Office of Dispute Resolution

Chairperson Training

Version: June 2021

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Chairperson Training and Exam

Dear Arbitrator:

The following is a print version of the Chairperson 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, and complete the enclosed exam in six hours.

Please thoroughly review the course material and complete the exam. After you complete the exam, please send it to FINRA's Department of Neutral Management for grading. **You must score at least 80 percent to receive credit for the course.** We strongly recommend that you maintain a copy of the exam for your own records.

You may submit your exam to FINRA by email, fax or mail:

By Email: luis.cruz@finra.org

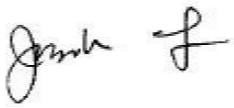
By Fax: FINRA Department of Neutral Management – FAX # 646-625-6020.

By Mail: FINRA
Attn: Luis Cruz – Neutral Management
One Liberty Plaza
165 Broadway, 27th Floor
New York, NY 10006

After grading your exam, you can be assured that FINRA will update your arbitrator disclosure report to reflect your completion of the Chairperson Training. **Nothing further is required of you with regard to this course**.

We hope you enjoy the course.

Very truly yours,



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Additional Notice

FINRA Office of 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.

Office of Dispute Resolution's Mission Statement

FINRA Office of Dispute Resolution's mission is to have all of its constituents–the investing public, brokerage firms and their employees, and neutrals (arbitrators and mediators)–view FINRA's forum 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: https://www.finra.org/#/

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Course Home

You must review each section, in the order presented, to complete the course.

Introduction

This course offers subject specific online training module for "Office of Dispute Resolution Chairperson Training".

Managing the Prehearing Process

This section discusses the ways in which the Chairperson can help facilitate fair prehearing conferences.
Upon completion of this section, you will be able to:

- Describe the prehearing process.
- Follow the steps that are necessary to ensure a fair prehearing conference.
- Identify discovery issues.
- Prepare a prehearing conference scheduling order.

Managing the Hearing Process

This section discusses how a Chairperson can facilitate fair and final hearings.

Upon completion of this section, you will be able to:

- Ensure Panel Teamwork: You'll learn that panel teamwork is essential to the process, and will make your job as Chairperson that much easier.
- Open Evidentiary Hearings: An effective opening of the evidentiary hearings sets the tone for the proceeding.
- Resolve Procedural Issues: You'll learn how to deal with issues such as postponement requests, absent parties, and motions to dismiss.

Modifying the Procedures

This section discusses how the Chairperson helps the panel tailor the hearing and award processes to a particular arbitration.

Upon completion of this section, you will be able to:

- Use the hearing script procedures.
- Adapt the hearing script procedures to meet the needs of individual cases.
- Follow the award content requirements set forth in the FINRA Code of Arbitration Procedure.
- Understand panel discretion to include reasons or explanations in the award.
- Facilitate deliberations.

Conclusion

This section brings the course to a conclusion.

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Introduction

What to Expect From This Course

This course consists of three sections, each containing lessons and review questions. At the end of the course, you will be instructed to take an online exam. You will be required to score 80% or higher to pass the exam.

The Financial Industry Regulatory Authority, Inc. (FINRA) created the Chairperson Training to assist arbitrators in fulfilling the role of the Chairperson on three-member panels. Throughout this course you will find references to valuable resource tools, such as:

- FINRA Code of Arbitration Procedure
- Arbitrator's Guide
- Arbitrator Disqualification Criteria
- United States Arbitration Act

FINRA Code of Arbitration Procedure:
https://www.finra.org/arbitration-mediation/code-arbitration-procedure

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

Arbitrator Disqualification Criteria:
https://www.finra.org/arbitration-mediation/disqualification-criteria

United States Arbitration Act:
https://uscode.house.gov/browse/&edition=prelim

What to Expect From This Course

We strongly encourage you to make use of these informative tools as some of the test questions on the final exam will pertain to the material.

The primary goal of this Chairperson training course is to enhance your leadership skills so – when selected to serve as a Chairperson – you are better prepared to conduct the process in a fair and impartial manner.

