves. Common requests you'll see from the parties include:

- production of documents and information;
- depositions;
- interrogatories;
- orders of appearance and production;
- subpoenas;
- other procedural matters; and
- sanctions.

Our next area of review discusses the process you will use to rule on each of these discovery-related requests.

Production of Documents and Information

Nowhere has the expansion of discovery been more pronounced than in requests for documents. The increase is not surprising because documentation often plays a primary role in the outcome of a case. At the same time, however, parties can use document requests to harass and burden their opponent.

In this section, we'll review the issues that arise with document requests and the questions you should ask yourself before ruling on these requests.

As the selected arbitrator, you must decide if a document request is reasonable. Please review the Arbitrator's Guide to assist you with this determination.

Occasionally, you may want to use the expertise of other panel members in making a decision. In this situation, contact FINRA staff and request that the full panel be convened or call the other panel members directly.

To determine whether a document request is reasonable, your first goal will be to determine whether the document is relevant or likely to lead to relevant evidence.

Only after determining that documents are relevant, or likely to lead to relevant evidence, should you consider the cost or burden of production. If a party has demonstrated that the cost or burden of production is disproportionate to the need for the documents, see whether there are alternatives that can lessen the impact, such as narrowing the relevant time frame or scope of the request, or whether other documents can provide the same information.

Arbitrator's Guide http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Confidentiality and Discovery

If a party objects to document production on grounds of privacy or confidentiality, arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. Arbitrators may also want to consider ordering the redaction (removal) of names or other information, or having the parties sign confidentiality agreements.

Ideally, the parties will agree on the form and content of a confidentiality order. In some instances, however, the parties will not agree on what is or is not confidential. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting or requesting confidentiality has the burden of establishing that the documents or information in question are entitled to confidential treatment. Arbitrators should not automatically designate all documents as confidential.

When the party requesting confidentiality has met the burden of establishing the need for confidentiality of certain documents or information, arbitrators should strive to accomplish the confidentiality sought in the least restrictive manner possible. In considering questions about confidentiality, arbitrators may consider the following factors:

- Whether the disclosure would constitute an unwarranted invasion of personal privacy (*e.g.*, an individual's Social Security number, or medical information).
- Whether there is a threat of harm attendant to disclosure of the information.
- Whether the information contains proprietary confidential business plans and procedures or trade secrets.
- Whether the information has previously been published or produced without confidentiality or is already in the public domain.
- Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
- Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

Confidentiality and Discovery (Continued)

Arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine.

Test Yourself

Fox Anderson, a customer of EZE Securities, alleged that a number of unauthorized trades of Smart securities were made in his account. As part of a document request, Anderson's representative demanded that EZE produce all order tickets of its clients for the past three years who had purchased Smart securities. Counsel for EZE objected to the request, arguing that the request is not relevant and production is burdensome.

What action would you take?

Question Feedback

You could order EZE to produce the Smart securities order tickets of Claimant Anderson or some other document containing this information. As to the production of other customer order tickets, you might not order their production unless they are shown to be relevant and, if relevant, you may order that EZE redact the other client names to protect privacy interests.

Test Yourself

Assume for the moment that in addition to order tickets of other EZE clients, Mr. Anderson requested the account statements for other customers who had alleged unauthorized trades by the same broker. In response, EZE’s counsel objected because account statements are confidential. Assume the documents are relevant or the documents may lead to relevant evidence and outweigh the burden involved.

What steps might you take? Why?

Question Feedback

Because the requested items contain confidential information, you could order EZE to redact customer names from the documents. If more serious proprietary (confidential or private) information is involved, you might ask the parties to sign a confidentiality statement regarding the information.

Production of Documents and Information (Continued)

Each document request must be considered on a case-by-case basis. For example, a case involving a broker's failure to execute a trade normally does not require a voluminous exchange of documents. While trade documentation would be relevant, the claimant's financial situation might not be relevant.

Once you issue a ruling, incorporate it into a written order with a deadline for compliance. Your written ruling should be submitted to FINRA for service upon the parties.

Test Yourself

Assume that respondent’s counsel requested any telephone notes made by the customer relating to the transactions in dispute. According to the customer’s response, the notes could not be located. What steps might you take?

Question Feedback

You could order the customer to conduct a search and either produce the document or sign an affidavit stating his or her efforts to locate the documents and that the documents could not be located or no longer exist.

Production of Documents and Information (Continued)

In addition to requests for documents, parties may request the production of information. Information requests are a form of interrogatory, but are more limited in scope, number, and specificity.

In general, requests for information assist the discovery process. Proper requests for information may include the following:

- Who was the branch manager?
- Was the current compliance manual in effect during the period in question?
- Who were the individuals that supervised the broker?

Questions that ask for opinions or conclusions, rather than seeking information on facts or events, may be improper. For example, a question asked of a witness such as," What is your understanding of this document?" should generally be left for the hearing.

Limiting the scope of requests for documents and information to the facts of a case keeps the discovery process moving. Identifying issues under contention focuses the parties and prevents unnecessary requests that slow down the process. Requests for documents and information are just one area in which a dispute may arise during discovery. Another request is to depose a party or witness. We'll look at this type of request next.

Depositions

The goal of arbitration is the speedy and inexpensive resolution of a controversy; therefore, depositions are not generally part of the arbitration process. A deposition is the testimony of a witness taken upon oral question or written interrogatories. Depositions are conducted under oath outside of the court room (or arbitration hearing) and are reduced to writing (transcript), authenticated and intended to be used in preparation for hearing.

Depositions are strongly discouraged in arbitration, pursuant to FINRA Rule 12510. However, under Rule 12510, upon motion of a party, arbitrators may permit depositions, but only under very limited circumstances, including:

- to preserve the testimony of ill or dying witnesses;
- to accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- to expedite large or complex cases; and
- if the panel determines that extraordinary circumstances exist.

Generally, witnesses may only be compelled to attend a deposition or hearing if it is held within the county in which: they reside, are employed, transact business, or in another convenient location. Ask the parties to provide the applicable state or local laws for your case.

Even when these situations occur, however, you must balance the need for the testimony against the expense and burden inherent in taking a deposition (*e.g.*, travel expenses, attorneys' fees, transcript costs, etc.). Before you rule on a request, you'll want to know:

- What information is the party seeking? Is it important?
- Is there some reason the party couldn't compel the witness to provide the information at the hearing (e.g., illness or travel)?
- Is there a less burdensome way to receive the information (e.g., stipulation by the parties, interrogatories, telephonic testimony, etc.)?

FINRA Rule 12510: http://www.finra.org/finramanual/rules/r12510

Test Yourself

Prior to a hearing, the respondent’s attorney files a motion requesting that you order the deposition of the claimant’s wife. Do you have the authority to grant this request? If so, what provides this authority?

Question Feedback

The selected arbitrator has the authority to issue rulings, including an order for deposition, which will expedite arbitration proceedings under Rule 12503 of the Code.

With respect to the request to depose the claimant's wife, you would want further information to determine whether you should grant the order.

You would want to ask the following questions:

- What information is the respondent seeking? Is it relevant or likely to lead to relevant evidence?
- Is there a reason such as illness or distance that prevents the claimant's wife from testifying at the hearing?
- Is there a less burdensome alternative for the party to secure the information?

Depositions often play an important role in courtroom litigation. You have greater discretion in finding a less expensive alternative, though, because arbitrators are not strictly bound by the rules of evidence.

Another discovery mechanism is interrogatories. We'll review this information device next.

Rule 12503: http://www.finra.org/finramanual/rules/r12503

Interrogatories

Interrogatories are written questions from one party to another. While less burdensome than depositions, interrogatories can be used to harass an opponent through the sheer volume of the requests.

Many state and federal jurisdictions have adopted limits on the number of interrogatories a party may serve on an opponent during discovery.

While requests for information promote efficient discovery, parties should ask more formal questions at the arbitration hearing itself. For example, asking where a registered person worked might lead to further discovery with respect to those firms. It is a proper request for information. However, asking about the conversations the registered person had with a supervisor may be improper during discovery and could be asked at the hearing.

Test Yourself

In a request for information, the respondent's counsel asks "Who was the broker that handled the transactions for the claimant?" Is this a proper discovery question? Why or why not?

Question Feedback

It is a proper question because it is likely to lead to additional discoverable evidence.

Test Yourself

Counsel for the respondent's next request is, "State how the claimant was introduced to the broker." Is this a proper discovery question? Why or why not?

Question Feedback

No. This question would be more proper at a hearing. There may be times, though, when you'll determine that certain interrogatories would streamline a case and would be appropriate.

Orders of Appearance and Production

Rule 12513 permits an arbitrator to order the appearance of any person employed or associated with any member of FINRA—even nonparties—or the production of any documents in the possession or control of such persons. In most instances, arbitrators should issue orders, instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons.

In general, the process used to order an appearance of a witness or production of documents is the following:

- The requesting party drafts an order and sends it to FINRA staff with copies to all parties to the arbitration.
- The order of appearance or production of documents is treated like a motion under Rule 12503. The responding party(s) must submit a response within 10 days of receipt of the motion, unless the moving party agrees to an extension or the Director or panel determines otherwise. Parties have 5 days from the receipt of a response to a motion to reply to the response unless the responding party agrees to an extension of time, or the Director or the panel decides otherwise. Once FINRA either receives all the responses or the deadline to respond has passed, FINRA staff will forward the request and the responses to the arbitrator for signature.
- The arbitrator promptly rules on the order and returns it to FINRA.
- FINRA returns the signed order of appearance or production of documents to the requesting party who is responsible for serving it on the person named therein, as well as providing copies to all parties to the arbitration.

Unless the panel directs otherwise, the party requesting the appearance of witnesses by or the production of documents from non-parties under this rule shall pay reasonable costs of appearances and/or production.

You'll analyze an order of appearance in a manner similar to a request for production of documents. When you receive a request for an order of appearance or production, balance the likelihood of the testimony or documents leading to relevant evidence against the burden to the individual who must appear.

Rule 12513: http://www.finra.org/finramanual/rules/r12513

Subpoenas

At times, important testimony and documents are not under the control of a brokerage firm or its employees. For such cases, Rule 12512 allows arbitrators to issue subpoenas. Under Rule 12512, only arbitrators are permitted to issue subpoenas for both parties and non-parties, whether for discovery or for appearance at a hearing. Although Rule 12512 authorizes the use of subpoenas, it also states that "to the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas."

Parties may make written motions requesting the arbitrator to issue a subpoena to a party or a non-party:

- Parties will send their requests for issuance of a subpoena to FINRA and to all parties at the same time and in the same manner. The request must be in the form of a written motion and must include a draft subpoena.
- If another party objects to the scope or propriety of the subpoena, that party must - within 10 calendar days of service of the motion - file written objections with FINRA, with an additional copy for the arbitrator, and must serve copies on all other parties at the same time and in the same manner as on FINRA.
- The party that requested the subpoena may respond to the objection within 10 calendar days of receipt of the objections.
- Once FINRA receives either all of the responses or the deadline to respond has passed, staff will forward the subpoena and the responses to the selected arbitrator for ruling.
- After considering timely objections, the arbitrator responsible for deciding discovery-related motions will rule promptly on the issuance and scope of the subpoena.
- Arbitrators will use their discretion to determine whether or not to issue a subpoena, and whether or not to limit the scope of the subpoena before it is issued.

After the requesting party receives subpoenaed documents from a non-party, the requesting party must notify all other parties within five calendar days of receipt. If another party requests copies of documents that were received in response to a non-party subpoena, the party that requested the documents must provide the copies within 10 calendar days.

These same principles apply equally when arbitrators are reviewing challenges to subpoenas issued to third parties.

Concerns about confidentiality and privilege might also be raised regarding subpoenas issued to non-parties. Pursuant to Rule 12512, a non-party may file an objection to a subpoena served upon the non-party. The arbitrator may set up a conference call with a non-party and the parties to discuss the non-party's objection to the subpoena. Staff advises the non-party and the parties of the arbitrator's decision. Non-parties also may ask the arbitrators to resolve questions concerning who pays the costs incurred as a result of producing subpoenaed documents.

Unlike orders of appearance for FINRA members, subpoenas may only be issued within geographic limits set by local or state law. For example, in some jurisdictions, you cannot compel the attendance of a witness living or working more than 40 miles from the hearing location.

Let's review examples of requests for orders of appearance and subpoenas.

Rule 12512: http://www.finra.org/finramanual/rules/r12512

Test Yourself

During a prehearing conference, Jack Donaldson, counsel for the claimant, informs you that he will be requesting orders of appearance for eight of the Respondent Tal Jones Securities' registered persons. Respondent objects. What steps might you take? Why?

Question Feedback

You would ask the claimant's counsel why eight witnesses are necessary and determine whether the testimony of the witnesses is cumulative, that is, only adding to or corroborating other testimony.

You could ask whether the respondent would produce the registered persons without an order. According to Rule 12512 of the Code, parties should cooperate in producing witnesses. You could direct Tal Jones' counsel to make the witnesses available.

Test Yourself

Assume that Tal Jones Securities' counsel replied that he would make seven of the eight registered persons available, but that the other individual moved 500 miles away to a neighboring state where he works for another FINRA brokerage firm. What questions might you ask? Why?

Question Feedback

Initially, you would want to know what information the claimant sought from the witness and whether his testimony was necessary. If the information was necessary, ask counsel whether there was a less burdensome way to obtain it, such as telephonic testimony or stipulations of fact.

If you determine the testimony is more critical than the burden of appearing at the hearing, order his appearance pursuant to Rule 12513.

Test Yourself

If the individual was not employed in the securities industry, could you subpoena him or her to appear? Why or why not?

Question Feedback

It is doubtful a witness in another state could be compelled to travel 500 miles to a hearing. If the claimant's counsel requests a subpoena, ask her to provide the statutory authority behind the request.

While issues involving subpoenas and orders of appearance are becoming more common, you can limit disagreements by emphasizing to the parties that you expect them to produce documents and make available witnesses who are under their control. Problems still may occur, however, most parties want to cooperate with an arbitrator and will attempt to comply with your request.

Now, let's look at other procedural issues related to discovery.

Other Procedural Matters

If you are the arbitrator selected to facilitate discovery, particularly in large or complex cases, you can do so by ruling on procedural matters. These matters may include:

- stipulations of uncontested facts;
- requiring advance identification of exhibits;
- exchange of witness lists;
- estimating the length of a case; and
- establishing a discovery schedule.

As the selected arbitrator, you may establish rules that can expedite the arbitration proceedings. Normally, you'll only make such determinations following a prehearing conference with the parties.

If a *pro se* party (a party representing himself or herself and appearing without legal representation) is involved, you might become more involved in the discovery process to help move the case along. For example, you might provide specific dates for document requests, responses, and any replies to those requests. However, you must always remain impartial and never become an advocate for any party.

As you have seen, there are a number of gray areas in the discovery process. While ruling on each motion based solely on the papers submitted is desirable, it is not always possible. Hearing the parties may increase your understanding of the key issues of the dispute.

Before we review how to conduct a prehearing conference on issues requiring additional information or clarification, let’s review sanctions.

Discovery Sanctions

While Rule 12513 of the Code authorizes the selected arbitrator to direct an appearance, Rules 12212 and 12511 provide the full panel with the authority to enforce orders. Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:

- failing to comply with the discovery provision of the Code, unless the panel determines that there is substantial justification for the failure to comply; or
- frivolously objecting to the production of requested documents or information.

Rule 12513: http://www.finra.org/finramanual/rules/r12513

Rule 12212: http://www.finra.org/finramanual/rules/r12212

Rule 12511: http://www.finra.org/finramanual/rules/r12511

Sanctions

Under Rule 12212, the panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by law, sanctions may include, but are not limited to:

- assessing monetary penalties payable to one or more parties;
- precluding a party from presenting evidence;
- making an adverse inference against the party;
- assessing postponement and/or forum fees;
- assessing attorneys' fees, costs and expenses;
- initiating a disciplinary referral; and
- dismissing with prejudice a claim, defense, or proceeding (see Rule 12513).

If assessing monetary penalties, remember to instruct parties to make them payable to one or more parties. Monetary penalties should not be made payable to FINRA as FINRA is not a party to the arbitration. Awards containing monetary sanctions payable to FINRA are inappropriate.

Arbitrators may also consider these sanctions to address a respondent's failure to sign and submit a Submission Agreement (SA), absent a specific jurisdictional challenge.

Pursuant to Rule 12302, claimants must submit the SA when filing the Statement of Claim; FINRA will not serve the claim until the claimant submits the signed SA. According to Rule 12303, Respondents must file a signed and dated SA within 45 days of receipt of the Statement of Claim.

As stated in *Notice to Members* 04-11, a party's failure to sign and submit the SA may cause confusion, lead to ancillary litigation, and undermine the enforceability of arbitration awards. For example, Section 13 of the Federal Arbitration Act (FAA) requires that a motion to confirm an arbitration award must include the parties' agreement to arbitrate. Although the claimant may be able to demonstrate that the respondent that failed to execute an SA was nonetheless required to arbitrate pursuant to FINRA rules, failure to execute the SA can unnecessarily hinder the ability of a claimant to seek confirmation of an award pursuant to Section 13 of the FAA.

In the IPHC Script, FINRA asks arbitrators to remind the parties of their requirement to sign and submit the SA. After the arbitrators acknowledge all pleadings, the script provides:

> *If one of the parties has failed to submit a signed Submission Agreement, please advise the parties of the following:* "Any party that has not yet filed a Submission Agreement or otherwise objected to jurisdiction must do so within 30 days or may be subject to sanctions as provided in the Codes of Arbitration Procedure (Codes)."

Occasionally, you will need clarification from the parties before ruling on a request. You may have FINRA coordinate a telephonic conference with the parties to discuss any outstanding issues. Next we will learn how to prepare and conduct a prehearing conference.

Notice to Members: http://www.finra.org/Industry/Regulation/Notices/2004/P003272

IPHC Script: https://www.finra.org/sites/default/files/iphc_script_800February_18.pdf

Schedule a Prehearing Conference

As we just discussed, you may become involved in the discovery process in two ways:

- by request of a party; or
- by your own initiative as the selected arbitrator.

In most instances, you will be asked to resolve a dispute by one of the parties who will generally file a motion to compel. After reading the motion, response, and any reply, you must ask yourself whether you can resolve the issue based on the written information before you. If you do not fully understand the facts in dispute or believe a discussion with the parties will help clarify the issues, schedule a prehearing conference.

Once you determine that a prehearing conference is necessary, the steps you'll take to schedule a hearing include:

- contacting FINRA staff and providing dates you're available;
- requesting FINRA staff to contact the parties and identify a mutually agreeable time. Do not directly contact the parties; and
- having FINRA staff inform you and the parties of the scheduled prehearing conference.

Because of time and expense, most prehearing conferences are generally handled by teleconference.

Test Yourself

When might you request an in-person prehearing conference? Why?

Question Feedback

You might request an in-person prehearing conference when you and party representatives are located in the same general location and the discovery issues are unusually complicated. It is often easier to control an in-person prehearing conference than a teleconference. In most cases, though, teleconferences provide the most efficient method of resolving discovery disputes.

Conduct a Prehearing Conference

As we just discussed, FINRA staff will inform you of the specific time the prehearing conference call will occur. Steps you'll take to conduct a prehearing conference include the following:

- prepare for the prehearing conference;
- manage the prehearing conference;
- rule on the issues; and
- communicate the results of the prehearing conference to FINRA staff in writing, who will in turn forward your ruling to the parties and other panel members.

Let's review each step in more detail.

Prepare for the Prehearing Conference

In most cases, you will have the motions, responses, and any replies of the parties prior to the prehearing conference. These papers, along with the pleadings, will help you identify the issues that must be addressed during the conference.

When you read the pleadings, motions, responses, and any replies, list the issues you've identified on a notepad. Then, when you discuss the issues with the parties during the prehearing conference, identify the moving or requesting party beside each issue. Once you have identified the issues, determine the sequence in which you and the parties can logically and efficiently discuss those issues. Arbitrators presiding at prehearing conferences should always give consideration to the oral arguments set forth by parties, as well as the documentary information provided prior to the conference.

It is important to be well prepared for the prehearing conference, because thorough preparation conveys an appearance of competence and objectivity and sets the tone for the entire case. It also makes the conference more efficient.
Now that you've prepared for the prehearing conference, let's review the steps you'll take to manage it in a fair and impartial manner.

Manage the Prehearing Conference

In most prehearing teleconferences, the only individuals who will discuss the issues are party representatives and the selected arbitrator. Even with such a limited number of speakers, controlling a teleconference can be difficult.
To begin the process, an operator will connect you to the conference call. Be careful not to discuss any matters until all parties are on the line. This is very important. We will discuss this more carefully when we examine *ex parte* communications later in the course.

To assist you with the procedural aspects of the prehearing conference, please refer to the Arbitrator's Guide.

Arbitrators Guide: http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Manage the Prehearing Conference (Continued)

You'll begin the conference by asking the individuals on the line—and those listening to the conference—to identify themselves. If numerous individuals are participating, or their voices are not distinct from one another, request that speakers identify themselves each time they speak.

Preliminary information you will provide the participants includes:

- case name and number; and
- a request that the parties confirm their acceptance of you as the arbitrator for purposes of the prehearing conference.

Once you have dispensed with the preliminary matters, you'll facilitate a discussion of the issues. Keep in mind that you do not have the independent authority to decide dispositive motions (e.g., motions to dismiss all or part of a case). If a dispositive issue arises, tell the parties it will be tabled until the full panel convenes.

Managing a prehearing conference is not unlike managing the hearing itself. The moving or requesting party initially explains the action or ruling requested. Then the opposing party responds, followed by a short rebuttal, if necessary.