The diverse participants in each case – and the assorted procedural issues involved – make it impossible for any training program to cover every conceivable situation that may arise. Likewise, no two Chairpersons will carry out their responsibilities in precisely the same manner.

This course will focus on subjects or situations likely to arise, offering suggested avenues or approaches that can help you fulfill your role as Chairperson effectively. The procedures and policies described are designed to foster fair hearings and awards that can be sustained if challenged in court. Chairpersons and arbitrators may alter the procedures and policies if so doing will facilitate and expedite a fair hearing and final award.

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.

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Criteria for Temporary or Permanent Disqualification

It is critical that arbitrators review the criteria for temporary or permanent disqualification every time they are selected to serve. Arbitrators must disclose any fact or circumstance that might result in their disqualification.

Arbitrators must also demonstrate appropriate demeanor, neutrality, skills, and performance. These indispensable arbitrator qualities are critiqued in the following evaluation tools:

- Arbitrator Experience Survey
- Arbitration Evaluation

Arbitrator Experience Survey
https://www.finra.org/arbitration-mediation/arbitrator-experience-survey

Arbitration Evaluation: https://www.finra.org/arbitration-mediation/arbitration-evaluation-form

Expected Chairperson Behaviors and Leadership Skills

Since parties, representatives, co-panelists, and staff members are encouraged to observe and evaluate arbitrators, all arbitrators must display the appropriate behavior continuously and consistently. Additionally, Chairpersons will be evaluated on their leadership skills. In their unique role, Chairpersons must:

- Ensure that their fellow panelists display appropriate arbitrator qualities.
- Set an appropriate tone with the panel and the parties during all arbitration stages.
- Demonstrate respect for all panel members and involve them in conducting fair hearings that result in final decisions on all properly submitted issues.
- Demonstrate respect for all parties, representatives, and other hearing participants.

The above skills will enhance the capabilities to chair an arbitration panel.

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Section 1: Managing the Prehearing Process

Section One Overview – Managing the Prehearing Process

In this section, you will learn how a Chairperson can help facilitate fair prehearing conferences.

Upon completion of this section, you will be able to:

- Describe the prehearing process.
- Follow the steps that are necessary to ensure a fair prehearing conference.
- Identify discovery issues.
- Prepare a prehearing conference scheduling order.

This section takes about 3 hours and 45 minutes to complete.

To complete this section, you will need to review the following documents online:

- Code of Arbitration Procedure
- Arbitrator's Guide
- Arbitrator Disqualification Criteria
- United States Arbitration Act

Code of Arbitration Procedure: https://www.finra.org/arbitration-mediation/code-arbitration-procedure

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

Arbitrator Disqualification Criteria:
https://www.finra.org/arbitration-mediation/disqualification-criteria

United States Arbitration Act:
https://uscode.house.gov/browse/&edition=prelim

What is an Initial Prehearing Conference?

Under Rule 12500, the Director of Arbitration (Director) will schedule an Initial Prehearing Conference (IPHC or Conference) after the panel is appointed.

Users of the forum consider the IPHC to be a valuable tool in managing the administration of arbitrations because it gives the panel and the parties an opportunity to:

- Organize the management of the case.
- Set briefing deadlines.
- Set discovery cut-off dates.
- Identify and establish a schedule for potential motions.
- Schedule hearing dates.
- Determine whether mediation is desirable.
- Resolve any other preliminary issues.

Rule 12500: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12500

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What is an Initial Prehearing Conference? (Continued)

In some cases, however, the parties may wish to opt out of the IPHC. Rule 12500(c) allows parties to forego the IPHC if they jointly provide the Director with the following information:

- A statement that the parties accept the panel.
- Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside.
- A minimum of four sets of mutually agreeable hearing dates.
- A discovery schedule.
- A list of all anticipated motions, with filing and response due dates.
- A determination regarding whether briefs will be submitted and if so, the due date for the briefs and any reply briefs.