After the parties have completed their presentations, ask questions if you need to identify or clarify an issue. Make sure your questions are presented as questions and not as statements. Proper demeanor in questioning provides an appearance of neutrality.

There are times during a prehearing conference when you may feel more like a mediator than an arbitrator. Whenever possible, you should assist the parties in reaching agreements among themselves rather than issuing orders.
If an agreement can't be reached, decide whether you agree with the moving party's position, the opposing position, or somewhere in between.

Test Yourself

Counsel for Seaside Securities, Dana Franklin, asks you to order the opposing party, customer Jack Bridge, to produce bank statements over the past five years. Mr. Bridge's counsel objects based on relevance and that many documents no longer exist. You have scheduled a prehearing conference for tomorrow morning.

What documents would you read to prepare for the prehearing conference? Why?

Question Feedback

You would read the pleadings, motions, responses, and any replies to try to identify the issues involved and determine whether Mr. Bridge's bank statements could lead to relevant evidence on these issues.

Test Yourself

After listening to Ms. Franklin's arguments at the prehearing, you still have a number of questions you need to have answered prior to making a decision. Would you ask your questions now? Why or why not?

Question Feedback

In general, you would allow the opposing counsel to make his or her arguments before asking questions. By waiting, you'll provide an appearance of neutrality and will not unduly interfere with the presentation of Mr. Bridge's case. You also might learn additional facts that will either resolve your questions or make future questions more focused.

After listening to both sides and then clarifying any issue with questions as necessary, you will make your ruling.

Rule on the Issues

You now understand the facts required to make a ruling. Frankly, whether you are confident of your decision or not, you are the authority. Be polite, but firm. Do not allow the parties to debate an issue once you have ruled.

Take clear notes of your orders as they are made. If an order requires more details than a statement of "granted" or "denied," read your written order to the parties to ensure that there is no confusion regarding the precise wording. Your rulings should be specific and clear.

After you have conducted the prehearing teleconference on the issues raised by the parties and still have everyone on the call, you may set a few additional rules for the upcoming hearing. In addition to the topics considered during the prehearing discovery conference, you may cover:

- offering stipulations to uncontested facts;
- providing lists of witnesses; and
- pre-marking all exhibits.

Test Yourself

In response to a request, you determine that the claimant must turn over certain records to the respondent. What information should you include in your ruling?

Question Feedback

You will want to specify:

- which records will be produced;
- the relevant time frame;
- locations where the records will be produced;
- dates by which the records will be produced; and
- who bears the cost of production, if necessary.

Test Yourself

Why do you believe it is important to be firm with your rulings even if you believe they fall within a gray area?

Question Feedback

It is important that the parties know you are in control of the hearing. Unless a representative has an additional argument for you to consider, do not allow him or her to reargue issues already decided. If you fail to be firm, the parties will likely challenge many or all of your future decisions.

Test Yourself

What steps can you take to ensure all parties understand your ruling?

Question Feedback

You can make your ruling during the prehearing conference, and then restate it along with all your other rulings at the end of the teleconference. Finally, you'll want to document your ruling in a written order.

Once you have discussed all of the issues, ask the parties whether they have any other issues they would like to discuss before you end the conference. If there are no further issues to discuss, thank the parties for their participation and hang up. If the full panel is participating in the teleconference, be absolutely certain that the parties are off the line before you begin your panel discussions.

The final step to a prehearing conference is documenting your decisions in a prehearing order. We'll briefly review that step next.

Communicate the Prehearing Conference Results

While the information is fresh in your mind, document the decisions you made. You already have clear notes of your rulings, so if time allows, listing your findings in an order should be relatively easy. You may also request that a party's counsel submit a draft order that you can either adopt or modify.

Once you have prepared an order, immediately fax, mail, or email a copy to the assigned FINRA staff member. Upon receipt, staff will copy and forward your order to the parties and to the other panel members.

As you may recall, however, not all of the issues will necessarily have been decided. In some cases, parties file motions that impact the status of the case. For these types of motions, a full panel must be consulted. We will review dispositive motions in the next lesson. But first, complete the following practice exercises on discovery issues.

Test Yourself

Registered representative Janet Evans alleges that her manager, Pete Posten, used sexually inappropriate language in her presence, forcing her to resign her position. Ms. Evans's attorney requested the personnel files of all registered persons who had resigned within the last five years. Firm's counsel objected based on relevance and the burden of producing the documents.

What steps would you take in this situation? Why?

Question Feedback

You may find that the likelihood of the request leading to the discovery of admissible evidence appears limited. The burden of the request also appears high. The personnel files of only those employees who had resigned and complained formally or informally of sexual harassment would more likely lead to relevant evidence and provide a lesser burden to the firm. Ordering the release of these files, however, creates confidentiality issues regarding the former employees.

Based on the complexity of the issue, you probably would schedule a prehearing conference.

Test Yourself

Respondent's counsel drafts a subpoena for Second Bank to obtain the claimant's bank records over the past three years. The respondent sends a copy of the subpoena to the claimant and FINRA.

The claimant files an objection with FINRA based on relevance and privacy. What steps would you take to resolve the issue? Why?

Question Feedback

You might take the following steps:

- review the pleadings to determine the nature of the claim;
- determine whether the bank records are relevant or could reasonably lead to relevant evidence about the claim; and
- determine whether the objecting party has demonstrated that the cost or burden of production is disproportionate to the need for documents.

Test Yourself

If the original claim was based on the suitability of the broker's recommendations, would you sign the subpoena?

Question Feedback

Depending on the facts of the case, you would identify the specific issue for which the respondent was seeking evidence and determine whether equally relevant but less intrusive documents could be used.

Ultimately, you must consider and balance the privacy rights of the claimant against the relevancy of the documents being sought.

You also may order that certain documents be kept confidential, and the originals and all copies be returned to the producing party at the conclusion of the case.

Test Yourself

Instead of issuing a subpoena to a third party, you are asked to order the claimant to turn over certain records. Specifically, what type of information will you identify in the order?

Question Feedback

You will want to identify:

- specific records;
- time frame of the records;
- location where the claimant needs to deliver the records;
- date by which the records are to be delivered; and
- party responsible for paying the costs of copying and delivering the records.

Lesson Summary: Manage the Prehearing Process

In this lesson, you learned to manage the prehearing process. You also learned how to identify situations in which you may need to manage the discovery process. Specifically, you learned to:

- conduct the IPHC;
- rule on requests based on the papers;
- schedule a prehearing conference; and
- conduct a prehearing conference.

In the next lesson, we will review rulings that no single panel member—even the chairperson or selected arbitrator—can make unilaterally, but for which you need a majority of the full panel.

Introduction to Lesson: Deliberate on Specific Motions

Although one arbitrator can rule on many prehearing requests and motions unilaterally, the entire panel must consider certain issues.

In this lesson, we'll review those requests and motions the entire panel must determine. Specifically, we'll look at the following requests to:

- dismiss a claim;
- deny the forum;
- postpone or adjourn a hearing;
- sever or consolidate claims;
- change the location of a hearing;
- bar a party from presenting facts or defenses; and
- motions in limine.

Some commonly used terms you will see in motions are:

- **Case-in-chief**: the main case presented by the party who filed the statement of claim, through the use of documentation, evidence and witnesses at an arbitration hearing.
- **Moving party**: party making a request for a ruling or order.
- **Non-moving party**: party that is the subject of the opponent’s motion.
- **Motion papers**: written request for a ruling or order.
- **Response**: written opposition to the motion of another party.
- **Reply**: a party's written response to the non-moving party's response to a motion.
- **With prejudice**: a ruling that prevents a party from refiling a claim.
- **Without prejudice**: a ruling that does not interfere with a party’s right to refile a claim.

Motions to Dismiss

A motion to dismiss is a request made by a party—prior to or after the conclusion of the case-in-chief—to the arbitrator(s) to extinguish some of all claims raised by the party filing a claim. Under the Code, there are three types of motions to dismiss:

- **Rule 12504(a) Motions**: motions to dismiss filed before a hearing on the merits (i.e., prehearing motions) or motions filed during the hearing on the merits but before a party has concluded its case-in-chief.

- **Rule 12504(b) Motions**: motions to dismiss made after a party has concluded its case-in-chief.

- **Rule 12206(b) Eligibility Motions**: motions to dismiss based on eligibility grounds.

Rule 12504(a) Motions to Dismiss Before a Party Concludes its Case-in-Chief

FINRA believes that parties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and should be granted only under limited circumstances. According to Rule 12504(a), the panel cannot act upon a motion to dismiss a party or claim, unless the panel determines that:

1. the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or
2. the moving party was not associated with the account(s), security(ies) or conduct at issue.

If a party files a motion to dismiss on multiple grounds, including eligibility, the panel must decide eligibility first (see Rule 12206). If the panel grants the motion to dismiss on eligibility, it must not rule on any other grounds for the motion.

A party must file a Rule 12504(a) motion in writing, separately from the answer, and only after filing the answer. Such motions must be filed at least 60 days in advance of the hearing, and the other parties will have 45 days to respond. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response. FINRA staff will forward motions, responses, and any replies to the full panel for review.

Not only do these motions require the input of the entire panel, but the panel must also hold a hearing before it grants a Rule 12504(a) motion, unless the parties waive the hearing. If the panel grants the motion, the decision must be unanimous and accompanied by a written explanation. If the panel denies the motion to dismiss, a party may not refile it, unless specifically permitted by panel order.

If the panel grants a Rule 12504(a) motion and dismisses all claims, the panel must complete the following tasks:

- render an award under Rule 12904; and
- allocate forum fees and costs among the parties.

Fees, Costs and Sanctions

If the panel denies a Rule 12504(a) motion, the panel must assess forum fees against the party who filed the motion. If the panel deems the motion frivolous, it must also award reasonable costs and attorneys' fees to the party who opposed the motion. If the panel determines that a party filed a motion to dismiss in bad faith, it may issue sanctions under Rule 12212 of the Code.

The panel should ask the parties to provide briefs if it needs additional information to decide a Rule 12504(a) motion to dismiss. Now, we'll look at Rule 12504(b) motions to dismiss **after** the claimant has presented his or her case-in-chief.

Rule 12504(a): http://www.finra.org/finramanual/rules/r12504

Rule 12504(b) Motions to Dismiss After a Party Concludes its Case-in-Chief

The restrictions set forth in Rule 12504(a) do not apply to Rule 12504(b) motions to dismiss after a party concludes his or her case-in-chief. After the claimant has presented his or her case—all documentary evidence and testimony—the respondent may ask the panel to dismiss the claim on the grounds that the claimant failed to prove the allegations in the statement of claim or failed to prove a right to recovery. Generally, these motions are made orally after the claimant's presentation at the hearing.

When ruling on motions to dismiss after a claimant has concluded his or her case-in-chief, always view the evidence in a light most favorable to the claimant. If the claimant has presented credible evidence to support a recovery, you should deny the motion. However, if the testimony and documents do not support any possible recovery, the panel may grant the motion to dismiss the claim.

Both sides have invested a lot of time and effort in the arbitration. Be sure that all parties had a full opportunity to argue the motion to dismiss. Consider the following issues before granting a motion to dismiss:

- Did the claimant have the chance to call all witnesses? Why or why not?
- Did the claimant meet his or her burden of proof? When determining this, remember to look at all evidence presented in the light most favorable to the claimant. *For more information about the appropriate standard of proof in arbitration, please refer to Module 3: Decide the Outcome of the Case of these training materials.*
- Does the claimant have any further witnesses, evidence or testimony to offer?

You may direct the respondent to present his or her case, even if the claimant's case is weak and the respondent's motion has some validity.

If the panel dismisses the claim after the presentation of the claimant's case, the panel must still complete the following tasks:

1. render an award under Rule 12904; and
2. consider how to allocate forum fees and costs among the parties.

Although Rule 12504(b) does not provide specific guidance on assessing fees and costs, it does not prevent a panel from issuing sanctions under Rule 12212 of the Code if it determines that a party filed a motion to dismiss in bad faith.

Test Yourself

At the end of the claimant's presentation, the respondent moves to dismiss the case. What should the panel do before ruling?

Question Feedback

First, explain that the panel wishes to analyze the motion carefully. Ask the claimant if he or she has any more witnesses, evidence or testimony to offer or wishes to respond to the motion to dismiss. After listening to all arguments, the panel should deliberate and make a ruling.

Rule 12206(b) Eligibility Motions

A respondent may file a motion to dismiss a case because of eligibility under Rule 12206 of the Code. Rule 12206 states that no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. Rule 12206 further clarifies that the full panel will resolve any questions regarding eligibility of a claim.

The Rule has several procedural requirements:

- A party must file an eligibility motion in writing, separately from the answer, and only after filing the answer.
- A party must file the motion at least 90 days before a hearing, and the other parties have 30 days to respond. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.
- FINRA staff forwards the eligibility motion and all response and reply papers to the full panel for review.
- If a party files a motion to dismiss on multiple grounds, including eligibility, the panel must decide eligibility first.
- If the panel determines that a claim was filed after the six-year eligibility cut-off and grants the eligibility motion, it cannot rule on any other grounds for dismissal.

The panel determines whether a claim meets the six-year eligibility requirement by reviewing the submissions, pleadings and arguments of the parties and giving the parties an opportunity to conduct discovery if requested. If the arbitrators have additional questions about the eligibility of the claim, they should ask the parties to brief the issue. The arbitrators may find that there is a continuing occurrence or event giving rise to the dispute. For example, although a customer purchased stock 10 years ago, there are allegations of ongoing fraud starting with the purchase, but continuing to a date within six years of the date the claim was filed.

If the panel dismisses a claim on the grounds of eligibility, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all claims, including the dismissed claim, in court. Before dismissing a claim, however, the arbitrators should carefully consider each party's positions in their moving, response, and any reply papers and oral arguments. If the panel reaches a unanimous decision to grant the eligibility motion, it should inform FINRA of its ruling promptly and provide a written decision.

If the panel **denies** an eligibility motion, the panel must assess forum fees associated with any hearings on the motion against the moving party. If the panel deems that an eligibility motion was frivolous, the panel must award reasonable costs and attorneys' fees to any party that opposed the motion. If the panel determines that a party filed an eligibility motion in bad faith, it may issue sanctions under Rule 12212.

Rule 12206: http://www.finra.org/finramanual/rules/r12206

Statutes of Limitations

Although the six-year eligibility rule resembles a statute of limitations, it is separate from any state and federal limitation periods for filing a claim.

Even though a claim is filed within the six-year eligibility period provided in the Code, federal or state statutes of limitation may preclude a monetary award for events occurring during that six-year time period. A statute of limitations is a time limit after which a claim may not be brought. For example, some states have a two-year statute of limitations for breach of contract claims. Whether or not statutes of limitation are applicable to the arbitration or the claim and the length of any applicable statutes depends on the nature of the allegations and the law of the relevant jurisdiction. You may ask the parties for instructions on these issues. Note that a statute of limitations may apply to one claim in a statement of claim but not to all the claims.

If a statute of limitations applies to a particular claim, you must also consider whether certain circumstances have tolled or extended the statute. A statute of limitations can be tolled for legal and equitable reasons. Examples of such reasons are concealment of wrongdoing by a party; continuing wrong or misrepresentation; or filing of a prior legal action. In addition, the date on which the statute of limitations begins to run sometimes depends upon the date that a party discovered, or should reasonably have discovered, the alleged wrongdoing. Again, you should look to the parties for instructions on these issues. If you find that a statute of limitations applies and, therefore, bars a claim, you should dismiss the claim with prejudice. And remember to consider the statute of limitations argument separately for each claim as different claims are subject to different limitations periods.

Deny the Forum

Most securities firms today incorporate a predispute arbitration clause in their customer agreements. Predispute arbitration clauses generally state that the firm and customer agree to resolve securities-related disputes in arbitration. Customers who have not agreed to arbitrate their claims may request dismissal of the action in favor of remedies in the courts.

By virtue of its membership in FINRA, a firm is required to arbitrate all disputes filed by customers whether it has contractually agreed to do so or not. Associated persons (employees of FINRA brokerage firms) are likewise required to arbitrate.

In addition to a lack of a contractual obligation to arbitrate disputes, parties may argue that arbitration is not the proper forum to hear the case. Issues you may see with respect to forum selection include:

- class actions; and
- failure to obtain jurisdiction over a necessary party.

Let's briefly look at each issue.

Class Actions

At times, an individual's claim may be one of many involving a specific member, registered person, and/or security. Under Rule 12204, any claim submitted as a class action is not eligible for arbitration. When a claim is certified as part of a class action by a court of law, each claimant must determine whether he or she wants the claim heard as part of the class or as a separate action against the respondent.

To opt out of a class action, parties generally sign a form stating they do not want their case included in the action and send it to the class representative.

In class actions, parties can show their intention to opt out of a class before the class is certified. A party's intention can be evidenced by an affidavit, pleadings or other document indicating that the party wants to proceed in arbitration and intends to opt out of the class action if and when it is certified. For an arbitration to proceed, it is generally not necessary for a court to approve a customer's intention to opt out where a class has not been certified.

Rule 12204: http://www.finra.org/finramanual/rules/r12204

Test Yourself

Claimant Neil Bunting filed for arbitration alleging misrepresentation in the purchase of certain securities from J&B Securities. J&B Securities, the respondent, argued the panel should dismiss the arbitration because Bunting is a member of a certified class action filed in federal district court against J&B Securities and other firms.

What questions should the panel ask prior to determining whether Bunting's case should be dismissed?

Question Feedback

The panel members should read the pleadings, motions, responses, and any replies and determine:

- whether Mr. Bunting's claims fall within the class action's claims; and
- whether Mr. Bunting has opted out of the class.

Test Yourself

Assume that Claimant Larry Lippold filed his claim against his broker before a court certified the class. Once the court certified the class, Mr. Lippold told the panel and the respondent that he would opt out of the class action to continue with the arbitration. At the hearing, respondent files a motion to dismiss based on the fact that Mr. Lippold failed to opt out of the class action in court.

What questions would you ask to determine whether you should continue with the arbitration?

Question Feedback

The panel should ask Mr. Lippold for proof that he opted out of the lawsuit.

Test Yourself

If Mr. Lippold did not have proof that he opted out of the class, but stated that he had, in fact, done so, what actions might you take? Why?

Question Feedback

If Mr. Lippold was unable to provide the information, the panel should adjourn. If proof is not provided within a reasonable period of time, dismiss the case without prejudice. Of course, be sure you forward your rulings to FINRA.

Failure to Obtain Jurisdiction over a Necessary Party

As we discussed earlier, most firms require customers to sign a predispute arbitration agreement before they enter into a business relationship. At times, however, individuals who are necessary parties to a case have not signed such agreements.

When these circumstances occur, you must determine whether it is more equitable to hear some of the issues in arbitration or whether the entire case should be heard in court.

Rule 12700 authorizes arbitration panels to dismiss actions on their own initiative or at the request of a party. Dismissals under this rule may be with or without prejudice, depending on the request of the parties.

Rule 12700: http://www.finra.org/finramanual/rules/r12700

Test Yourself

Assume that Claimant Mary Sandoval, who signed a predispute arbitration clause with Respondent Baker & Baker Brokerage, Inc., provided Edgar Bennett with power of attorney to conduct business with Baker & Baker.

Baker & Baker files a motion to dismiss the arbitration asserting Mr. Bennett orchestrated all of the wrongdoing. Respondent further asserts it cannot file a third party claim against Mr. Bennett in arbitration because he never signed a predispute arbitration agreement relating to this controversy.

Should the panel dismiss the case? Why or why not?

Question Feedback

Because the power of attorney did not bind Mr. Bennett to arbitration, the panel members must determine whether it would be more equitable to hear Ms. Sandoval's claim against Baker & Baker in arbitration, or have the entire case heard in court.

Rule on Other Motions

Now that we've reviewed motions to dismiss, we will go over other common motions that require review.

Specifically, we'll review requests to:

- adjourn or postpone a hearing;
- sever or consolidate claims;
- change the location of a hearing;
- bar a party from presenting facts or defenses; and
- motions in limine.

The first motion we'll review is the most common: a motion to adjourn or to postpone a hearing.

Adjourn or Postpone a Hearing

Rule 12601 authorizes arbitrators to adjourn any hearing on their own initiative or at the request of a party. While the rules do not limit the number of times the arbitrators may postpone a hearing, arbitrators should be mindful that one of the goals of arbitration is to provide a speedy method for resolving disputes. The arbitrators' role is to bring the parties' disputes to a fair and expeditious conclusion so arbitrators should refrain from postponing hearings on their own accord whenever possible.

The reasons parties request postponements include, but are not limited to, the following:

- retaining counsel;
- completing discovery;
- attempting to settle the case;
- death or illness of a witness; and
- unavailability of a witness, party, or counsel.

Rule 12601:http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Consensual Motions to Postpone

Rule 12601 allows for postponements by agreement of all parties. This type of postponement will not be forwarded to the panel for ruling. If all parties agree to a postponement, the hearing shall be postponed.

Whether all parties consent to the postponement or not they still must provide information on other mutually available dates.

Under Rule 12601, if all parties jointly request or agree to more than two postponements, the panel may dismiss the arbitration without prejudice.

Contested Motions to Postpone

When parties request a postponement without the agreement of all parties, the panel may not grant a postponement request made within 10 days of a scheduled hearing session, unless the panel determines that good cause exists. FINRA will forward to the panel a postponement request, and any objection, when the requesting party provides all of the following information:

- reason for the request; and
- four sets of hearing dates that are mutually available to the parties.