How to Prepare for the Initial Prehearing Conference

Before the IPHC, the Chairperson and the other panel members must read:

- All filed pleadings (i.e., claims, answers, counterclaims, cross-claims, and third-party claims)
- Initial Prehearing Conference Script
- Scheduling Order
- The Discovery Guide (in customer cases only)
- Code of Ethics for Arbitrators in Commercial Disputes
- Case Information Sheet

Initial Prehearing Conference Script:
https://www.finra.org/media/document/37

Scheduling Order:
https://www.finra.org/arbitration-mediation/forms-tools

The Discovery Guide (in customer cases only)
https://www.finra.org/arbitration-mediation/discovery-guide

Code of Ethics for Arbitrators in Commercial Disputes
https://www.finra.org/arbitration-mediation/code-ethics-arbitrators-commercial-disputes

All Filed Pleadings

All filed pleadings are required reading for the entire panel. The pleadings provide the framework for party agreements or panel decisions on significant IPHC issues such as scheduling evidentiary hearing dates and resolving discovery disputes. When reviewing the pleadings, consider the following items:

- Did the claimant file a Submission Agreement (SA) listing all named parties?
- Did any party with a third-party claim file a SA appropriately naming the additional parties?
- Was service of claim effected by FINRA?
- Have amendments and/or subsequent pleadings been properly served by the parties?
- Do the items checked off on the Certificate of Arbitrator Exhibits correspond to the pleadings received?
- Are there any questions concerning the pleadings or their service that should be raised with FINRA staff?

In reviewing the pleadings, the panel may discover the absence of an answer from a named respondent. In this situation, contact the staff to determine whether there was a problem with the service of the claim or with that particular respondent.

Jurisdictional, service, or notice problems that may accompany missing respondents will be discussed under "Absent Respondent" in Section 2.

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Initial Prehearing Conference Script and Scheduling Order

The Chairperson and panel should carefully review the Initial Prehearing Conference Script and the Scheduling Order to properly prepare for the IPHC. The IPHC Script encourages arbitrators to schedule sufficient evidentiary hearings at the earliest available time consistent with the parties' need to prepare.

Both the Script and the Scheduling Order were created to help the Chairperson and panel manage an effective IPHC, one that provides all the parties with a clear idea as to how the case will proceed. The Script contains required prehearing functions or activities, and suggests procedures for accomplishing these functions or activities during the IPHC. The Scheduling Order helps the Chairperson accurately record the parties' agreements, or panel decisions, on such activities.

Staff will provide the Chairperson and other panel members with the IPHC Script and Scheduling Order along with the case materials. If these two documents do not arrive with the case materials, each arbitrator should contact staff immediately. If after reading the IPHC Script and Scheduling Order the Chairperson, or other panel member, has questions or concerns, the staff should be contacted immediately.

Initial Prehearing Conference Script:
https://www.finra.org/media/document/37

Scheduling Order:
https://www.finra.org/arbitration-mediation/forms-tools

Discovery Guide

If you are selected to serve as Chairperson on a customer case, you should become familiar with Rules 12505-12514 of the Customer Code and the Discovery Guide. The Discovery Guide, including the Document Production Lists, serves as a guide for the parties and the arbitrators to facilitate the efficient exchange of documents and information in customer cases.

Further discussion of the Discovery Guide can be found in this section.

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

Code of Ethics

The Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) was prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. All arbitrators must read and comply with the ethical standards in the Code of Ethics, and are encouraged to refer to it regularly. The Code of Ethics is not a substitute for nor does it supersede applicable law or the FINRA Code of Arbitration Procedure.

Code of Ethics for Arbitrators in Commercial Disputes:
https://www.finra.org/arbitration-mediation/code-ethics-arbitrators-commercial-disputes

How to Conduct an Initial Prehearing Conference

When conducting an IPHC, the Chairperson should be mindful of the following:

- The Conference, conducted by the telephone, is not recorded unless the panel determines otherwise, either on its own initiative or upon motion of a party. Please see Rule 12502.
- Scheduling evidentiary hearings is a primary goal of the IPHC.
- The parties were advised by the staff to be prepared at the IPHC to schedule future hearing dates.
- Arbitrators need to be prepared with their calendars to schedule future hearing dates.