The Arbitrator's Guide recommends that the panel consider the following factors before ruling on a postponement request: the fairness to the parties, the number of prior postponements, the burden placed on the parties, and the panel's ability to conduct a productive hearing.

The panel should also consider whether the party or parties had information, which formed the basis for the request at an earlier time so that they could have avoided the need to request a postponement.

The Arbitrator's Guide: http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Rule 12601: http://www.finra.org/finramanual/rules/r12601

Test Yourself

Five days before a scheduled hearing session, Gary Howe, counsel for Claimant Charles Johnson, requests a postponement because his key witness has fallen ill. The Respondent objects to the request.

Should the panel grant the postponement? Why or why not?

Question Feedback

Under Rule 12601, the panel may not grant a postponement request made within 10 days of a scheduled hearing session unless good cause exists. In this case, the panel should consider the arguments made by both parties and determine whether good cause exists.

If in this case both parties agree to the postponement, the hearing would be postponed, and no ruling from the panel would be necessary. Even though the request was made within 10 days of the hearing, the hearing would be postponed under Rule 12601(a)(1), and no finding of good cause by the panel would be necessary.

Test Yourself

Thirty days before a hearing, the respondent requests that the hearing be postponed because the claimant failed to produce all of the documents she requested.

What information would the panel need to rule on this request?

Question Feedback

The panel needs to determine whether the documents the claimant failed to provide were significant or not. If you determine the respondent would be unable to present a proper defense because of this failure to produce, you would grant the motion.

Although the respondent, as the party that filed the motion, would be required to pay the postponement fee, the panel could assess the fee against the claimant if it determines the claimant caused the delay.

Sever or Consolidate Claims

As was the case with your decision to postpone a hearing, the panel will grant or deny a motion to sever or consolidate a claim based on equitable principles.

A *motion to sever* occurs when a party wants to have a claim heard separately from another claim.
A *motion to consolidate* occurs when a party wants a claim heard at the same hearing as another claim.

Motions to sever or consolidate claims tend to be fact-specific. Your decision may be influenced by at least the following two factors:

- Would it be efficient to hear more than one claim at the same hearing?
- Would it prejudice a party's case if all claims were heard together?

Rules 12312-12314 of the Code list a number of situations in which efficiency is served by consolidating claims involving the same firms, brokers, and/or securities. On the other hand, if hearing all of the claims together might prejudice one of the parties, the panel might decide the claims should be heard separately.

In most cases, FINRA will make the initial determination as to whether cases will be consolidated or severed. The parties, however, have the right to raise the issue with the panel.

Rules 12312-12314: http://www.finra.org/finramanual/rules/r12312

The Code: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Test Yourself

Siblings Jack, Jill, Peter, and Beth Blakey all purchased Magic Carpet securities from Axel & Sons Securities. After the stock crashed, they all filed for arbitration based on alleged misrepresentations involving the risk of the securities. Furthermore, the same broker made all the alleged misrepresentations at the same time to all claimants.

If the Blakeys asked to consolidate their claims, would you grant their request? Why or why not?

Question Feedback

Efficiency would probably support the consolidation of the similar claims.

Test Yourself

Assume for the moment that in addition to the claim of misrepresentation, Beth Blakey also alleged that based on her financial situation, the securities purchased were unsuitable. None of the other siblings made this claim.

Would this change your opinion as to whether the panel should consolidate the claims? Why or why not?

Question Feedback

The addition of this one claim would probably not change your support for consolidation. The common questions of law and fact could still be determined more efficiently at one hearing.

Even if the panel decides to consolidate claims, it can still order that the claimants testify one at a time and not discuss their testimony with the other claimants. We will discuss hearing testimony in the next module.

Change the Location of a Hearing

FINRA selects the location and time for the initial hearing. In most cases, public customer cases are heard at the location closest to where the customer resided at the time of the controversy. However, Rule 12213 authorizes arbitrators to change the hearing location established by FINRA.

If all parties agree to change the location, the panel should grant the motion.

Rule 12213: http://www.finra.org/finramanual/rules/r12213

Test Yourself

Claimant Ray Bradbury files a motion to move the hearing from Los Angeles to San Diego, where he presently resides. Along with his request, Mr. Bradbury attaches his doctor's letter indicating that Mr. Bradbury is undergoing radiation treatments and should not travel outside the city. Respondent objects to the motion because moving the hearing is a burden.

Should the panel move the location of the hearing?

Question Feedback

If Mr. Bradbury is unable to travel, the panel would probably agree to the change. If the doctor's note lacks specificity, however, the panel might ask the claimant to provide additional information.

Bar a Party from Presenting Facts or Defenses

Rule 12303 of the Code requires respondents to answer allegations within 45 calendar days of receiving a statement of claim. If a respondent misses the deadline, the arbitrators can bar him or her from presenting defenses or facts at the hearing.

Rule 12207 allows parties to agree in writing to extend or modify the deadline to serve an answer. Absent such an agreement, if a respondent does not answer within the time period specified in the Code, the panel may, upon motion, bar that party from presenting any defenses or facts at the hearing.

The panel's determination on whether to bar late defenses is based on equitable factors, including:

- reason for the delay;
- length of the delay; and
- whether the late filing prejudices the claimant's ability to be prepared for the hearing.

The panel must exert control over the hearing, and ensure that all parties are required to "play on a level playing field." It is unfair to require one party to follow the rules without requiring the same from the other party.

Rule 12303: http://www.finra.org/finramanual/rules/r12303
Rule 12207: http://www.finra.org/finramanual/rules/r12207

Test Yourself

The respondent answered the claim 90 days after receipt. The claimant requested that all defenses in the answer be barred from the hearing. In response, the respondent stated she had been in an automobile accident and was unable to review the paperwork.

Should the panel bar the defenses at hearing?

Question Feedback

Absent a showing of prejudice to a claimant’s ability to prepare for the hearing, you would probably not bar the response. The panel could assess costs against the respondent if the hearing was postponed as a direct result of the late response.

Motions in Limine

A motion in limine is a request for the arbitrators to rule on the admissibility of evidence in advance of the hearing. Parties may try to include other issues for ruling when filing motions in limine, including requests to dismiss one or more of the alleged claims. Arbitrators should treat any requests for dismissal of claims as motions to dismiss and respond to them in accordance with FINRA's motion to dismiss rules. As with all motion practice, arbitrators should be alert to the possible misuse of motions as tactics to delay the hearing.

Ruling on Motions

As you have seen, many of the motions that panels review are based on equitable principles. You will see many of these equitable principles in the next module: Conducting a Fair and Impartial Hearing.

Before we move to the next module, however, complete the practice exercises to test your understanding of deliberating on dispositive and other motions.

Test Yourself

Claimant Dale Springer filed a Statement of Claim on September 7, 2008, in which he alleged his broker, Myrna Robertson, misrepresented the price of Pampered Pooch securities on August 19, 2004, and continued to misrepresent the price of the security through the end of that year.

At the end of Claimant Springer's case-in-chief, Ms. Robertson files a motion to dismiss the claim based on the state statute of limitations that bars cases involving misrepresentation filed more than three years after the transaction at issue.

If the state statute was clear about the three-year statute of limitations, should the panel dismiss the case? Why or why not?

Question Feedback

The panel should carefully review the respondent's and the claimant's briefs on the issue, as well as the pleadings. Because there is an allegation of continuing misrepresentation, the statute of limitations may have tolled beyond the three years; the statute may not have elapsed. The panel should seek additional information from the parties about applicable state laws, if necessary, before making a decision on the motion.

Test Yourself

If the respondent already argued the statute of limitations question in court, and the court affirmatively stated that the claim was within the limitations period, can the panel review the court's decision at the behest of the respondent?

Question Feedback

No. If so directed by a court of competent jurisdiction, the panel must conduct the arbitration. In contrast, if the court referred the issue to arbitration without comment, the panel could review the arguments and decide the statute of limitations question.

Test Yourself

Claimant Chad Burns filed a claim against his broker, Respondent Edward Roberts, for losses incurred in his account between March and July 2009. Respondent Roberts responded to the claim and filed a separate motion to dismiss. In his motion, Respondent Roberts states that he did not make the trades in dispute in Claimant Burns' account during the specified time period. Claimant Burns responds to the motion and provides documentation showing that Respondent Roberts was the named representative on the account during the time period in dispute. How should the arbitrators rule on Respondent Roberts' motion to dismiss?

Question Feedback

The panel should review the motion to dismiss and all reply papers carefully in preparation for the hearing. Because this is a Rule 12504(a) motion to dismiss, the full panel must hold a hearing before ruling on the motion and render a written explanation of its decision. Before ruling on the motion to dismiss, the panel must first determine whether (1) Claimant Burns previously released the claim in dispute by a signed settlement agreement and/or written release or (2) that the Respondent Roberts was not associated with the account, securities or conduct at issue before acting on the motion. Only if the panel finds that Respondent Roberts has met one of these conditions can it act on his Rule 12504(a) motion to dismiss.

Test Yourself

Brian Jones, the attorney for a party, faxes to FINRA a request to postpone a pending arbitration hearing that was scheduled to begin eight days from the day of his fax. The stated reason for the requested postponement is that one of Mr. Jones' key witnesses just informed him that he would not be available during the week of the hearing. The opposing counsel objects to the postponement request. Brian Jones claims that the witness' testimony will be a critical part of his case.

What steps should the panel take in this situation? Should it postpone the hearing?

Question Feedback

Rule 12601 requires the panel to find good cause to postpone a hearing if a request is made within 10 days of the first scheduled hearing session. In this case, the panel should weigh the factors, including:

- the reason(s) for the request;
- the fact the opposing party objects;
- whether this is a first request for a postponement;
- the ability to conduct a productive hearing if the request is denied;
- the burdens placed on the party opposing the postponement; and
- whether the requesting party knew or could have discovered the scheduling problem earlier.

The panel should consider the arguments of the parties and then reach a decision based on whether the requesting party has established good cause. If the panel grants the postponement, it must consult Rule 12601 and consider the issue of postponement fees. The panel may assess the moving party with the costs of and fees incurred by the objecting party as a result of the postponement.

Test Yourself

Billy and Maude Evanski lived in Boston when broker Chip Summers made numerous transactions on their behalf. Upon retirement, the Evanskis moved to Fort Lauderdale.

When the Evanskis filed a complaint against Mr. Summers for allegedly churning (excessive trading for the purpose of generating commissions) their account, the arbitration was scheduled for hearing in Boston.

The Evanskis now file a motion to move the hearing to Florida because it would be easier for them. Counsel for Mr. Summers objects, stating that the documents and witnesses are in Boston, and that the transactions were made there.

Should the panel move the location of the hearing to Florida or some other location? Why or why not?

Question Feedback

Without additional information from the claimants, the hearing should remain in Boston.

Lesson Summary: Deliberate on Specific Motions

In this lesson, you learned about motions requiring panel consideration and reviewed the analysis that would apply to each. Specifically, you learned to rule on several different types of motions, including dispositive motions.

Module 2: Conduct a Fair and Impartial Hearing

Introduction

In this module, you will learn how to conduct a fair and impartial hearing.

After completing this module, you'll be able to:

- Organize the hearing setting;
- Call the hearing to order;
- Let each party present its case; and
- Complete the hearing.

This module takes approximately two and half hours to complete. To help you complete this module, you may review the following materials on our Web site at www.finra.org:

- The Code
- Arbitrator's Guide

The Code: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Arbitrator's Guide: http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Introduction to Lesson: Organize the Hearing Setting

Before the hearing begins, you will perform several preliminary tasks to set the stage for a fair and efficient hearing. In this lesson, you'll learn the importance of:

- identifying the hearing participants;
- avoiding *ex parte* communications; and
- participating in the initial executive session.

So let's start with your first step: identifying the other individuals in the room.

Identify the Hearing Participants

When you first arrive at the hearing, you may find yourself in a room full of people you don't know. Because there may be multiple hearings being conducted in the same building, the first thing you should do is make certain that you are in the correct hearing room. If so, introduce yourself and then ask, "Are the other panelists here?" The other panel members should introduce themselves.

You and the other panelists should not address the parties directly because doing so-however harmlessly it is done-might create an appearance of bias. To maintain the appearance of neutrality, you must keep a formal demeanor.

The period just before the hearing is an especially risky time for inappropriate communications—especially if only one party has arrived. For the same reason, never address the parties or representatives by their first names. Any preliminary small talk with a party, beyond a simple introduction, must be avoided.

Let's look more closely at how and why you must avoid such communications.

Avoid Ex Parte Communications

Rule 12210 expressly prohibits *ex parte* communication. Specifically, no party, or anyone acting on behalf of a party may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

Ex parte communications may include any discussion between an arbitrator and a party, party representative, or witness when the other parties are not present. This includes pleasantries exchanged in the elevator, hallway, or rest room.

Even being in the hearing room with only one of the parties present could cause the other parties to presume that an *ex parte* communication took place. As an arbitrator, avoid such communications before, during, and after the hearing. Early in the hearing, the chairperson will explain why the panel members cannot speak with a party outside the hearing. (See the Hearing Procedure Script).

Please refer to Rule 12210 and Canon III of the Code of Ethics.

Now let's look at some examples.

Hearing Procedure Script: http://www.finra.org/sites/default/files/hearing_script_3_arb_Sept%2025.pdf

Rule 12210: http://www.finra.org/finramanual/rules/r12210

Code of Ethics: http://www.finra.org/arbitration-and-mediation/code-ethics-arbitrators-commercial-disputes

Test Yourself

Why must you avoid *ex parte* communications?

Question Feedback

Avoiding *ex parte* communications allows you to preserve the integrity of the arbitration process. Even casual conversation with one of the parties or representatives could cause you to appear partial to that side.

Test Yourself

During a break in the hearing, you pass Mickey Kreutzmann, the claimant, in the hallway. “Hot enough for you, chief?” he asks jovially. Should you respond? Why or why not?

Question Feedback

Do not respond because you could damage your unbiased demeanor. When the hearing resumes, the chairperson can remind the parties that *ex parte* communication is not permitted.

Test Yourself

Now suppose you slip up and find yourself in an *ex parte* communication with one of the parties. How should you resolve this situation?

Question Feedback

First, terminate the conversation immediately. Appearing free of bias sounds simple, but it is an ongoing responsibility-you’ll have to watch yourself every minute. If you appear biased to a party, you could find yourself unexpectedly challenged with a motion to recuse (i.e., a motion requesting that you remove yourself from the panel) from the offended party. If you remain on the panel, the losing party may use your *ex parte* communication to ask a court to vacate the panel’s award.

Avoid Ex Parte Communications (Continued)

On a related point, do not discuss the case, the evidence, or the representatives with the other panel members when the parties, representatives, or other persons are within earshot. For all such discussions—and for any activity outside the hearing room—find a place where no one can overhear you. The chairperson can create such a place in the hearing room itself by asking everyone but the panel to leave. For example, he or she will probably do this before the panel's initial executive session, which we'll discuss now.

Participate in the Initial Executive Session

Once you've met the other panel members, the chairperson will ask the parties, witnesses, and representatives to step outside the hearing room so you can discuss matters openly with the rest of the panel in a private meeting called an executive session. The panel should arrive early to hold this executive session before the time set for the hearing's commencement.

This initial meeting should take place in the hearing room so panel members can take care of such important tasks as:

- marking the recordings and testing the recording device;
- preparing an exhibit list;
- updating each other on any prehearing rulings;
- answering any unresolved questions;
- making sure all panel members have signed the Oath of Arbitrator (you'll learn more about this Oath in the next lesson); and
- ensuring that each arbitrator has read all of the pleadings including any attached exhibits. The panel will mark these documents as Arbitrator's Exhibit #1 during the hearing.

The executive session is also a perfect opportunity to set ground rules for arbitrator conduct during the hearing. For example, agree on how to ask questions, how to divide duties, and how to call an executive session.

How and When to Ask Questions

As you'll learn later, you and the other arbitrators will be able to ask questions after each witness has been examined and cross-examined by all counsel. Save your in-depth questions until then.

However, you may occasionally need to ask questions to clarify the evidence as it is being presented. You need to agree on whether the panel members should ask such questions themselves or have the chairperson ask questions.

How to Divide Routine Duties

Who is responsible for keeping a record of the witnesses and exhibits? Who manages the recording of the proceeding? These tasks are usually agreed upon by the arbitrators. Remember that Rule 12606 of the Code requires that a record be kept of all hearings.

Rule 12606: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

How and When to Call Executive Sessions

Executive sessions may be requested by any arbitrator for any reason provided they facilitate a full and fair hearing. You may call such sessions to discuss procedural or substantive motions or to discuss a question, concern, or observation from any member of the panel, at any time during the hearing.

Not all panel decisions will be unanimous. At some point during the hearing, you may be in the minority and will have to accept a ruling with which you disagree. Avoid the appearance of dissension in the hearing room. While disagreements may occur, the appearance of camaraderie and teamwork among arbitrators is key to a hearing's success.

Test Yourself

Why do you think setting hearing guidelines beforehand is important?

Question Feedback

Setting these guidelines in advance is important because resolving these issues before they occur ensures that the hearing runs as smoothly as possible from the outset.

- An advance meeting helps ensure that you and the other arbitrators understand your respective roles.
- Assigning routine duties ensures that they are covered. It's important to be clear on who performs required tasks such as keeping a record of the hearing.
- This meeting will help you present a unified panel to the parties.

Record of the Proceedings

Once you have finished the initial executive session, the chairperson will call the parties into the room and start the proceedings by turning on the recording device. The recording is the official record of the proceeding, even if it is transcribed.

Any party may make a stenographic record of the hearing. Even if a stenographic record is made, the recording will be the official record of the proceedings, unless the panel determines otherwise. If the stenographic record is the official record of the proceeding, a copy must be provided to the Director, each arbitrator, and each other party. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel determines otherwise.

Regardless of how the official record of the hearing is created, parties and counsel should refrain from making audio or video recordings or transmissions of the proceedings unless otherwise agreed by all parties and arbitrators.

If you are recording the proceeding, the panel member in charge of recording should:

- identify the recordings with the case name and number, the hearing date and the recording number;
- clearly identified recordings on different hearing dates;
- ensure that the recording device is functioning properly;
- be certain that the recording device is turned off during all executive sessions;
- remember to restart the recording device after lunch, breaks and executive sessions; and
- return all recordings to FINRA at the end of the hearing.

The panel may prepare an attendance sheet each day, so it has a written record of everyone present. It may be helpful to create a seating chart as participants introduce themselves.

With the recording device on, the chairperson will introduce the panel and have all persons in the room—including parties, representatives, witnesses, and observers—introduce themselves for the record.

Now that you know how to organize the hearing, you're ready to learn how to conduct the hearing itself. But first, test what you've learned by answering the practice exercise that follows.

Test Yourself

List three issues you should resolve with the other arbitrators before the chairperson calls a hearing to order.

Question Feedback

Three issues to resolve with the other panel members include:

- how and when to ask questions;
- how and when to call executive sessions; and
- how routine duties will be divided.

Security Tips

Given today's world of heightened security and increased awareness, FINRA considers it fitting to share the following security tips with the arbitrators who serve in our forum:

- Alert the FINRA staff member assigned to your case of any security concerns related to serving as a FINRA arbitrator.
- If you experience an immediate security threat while serving as an arbitrator off FINRA premises, do not hesitate to contact the local authorities.
- If your case's hearing is being conducted in a hotel, instruct the hotel front desk personnel that no one but the chairperson is to have a key to the hearing room.
- When using the hearing facilities on FINRA premises, and you are assigned an access badge, always wear the access badge in plain view.
- Refrain from discussing personal matters such as where you live, what type of car you drive, the name of your spouse and/or children, etc.
- If you bring a laptop computer with you, do not leave it unattended.

Lesson Summary: Organize the Hearing Setting

In this lesson, you learned how to organize the hearing. Specifically, you learned how to:

- identify the hearing participants;
- avoid *ex parte* communications; and
- participate in the initial executive session.

In the next lesson, you will learn how to call the hearing to order.

Introduction to Lesson: Call the Hearing to Order

Once the stage is set for the hearing, the chairperson will call the hearing to order. In this lesson, we'll look at the steps the panel will take to open the hearing:

- introduce the case;
- explain hearing guidelines to the parties; and
- rule on the failure of a party to appear.

We'll examine the first task, introducing the case, now.

Introduce the Case

Among other things, introducing the case includes the following steps:

- stating the specifics of the case;
- ensuring that all parties accept the panel; and
- administering the Oath of Arbitrator.

Let's start with stating the specifics of the case.

State the Specifics of the Case

At a minimum, the chairperson will state the case name, case number, and the date and time of the hearing. The chairperson will use the Hearing Procedure Script to state this information.

For example: “We are here today to conduct the hearing of case number 08-5000, Widget versus Dilbert, being heard at 9:30 a.m. on Monday, November 19, 2009.”

Once the chairperson has made this statement, the next step is to confirm that all parties accept the panel.

Hearing Procedure Script:
https://www.finra.org/sites/default/files/hearing_script_3_arb_Sept%2025.pdf

Confirm that All Parties Accept the Panel

Ensuring that all parties accept the composition of the panel is a critical step. Essentially, each panel member will:

- repeat previous disclosures and make any new disclosures; and
- respond to objections to the panel.

We'll discuss each of these tasks now.

Repeat Previous Disclosures and Make New Disclosures

Earlier, you learned about the disclosures that you and the other panel members must make prior to the hearing. Examples include:

- a witness you or your firm has represented;
- a witness who turns out to be a relative of your neighbor;
- a representative, party, or witness you know socially;
- case information involving a firm you have worked for or with which you have a business relationship; and
- a representative, party, or witness whose son or daughter participates in events—such as swim team or soccer team—with one of your children

This is not an exhaustive list. If the question, "Should I disclose this relationship?" even crosses your mind, disclose it. Even if you believe the parties were informed of these disclosures, restate them for the record.