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IPHC Script

As indicated earlier, the Chairperson should use the IPHC Script and the Scheduling Order to facilitate management of the conference and to help accomplish important prehearing functions. At the outset of the IPHC, advise the participants that the IPHC Script and the Scheduling Order will be used throughout the Conference to accomplish several important tasks, including the following:

- To keep all conference participants focused on IPHC activities.
- To ensure fair and complete participant discussion of all IPHC issues.
- To facilitate the recording of all party agreements or panel decisions relating to the IPHC activities in the Scheduling Order.

As Chairperson, you may occasionally need to remind the parties or their representatives that arguments on the substance or merits of a dispute will not be entertained during the IPHC, unless the panel agreed otherwise prior to the IPHC

To Begin the Conference

To begin the IPHC the Chairperson should handle the following housekeeping details:

- Identify conference participants and resolve any absent party issues.
- Advise all participants that they must identify themselves throughout the teleconference.
- Announce new arbitrator disclosures before confirming that the parties agree to the composition of the panel. Note that there is a causal challenge, if any, and
    - Tell the parties you'll proceed with the scheduling of dates and discovery, and
    - Advise the parties that they need to tell the staff person that a causal challenge exists which needs to be addressed. (See IPHC Script).

If the arbitrator involved in the causal challenge believes it appropriate to withdraw, he/she should disconnect from the call.

- Fulfill the Oath of Arbitrator (Oath) requirement under Rules 12402 and 12403 of the FINRA Code of Arbitration Procedure (Code). If an arbitrator fails to complete the Oath, the IPHC Script addresses how you can administer the Oath.
- Remind all parties and counsel to express their views and objections to the panel and not to one another.
- Remind all conference participants to conduct themselves in a civil manner during all prehearing conferences and evidentiary hearings. You also may have to caution the participants to avoid overly contentious or hostile demeanors.

Any arbitrator who has not received and reviewed the Temporary and Permanent Arbitrator Disqualification Criteria, the Arbitrator Disclosure Checklist, and his or her Arbitrator Disclosure Report cannot make rulings.

Rule 12402: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12402

Rule 12403: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12403

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Senior or Seriously Ill Parties

The IPHC will also be a 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 expedite the process and provide a reasonable amount of time for case preparation, particularly in the areas described below:

Discovery Deadlines

Arbitrators should take all steps within their authority to help expedite the exchange of documents and the identification of witnesses. During the IPHC, the panel should establish a discovery cut off as close to the IPHC date as possible. FINRA also recommends that the panel set the deadline for the filing of discovery motions no more than three months after the IPHC date.

Scheduling the Hearing

Arbitrators should schedule dates that will expedite the process but still provide a reasonable amount of time for case preparation. FINRA encourages parties and arbitrators to schedule the hearing within six months from the date of the IPHC. FINRA also recommends setting aside extra dates to avoid delay in the arbitration process.

Adjournments

When deciding adjournment requests, arbitrators should be mindful of the age and health of parties or key witnesses. In addition, arbitrators are expected to avoid causing postponements absent a genuine emergency.

Direct Communication

FINRA asks the parties and arbitrators to consider agreeing to direct communication in this matter if all parties are represented by counsel.

Decisions

Arbitrators should return orders and decisions to FINRA as soon as possible, preferably by email or through the portal (on DR Portal cases). To facilitate prompt return, arbitrators can sign orders and Awards electronically.

FINRA intends for these measures to improve the arbitration process for disputes involving senior or seriously ill parties, while maintaining procedural balance and fairness for all involved parties.

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Challenges to Proceeding with an IPHC

A party may challenge going forward with an IPHC for any of the following reasons:

1. They are in the process of settling.
2. They plan to seek a motion to dismiss prior to going further.
3. A party has a challenge to a panelist.

What should the Chairperson do in the above instances?

In example one, you would acknowledge that the parties are working on a settlement, however, inform them that the IPHC had been scheduled for some time. The parties are still welcome to work on settlement, however, the Conference should proceed in the meantime.

In example two above, the panel should advise the parties that the IPHC will go forward as scheduled, and the deadline for the motions will be calendared during the call. If the motion to dismiss has already been filed and answered, the panel may schedule a subsequent date to either rule on the motion or to have the motion heard during a later call.

Finally, in example number three above, a party will occasionally refuse to proceed with the IPHC before the two remaining arbitrators after a challenged arbitrator has disconnected from the call. Because no substantive matters are addressed during an IPHC, the Chairperson should continue and complete the scheduling order.

Maintaining Neutrality

The panel must also conduct itself in a manner that encourages and protects the parties' right to a full and fair hearing. It is your role as Chairperson to ensure that all arbitrators listen to the diverse viewpoints with calm, unbiased attention and without unnecessary interruption. It is also your role to call for private executive sessions to consult with the panel during and after the IPHC.

When announcing an executive session, confirm with the telephone operator that only the arbitrators remain on the line. Arbitrators should remain silent until the Conference call operator confirms that only the arbitrators are on the line.

Steps to Follow

After all housekeeping details have been addressed, the following tasks are necessary to ensure that the IPHC will effectively expedite the proceedings:

- Follow the IPHC Script.
- Identify each filed pleading received and read by the arbitrators.
- Schedule any necessary deadlines for discovery. Keep in mind additional scheduling needs that may include: scheduling of motions, prehearing conference calls, and briefing of legal issues.
- Ascertain whether an adequate number of evidentiary hearings have been scheduled. If not, schedule the dates after confirming the definite availability of the parties, their witnesses, and the panel. Make sure that sufficient time is permitted for adequate party preparation and/or resolution of other prehearing issues. It is essential that parties and arbitrators have their calendars up-to-date and available at the IPHC.
- Strive to schedule evidentiary hearings to commence within nine months or less after the IPHC. There may be times when this is not feasible or the parties have agreed to schedule the hearing more than nine months after the IPHC. In those instances, the panel should schedule the hearing more than nine months after the IPHC if appropriate. However, the commencement of hearings more than nine months after the IPHC should be the exception.
- If the arbitrators have been advised that there are very ill or senior parties or essential witnesses, the panel should strive to select dates that will expedite the process and provide a reasonable amount of time for case preparation.

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Steps to Follow (Continued)

- Discuss with the parties the option to communicate directly pursuant to Rule 12211 of the Code. (For information on direct communication, review FINRA's arbitrator online training course titled "Direct Communication Rule.")

- While parties may ask the panel to consider motions at the IPHC, the panel is not obligated to do so at that time, even if motions and responses were received and read prior to the IPHC. If the parties serve and file motions and related papers, suggest that the panel and the parties discuss the need for a subsequent prehearing conference. Emphasize that the arbitrators will determine whether such a conference is necessary. If the arbitrators direct a subsequent prehearing conference based on the parties contentions, it should be scheduled during the IPHC and noted on the Scheduling Order.

- Ensure that all parties are given an opportunity to completely state their views on all issues.

Contact FINRA Staff immediately after the call concludes if any filed pleading is missing. Pleadings do not include discovery requests and/or motions to which responses are not yet filed.

Remember to review your entire case packet before the conference call begins.

How to Conclude an IPHC

At the end of the IPHC, read the contents of the Scheduling Order to all the parties and/or representatives. This action verifies the accuracy and completeness of all party agreements or panel decisions during the IPHC and contributes to complete party compliance with the Scheduling Order.

In addition, it is important that you submit the completed Scheduling Order to staff within two business days after the IPHC ends. This action allows staff to serve the Scheduling Order promptly on all parties and/or representatives and contributes to expeditious party compliance with all IPHC agreements or decisions.