After you make a disclosure, parties typically ask follow-up questions. As you answer these questions, please be sure that you are still able to conduct a fair and impartial hearing.

As the case unfolds, keep an eye out for additional disclosures you need to make. In some cases, you'll need to make new disclosures as soon as the parties have introduced themselves.

Once the panel has made all required disclosures, the chairperson will ask the parties if they accept the composition of the panel. In most cases, they will accept the panel.

However, one or both of the parties may ask you to step down at any time during the hearing process. Let's see how you will handle such a motion.

Let's look at some examples.

Test Yourself

Why should you restate disclosures you've already made?

Question Feedback

You should restate previous disclosures because:

- you want a verbal record of your disclosures;
- by doing so, you ensure that all parties received your disclosure statement;
- a representative may have failed to share your disclosure with his or her client;
- if a party changed counsel, this will ensure that the new representative knows of previous disclosures; and
- restating previous disclosures gives the parties the chance to ask further questions and establish a comfort level with the panel.

Test Yourself

During the preliminary introductions, you realize the respondent, Deep Discount Brokers, has replaced its counsel at the last minute. The new attorney has appeared before you a number of times before, and no one objected to your serving on the panel at those hearings. You don't believe the attorney's presence will affect your decision.

Would you disclose this relationship anyway? Why or why not?

Question Feedback

Yes, you should disclose the relationship. Even if you believe your prior dealings with this attorney are a non-issue, your failure to disclose it could result in a party attempting to vacate your award later.

Respond to Objections to the Panel

After the first hearing commences, a party may request that a panel member withdraw from serving on the case; such a request is called a motion to recuse. Under Rule 12406, any party may ask an arbitrator to recuse him or herself for good cause. Requests for arbitrator recusal are decided by the arbitrator who is the subject of the request. You must rule fairly on such motions. To help you decide whether to withdraw, please review the balancing test contained in Canon II-G of the Code of Ethics.

Code of Ethics:
http://www.finra.org/arbitration-and-mediation/code-ethics-arbitrators-commercial-disputes

Test Yourself

Remember how you decided to disclose your previous contact with the last-minute replacement counsel for Deep Discount Brokers? Suppose that, to your surprise, all parties ask you to withdraw from the panel, even though you feel you can decide the case fairly.

Should you do so? Why or why not?

Question Feedback

Yes, you must withdraw from the case, because all parties have requested that you do so. Canon II-G recommends that you withdraw if all parties ask you to.

Test Yourself

Suppose the respondent has called rebuttal witness Sam Stone of Practical Financial, Inc. You represented this firm in an unrelated case four years ago. When you disclose this fact the respondent moves that you withdraw from the panel.

What questions would you ask yourself before deciding how to rule on this motion?

Question Feedback

The two questions you would ask yourself based on Canon II-G are:

- Is the reason for the challenge insubstantial? To answer this question, you must consider how close the relationship is and how important the testimony is to the case.
- Can I rule fairly and impartially in spite of the disclosure? In other words, would knowing this witness affect your ability to render an equitable and unbiased decision? You should withdraw from the case if you cannot be completely fair and impartial in all aspects of the case.

Test Yourself

What are two things you could do if you have difficulty deciding whether to remain on the panel?

Question Feedback

To help you make this decision, consult with the other panel members. They will help you reach a fair decision. If the other arbitrators can't assist you, consider calling a recess to allow the parties to prepare briefs on the issue. If you take this route, don't forget to set new dates for the hearing to reconvene.

Respond to Objections to the Panel (Continued)

If you decide not to withdraw, the moving party may request that the Director of Arbitration (Director) or the President of Dispute Resolution (President) remove you from serving on the case pursuant to Rule 12407 of the Code.

After the first hearing session or prehearing conference begins, the Director or President may exercise this non-delegable authority and remove an arbitrator from a case upon request of a party or on the Director's own initiative, provided that the information supporting removal meets all of the following requirements:

- The information was not previously known by the parties when the arbitrator was selected to serve.
- The information was required to be disclosed under Rule 12405.

After the parties have accepted the composition of the panel, the chairperson's next step is to administer the Oath of Arbitrator. Let's take a quick look at this step.

Rule 12405: http://www.finra.org/finramanual/rules/r12405

Rule 12407: http://www.finra.org/finramanual/rules/r12407

Administer the Oath of Arbitrator

When you are selected to serve on a case, FINRA will send you a packet containing, among other things, your Oath of Arbitrator (Oath). You will sign the Oath and return it to FINRA before any hearings or prehearing conferences have commenced.

If a panel member brings his or her executed Oath to the hearing, the chairperson will collect it and send it to FINRA for its file.

If the panel members have already signed and returned their Oaths, the chairperson will announce on the record that each panelist has executed and filed his or her Oath.

The Oath states:

Do each of you, as the arbitrators selected to hear and determine the matter in controversy, solemnly swear or affirm that you are not an employer of, employed by, or related by blood or marriage to any of the parties or witnesses whose names have been disclosed to you; that you have no direct or indirect interest in this matter; you know of no existing or past financial, business, professional, family or social relationship which would impair you from performing your duties; and that you will decide the controversy in a fair manner and render a just award?

Do you swear or affirm that, based on FINRA Dispute Resolution's Temporary and Permanent Arbitrator Disqualification Criteria, you are not temporarily or permanently disqualified from being a FINRA arbitrator?

Do each of you, having reviewed the Arbitrator Disclosure Checklist, certify that you have made all disclosures of items on the Arbitrator Disclosure Checklist?

Do each of you swear or affirm that your Arbitrator Disclosure Report is accurate, current, and up to date, and that you have no additional disclosures to make?

Once the chairperson has introduced the case, the next task is to explain hearing guidelines. Let's see how this is done.

Explain Hearing Guidelines to the Parties

To explain hearing guidelines to the parties, the chairperson will:

- read the opening segment of the script; and
- determine who should be in the room.

Let's look more closely at each task.

Read the Opening Segment of the Hearing Procedure Script

The script contains the language the chairperson should read when explaining the hearing guidelines.

Sometimes *pro se* parties may be less familiar with the procedural rules of arbitration. If any of the parties are *pro se*, the chairperson may explain the guidelines in more detail than the script. Whether or not parties are represented by counsel at the hearing, the chairperson should ask the parties if they have any remaining questions before you proceed with the hearing.

Points the chairperson may explain to *pro se* parties include the following:

- Arbitration is not mediation. The arbitrator's role is therefore not to reach a compromise decision, but to make a final decision on the facts, determine whether liability exists, and, if so, the amount of the damages, if any.
- The chairperson will explain the arbitration procedure—including the Code and the sequence of testimony and questions—to a *pro se* party. However, as arbitrators, the panel cannot present a party's case.
- The purpose of the opening statement is to allow the parties to explain what they intend to prove—not to present evidence.
- While the hearing must be orderly, arbitrators are not bound by formal rules of evidence.
- A *pro se* party may present his or her testimony in a narrative statement.
- When questioning witnesses, parties may not argue with them.
- Parties must address any motions or objections to the panel, not to the other side.
- If a party feels a question from the other party is irrelevant or inappropriate, he or she may object.
- Parties must give copies of each document to the opposing parties—who may object to the documents—before the panel decides whether to admit it as evidence.
- All parties have the right to be represented by a lawyer at any time in the proceeding.

Once these initial statements are concluded, the next task is to determine who should be in the hearing room.

Determine Who Should Be in the Hearing Room

The panel will decide which witnesses should be allowed to remain in the hearing room and which should be sequestered (asked to wait outside of the room). As you might guess, the parties may differ on this issue.

This training assumes the chairperson will swear witnesses in individually as they take the stand. However, before sequestering witnesses, he or she can swear or affirm them all at once. You'll learn about this task in the next lesson.

Parties

Pursuant to Rule 12602, the parties and their representatives are entitled to attend all hearings. Additionally, an attorney for a non-party witness may attend a hearing while that non-party witness is testifying. Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination.

According to Rule 12208(a), parties may represent themselves in any arbitration held in a United States hearing location. A member of a partnership may represent the partnership. A bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. In addition, a non-attorney may represent a party, unless state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity or the person is currently suspended from the practice of law or disbarred.

Rule 12602: http://www.finra.org/finramanual/rules/r12602

Rule 12208(a): http://www.finra.org/finramanual/rules/r12208

Witnesses

Generally there are two types of witnesses present during an arbitration hearing: fact witnesses and expert witnesses:

- Fact witnesses testify on the material facts of the case. Unless both parties agree otherwise, the panel will usually sequester fact witnesses.
- Expert witnesses express views, give interpretations, and apply their standards of expertise to facts others have provided. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.

The same person can be both a fact witness and an expert witness.

Expert witnesses are likely to be present during a hearing. The main reason for the expert's presence is to help both the parties, as well as the panel, understand technical or complex issues as the facts are presented.

Second, the expert's presence can expedite the hearing. Consider what would happen if an expert witness were sequestered. To elicit a relevant response from an expert who is unaware of the facts of the case, the parties would have to construct an elaborate hypothetical scenario that sounds exactly like the actual case. To avoid this time consuming step, experts are often allowed to hear the case itself.

In addition, if one party has an experienced attorney and a corporate representative in the room, while the other side is an inexperienced *pro se* party, having the latter party's expert witness present may assist the *pro se* party in a fair presentation of its case.

Determine Who Should Be in the Hearing Room (Continued)

Fact witnesses are sequestered more often because their testimony should be independent and not influenced by other witnesses.

For example, if fact witness A hears fact witness B testify that a broker-dealer made three guarantees to a customer, then fact witness A may later state that he heard three guarantees as well because he relied unduly on the testimony of fact witness B, rather than on his own recollections of what happened. Please see Rule 12602 and the Arbitrator's Guide for guidelines on ruling on the attendance of expert witnesses.

On the other hand, the number of guarantees is unlikely to affect the testimony of expert witness C at all, because he or she may be there merely to apply standards. For example, the expert witness may testify as to whether the investments were suitable given the claimant's financial objectives and investment sophistication.

The chairperson should caution witnesses not to discuss either the case or their testimony with each other before excusing them.

Test Yourself

At a hearing, the respondent objects to the presence of the claimant’s expert witness, J.R. “Bob” Dobbs, who will testify on the psychological nuances of misleading sales tactics that were allegedly used with the claimant.

What should the panel do? Why?

Question Feedback

First, determine the basis for the respondent’s objection and obtain more detail on Mr. Dobbs’s testimony. He may also plan to testify that he was privy to the actual conversations or correspondence he will analyze. If so, he is also a fact witness and should be excused. If the respondent’s reasoning sounds compelling in light of the planned testimony, excuse this witness. If not, allow the witness to remain.

Rule on the Failure of a Party to Appear

By the time the chairperson completes these preliminary steps, you'll probably know if all parties are present. If not, the panel must address any party's failure to appear.

If a party does not appear at the hearing, your response will depend on whether the absent party is a respondent or a claimant. If a party's representative is present, the party is considered present.

Respondent Is Absent

Of the two parties, a respondent is more likely to be absent. One sign that the respondent does not plan to appear is the failure to file an answer.

If you are satisfied that a respondent received adequate notice of the hearing from FINRA, you may proceed in the absence of the respondent.

Under Rule 12300, the Director will serve the initial statement of claim to the named parties, and send copies of the statement of claim to each arbitrator. This document is usually sent by regular mail, followed by an overdue notice if the respondent does not answer within 45 calendar days.

Unless a respondent has previously indicated that it would not appear at the arbitration, you should ascertain, through FINRA staff, why the respondent is absent.

Therefore, your goal is to locate documentary evidence to show that a respondent received notice of the hearing. To do this, review all correspondence to the respondent with the other panel members in an executive session. Based on these documents, decide if:

- **The statement of claim was mailed to the respondent**. If the claim was sent by regular mail and returned to FINRA, the respondent may not have received it.
- **The respondent still works in the securities industry**. If so, a current address is more likely to be available.

The Central Registration Depository (CRD®) is a computerized database, maintained by FINRA, that contains information about securities firms and brokers. The CRD system contains, among other things, registration and employment information about all registered persons authorized to trade securities in the United States. In addition, a current CRD record may also show the respondent's current home address and business affiliation.

If the panel is not satisfied that the respondent had due notice of the hearing, it may postpone the hearing and reschedule it to a future date. On the record, the panel may ask the claimant if he or she:

- received a message from FINRA stating that the respondent could not be reached;
- served notice to the respondent on his or her own. Upon being notified by FINRA of its inability to serve a respondent, claimants often hire a process server to deliver the claim. If so, they may have an affidavit from the server verifying that the claim was delivered. Request a copy of this affidavit if it exists;
- discussed this arbitration with the respondent. While such a conversation in itself is not a basis to proceed, it is a factor to consider, as the claimant is charged with enforcing any award and may want to wait until the respondent is located. If other respondents are involved, ask them as well.

Based on the answers to these questions, you can usually decide if the respondent was notified. If this seems to be the case, the chairperson will ask the parties if they want to proceed in the absence of the respondent. If other respondents are present, the claimant may want to proceed. If, however, the claimant wishes to postpone the hearing, do so.

Let's consider the following example.

Test Yourself

You are deciding whether to proceed with a hearing in which the respondent is absent. The correspondence file contains a copy of the cover letter, but the respondent did not answer his phone when FINRA made a reminder call yesterday.

What should the panel do?

Question Feedback

The panel should look for evidence that the respondent received due notice of the hearing. Consider introducing any evidence you find that notice was received as an Arbitrator's Exhibit. For example, the panel should ask FINRA what the respondent's current address is. The panel should also ask the other parties if they discussed the hearing with the respondent. The chairperson should ask the claimant if he or she wishes to proceed with the hearing.

Default Procedures

In some instances, the claimant may elect to use default procedures, outlined in Rule 12801 of the Code, and have a single arbitrator rule on the case without a hearing. Let's look at this procedure.
Under Rule 12801, a claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code:

- a member, whose membership has been terminated, suspended, canceled, or revoked;
- a member that has been expelled by FINRA;
- a member that is otherwise defunct; or
- an associated person whose registration is terminated, revoked, or suspended.

To initiate default proceedings against one or more respondents that fail to file a timely answer, the claimant must notify the Director in writing and send a copy of the notification to all other parties at the same time and in the same manner as the notification was sent to the Director. If there is more than one claimant, ALL claimants must agree in writing to proceed under this rule.

12801: http://www.finra.org/finramanual/rules/r12801

Ruling on the Claim Under Default Procedures

If the claimant uses the default rule, a single arbitrator will be appointed to decide the case on the statement of claim and other documents presented by the claimant. NO HEARING WILL BE HELD.

The arbitrator may not issue an award based solely on nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.

If a defaulting respondent files an answer after the Director notified the parties that the claim against that respondent will proceed under this rule but before an award has been issued, the proceeding against the respondent under this rule will be terminated and the claim against that respondent will proceed under the regular provisions of the Code.
Now let's look at the absence of a claimant.

Claimant Is Absent

Because the claimant initiates the case, he or she is much less likely to be absent, unless the claimant:

- did not receive the required notice from FINRA of the hearing date and location;
- is delayed, for example, the claimant may be sick or stuck in traffic; or
- decided not to proceed.

If, for whatever reason, a claimant fails to appear, the chairperson will state on the record that the claimant is absent, and then open the record to the respondent's position. The respondent may move to dismiss the case.

Claimant Is Absent (Continued)

Before dismissing the case, you may ask FINRA to call the claimant and try to determine why the claimant failed to appear. If the claimant cannot be reached, the panel has two suggested options:

- Grant the respondent's motion and dismiss the case.
- Adjourn and schedule a day to reconvene to give the claimant time to submit a written explanation of his or her absence. The chairperson also may state for the record that the case will be dismissed unless the claimant gives a reasonable basis for his or her absence.

Before we move on, let's look at an interesting variation on this theme of absent parties.

Test Yourself

After two days of hearings, the claimant tells FINRA that he cannot attend the next scheduled hearing due to a family vacation. FINRA explains—verbally and in writing—the procedure for making a postponement request. The claimant requests a postponement. What do you think the panel should do in this situation? Why?

Question Feedback

The claimant has notice of the hearing. The hearing may proceed without the claimant unless the panel grants the postponement. Under Rule 12603, the panel may go forward with a hearing if any party fails to appear after receiving due notice.

12603: http://finra.complinet.com/en/display/display_main.htm

Test Yourself

The panel has turned on the recording device to place the hearing on the record. Should you repeat previous disclosures at this point? Why or why not?

Question Feedback

You should restate previous disclosures because:

- you want a record of your disclosures;
- by doing so, you ensure that all parties received your disclosure statement;
- a representative may have failed to share your disclosure with his or her client;
- if a party changed counsel at the last minute, you can ensure the new representative knows of previous disclosures; and
- restating previous disclosures gives the parties the chance to ask further questions.

Test Yourself

After the parties learn of your relationship with Mr. Lewis, all parties move that you withdraw from the panel. What should you do? Why?

Question Feedback

Withdraw from the panel. Any time all parties request that you withdraw, do so.

Test Yourself

In reading the hearing script, the chairperson has just stated that all witnesses shall be excused. They file out of the room, except for the claimant's second witness, Dot Matrix, an expert testifying on the nature of the investment in the case. The respondent objects to her presence. What should the panel do in this situation? Why?

Question Feedback

The panel should ask what Ms. Matrix will testify to and ask the respondent to explain why he opposes her presence. as Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. See Rule 12602.

Test Yourself

As the parties are introducing themselves, you realize that the respondent is not present. What should the panel try to determine? How would you go about doing so?

Question Feedback

Determine what efforts FINRA made to notify the respondent of the claim and this hearing. To do this, you would call an executive session to review correspondence and call the assigned FINRA staff member, if necessary, to request a current CRD record, which may show any address change. Perhaps a call to the respondent should be made by FINRA staff. Also see if the respondent filed an answer or spoke with FINRA or other parties. If the panel determines that there is insufficient evidence that the respondent received due notice of the hearing, it should postpone the hearing and direct FINRA to attempt to effect service on the respondent.

Lesson Summary: Call the Hearing to Order

In this lesson, you learned how to call a hearing to order. Specifically, you learned how the panel will:

- introduce the case;
- explain hearing guidelines to the parties; and
- rule on the failure of a party to appear.

In the next lesson, we will review the parties' presentations and how you'll facilitate this process.

Introduction to Lesson: Let Each Party Present Its Case

Once the chairperson has called the hearing to order and set a proper tone for the arbitration proceeding, your next task is to maintain that tone as the parties present their cases. How the panel members act sets the tone for the entire hearing. The representatives and parties will follow your lead.

Remember, while you want to control the activities in the hearing room, you also want each party to feel that he or she has a full and fair hearing. To do this, the panel will:

- facilitate the parties' opening statements;
- listen to the presentations of the claimants and the respondents;
- ask questions to clarify and elicit important facts;
- rule on the admissibility of evidence;
- facilitate testimony by telephone or affidavit; and
- facilitate executive sessions.

Let's start by looking at how to facilitate the opening statements.

Facilitate the Parties' Opening Statements

After the chairperson has called the hearing to order, each party may—but is not required to—make an opening statement, starting with the claimant. To facilitate this step in the process, the panel will:

- introduce Arbitrator's Exhibit #1;
- resolve any preliminary matters; and
- listen to the parties' opening statements.

Let's look at each of these.

Introduce Arbitrator's Exhibit #1

As you learned earlier, one task of the initial executive session is to ensure that all panel members possess—and have read—the pleadings and attached documents the parties have submitted. Together, these papers comprise Arbitrator's Exhibit #1.

Before the parties make their opening statements, the chairperson will introduce Arbitrator's Exhibit #1 by summarizing its contents and stating that all panel members have read the documents. The Hearing Procedure Script contains a statement the chairperson may read as one of the panel members identifies, marks, and accepts Arbitrator's Exhibit #1 into evidence. Only documents admitted into evidence are part of the record and may be considered by the panel in its deliberations.

The panel's next task is to make sure all preliminary business has been concluded before the opening statements begin.

Rule 12904 requires that the arbitrators acknowledge that they have read the pleadings filed by the parties.

Hearing Procedure Script:
https://www.finra.org/sites/default/files/hearing_script_3_arb_Sept%2025.pdf

Resolve Any Preliminary Matters

Before asking the parties if they wish to make opening statements, the chairperson will ask the parties if they have any preliminary matters to discuss. Here is a partial list of such matters you may encounter:

- unresolved discovery issues;
- timing of breaks;
- changes in the order of witnesses;
- bound, premarked exhibits or briefs offered by the parties; and
- last-minute motions to sever or dismiss, or other types of motions.

Once these preliminary matters are concluded, you'll listen to the parties' opening statements. Let's see how to do this.

Listen to the Parties' Opening Statements

The chairperson will use the Hearing Procedure Script to advise the parties that they may make an opening statement These opening statements are a road map showing what the parties intend to prove. They should not be used to present evidence.

Once the parties have given opening statements, they will begin presenting evidence to support the claims and defenses they are making. Let's see how to facilitate this step.

Hearing Procedure Script:
https://www.finra.org/sites/default/files/hearing_script_3_arb_Sept%2025.pdf

Listen to the Presentations of the Claimants and Respondents

After the chairperson has called the hearing to order, the parties will present their arguments and evidence. The claimant will start.

Think of this step as the "heart" of the hearing. Witnesses will be given an opportunity to present testimony and identify documents that may be admitted into evidence. As an arbitrator, it is critical that you maintain proper decorum at all times. Decorum is important because it:

- preserves the integrity of the arbitration process—as well as your own credibility as an individual who will rule on the case. If the parties are permitted to conduct themselves in a disruptive manner, they might doubt the finding was based on facts rather than emotion and the sense of fairness may be lost and
- enables the arbitration hearing to do what it is intended to do: resolve disputes in a fair, efficient, and final fashion.

Some hearings require little management from the panel members, because the parties and their representatives behave courteously. However, if the decorum of the hearing needs to be controlled, make sure that the panel is in control and not the parties.

To prevent the hearing from spinning out of control and losing credibility, the chairperson, with the support of the panel, will manage the behavior of the various participants, including:

- witnesses and parties;
- representatives; and
- other panel members.

Let's see how the chairperson will manage the conduct of each of these participants, beginning with the witnesses and parties.

Manage Witness and Party Behavior

As the hearing progresses, witnesses and parties may behave in ways that disrupt the decorum of the proceeding. For example, they might:

- use distracting body language;
- whisper or pass notes to one another;
- laugh out loud;
- interrupt witnesses, arbitrators, or parties; and
- argue with each other.

If such behavior occurs, the chairperson should intervene to maintain the decorum of the hearing.

Parties are allowed to pass notes to their representatives as long as they don't do so while giving testimony.

Test Yourself

How do you think the chairperson might intervene if an attendee or witness begins acting disruptively? What if this person continues to do so?

Question Feedback:

The first time such behavior occurs, the chairperson should instruct the person that this behavior is not appropriate and to discontinue such action. If this reminder is ineffective, the chairperson can call a recess and instruct the counsel to speak with the attendee or witness.

The chairperson obviously can't threaten to remove a party or his or her representative, but other participants may be removed from the hearing. As you learned earlier, parties have a right to attend all hearings.

In cases of extreme misbehavior by parties or their representatives, the panel should consult Rules 12212 and 12409 of the Code.

Rule 12212: http://www.finra.org/finramanual/rules/r12212

Rule 12409: http://:www.finra.org/finramanual/rules/r12409

Manage Witness and Party Behavior (Continued)

In addition to maintaining decorum, the chairperson has the responsibility of swearing in or affirming witnesses. The parties ordinarily will begin presenting their cases by calling a witness. If the witness has not taken an oath at the beginning of the hearing, the chairperson will ask the witness the following question:

Do you solemnly swear or affirm that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth?

After witnesses have answered in the affirmative, the chairperson will ask them to state their name, home address, and business affiliation (if applicable). They may then give their testimony.

After the witness has testified—a process that allows direct examination, cross-examination, redirect examination, and recross-examination—the panel will have the chance to ask questions. These questions may create the need for the parties to question the witness again.

After the parties and arbitrators have asked their questions, the witness may be excused. The chairperson should remind excused witnesses not to discuss their testimony with other witnesses.

Pro se parties may present a narrative statement to the panel and then to be cross-examined. The chairperson will swear them in as any other witness.

If a witness' testimony is interrupted by a recess—however long or short—when the hearing reconvenes, the chairperson should state that the witness is still under oath.

Now let's see how the chairperson will manage the behavior of the representatives.

Manage Representative Behavior

Occasionally during an arbitration, representatives act in ways that jeopardize the tone of a hearing. For example, they may:

- attempt to unfairly turn the informality of the arbitration process to their advantage. For example, they may continually ask leading questions (questions that imply the desired answer) to their own witnesses, and in extreme cases, attempt to testify themselves;
- repeat evidence over and over, in the hope that the more often they make a statement, the more likely you are to believe it;
- make speaking objections to guide witnesses' answers; and
- shout, use profanity, or make gratuitous remarks.

In most cases, opposing counsel will object to this type of behavior, which can be corrected with a firm "sustained." At other times, however, the panel may need to intervene in a more proactive manner to protect the integrity of the process. *Pro se* parties might behave inappropriately, because they don't understand the arbitration process. If this is the case, the chairperson should explain the process to them in the presence of all parties and their representatives.

Maintaining decorum is easier than restoring it after it has been lost. Steps the chairperson can take to control the hearing and keep emotions in check include:

- remind the representatives that to maintain a proper record, only one person may speak at a time; each person will get the opportunity to express his or her view;
- tell the representatives to direct their comments and questions to the panel instead of to each other; and
- call a recess to allow the parties to cool down if infractions continue. Then, when the hearing reconvenes, instruct the representatives to maintain decorum.

When addressing the parties, you should keep your language as neutral as possible. Strong language can be perceived as adversarial and may lead to arguments between the representatives and the panel. Canon I of the *Code of Ethics* directs arbitrators to prevent any disruption of the arbitration process.

Now let's look at some examples of how the chairperson will manage the representatives' behavior.

Code of Ethics: http://www.finra.org/arbitration-and-mediation/code-ethics-arbitrators-commercial-disputes

Test Yourself

You are hearing an arbitration involving an alleged recommendation. While questioning the claimant, the claimant's counsel asks, "Did Mr. Miller tell you he had a 'can't lose' investment?" The respondent's representative objects that this is a leading question.

What action should the chairperson take? Why?

Question Feedback

The chairperson may sustain the objection on the grounds that it is a leading question and explain to counsel that the panel would appreciate hearing the claimant's testimony, as it is her testimony, not counsel's, that is evidence. A leading question is a question in which the wording of the question suggests what the expected answer should be. While leading questions might be appropriate to expedite the hearing and to cover non controversial matters, it is ordinarily inappropriate for counsel or representative to ask leading questions of his or her own witnesses on important matters and, in effect, testify for the witness. Under the formal rules of evidence, leading questions are permitted during cross-examination or if a party calls a hostile witness, adverse party or a witness identified with an adverse party.

While the formal rules of evidence do not, as a general matter, govern the conduct of arbitration proceedings, they may often provide good, practical guidance on what evidence is probative. Generally, arbitration proceedings are more informal and permit more liberal admission of evidence than would be permitted in court.

Test Yourself

Suppose that after the chairperson has made her ruling, the claimant's representative continues to ask leading questions, although the panel continues to sustain objections. The respondent becomes angry, and the parties start to argue with each other.

What do you think the chairperson should do?

Question Feedback

First, the chairperson should tell the parties and their representatives that all comments and objections are to be directed to the panel rather than to each other. Then the chairperson should remind counsel of the earlier ruling and that only testimony from sworn witnesses is evidence and part of the record. The chairperson should continue to sustain valid objections to leading questions as they are raised. Eventually the counsel who previously had used leading questions will begin phrasing his or her questions appropriately.

Test Yourself

What do you think the chairperson would do if the parties continue to argue with each other?

Question Feedback

Call a recess to allow the representatives to cool down. Then, when the hearing reconvenes, instruct the representatives to maintain decorum.

Manage Panel Member Behavior

As you learned earlier in this module, the chairperson involves the rest of the panel in deciding the case. The chairperson will also make sure the other arbitrators conduct themselves in a manner that allows parties to receive a fair hearing. On occasion, you may need to help the chairperson with this task, or in rare cases, manage the chairperson's behavior.

Problems you may see include:

- sounding too aggressive or impatient when asking questions;
- expressing opinions of the parties, or products, or any facts of the cases involved;
- engaging in *ex parte* communication;
- displaying body language, facial expressions, or tones of voice that suggest bias against a party, representative, or witness;
- openly disagreeing with you or another panel member in front of the parties; and
- appearing bored or falling asleep.

In addition, you are encouraged to exercise good judgment in not consuming alcoholic beverages during the lunch break. If any of these situations arise, call an executive session and politely remind the panel member that such behavior undermines the integrity of the arbitration process and any award rendered. In some cases, it may be necessary to adjourn for the day.

Now let's look at another critical task you'll perform as the parties present their cases—asking clarifying questions.

Ask Questions to Clarify and Elicit Important Facts

As mentioned earlier, you will have the chance to question each witness after he or she has been questioned, cross-examined, redirected, and recross-examined. Therefore, you should save most of your questions until these points and not interrupt the questioning of the witnesses by the parties.

As with other stages of the hearing, the parties will be watching your demeanor closely when you question witnesses. For this reason:

- don't hesitate to request an explanation of legal or securities terms that are unfamiliar to you, but are important to your understanding of testimony or motions;
- avoid body language and facial expressions that may indicate your feelings about the case, and be aware of your tone of voice;
- avoid engaging in exchanges with the witness or representative;
- keep your questions neutral. For instance, asking "Could you explain that point in more depth?" is preferable to "What are you talking about?";
- keep your questions to the point and phrase them as questions. In other words, avoid statements or monologues on your own experience; and
- maintain a non-accusatory tone.

If you think that documents not submitted by parties—such as charts, briefs or summaries of legal points, or information already presented—will greatly enhance your ability to decide the case, consider requesting them.

However, there are two potential risks in requesting additional documents at this stage. Asking for additional evidence can be dangerous and tricky because:

- you may give the impression that you're putting on a party's case for him or her; and
- such documents may catch one or both parties off-guard. If either or both parties appear surprised or ill-prepared, allow them sufficient time to respond.

Now let's see how you'll perform another important task of deciding whether to admit evidence.

Rule on the Admissibility of Evidence

While the rules of evidence used in a court may provide guidance, arbitrators are not bound by them (see Rule 12604 of the Code). This doesn't mean, however, that the panel should accept everything offered into evidence. In fact, the opposing party will probably object to at least some of the evidence introduced.

Because arbitration is less formal than the judicial process, the panel is not bound by the rules of evidence used in court. Arbitrators will decide for themselves whether to admit evidence and how much weight to give it.

Now let's review how the panel will rule on the:

- weight and relevance of evidence;
- form and timing of questioning; and
- failure to produce evidence during discovery.

We'll start with weight and relevance of evidence.

As the parties introduce exhibits, mark each in the order it is introduced.

Weight and Relevance of the Evidence

Just as it was during discovery, relevance is a key factor to consider when deciding whether to admit evidence. When determining relevance, decide how the evidence relates to the issue at hand.

The main question you should ask is: "How much might this document or testimony help prove or disprove the claimant's case (or the respondent's defense)?" Obviously, the parties will try to convince you of their answer to this question.

Another factor that may come up during evidentiary disputes is whether the document or testimony is duplicative or cumulative. If you sense that this is the case, consider whether alternative evidence would serve the same function as the item in question.

Test Yourself

During a hearing on whether a publishing house’s penny stock was a suitable investment for the claimant, the respondent submits a copy of a sports magazine containing an article authored by the claimant. When the claimant objects that this exhibit has nothing to do with the disputed transaction, the respondent says it is intended to document the claimant’s knowledge of the publishing industry.

How would you rule? Why?

Question Feedback

Because the relevance of this exhibit appears peripheral, you would probably sustain the objection. Authoring an article in one magazine does not mean the claimant has in-depth knowledge of the publishing industry, or knowledge regarding the stock offerings of a publishing house.

Admissibility and Reliability of the Evidence

In addition to determining if evidence is relevant, also consider the form in which it is offered. The reliability of the evidence may also be considered. For example, if a party offers a copy of a financial blog on the Internet, you may determine that it is not sufficiently reliable to establish the facts stated. An official public record, on the other hand, generally has higher indicia of reliability.

A party may object to the admissibility of evidence on the grounds that it is prejudicial. In such a situation, you must determine whether any prejudice outweighs the “probative value” of the evidence (the degree of relevance and usefulness of the evidence in determining the facts of the case). If you decide the value of the evidence is greater than the prejudice, it should be admitted; if you decide that the prejudicial effect is greater than the value of the evidence, it should not be admitted.

Form and Timing of Questioning

Even after you have decided that a witness' testimony is relevant, the panel will probably have to rule on objections as to how that testimony is elicited.

To expedite the hearing, the chairperson may, with the panel's permission, rule on the panel's behalf on evidentiary and procedural objections. However, if an objection is unusual or has the potential to materially impact the case, then the entire panel should discuss it in executive session before ruling.

Here are a few testimony-related issues the panel may be asked to rule on:

- leading questions;
- argumentative questions;
- repetitive questions that have already been asked and answered;
- misquoting the witness;
- questions with insufficient foundation;
- questions that assume facts not yet in evidence;
- questions too complex or convoluted to answer;
- abusive questioning;
- witness questioning counsel;
- rambling testimony with no question; and
- non-responsive answers.

Upholding an objection to the timing or the form of a question does not mean the question may not be asked-just that it be asked at a different time or in a different manner.

The chairperson should be careful that the panel's rulings are consistent and even-handed as to all parties. Fairness is the ultimate objective in this proceeding.

Now let's look at another issue: failure to produce evidence during discovery.

Failure to Produce Evidence During Discovery

Earlier, you learned that during discovery, parties sometimes indicate that they cannot produce a document because it no longer exists (or never did). When a party makes such a claim, the chairperson or selected arbitrator may direct the party to state in a sworn, written statement called an affidavit that it doesn't exist.

Rule 12514 requires parties to provide each party with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced, at least 20 days before the first scheduled hearing date. The idea behind the 20-day rule is not to penalize parties who produce documents late, but to

maintain a level playing field by giving the other side ample opportunity to digest the documents.

Documents not echanged or witnesses not identified may be barred from the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.

Failure to Produce Evidence During Discovery (Continued)

Failure to produce documents under the 20-day rule can present issues for the panel, especially in long, antagonistic hearings. Here are some issues to consider:

- If the document was exchanged, how late was the exchange?
- How long did the party hold on to the document before exchanging it?
- Is the complaining party prejudiced in any way? If so, how can the prejudice be remedied?
- Was the document exchanged late for reasons beyond the producing party's control?

Another violation of the 20-day rule occurs when items prepared by a third party—such as expert documents—are produced late. In such cases, determine if the parties exchanged documents as soon as possible.

Nothing slows down a case as much as late exchange or non-exchange of evidence. Barring circumstances beyond the party's control, such behavior is a violation of the Code—not to mention unfair.

The panel may handle this issue proactively by giving the parties one last chance to exchange documents and identify witnesses before excluding them. For example, the chairperson might make the following statement on the record:

The panel is concerned over the failure of the parties to comply with Rule 12514 of the Code, but would like to allow the parties one last chance to exchange documents and identify witnesses under this section. Any further violations of Rule 12514 may result in exclusion of the document or witness.

Now, let's look at a few examples.

Test Yourself

In an employment case, the respondent repeatedly presents excerpts of the firm's employee handbook on respondent's direct examination. The handbook outlines behavior a broker-dealer must follow. Claimant objects that she was never furnished copies of the handbook during the course of document production. After numerous arguments, the chairperson calls an executive session to discuss the problem.

What might you recommend? Why?

Question Feedback

When faced with a situation such as this one, the panel might consider asking the parties to address whether:

- the document should have been produced either during the course of discovery or as part of the 20-day identification of documents and witnesses;
- the document is rebuttal material (although in this example its use on direct examination suggests otherwise);
- the significance of the document to be produced;
- the extensiveness of the document to be produced; and
- the panel has previously allowed both sides to offer documents that had not previously been produced.

If the submitting party has no good reason why the document was not previously provided, the panel should consider excluding it. Withholding documents contrary to FINRA rules wastes the time of the parties and the panel and causes undue surprise and prejudice to the party against whom the document is produced

On the other hand, the panel may decide not to exclude the document. If the panel so decides, it should take sufficient steps to reduce any prejudice to the party objecting to the document. Such steps may include:

- time to review the document;
- the opportunity to re-call witnesses whose testimony regarding the document might be relevant; and
- sanctions against the party who did not timely produce the document.

Test Yourself

During a hearing, the claimant alleges that options were unsuitable for him. In his statement of claim, he maintains he has never traded options before. During cross-examination, the respondent asks the claimant to identify other broker-dealers with which he had accounts over the last 10 years. When the claimant names three other firms, the respondent turns to the panel and says the claimant had stated earlier that he never had an account before. The respondent requests an adjournment to allow her to obtain and review monthly account statements from the other three firms. The claimant objects to this delay.

How would you handle this situation? Why?

Question Feedback

Discuss the matter with the panel in an executive session. You may grant the motion so the respondent can obtain and review copies of the account statements. The claimant may or may not have had experience trading options; in any case, the statements are relevant to the claimant's financial experience and sophistication. You may consider assessing costs of the postponement in your final award.

Facilitate Testimony by Telephone or Affidavit

Live testimony is most common and preferred, but sometimes parties agree to testimony by telephone. This may occur because a party or a witness may be unable to physically appear at the hearing or cannot be subpoenaed or ordered to appear. In such a situation, the parties may agree that the witness be allowed to testify by telephone conference. Ordinarily, this agreement is made before the evidentiary hearing. Where parties agree, arbitrators should allow testimony by telephone.

If parties disagree about telephonic testimony, consider the following:

- the witness' reason for not attending in person;
- whether the person is a less critical witness whose testimony will be short;
- whether the witness will comment on documentary evidence not in his or her possession—and any difficulty involved in relaying those documents;
- whether credibility is an issue. If so, consider whether you can judge the witness' credibility over the phone; and
- whether a video conference is available and can remedy any of the issues presented.

If allowing telephonic testimony—either by agreement of the parties or by ruling of the panel—the chairperson should:

- swear in or affirm the witness as usual, but modify the oath to have the person state that he or she is who he or she claims to be. If you have doubts, consider having a notary present at the witness's location;
- have the party calling the witness initiate the call;
- indicate to the witness who you are and who else is listening to his or her testimony;
- before testimony begins, do all the same things you would do if the witness were present: explain the testimony process, obtain a vocal introduction for the record, and caution the witness not to discuss the case with other witnesses until the case is completed;
- make sure the parties have advised the witness what documents—such as order tickets, letters, written supervisory procedures—he or she will need to refer to during testimony. Through the parties, confirm that the witness has all, and only, those documents that the parties will reference during questioning; and
- ask the witness if he or she is alone in a private room. By preventing disruptions of the testimony, you protect both the accuracy and efficiency of the testimony.

As an alternative to telephonic testimony, a party may wish to submit evidence in an affidavit.

Affidavits are allowed in cases filed pursuant to FINRA Rule 12800 (Simplified Arbitration) because it is the best method available for parties to use to present sworn testimony. (Simplified Arbitration cases are those that are decided on the papers submitted to a single arbitrator without a live hearing.)

In contrast, affidavits are infrequently submitted in an evidentiary hearing for anything other than ministerial matters, like authenticating third-party records. To consider a request to submit an affidavit in an evidentiary hearing, the panel should meet in an executive session to discuss why the witness can't attend the hearing (or at least testify by telephone), and whether to admit such testimony.

Test Yourself

Do you see any potential problem when testimony is admitted by affidavit? How do you think the panel might address such problems?

Question Feedback

While formal rules of evidence do not apply to arbitration, testimony by affidavit from a witness who could testify in person or by telephone prevents one party from cross-examining that witness. After all, the opposing party cannot cross-examine an affidavit.

Affidavits are infrequently submitted in an evidentiary hearing for anything other than ministerial matters, like authenticating third-party records. If the panel, however, decides to admit an affidavit, the chairperson may state that its weight as evidence may be diminished, because the opposing party will not have a chance to challenge the truth of the statements it contains.

Facilitate Executive Sessions

As you learned, you and the other panel members should keep disagreements and discussions out of the view and hearing of the parties by holding executive sessions. How you manage executive sessions will determine their effectiveness. Here are a few pointers to help you and the chairperson ensure that your executive sessions run as efficiently as possible:

- The chairperson should ask the parties and their representatives to leave the room.
- Make sure the recording device is not running, so the discussion will remain off the record.
- The chairperson should start by asking the other panelists to express their views on the matter, and then the chairperson will express his or her own views.
- If all panel members agree immediately on the ruling, bring the parties in and announce your decision.
- If one arbitrator disagrees, carefully consider his or her views.
- Don't let the session get bogged down on issues that have already been resolved. Direct the other arbitrators to focus on the issue at hand.
- If a unanimous decision is not possible, make sure the dissenting arbitrator at least understands the reasoning behind the panel's ruling. Be considerate to the dissenter, but explain that the hearing must move forward.
- When you return, the chairperson can announce the ruling and move on. Do not indicate whether it was unanimous or by majority vote. Generally, you should not explain or justify your decision to the parties. Remember the importance of preserving the appearance of unity.

Test Yourself

During an executive session, you and the chairperson agree that a document is irrelevant and should not be received as evidence. The third panel member has doubts, believing it may turn out to be relevant.

How would you handle this situation?

Question Feedback

First allow the third panel member to explain why she feels the document may be relevant. If you and the chairperson are unconvinced, try to work out a compromise—perhaps allowing the party to reintroduce the document later. If no compromise is possible, make sure the dissenter is clear on the reasoning behind the panel’s ruling.

Before moving on to the next lesson, please complete the following practice exercises on facilitating the parties’ case presentations and conducting executive sessions.

Test Yourself

During his opening statement, a *pro se* claimant begins presenting facts and addressing questions to the respondent. What should the panel do in this situation? What if the claimant persists in his behavior?

Question Feedback

Repeat that the opening statement is for a summary, not presentation, of each party's case. Explain that the claimant and respondent will have the opportunity to ask questions later in the hearing.

Test Yourself

During testimony, the respondent's witness states that the industry practice is to review the customer's financial background when determining suitability. "Don't you also consider investment objectives?" demands Simon Moon, a panel member from the securities industry.

How should the panel handle this situation?

Question Feedback

The chairperson should tell the witness to hold the answer to this question while the panel conducts an executive session. Once the panel is alone, the other arbitrators should remind Mr. Moon to save his questions—except for clarifying ones—until both parties have examined and cross-examined the witness.

Test Yourself

In the previous scenario, what might the panel tell Mr. Moon about the nature of his question?

Question Feedback

Tell him that the question—or at least the tone in which it was asked—may affect his appearance of impartiality. For this reason, suggest that he withdraw the question when the hearing resumes.

Test Yourself

One day before the hearing, FINRA staff gives you a party's written request to let a witness who does not work in the securities industry and lives out of state testify by telephone. Counsel for the non-moving party objects. Assume that the witness was included on the moving party's witness list that was provided to the other side more that 20 days prior to the first scheduled hearing date.

How should the panel handle this situation? What factors would you consider? If you grant the party's request, who will initiate the call back?

Question Feedback

As stated previously in this training material, live testimony is most common and preferred, but sometimes parties agree to testimony by telephone. Where parties agree, testimony by telephone is generally allowed by the arbitrators.

If parties disagree about telephonic testimony, remember to consider the following:

- the witness's reason for not attending in person;
- whether the person is a less critical witness whose testimony will be short;
- whether the witness will comment on documentary evidence not in his or her possession—and any difficulty involved in relaying those documents;
- whether credibility is an issue. If so, consider whether you can judge the witness' credibility over the phone; and
- whether a video conference is available and can remedy any of the issues presented.

Finally, if allowing telephonic testimony—either by agreement of the parties or by ruling of the panel—the chairperson should:

- swear or affirm the witness as usual, but modify the oath to have the person state that he or she is who he or she claims to be. If you have doubts, consider having a notary present at the witness' location;
- have the party calling the witness initiate the call;
- indicate to the witness who you are and who else is listening to the testimony;
- before testimony begins, do all the things you would do if the witnesses were present: explain the testimony process, obtain a vocal introduction for the record, and caution the witness not to discuss the case with other witnesses until the case is completed;
- make sure the parties have advised the witness what documents—such as order tickets, letters, written supervisory procedures—he or she will need to refer to during testimony. Through the parties, confirm that the witness has all, and only, those documents that the parties will reference during questioning; and
- ask the witness if he or she is alone in a private room. By preventing disruptions of the testimony, you protect both the accuracy and the efficiency of the testimony.

Test Yourself

After the parties have presented all their witnesses, you realize you have additional questions for the respondent's last witness. Before you ask these questions, you call for an executive session to discuss the questions. How could the panel manage this session?

Question Feedback

Announce the executive session for the record and ask all parties to leave the hearing room together. Make sure the recording device is not running then ask the other arbitrators if they have questions of their own. Call the parties back into the hearing room. Once you are back on the record, call the witness back and the panel can begin asking its questions.

Lesson Summary: Let Each Party Present Its Case

In this lesson, you learned how to allow the parties to present their cases. Specifically, you learned how to:

- facilitate the parties' opening statements;
- listen to the presentations of the claimants and respondents;
- ask questions to clarify and elicit important facts;
- rule on the admissibility of evidence;
- facilitate testimony by telephone or affidavit where appropriate; and
- facilitate executive sessions.

In the next lesson, you will learn how to facilitate the completion of the hearing.

Introduction to Lesson: Complete the Hearing

After the parties have presented their cases, you are almost ready to begin deliberating with the rest of the panel. But first, several tasks remain.

In this lesson, you will learn how to:

- determine if additional hearing dates are necessary;
- facilitate closing statements; and
- close the hearing.

Let's start by looking at how the panel determines whether there's a need for additional hearings.

Determine if Additional Hearing Dates Are Necessary

Many times, a case will not finish in the allotted time. Additional hearing dates are generally needed if the parties have not completed their presentations. Never cut off a hearing prematurely and have parties believe that they did not get a fair hearing.

The chairperson may ask the parties on the first day to estimate how long they will take to present their cases. As you become more experienced, you may be able to help the chairperson determine whether the time for presentations is sufficient.

You may find the lists of witnesses that the parties submitted in advance (pursuant to the 20-day rule) useful in estimating the time a hearing will require.

If additional dates are needed, the panel will schedule them before the hearing adjourns. The additional hearing dates should be scheduled for the next dates all the parties, representatives, arbitrators, and witnesses are available. Bring your calendar to the hearing.

Based on this information, the panel will schedule the additional dates, and the chairperson will announce them before you adjourn that day. Finally, be sure to communicate these additional dates to FINRA staff.

Test Yourself

Suppose one of the parties claims to be unavailable for a long period of time. What do you think the panel might do in this situation?

Question Feedback

Ask for an affidavit of engagement or similar proof that the party is actually unavailable. To keep a case on track and avoid severe prejudice to a party, arbitrations have been conducted after hours, on weekends, and during holidays. Consider these approaches as well.

Facilitate Closing Statements

Before you formally close the hearing, the chairperson will make sure none of the parties or panel members has any unanswered questions. Then each party will have a chance to give a closing statement.

If you have questions that have not been addressed effectively by the parties, you may request additional information that can help the panel reach a fair decision. Additional information may come in the form of:

- written summaries of the parties' cases;
- proposed draft awards, which document the specific relief requested; and/or
- briefs of legal issues.

If you request this information, be sure to set a deadline and page limit. The panel should specify what issue the parties should brief or information they should submit. Also indicate whether the submissions should be simultaneous, and whether replies are allowed. Finally, advise FINRA staff that the parties will be filling posthearing submissions.

Most arbitration claims present questions of fact that the panel will be able to decide on the proffered evidence. Some parties may rely on a specific law or statute. Generally, the party who raised a legal issue will offer the panel a brief that sets forth the law or statute along with an explanation of how it applies to the facts of the case.

Arbitrators should not make independent factual investigations of a case, nor should they ask FINRA staff to conduct research on their behalf. When arbitrators are in doubt about an issue, legal or otherwise, they should request briefs from the parties. If cases are cited in a party's motion or brief, and the arbitrators wish to read the full court opinions, the arbitrators should ask the parties to supply copies. Arbitrators generally should review only those materials presented by the parties.

Closing statements are strictly for summarizing the evidence already presented, not for presenting new evidence. The panel must rely on the documents and testimony admitted into evidence. Consequently, the panel should be certain that closing statements accurately reflect the evidence admitted. Rebuttal is allowed. In fact, the claimant may devote most or all of his or her closing statements to rebuttal.

Test Yourself

The parties are ready to begin their closing arguments. The claimant wants to summarize her evidence, but might want to rebut the respondent's closing argument. Both parties want to present their closing arguments last.

In what order would the parties present their closing arguments according to the Code?

Question Feedback

Rule 12607 states that generally the claimant shall present its case, followed by the respondent's defense. In other words, allow the claimant to summarize her evidence, which the respondent could then rebut in his or her closing statement. Finally, the claimant would be allowed to rebut the respondent's closing statement. Claimants may reserve their entire closing for rebuttal.

Close the Hearing

Just as the chairperson used the hearing script to open the hearing, he or she will use the script to close the hearing. This portion of the script is especially important because the chairperson asks the parties to state on the record whether they have any other issues or objections that they would like to raise that they have not previously raised. Before making this request, however, the chairperson will ask the parties if they have additional evidence to offer. If not, the chairperson will pose the following question to the parties:

"Do the parties have any other issues or objections that you would like to raise that you have not previously raised?"

Let's look at an example where a party does not feel that she had a full and fair opportunity to be heard.

Test Yourself

Suppose the panel had previously ruled that a witness for the claimant could not testify because the witness' testimony was irrelevant. Before the closing, the claimant says she does not feel that her request to question this witness was adequately addressed and would like reconsideration.

What might the panel do in this situation?

Question Feedback

First, ask the party to explain why she feels this way. Next, determine the content of the testimony and see if the respondent will stipulate to the content of the proposed testimony. If not, consider the costs and benefits of allowing the testimony: length of testimony, prejudice to the respondent, ease of summoning the witness, and above all, fairness. Finally, decide whether to allow this non-rebuttal witness to testify. If you decide to disallow the testimony, the chairperson should state the panel's rationale for the record. If the party still insists she did not get a fair chance to present her case, the objections are part of the record. The panel may close the hearing.

Close the Hearing (Continued)

Once all issues or objections have been addressed, the chairperson will tell them that the panel's decision will be forwarded to them after the award is complete.

Next, the chairperson will caution the parties that they may not contact the panel members directly after the hearing. Rather, they should contact FINRA staff with any questions or communications.

Finally, the chairperson will ask that all parties leave the hearing room at the same time. It is important that all parties leave the hearing room together, because leaving separately could invite *ex parte* communication. As you learned earlier, panel members should try to avoid situations in which such communication could arise. If one party remained after the other party left, the perception of fairness might be damaged. Even if the panel did not communicate with the remaining party, the party who left would have no way of knowing such communication did not occur.

Now that you know how to conduct a fair and impartial hearing, you're ready to learn about the post-hearing steps you'll take. But first, test what you've learned by completing the practice exercises that follow.

Test Yourself

You are at a hearing that is scheduled for two days. The parties' witness lists indicate a total of 10 witnesses. How would you determine whether or not two days is enough time to accommodate all witnesses?

Question Feedback

Ask the parties and the other panel members to estimate how long their presentations will take. When you become more experienced, you may be able to estimate whether this time frame is adequate based on the number of witnesses.

Test Yourself

In the previous example, suppose the consensus is that the hearing will take three days. How would the panel go about scheduling the additional hearing date?

Question Feedback

Have the parties consult their calendars, and, if necessary, have them call their offices for their schedules during the next month or two. Then meet with the rest of the panel to determine the earliest dates everyone is free. Finally, announce these dates to the parties before you adjourn that day and notify FINRA staff of the additional dates.

Test Yourself

The claimant announces he will devote his entire closing argument to rebuttal. Based on the Hearing Procedure Script, in what order would the parties present their closing arguments?

Question Feedback

The Hearing Procedure Script instructs arbitrators that the claimant may rebut the respondent's closing argument. Because in this case the claimant has said that his entire closing argument will be devoted to rebuttal, the respondent would give his or her closing argument, followed by the claimant.

Test Yourself

In what order should the parties leave the room? Why?

Question Feedback

All parties should leave at the same time, because letting them leave separately may invite *ex parte* communication, or at least create the impression that such communication could occur.

Lesson Summary: Complete the Hearing

In this lesson, you learned how to:

- determine if additional hearing dates are necessary;
- facilitate closing statements; and
- close the hearing.

In the next module, you will learn about the steps you'll take after the hearing.

Module 3: Decide the Outcome of the Case

In this module, you will learn how to decide the outcome of the case.
After completing this module, you'll be able to:

- determine liability;
- determine remedies;
- complete the appropriate documentation; and
- respond to post-award requests.

This module takes approximately two hours to complete. To help you complete this module, you may review the following materials online:

- The Code
- Arbitrator's Guide

The Code: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Arbitrator's Guide:
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/ArbitratorsReferenceGuides/

Introduction to Lesson: Determine Liability

Now that the parties have presented their evidence, you and the other panel members must determine the outcome. Typically, and if at all possible, you'll conduct your deliberations immediately after the close of the hearing.
If the panel can't deliberate after the hearing, schedule an in-person or telephonic conference to be held as soon as possible, while the evidence is still fresh in your minds.

Of course, you may have already discussed parts of the case with your fellow panel members over lunch and during breaks. Individually or collectively, you should not previously have come to any definite conclusions about the case. However, now you have all the facts before you.

In this lesson, we'll look at the first step in conducting deliberations: determining the liability of the parties. Specifically, we'll review how you will:

- participate in panel deliberations;
- determine the facts of the case;
- apply the law to the facts; and
- reach a decision.

We'll begin our review by looking at guidelines you might use to conduct panel discussions.

Before determining liability, the panel should review and rule on any outstanding motions.

Participate in Panel Deliberations

Each arbitrator on the panel must take part in deliberating the facts and issues. Each panel member's observations and opinions should be heard, acknowledged, and considered.

We've already discussed how demeanor can affect the hearing itself. It also affects deliberations. Your tone of voice and body language should tell the other panel members that their opinions are important to you.

To help convey your interest and encourage discussion, be sure to:

- present your views in turn;
- openly discuss your differences;
- do not judge other panel members' opinions. Although ideas should be challenged, people should not; and
- use phrases such as, "Please explain," or, "What evidence supports that idea?" when talking to other panel members.

Now that we've discussed how to conduct panel deliberations, let's review the type of information you'll consider when determining liability.

Remember, the hearing is confidential. If you discuss the case in a public space, make certain no one can overhear you.

Determine the Facts of the Case

Assume the panel has heard three days of testimony and accepted nearly 35 documents into evidence. A common question is, "Where do we begin?"

Determining whether the claimant's story is true, the respondent's story is true, or if the facts are somewhere in between can be difficult. The first step in deciding the outcome of the case is to determine the facts, and if the facts support a finding of liability. Don't consider specific damages unless and until liability has been determined. To determine the facts of the case, you will generally:

- evaluate the testimony and weigh the credibility of the witnesses; and
- evaluate the weight or the value of documents.

Evaluate the Testimony and Weigh the Credibility of the Witnesses

Generally, the parties will disagree about some key facts in the case. As a panel member, you need to assess the credibility of each witness to determine what testimony most accurately reflects the facts of the case.
To determine whether a witness is telling the truth, you'll consider various factors, including:

- **Selective memory**. A witness who remembers only facts that help his or her position may not be as credible as a witness whose memory is less selective.
- **Record of untruthfulness**. A witness with a record of untruthfulness may be less credible.
- **Inconsistent statements**. A witness who has made prior statements about significant events that are inconsistent with present testimony may be less credible.
- **Contradictory evidence**. A witness whose testimony is contradicted by other significant testimony or documents may be less credible.

While testimony often plays a significant role in proving a case, documentary evidence is also important. We will look at this type of evidence next.

If you determine that part of a witness' testimony is not credible, you may disregard all or part of the testimony.

Evaluate the Relevance of Documents

In weighing the documentary evidence, consider:

- **Who prepared it?** A document prepared by a disinterested party might be more reliable than a document prepared by an interested party.
- **Was it prepared in the normal course of business?** A document prepared in the normal course of business is often more reliable than one created with litigation in mind.
- **When was it prepared?** A document prepared shortly after a conversation or event is generally given more probative weight than one prepared months later.
- **Who had custody and control of the document?** The chain of custody, or whether someone else had an opportunity to create or change a document, is sometimes critical to the value you'll accord it.

Test Yourself

Branch manager Henry Kimball filed a claim of age discrimination after he was fired by Carol Walker Associates for alleged poor performance.

Over the past five years, Mr. Kimball's performance evaluations were excellent—except for the one immediately prior to his termination.

What information might the panel review in determining the accuracy of the performance evaluations?

Question Feedback

You could first determine who made the evaluations. If the last evaluation was prepared by a different supervisor, there may have been a difference in expectations.

If the same supervisor prepared the evaluations, you'd want to know if Mr. Kimball's performance or responsibilities had changed enough to justify the difference in evaluations.

You'd also check the date of the poor performance evaluation. If it was prepared shortly before the termination, it might be more suspect than if it was created months ahead of time.

It is not always easy to determine the facts of a case. Apply your listening skills, observation skills, experience, and judgment to make an impartial and careful determination of the truth.

Next we will examine the application of law.

Apply the Law to the Facts

As arbitrators, you are not strictly bound by legal precedent or statutory law. However, it's important that you do not manifestly disregard the law. By doing so, your award may be vacated. In other words, if the parties have provided the panel with the law, the law is clear, and it applies to the facts of the case, do not disregard it.

Also, the integrity of arbitration requires a degree of uniformity of result. If the panel members made up their own laws, the process would lose credibility.

In certain jurisdictions, manifest disregard of the law is a basis for courts to vacate or set aside a panel's award.

Test Yourself

Claimant employee Miles O'Grady is a paraplegic and alleges that Johnson Securities has failed to provide him access to its office as required by the Americans with Disabilities Act. According to Johnson Securities, retrofitting its elevator to accommodate Mr. O'Grady would cost the firm $50,000.

Assume for the moment that the applicable law is clear and that Johnson Securities must spend the money to retrofit the elevator. You, however, believe the price is exorbitant and that the ADA, in this instance, is bad public policy.

How should you determine liability?

Question Feedback

You must find for Mr. O'Grady. It is the arbitrator's role to apply the law where it is clear and applicable.

Test Yourself

Claimant Mark Stout alleged that his broker, Ileane Richards, fraudulently induced him into purchasing NoGo securities. Assume the elements of fraud, as determined by the panel and based on the arguments made by the parties, are:

- respondent made a knowingly incorrect statement about a material fact;
- claimant relied on the statement;
- respondent knows, or should have known, that the claimant would rely on the statement; and
- claimant is damaged.

During deliberations, the panel members determined that Ms. Richards knowingly made a false claim that the claimant relied upon and a majority of the panel decided that Ms. Richards did know Mr. Stout relied on the statement. Claimant was damaged.

How should the panel rule?

Question Feedback

The panel must rule in favor of the claimant on the issue of fraud. The panel must rule for the claimant when the facts in the case meet all the elements of fraud. You may not agree with the required elements of fraud in the jurisdiction; nevertheless, when the law is clear, and clearly applicable, you must follow the law.

When the law is not clear or you cannot determine whether it applies to the facts of your case, you should look to equity, fairness, and justice.

Test Yourself

What do you do if the law is not clear, or the application of the law to the facts is unclear?

Question Feedback

If the law is not clear, or the application of the law to the facts is in doubt, you should ask the parties either to focus on this in their closing arguments, or to provide written briefs to the panel concerning these issues.

Reach a Decision

Rule 12410 of the Code states that all rulings and determinations by the panel shall be by a majority of the arbitrators. A decision on liability, too, requires a majority vote. While a decision requires that at least two panel members agree on liability, the reasons behind their determinations may differ.

For example, a party may present several theories to support its argument on liability. As long as two panel members agree on liability, even if based on different theories, the panel may make a finding on the party's behalf.

If the claimant separates his or her claim into specific issues, you'll probably want to separate your analysis and decision by issue, too.

Generally, the standard for determining whether a claimant has proven his or her case is by a preponderance of the evidence (“the greater weight of the evidence”). The panel should determine if the claimant has proven that he or she has suffered damages and that the respondent is responsible for these damages. Requirements for liability vary from state to state, and among various jurisdictions, so ask parties to educate the panel as to those requirements if you are unsure.

Most cases involve several claims. One way to make your analysis easier is to consider each claim separately. Remember a panel must decide all properly submitted claims.

Test Yourself

What should the panel do if it determines that neither the claimant’s nor respondent’s arguments are more persuasive? In other words, you believe it is a draw?

Question Feedback

You would find for the respondent because it is the claimant’s responsibility to prove his or her case. If you believe the claimant’s case is even slightly more believable, and that the claimant has proven liability, you would find for the claimant and turn your attention to damages.

Test Yourself

During deliberations, one of the panel members says, “I don’t know what happened or whose fault it is. Let’s just split the baby.”

What should you do?

Question Feedback

You should insist that the panel continue deliberations. The integrity of the arbitration process requires the panel to take whatever time is needed to discuss the case and resolve the issues by a preponderance of the evidence.

Test Yourself

You are in the middle of the claimant's presentation. During lunch at a local deli, a panel member states, "I'm surprised the claimant had the nerve to bring such a ridiculous case to arbitration."

Should you continue this discussion? Why or why not?

Question Feedback

At this point, each panel member should keep an open mind. You might say something like, "Although it's okay to express your viewpoint based on where the case is now, we need to keep open minds until we evaluate all the evidence."

In addition, your discussion in a public place raises the issue of confidentiality. Be certain your discussions are not overheard and are not so factually specific that someone overhearing the conversation could identify the parties or their representatives.

Test Yourself

Claimant Bill Madison alleged that registered person Andrea Unger purchased a put rather than a call. The claimant testified that he has a personal policy of never purchasing puts.

What documents could you review to help determine the claimant's credibility?

Question Feedback

You might want to review the claimant's prior account statements to determine whether there is documentary evidence to support Mr. Madison's testimony that he never purchases puts.

Determine Liability Among the Parties

Before considering the issue of remedies, the panel must decide the liability, if any, of each respondent for the alleged loss. Requirements for liability vary from state to state, and among various jurisdictions, so ask the parties to educate the panel as to those requirements if you are unsure.

If there is more than one respondent, you will have to determine the liability of each. You may decide that only one respondent is liable, and dismiss the others. Similarly, you may determine that two respondents are liable, but in different amounts. This may occur, for instance, in cases in which the claimant had accounts with two different respondent firms, and suffered compensable losses at each firm, but in different amounts.

Some laws provide for "joint and several liability," which means that each respondent can be held responsible for the full amount of the award regardless of the degree of fault. As a result, the claimant may enforce the award against any or all of the parties. If there is more than one respondent, you should look to the parties for guidance on the applicable law.

Some laws impose liability without fault based on the party's relationship to the primary wrongdoer, such as an employer's responsibility for its employee's acts in many circumstances. Again, the parties can provide guidance on the circumstances and limitations on this liability.

Test Yourself

Ms. Bolaño brings a claim against EZE Securities and Bull 'n' Bear Securities, where she carried accounts at consecutive time periods. You find that EZE recommended unsuitable securities, which caused $25,000 in compensable damages. You find no liability against Bull 'n' Bear on the suitability claim, but find an overcharge of fees in the amount of $1,500. How might you allocate damages between the respondents?

Question Feedback

You should award $25,000 against EZE and $1,500 against Bull 'n' Bear. This is not a case for "joint and several liability."

Test Yourself

Mr. Creighton brings a claim against Penne Stock Brokers and one of its employees, Rich Anrun. You find that Anrun recommended unsuitable purchases in the course and scope of his employment and under his manager's supervision. How might you allocate damages?

Question Feedback

You should find both Anrun and Penne liable for the full amount of the damages, jointly and severally.

Lesson Summary: Determine Liability

In this lesson, we began deliberations and learned a process to determine liability. Specifically, we discussed how you'll:

- Participate in panel deliberations.
- Determine the facts of the case.
- Apply the law to the facts.
- Reach a decision.

Now that you and other panel members have determined liability, you will need to determine the award.

Introduction to Lesson: Determine Award

Once you've determined the liability of the parties, the panel's next task is to determine the award.

FINRA staff will provide the panel with an Award Information Sheet to complete. The panel should use the worksheet to ensure that it considers all requests for relief, as it is the panel's duty to determine all claims. Failure to decide all claims may constitute a basis for a court of law to vacate the award.

In this lesson, we'll look at the elements of an award and the various types of compensation you'll consider. Specifically, we'll review how you will:

- determine remedies; and
- determine costs.

We'll begin our review with one of the primary reasons a party files a claim: to recover damages.

Determine Remedies

Depending on the relief the parties request, there are several types of remedies you may consider. They include:

- actual damages and/or statutory damages;
- punitive damages;
- specific performance;
- injunctive relief; and
- expungements.

Determine Remedies

If the panel is satisfied by a preponderance of the evidence that the respondent is liable for the alleged loss, the panel should determine an appropriate remedy.

We'll start our review with actual damages.

Actual Damages

Actual damages, sometimes called compensatory damages, are a monetary sum required to compensate a party for his or her loss.

While arbitrators have flexibility to award damages to suit the particular case, they should have a rational and understandable basis for their award. Furthermore, actual damages should not be based on speculation, but should be designed to make the claimant “whole” for losses suffered due to misconduct found to exist.

The claimant has the burden of proof as to damages, but absolute precision in actual damage calculation is not required. Because there are a number of ways to determine actual damages, the panel must closely listen to all parties to determine which method, if any, it will apply. In different states, different legal theories or other considerations apply to various damage theories. What follows is a listing of some of the ways that actual damages may be determined.

Damages

1. **Net Out-of-Pocket Losses**. The calculation of a claimant's net out-of-pocket losses varies depending on whether the panel finds the wrongful conduct involves one or more specific trades or the management of an entire account. For specific trades, net out-of-pocket loss is the purchase price of the security plus commissions minus the total of the value of the security on the relevant date plus dividends or interest received. For wrongful conduct involving an entire account, net out-of-pocket losses are calculated by taking the beginning account value, plus money and securities deposited, minus money and securities withdrawn, less account value on the relevant date. You should look to the parties for instructions on these issues.

   In addition, some claimants may argue that to award "full compensatory damages" it is necessary to look beyond a claimant's net out-of-pocket loss. These "special" or consequential damages might include:

   - lost profits in the form of dividends on stocks sold because of wrongdoing;
   - taxes the claimant incurred because of the wrongdoing;
   - loss of available funds in the claimant’s business;
   - loss of financing; and
   - commissions paid;

2. **Benefit of the Bargain**. The benefit of the bargain measure seeks to give the claimant the expected value of the investment. For example, the claimant's measure of damages would be the amount the investment would have been worth if the respondent's misrepresentation had been true, less what the investment is actually worth. The difficulty with applying the benefit of the bargain measure of damages is determining, with some specificity, the profits that the claimant would have reasonably received.

3. **Well-managed portfolio account**. This measure of damage allows the claimant to recover the difference between what the claimant's account made or lost versus what a well-managed account, given the investor's objectives, would have made during the same time period

4. **Statutory Damages**. Sometimes, a claim will be based upon a statute that explains how damages should be calculated. If a claim is based upon such a statute, you should look to the parties for guidance on how the law requires you to calculate damages.

Other Remedies

- **Rescission**. Rescission is designed to place the claimant in the same position occupied before the wrongful transaction. In some instances, it may include the return of securities at issue.

- **Disgorgement**. The arbitration panel may require the respondent to disgorge profits or commissions. The goal of disgorgement is to make the wrongdoing unprofitable and therefore deter the wrongdoing. Disgorgement might be available even where the claimant has not suffered net out-of-pocket losses.

Damages (Continued)

“Mitigation” refers to the concept that a party should, when possible, take action to limit loss or avoid damage. The law varies as to when an injured party is required to mitigate damages. Some laws allow a respondent to raise the issue of mitigation, and require a claimant to act reasonably to avoid losses once the harm is discovered. Other laws, including some “blue sky” laws (state securities laws), do not recognize mitigation as a defense. If the issue of mitigation arises, ask the parties for guidance as to the role of mitigation in each theory of recovery.

Interest

Let's assume for the moment that you've awarded actual damages. If requested by the party, the panel will now determine whether the damages should include interest.

The issues you'll review when awarding interest are:

- statutory or contractual basis that allows interest to be awarded;
- amount of or rate of interest;
- date interest begins; and
- date interest ends.

The interest rate you select can vary by jurisdiction and case. Some states specify the legal rate of interest that may be awarded in legal matters. Other jurisdictions use Internal Revenue Service rates or those on treasury bills. In some cases, panels select the rate of interest the broker applies to its own customers for outstanding debts. In general, a panel should apply a reasonable interest rate that is based on the facts of the case.

With respect to when interest begins to accrue, you'll generally apply interest from the date a contract was breached or the time the panel determines that a debt became due or payable.
That concludes our review of actual damages.

Punitive Damages

A party also might have requested punitive damages. Punitive damages are not intended to right a wrong, but are intended to punish the wrongdoer and to deter future wrongdoing.

Generally, you may award punitive damages if the claimant requests it, and the respondent has engaged in serious misconduct that meets the standards for such an award, as well as any arbitration forum rules on the subject. However, an award of punitive damages is discretionary with the panel.

The standards for awarding punitive damages vary from state to state. While most states permit punitive damages only for conduct that is malicious or intentional, some states permit punitive damages for reckless indifference to the rights of others or for gross negligence.

If you and the other panel members are considering a punitive damage award, you may ask that the parties brief the issue to help you determine whether both factual and legal bases exist for this determination.

Let's look at an example of a request for punitive damages in a jurisdiction that authorizes this type of award.

Punitive damages are generally grounded in the law of torts and are not permissible for actions alleging breach of contract.

Sanctions

If the panel issues sanctions, pursuant to FINRA Rule 12212, it must include this information in the award. Arbitrators should not make sanctions against parties payable to FINRA as FINRA is not a party to the proceeding. Awards containing monetary sanctions payable to FINRA are inappropriate.

FINRA Rule 12212: http://www.finra.org/finramanual/rules/r12212

Test Yourself

Customer Dorothy Gale, a single parent, lost $20,000 by investing in NYCO at the recommendation of registered representative Charlie Em. Mr. Em knew that Ms. Gale wanted the monies invested conservatively for her 12- year-old daughter's college fund.

At the hearing, Ms. Gale presented evidence that representative Em received a $1,000 kickback for every $10,000 that was invested in NYCO. His assistant testified that Mr. Em knew NYCO was experiencing financial difficulties but knowingly misrepresented this fact to his clients. In fact, the evidence showed Mr. Em prepared and showed false financial statements to Ms. Gale to induce her to purchase NYCO.

Because 50 people had invested in NYCO through representative Em, Ms. Gale argued that he should pay her $20,000 in actual damages and punitive damages in the amount of $30,000.

Would you award Ms. Gale punitive damages in this case? What steps would you take in making your determination?

Question Feedback

First, you should ask for briefs on the issue and determine whether the panel has the authority to award punitive damages. You should then consider whether the claimant presented sufficient evidence of wrong doing by the respondent to justify an award of punitive damages.

If you determine that the above facts are true, and review of the briefs leads you to believe that you possess the authority to award punitive damages, you may award punitive damages.

Specific Performance

At times a claimant will ask for specific performance instead of, or in addition to, actual damages. Specific performance requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. For example, a panel might determine that specific performance or agreement is the only way to place the parties back in the position they were before the wrongdoing.

If you award damages and the claimant investor has not yet sold the securities, the award should direct what happens to the securities—whether the claimant retains them, sells them or returns them to the firm, and under what conditions.

If you determine that specific performance is an appropriate remedy for a case, make sure the award is specific and clear with respect to:

- the action to be taken;
- the individual who will take the action; and
- if appropriate, when the action will take place.

Test Yourself

The panel on which you are sitting determines that claimant Clarence Kayo was defrauded out of his share of a family-owned brokerage firm by Melissa Kayo, his sister. Because of her actions, Ms. Kayo now controls the business.

Should you consider specific performance in this instance? Why or why not?

Question Feedback

You would consider ordering Ms. Kayo to return the shares to her brother. Although monetary relief is a possibility, the only way to return control in the family business to Mr. Kayo is by ordering specific performance.

Injunctive Relief

Unlike specific performance, which requires a party to take action, injunctions require parties to refrain from certain acts. Claimants typically request injunctive relief if the alleged harm is immediate and would cause irreparable harm if continued.

According to Rule 13804 of the Code, parties to industry or clearing disputes that are required to be submitted to arbitration under the Code may seek a temporary injunctive order from a court of competent jurisdiction. A party seeking a temporary injunctive order must file simultaneously with FINRA a statement of claim requesting permanent injunctive relief. Expedited hearings often involve a request for injunctive relief.

Test Yourself

Lyle, Len & Associates' Statement of Claim alleges that it has a contract with former employee Richard Dolan who is contacting its customers in violation of a non-compete clause in the contract. Lyle, Len has obtained a TRO from a court and now asks you to grant a permanent injunction to prevent Mr. Dolan from contacting its customers.

Would you consider granting a temporary restraining order against Mr. Dolan? Why or why not?

Question Feedback

This is the type of case in which an injunction might be granted.

Based on the parties' briefs, you must determine whether the claimant has met the required standards for this relief as contained in Rule 13804 Injunctions.

Expungements

Information about expungement is being offered as a mandatory online training course to new arbitrators.

The course explains the role of the Central Registration Depository (CRD); gives a general overview of the expungement process; and discusses the specific findings arbitrators must make in order for FINRA to waive its right to oppose an expungement request in court. Upon receiving notification that you have successfully completed both the online Basic Arbitrator training and the classroom portions of the training, you must complete the mandatory online Expungement training course. You may enroll for the course on our Web site at www.finra.org.

Determine Costs

Arbitrations involve a number of fees and expenses. The panel decides which party, if any, must pay these costs. The panel may ask FINRA staff to provide a summary of all fees that have been incurred as a result of the arbitration, as well as payments made by each party.

In this section we'll review a variety of fees that you may assess, including:

- forum fees;
- attorneys' fees;
- witness and production fees; and
- other case-related costs.

Let's look first at how you'll determine the amount and distribution of forum fees.

Determine Forum Fees

When a party files a claim, counterclaim, third party claim, or cross claim, he or she must remit a filing fee .The cost of the filing fee is based on the amount in dispute and the number of arbitrators hearing a case. Schedules of fees can be found in Rules 12900 through 12903 of the Code.

FINRA may temporarily waive fees if the party shows that he or she is unable to pay for the filing fee and/or hearing session deposit. However, FINRA will also inform the party that the panel may still assess arbitration costs at the close of the case.

The total amount of forum fees you may assess the parties is based upon the number of hearing sessions needed to complete the hearing. A hearing session includes any meeting between the parties and arbitrator(s) that lasts four hours or less.

For example, a hearing that runs two days—eight hours each day—is subject to a maximum forum fee assessment for four hearing sessions.

If a hearing is scheduled for four or more days, or if you determine that a hearing will require more days than are presently scheduled, you might consider requesting deposits of additional hearing session fees by the parties in equal amounts. Please see Rule 12902 of the Code.

Determine Forum Fees (Continued)

The panel has the discretion to assess forum fees among the parties in any fashion. In deciding how to divide the forum fees, you might consider the following factors:

- temporary waivers of filing fees or hearing session deposits granted because of financial hardship;
- actions by any party that may have prolonged the length of the hearing;
- the legitimacy of arguments made or positions taken;
- disruptions or time delays caused during hearing sessions; and
- the ultimate merits of the case (i.e., who prevailed or substantially prevailed).

Some parties may be surprised when you assess the hearing session fees. To better prepare them, don't assume the parties—particularly *pro se* parties—are familiar with the forum fees they may be incurring. Remind them periodically. Liability is not the only factor to consider when deciding to assess forum fees.

In addition to forum fees, a panel may elect to assess an adjournment fee in its award. You will consider the same principles in assessing this fee.

For example, if a party requested and was granted a postponement because another party failed to produce documents, you might consider assessing the fee against the non-producing party in your award.

Before we move onto attorneys' fees, please complete the following practice exercises on determining forum fees.

Test Yourself

At the end of the proceeding, you note that a party's failure to produce a witness on time caused the hearing to be postponed for three hours.

What might the panel do?

Question Feedback

If you decide that the party was at fault, the panel might assess him or her with an additional session fee.

Test Yourself

During a hearing, it becomes clear that a party has a solid case. However, the party has caused numerous disruptions and time delays by interrupting and arguing with the witnesses.

On the other hand, the other party was cooperative and timely in its presentation of the evidence and the case law.

Would you take a party's behavior into account when assessing forum fees?

Question Feedback

Yes, even if a party prevails, you could consider the actions that prolonged the hearing.

Determine Attorneys' Fees

There are three situations when parties may pursue attorneys' fees:

- A contract includes a clause that provides for the fees.
- The fees are required as part of a statutory claim.
- All of the parties request or agree to such fees.

You must award reasonable attorneys' fees to claimants who prevail under statutes that provide for attorneys' fees, including, among others, Title VII actions for discrimination and many state securities statutes.

If a prevailing party requests reimbursement of attorneys' fees and you have questions regarding the panel's authority to award such fees, you may request briefs from the parties relating to an applicable statute or other basis for awarding the fees.

If the panel determines that a party has a contractual or statutory right to reimbursement, that party must prove the amount to the satisfaction of the panel.

In addition to attorneys' fees, parties might sometimes request witness and production fees. Let's look at these next.

Determine Witness and Production Fees

On occasion, parties request that the arbitrators direct reimbursement for:

- expenses of a witness; and
- costs associated with producing documents.

When reviewing witness fees, you'll generally follow the rule in the applicable jurisdiction. If necessary, ask the parties to brief the issue for you.

The panel can also wait until the conclusion of the hearing to assess the fees. For example, if a witness is located a significant distance from the hearing site, you might decide to assess the cost of the witness' travel after you've heard the case.

Usually, each party is responsible for producing and copying documents that are relevant to the case. According to Rule 12513 the party requesting the production of documents shall bear all reasonable costs of production unless the panel directs otherwise.

On larger cases, a party might ask that the requesting party come to the location of the documents and copy what is needed.

If the parties cannot agree on who should bear such fees, your job is to find a reasonable solution. Whatever decision you and the other panel members make, however, memorialize it in an order or the award.

We've already reviewed some of the costs and fees that you'll frequently review during an arbitration. In the next section, we'll briefly review other costs parties may request.

Rule 12513: http://www.finra.org/finramanual/rules/r12513

Other Case-Related Costs

The parties may request that the arbitrators direct reimbursement for other expenses, such as:

- cost of transcribing the record;
- travel costs—when the parties have traveled to the hearing and a party has caused the case not to go forward (last-minute postponement request);
- expert fees; and
- teleconference fees.

Also, FINRA may alert the panel to outstanding administrative costs such as:

- recording duplication fees;
- copying charges;
- mailing charges;
- unpaid postponement fees; and
- unpaid administrative costs.

A panel may assess each of these fees and costs in its award using the equitable principles described throughout this lesson.

Member Surcharge and Process Fees

Although arbitrators generally have wide latitude in determining how to assess fees and costs against the parties, they do not have discretion in allocating member surcharges and process fees.

Rules 12901 and 12903 require a brokerage firm to pay a surcharge and process fees when the firm: 1) files a claim; 2) is named as respondent in a claim, counterclaim, cross claim or third party claim; or 3) employed an associated person at the time of the dispute who is named as a respondent in a claim, counterclaim, cross claim or third party claim.

Arbitrators may not reallocate any of the member surcharge or process fees paid by a firm to another party.

That completes our review of costs and fees. In the next lesson, we'll review the documentation you'll need to prepare to complete the arbitration proceeding.

Before we move on, however, test your knowledge of awards by completing the exercises that follow.

Test Yourself

Elliott & Lee Securities filed a claim against registered person George Arringson. Elliott & Lee claims that when Mr. Arringson joined the firm, he executed a promissory note and in return was provided “up front” money consisting of a forgivable loan in the amount of $250,000.

The loan said that $50,000 would be forgiven for every six-month period that Mr. Arringson remained employed. However, if Mr. Arringson left his employment early, he would pay the balance on the note. In addition, the note stated that if Mr. Arringson left the firm without paying the balance and Elliott & Lee had to file an arbitration to collect, the firm should receive attorneys’ fees.

If you find for Elliott & Lee at the hearing, can you award attorneys’ fees? Why or why not?

Question Feedback

Yes. In view of the contract, if Mr. Arringson did not have a valid defense to an award of attorneys’ fees, you could award them against him.

Test Yourself

Jim and Mary Gold brought an action against MP Investments Co., a small broker-dealer. The Golds spent 18 days putting on their case to prove MP Investments was negligent with their account.

During this time, the case was postponed seven times due to the unavailability of the Golds, their attorney, or their witnesses. The parties and panel spent much time off the record waiting for the Golds, their attorneys, and their witnesses to show up.

You and the other panel members determine that the Golds proved their case by a preponderance of the evidence. How might you assess forum fees and costs in this case?

Question Feedback

You might decide to assess against the Golds that proportion of forum fees and costs caused by their delays.

Lesson Summary: Determine Awards

In this lesson, you learned how to determine awards. Specifically, we reviewed how you will:

- determine remedies; and
- determine costs.

In the next lesson, we will review how you'll document your determination of liability in the corresponding award.

Introduction to Lesson: Complete the Appropriate Documentation

Now that you have determined liability, remedies, additional fees and costs (if any), your next role as a panel member is to communicate the results of the hearing to FINRA.

In this lesson, we'll look at the documentation you'll prepare to complete the award. Specifically, we'll review how you'll:

- execute an award;
- determine whether to make a disciplinary referral; and
- evaluate other panel members. You will also learn how parties and the FINRA staff will evaluate you and the factors they will consider.

We'll begin with executing an award.

Execute an Award

The panel's first step in communicating the result of the arbitration is to complete the Award Information Sheet and prepare the award. Rule 12904 of the Code states that the panel will endeavor to render an award within 30 business days from the date the record is closed. Confusion may arise because parties might think the 30-day period begins to run at the conclusion of the hearing or the receipt of briefs. To avoid this confusion, the panel should state to the parties at the close of the hearing that the record will remain open until the panel arrives at a decision or determines that the record is closed.

Suggested language for this statement is contained in the Hearing Procedure Script. The panel should not close the record at the conclusion of the hearing, but should wait a reasonable period of time while it determines what is needed to decide all submitted issues. During the hearing, keep a list of important issues considered and decided, including jurisdiction, settlements, exclusion of witnesses or evidence, dismissal of claims, and due notice to non-appearing parties. For a non-appearing party, document the contacts with this party and attach any certified letters of notice.

FINRA provides the panel with an Award Information Sheet prior to a hearing which contains a number of questions about the hearing. By answering all of the questions on the sheet, the panel ensures that it has considered all of the items necessary to enter an award. The panel may submit a handwritten copy of the Award Information Sheet to FINRA.

If you have any questions about the information requested on the Award Information Sheet, contact the staff member assigned to your case.

Rule 12904: http://www.finra.org/finramanual/rules/r12904

Hearing Procedure Script:
https://www.finra.org/sites/default/files/hearing_script_3_arb_Sept%2025.pdf

Award Information Sheet:
https://www.finra.org/sites/default/files/award_info_sheetSeptember22.pdf

Execute an Award (Continued)

FINRA staff will draft the award based on the information you provide in the Award Information Sheet. You must check the final award closely to be sure that all issues have been clearly decided before signing it. FINRA makes arbitration awards, their contents, and the names of the arbitrators available to the public.

Under Rule 12904, all awards must include:

- names of the parties;
- names of counsel (or other representatives);
- acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;
- summary of the issues, including the type of security or product involved;
- damages, interest, and other relief requested;
- damages, interest, and other relief awarded;
- statement of any other important issues considered and resolved (e.g., motions, jurisdictional issues);
- allocation of forum fees and any other fees allocable by the panel;
- names of the arbitrators;
- date the claim was filed;
- date the award was rendered;
- number and dates of hearing sessions (including prehearing conferences);
- location of hearings; and
- signatures of the arbitrators concurring in the award.

Rule 12904: http://www.finra.org/finramanual/rules/r12904

Explained Decisions

If the arbitrators believe that an explanation for the award would benefit the parties, please include a written decision to be published within the body of the award.

The parties may also request an explained decision. Rule 12904(g) requires the panel to provide an explained decision at the parties' joint request. The Rule further explains that:

- an explained decision is a fact-based award stating the general reasons for the arbitrators' decision;
- parties will be required to submit a joint request for an explained decision at least 20 days before the first scheduled hearing date; and
- the chairperson of the arbitration panel will write the explained decision and will receive an additional honorarium of $400 for doing so.

Rule 12904(g): http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Dissenting Opinions

A majority of the panel must agree with an award and sign the final award document. If you disagree with the determination of the panel's majority opinion, you may sign the award as a dissenting arbitrator. You may also write dissenting opinion if you feel it is important to do so.

Determine Whether to Make a Disciplinary Referral

During the course of the hearing, you may have heard evidence of serious wrongdoing that you believe warrants further investigation and possible disciplinary action.

While the purpose of arbitration hearings is not for arbitrators to make disciplinary referrals, FINRA takes such referrals very seriously. In addition, many arbitration awards are reportable on a CRD record, and this may become the basis for an investigation.

A disciplinary referral is not a recommendation that discipline be imposed, but a recommendation that FINRA conduct an investigation to determine whether disciplinary action is appropriate.

Post-Case Referral

Under Rule 12104 at the conclusion of an arbitration, any arbitrator may refer to FINRA for investigation any matter or conduct that has come to the arbitrator's attention during the arbitration, which the arbitrator has reason to believe may constitute a violation of the rules of FINRA, the federal securities laws or other applicable rules or laws.

Mid-Case Referral

Rule 12104 also allows an arbitrator to make disciplinary referrals during an ongoing arbitration in very limited circumstances. Any arbitrator may refer to the Director of FINRA Dispute Resolution, 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 threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken. Examples of such a threat would include evidence of a Ponzi scheme or money laundering. Giving arbitrators a way to alert FINRA of these types of extraordinary events allows FINRA to protect investors and the public interest from serious ongoing or imminent threats to the securities markets. You should not, however, make referrals during an arbitration based solely on allegations in the statement of claim, counterclaim, cross claim or third party claim. Dispute Resolution routinely provides copies of arbitration claims and other pleadings to other FINRA divisions to analyze for fraudulent securities activity or other possible rule violations. Thus, mid-case referrals based only on the pleadings are not necessary to apprise those divisions of possible wrongdoing.

Making a Mid-Case Referral

An arbitrator may make a mid-case referral based on evidence or testimony heard during the hearings. If, for example, a claimant offers testimony or documentation that suggests a serious threat, you may want to consider whether other documentation, other testimony or cross-examination corroborates or refutes the issue or claim when deciding whether the issue warrants making a mid-case referral.

This guidance is not suggesting that arbitrators should delay making a mid-case referral if you believe it is warranted. Rather, it is encouraging the arbitrators to make sure they have all the facts and evidence available to support a reasonable allegations in the statement of claim, counterclaim, cross claim or third party claim. Dispute Resolution routinely provides belief that a serious threat exists that is likely to harm investors unless immediate action is taken before making such a referral. If an arbitration case is scheduled to be heard over a period of weeks or months and you are satisfied that other evidence and testimony support your belief that a serious threat exists, then it may not be prudent to wait until the case concludes to make a mid-case referral. If, however, you believe that such a threat exists but the case is about to conclude, then you should wait until the case concludes to make a post-case referral as long as doing so would not materially compromise investor protection. For example, if during the third of four consecutively scheduled hearing days you learn of a serious threat that meets the criteria of the rule and anticipate that the remaining tasks to close the hearing will be completed shortly after the last hearing session on the fourth day, you could defer making the mid-case referral to avoid a significant delay to the conclusion of the case.

In deciding whether to delay making the referral, you should balance the potential harm a mid-case referral could have on the claimants against the possible harm to non-party investors that a brief delay could cause. In cases where there are only a few hearing sessions scheduled, arbitrators should weigh the potential effect a mid-case referral could have on a claimant's case against the gravity of the issue that a mid-case referral would address. For example, claimants may incur increased costs associated with delays to address possible motions to recuse and to reschedule hearings. If an arbitrator agrees to recuse as discussed below and parties agree to a replacement arbitrator, this may result in a delay while the replacement arbitrator becomes familiar with the case. In some instances, parties would need to restart the case should more than two arbitrators agree to make a mid-case referral and agree to recuse themselves. There may also be additional, expert witness fees and attorneys' fees. Given the potential negative effects a mid-case referral could have for the claimant, you must give serious consideration to these competing interests before choosing to make a mid-case referral.

Director's Authority and Disclosure to Parties

Rule 12104 authorizes only the Director to evaluate the mid-case referral to determine whether it should be forwarded to other FINRA divisions. The Director has discretion not to forward information revealed during hearings that an arbitrator believed warranted making a mid-case referral. However, regardless of whether the mid-case referral is forwarded, FINRA will disclose to the parties that an arbitrator made a mid-case referral to the Director.

Recusal Request and Arbitrator Response

After being notified of a referral, a party could request that the referring arbitrator(s) recuse themselves. Any such request must be made no later than three calendar days after FINRA notifies the parties of the referral or the party forfeits the right to request recusal of the referring arbitrator(s).

The rule does not create a right to make a recusal request; this right exists in any arbitration. Rule 12406 states that an arbitrator who is the subject of a recusal request has the discretion to decide whether to withdraw from the case. FINRA rules do not currently dictate the grounds for granting recusal requests and do not require specific decisions by arbitrators in response to such requests. Therefore, you would not be required to grant a party's recusal request that results from the arbitrator's mid-case referral. Consistent with any other recusal request, an arbitrator challenged because of a mid-case referral would be required to make that decision in accordance with the Codes, and Code of Ethics for Arbitrators in Commercial Disputes (*See* Canon I(E)).

If an arbitrator denies a party's recusal request, FINRA does not believe that the denial would provide the subject of the referral with valid grounds to challenge an award. The Federal Arbitration Act establishes four grounds for vacating an arbitration award (*See* 9 U.S.C. §10(a)):

1) where the award was procured by corruption, fraud, or undue means;
2) where there was evident partiality or corruption in the arbitrators, or either of them;
3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or
4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

One possible challenge that might be triggered by a mid-case referral would be evident partiality. However, arbitrator evident partiality encompasses both an arbitrator's explicit bias toward one party and an arbitrator's inferred bias when an arbitrator fails to disclose relevant information to the parties.[1] "The party alleging evident partiality must

[1] Windsor, Kathryn A. (2012) "Defining Arbitrator Evident Partiality: The Catch-22 Of Commercial Litigation Disputes," *Seton Hall Circuit Review*: Vol. 6: Iss. 1, Article 7, p. 192.

establish specific facts which indicate improper motives" on the part of the arbitrators.[2] Further, courts have stated that neither the appearance of impropriety, standing alone,[3] nor the arbitrators' decision is sufficient to constitute a showing of evident partiality.[4]

In considering the recusal motion, you should be aware that case law supports an arbitrator's ability to make decisions during a case, based on evidence learned during the case. Courts have found that a situation in which an arbitrator forms an opinion using evidence presented during a hearing and then acts on that evidence does not rise to the level of evident partiality.[5] Also, courts expect that after an arbitrator has heard considerable testimony, the arbitrator will have some view of the case.[6] As long as that view is one that arises from the evidence and the conduct of the parties, it cannot be fairly claimed that some expression of that view amounts to bias.[7] Thus, based on case law, courts expect arbitrators to form opinions based on evidence presented to them after they are appointed. It is, therefore, likely that a prevailing investor's award would not be vacated because arbitrators acted on their views, in the form of a mid-case referral, prior to the conclusion of the proceedings.[8]

A party cannot require you to recuse yourself as a result of making a mid-case referral. Further, your denial of a party's motion to recuse should not create a basis for the subject of the referral to challenge an award, if one is rendered. However, if you believe that your act of making the mid-case referral has compromised your ability to remain impartial for the remainder of the case, then it may be appropriate to grant the party's recusal request.

Again, Rule 12104 retains the option for arbitrators to make a post-case referral. In assessing the issue, facts, documents, testimony and time remaining before the case concludes, it may be appropriate to make a post-case referral, if such a delay would not materially compromise investor protection. Mid-case referrals should be made only in extraordinary circumstances. The post-case referral rule should be the default option.

Please see *Regulatory Notice 14-42* for more information about mid-case referrals.

In general, you would refer matters that are of regulatory interest.

Rule 12104: http://www.finra.org/finramanual/rules/r12104

Regulatory Notice 14-42: http://www.finra.org/industry/notices/14-42

Rule 12406: http://www.finra.org/finramanual/rules/r12406

Code of Ethics for Arbitrators in Commercial Disputes:
http://www.finra.org/ArbitrationAndMediation/Arbitrators/Responsibilites/CodeofEthics/index.htm

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2 *Sheet Metal Workers International Association Local Union 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985).

3 *Kinney*, 756 F.2d at 746 (citing *International Produce, Inc. v. Rosshavet*, 638 F.2d 548, 551 (2d Cir.), *cert. denied*, 451 U.S. 1017 (1981)).

4 *Stanley J. Mical, et al. v. Phillip J. Glick, et al.*, No. 13 C 6508 (N.D. Ill. filed Jan 28, 2014).

5 *Ballantine Books Inc.*, 302 F.2d at 21. *See also Bell Aerospace Co. v. Local 516, UAW*, 500 F.2d 921, 923 (2nd Cir. 1974).

6 *Ballantine*, 302 F.2d at 21.

7 *Id. See also Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992).

8 *Health Services Management Corp.*, 975 F.2d at 1267.

Test Yourself

After finding for the claimant because the respondent failed to disclose important information about a particular security, you and the other panel members discuss whether you should make a disciplinary referral.

What elements would you review in making this determination?

Question Feedback

You would review the facts of the case and determine whether the failure to disclose was intentional and substantial. You should also discuss the strength of the evidence against the representative.

Determine Whether to Make a Disciplinary Referral (Continued)

Once you and the other panel members determine that you should make a referral, complete the disciplinary referral form and contact the staff person assigned to your case. FINRA will send your referral to the appropriate district office for review.

It is important to point out that Rule 12104 does not require the majority consent of the panel to initiate a disciplinary referral. A single arbitrator may initiate a disciplinary referral, absent the consent of the panel. However, arbitrators are encouraged to discuss the matter with their co-panelists before initiating a referral.

As you can see, you have great discretion in determining whether to refer a case for a disciplinary inquiry or not. If you determine a referral is appropriate, it should be reduced to writing and specify:

- the firm or individual you are referring for possible discipline;
- a potential rule violation;
- the principal evidence indicating that a violation may have occurred; and
- the dates or time frame of the occurrence.

You should not discuss in the referral the basis for the award in the arbitration case; discuss only those facts and circumstances that underlie the decision to make the referral for disciplinary investigation. You may complete the Arbitrator Disciplinary Referral Form on our website and submit it online.

Rule 12104: http://www.finra.org/finramanual/rules/r12104

website: http://www.finra.org/arbitrationandmediation/arbitrators/caseguidanceresources/disciplinaryreferrals/

Arbitrator Disciplinary Referral Form:
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009516.pdf

Now try the following exercises.

Test Yourself

John Smith, Kerry Kittleman, and Patricia Pratt are panel members for a hearing. After discussing the evidence, Mr. Smith and Ms. Pratt agree the claimant proved his case. Ms. Kittleman disagrees. When they discuss damages, Mr. Smith and Ms. Pratt agree on the amount of damages the claimant should be awarded, but Ms. Kittleman dissents. Can the panel issue an award? Why or why not?

Question Feedback

The panel can issue an award in favor of the claimant. Awards do not have to be unanimous, but must be signed by a majority of the panel.

Test Yourself

When the panel members write their award, may Ms. Kittleman write a dissenting opinion for those portions of the final award with which she disagrees with the majority? Should she write a dissenting opinion?

Question Feedback

Ms. Kittleman may write a dissenting opinion if she feels it is important to do so. However, dissenting opinions lengthen the proceedings and may encourage the losing party to file a motion to vacate. The decision whether to write a dissenting opinion must be made on a case-by-case basis.

Test Yourself

Sollie Hannsen, a former representative of William Dean & Co. and a respondent party to the case, failed to appear during the first day of hearing. The panel has a receipt from a certified letter showing that Mr. Hannsen received notice of the hearing dates. According to counsel for William Dean & Co., Mr. Hannsen told him that he was not coming to the hearing because he was out of the business and too poor to pay a judgment if he lost. Can the panel still hear the case and make an award? Why or why not?

Question Feedback

The panel can hear the case. However, it should indicate on the record and in its award all of the steps taken to notify Mr. Hannsen of the hearing.

Test Yourself

The panel has just determined that, in violation of a non-compete clause, five former employees from the firm of Dewey & Howe contacted a number of clients after leaving the firm. Would you refer this case to FINRA for possible disciplinary review? Why or why not?

Question Feedback

You ordinarily would not refer this case for disciplinary review because it is a contractual matter between a member and its associates and appears non-regulatory in nature.

Evaluation Process

FINRA continuously evaluates its arbitrators and the hearing process in an effort to improve the effectiveness of its arbitrators and its arbitration program.

Evaluate Other Panel Members

So that we may more effectively evaluate our arbitrators' performance, we ask each arbitrator to complete the Arbitrator Experience Survey at the conclusion of each arbitration. Please see the *Arbitrator's Guide* for further information about the Arbitrator Experience Survey. Your comments on your co-arbitrators are confidential and will not be shared without your permission.

In evaluations, as in any number of matters, feel free to speak directly with the staff member assigned to your case at any time.

Arbitrator's Guide:
http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Arbitrator Experience Survey:
https://www.finra.org/sites/default/files/ArbMed/p014776.pdf

Party Evaluation of Arbitrators

At the conclusion of the arbitration hearing, all parties and their representatives are asked to complete a questionnaire concerning the arbitration.

According to the Hearing Procedure Script, the chairperson is instructed to request the parties to voluntarily complete and file an Arbitration Evaluation Form. The form specifies important arbitrator characteristics, which are essential to successful arbitrator performance

Arbitration Evaluation Form:
http://www.finra.org/arbitration-and-mediation/arbitration-evaluation-form

Staff Evaluation of Arbitrators

In addition to the party evaluations of the arbitrators, the staff will also evaluate arbitrators. Once again, this form specifies required arbitrator demeanor, skills and performance factors.

Lesson Summary: Complete the Appropriate Documentation

In this lesson, you learned to complete the necessary documentation following the conclusion of an arbitration hearing. Specifically, you learned about:

- executing an award;
- determining whether to make a disciplinary referral;
- evaluating the other panel members;
- parties evaluating the arbitrators; and
- staff evaluating the arbitrators.

In the next lesson, we will review how to respond to post-award requests.

Introduction to Lesson: Respond to Post-Award Requests

Now that you've determined the award and have completed the appropriate documentation, there is one more step we need to discuss: how you'll handle post-award requests and communications.

In this lesson, we'll look at the actions you'll take—and won't take—to respond to post-award contacts. Specifically, we'll review how you should:

- maintain confidentiality after a hearing; and
- respond to post-award motions and requests.

We'll begin our review by looking at your continuing duty to maintain confidentiality.

Maintain Confidentiality After a Hearing

Even after you've rendered a decision in a case, you have a continuing obligation to maintain confidentiality. In other words, you may not discuss the pleadings and what happened inside the hearing room with individuals outside the hearing room—including friends, family members, and colleagues. Although awards in arbitration cases are available to the public, you should never distribute or disclose awards. The only thing you should disclose is where the inquiring individual can obtain a copy of your decision.

Maintaining confidentiality is as important to you as it is to the process. By discussing a case, you may waive your right, and those of other panel members, to immunity as arbitrators.

Arbitrators have immunity from civil liability that may arise out of their conduct as arbitrators. With respect to testimony, arbitrators generally have a quasi-judicial privilege from discussing the basis for a decision. However, if one arbitrator waives this immunity by discussing the basis for the decision, he or she can waive the immunity for the other arbitrators on the panel, making it very important that no one discuss the basis of a decision made in arbitration.

FINRA will provide legal counsel and indemnify you if you are made a party to an action or proceeding relating to your role as an arbitrator.

Arbitrators are not immune from liability for misconduct that is punishable by law, such as fraud or corruption. They can be liable for acts they commit while serving as arbitrators that are not related to their roles as arbitrators.

Call staff immediately if you receive a request to file an affidavit or are served with any form of subpoena or notice to testify.

While you should never talk publicly about a case, there are limited times when you may be asked to clarify your decisions. This brings us to our next topic: responding to post-award motions and questions.

Respond to Post-Award Motions and Requests

There may come a time when a party will contact you about a decision you've made. However, you should never enter into post-award discussions with the parties, their representatives, or witnesses regarding a disputed matter.

If a party asks you about a decision, you should politely but firmly inform the party that you are not allowed to discuss the case and that he or she should contact FINRA staff. You should then immediately inform FINRA staff about the *ex parte* contact.

Staff will handle the various questions or motions the parties present. If your assistance is required, such as on a motion for clarification, the staff will contact you.

Though they usually will not find their way to your desk, there are two types of motions you should be aware of:

- motions to submit documents to arbitrators in closed cases; and
- motions to vacate or set aside awards.

We'll briefly look at each, beginning with motions to submit documents to arbitrators in closed cases.

Motions to Submit Documents to Arbitrators in Closed Cases

Parties may not submit documents to arbitrator(s) in cases that have been closed except under the following limited circumstances:

- as ordered by a court;
- at the request of a party within 10 days of service of an award or notice that a matter has been closed, for typographical or computational errors, or mistakes in the description of any person or property referred to in the award; or
- if all parties agree and submit documents within 10 days of service or an award or notice that a matter has been closed.

A party may request that a court modify or correct an award. Issues the court can review include the completeness of the award (whether all issues and claims were addressed), clear mistakes as a matter of law, miscalculations of figures, and the erroneous description of parties or property.

To prevent unnecessary court intervention in the panel's award, it is important for you to review any draft award to be sure it is accurate in all respects.

Test Yourself

FINRA staff has forwarded you the parties' briefs. The claimant wants the panel to recalculate the award. In her brief, the claimant also states that the panel should not have excluded her son's affidavit. The respondent's brief states that the calculations were correct and argues that pursuant to Rule 12905, the claimant may not ask the arbitrators to review the affidavit issue. What should the panel do? Why?

Question Feedback

You could review the damages to see whether a mistake was made with respect to the calculations. However, you should not consider either party's argument about the son's affidavit because doing so would be prohibited by Rule 12905 because review of the affidavit issue does not concern a typographical or computational error or a mistake in the description of a person or property referred to in the award.

Motions to Submit Documents to Arbitrators in Closed Cases (Continued)

Whether the panel decides to modify the award or not, it must communicate the decision to staff.

Let's look next at what happens when a party files a motion to vacate an award.

Motions to Vacate

A motion to vacate must be made through the courts. The grounds on which parties typically challenge awards include: **Arbitrator partiality or misconduct**. Examples of partiality or misconduct include undisclosed relationships with the parties or counsel, exceeding authority, prejudicial conduct of the hearing, ambiguities or mistakes on the face of the award, corruption or fraud, unreasonable refusal to hear evidence or postpone the hearing, and manifest disregard of the law.

In motions to vacate alleging arbitrator partiality or misconduct, an arbitrator may be called upon to provide testimony about his or her or other arbitrators' conduct in an arbitration, or about an alleged conflict of interest. If an arbitrator is contacted in this context, he or she should notify FINRA staff immediately and not discuss the matter with the party.

Invalidity or absence of the arbitration agreement, expiration of the statute of limitations, or lack of notice of the proceedings. In most instances, these challenges are made by a respondent who did not participate in the arbitration. Motions to vacate show how critically important it is for the arbitrators to be competent and fair in all that they do. Justice must not only be done, but must appear to be done in all components of arbitration.
Now, test your understanding of the material in this lesson by completing the exercises that follow.

Newly discovered evidence does not constitute grounds for vacating an arbitration award.

Test Yourself

You decided a case last week, but the decision has not yet been signed by all arbitrators and transmitted to the parties. At a business meeting, a colleague asks how the case went and what was decided. What would you do in this situation? Why?

Question Feedback

You should tell your colleague that you cannot discuss the case with him. Arbitrators must maintain confidentiality in all aspects of an arbitration. You should not provide information from the hearing to anyone.

Test Yourself

Assume the same facts as in the previous question, except the parties have been advised of the decision. What would you do in this situation? Why?

Question Feedback

Again, you should tell your colleague that you cannot discuss the case with him now or in the future. You can tell your colleague where he can obtain a copy of the decision, however.

Test Yourself

Counsel for a party calls you after she receives the award and asks you to clarify one of the panel's positions. What should you do in this situation? Why?

Question Feedback

You should refer her to FINRA staff assigned to the case and let FINRA know about the *ex parte* communication. An arbitrator should never enter into post-award discussion with the parties, their representatives, or witnesses regarding the matter in dispute.

Lesson Summary: Respond to Post-Award Requests

In this lesson, you learned how to respond to post-award requests. Specifically, you learned to:

- maintain confidentiality after a hearing; and
- respond to post-award motions and requests.

Conclusion

Closing Remarks

The suggested guidelines and procedures contained in this course should help arbitrators facilitate fair and efficient proceedings. Arbitrators who consider these suggestions and encourage their appropriate use will help to alleviate successful motions to vacate awards and ultimately help to preserve award finality.

FINRA hopes that by serving the interests of fairness, efficiency, and finality, you will enhance user confidence in this forum.

Next Steps

You are now ready to proceed to the mandatory exam. Please feel free to review any of the course material before starting the exam. The exam consists of 25 multiple choice questions, and you must answer at least 20 questions correctly (80 percent) to pass the course. If you do not pass the exam on the first attempt, you will have only **one** additional opportunity to retake it—for a maximum of two attempts.

You may access the exam by:

- clicking the Exit button in the top right hand corner to close the course window;
- selecting the Return to Content Structure button; and
- selecting the exam for this course.

After answering all of the questions, select the Grade button, and you will receive your test score. Thereafter, FINRA will receive confirmation that you have completed the course and will update your Arbitrator Disclosure Report.

If you would like to complete the exam in a paper format, please contact Luis Cruz at luis.cruz@finra.org or 212-858-4339 to fax you the exam. You will have one hour to complete the exam and return it to Luis Cruz at the following fax number: **646-625-6028**. After grading your exam, FINRA will send you an email with the results and instructions on your next steps to complete your training requirements.