Finally, conduct a post-IPHC executive session with the panel to consider the following:

- Whether the parties should be assessed additional hearing session deposits if the panel scheduled multiple evidentiary hearing sessions under Rule 12902(b).
- Whether and how the parties should be assessed the cost of the Conference if the case settles before the evidentiary hearings commence and the parties fail to allocate such cost in the settlement agreement under Rule 12701(b).

Rule 12902(b): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12902

Rule 12701(b): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12701

Lesson Summary

You have now completed the first lesson of Section 1. Test your knowledge through the following exercises before advancing to the next lesson.

You will now receive a series of open-ended questions. Think about each question carefully before reviewing the suggested answer provided.

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Test Yourself

What is the primary purpose of the Initial Prehearing Conference Script and the Scheduling Order?

Question Feedback

The primary purpose of these two procedural tools is to help the Chairperson manage an effective IPHC, one that provides all of the parties and the panel with a clear idea as to how the arbitration will proceed. The IPHC Script contains required prehearing functions or activities and guidelines for accomplishing them. The Scheduling Order, which immediately follows the IPHC Script, corresponds with the IPHC Script and allows the Chairperson to record all panel decisions or party agreements about the IPHC activities and when they are scheduled to take place.

Test Yourself

What are some of the required prehearing activities contained in the Initial Prehearing Conference Script and the Scheduling Order?

Question Feedback

Some required Initial Prehearing Conference Script functions or activities may include the following:

- Identifying expected Conference participants and resolving absent party problems before continuing the Conference.
- Requiring all Conference participants to identify themselves throughout the Conference.
- Encouraging full arbitrator disclosure before asking the parties to confirm their acceptance of the panel.
- Noting all causal challenges to the arbitrators, if any, and:
    - Telling the parties you'll proceed with the scheduling of dates and discovery, and
    - Advising the parties that they need to tell the staff person that a causal challenge exists which needs to be addressed.
- Complying with the Oath of Arbitrator requirement in Rules 12402 and 12403.
- Complying with the Acknowledgment of Claims requirement.
- Promoting, as appropriate, the FINRA Mediation Program.
- Reminding all participants to avoid ex parte contact with any of the arbitrators.
- Scheduling adequate evidentiary hearing dates.
- Resolving discovery disputes and setting specific production schedules.

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Powers of the Selected Arbitrator

One member of the panel, usually the Chairperson, decides discovery issues. The Code authorizes the appointment of one arbitrator to determine, on the panel's behalf, all unresolved discovery issues. Prehearing Discovery conferences, when held, are usually conducted by telephone.

Staff provides the arbitrator selected to hear discovery issues with a copy of the motions, objections, responses, and related documents. The arbitrator determines whether to decide the discovery issues by reviewing the filed papers or by conducting a telephonic prehearing conference.

Rule 12503(c) authorizes the arbitrator selected to hear discovery issues to act on behalf of the full panel with regard to the following activities:

- Issuing subpoenas
- Ordering the appearance of witnesses
- Ordering the production of documents
- Setting deadlines for compliance with orders to appear or produce
- Issuing any other ruling which will expedite the arbitration proceedings

The selected arbitrator also may refer any discovery issue to the full panel for a decision.

Rule 12503(c): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12503

Rule 12503(c)

Rule 12503(c) does not authorize the arbitrator selected to hear discovery issues to decide the following matters, absent the full panel:

- To decide or dispose of submitted claims or defenses under Rule 12504. Note: Only the full panel has the power to make such dispositive rulings.
- To determine issues of ineligibility based on the time when the claim was submitted to arbitration under Rule 12206.
- To determine ineligibility based on the submitted subject matter under Rule 12201 (e.g., insurance disputes).
- To dismiss a pleading under Rule 12212.

Rule 12504: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12504
Rule 12206: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12206
Rule 12201: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12201
Rule 12212: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12212

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Rule 12503(c) (Continued)

Additionally, Rule 12503(c) does not authorize the arbitrator selected to hear discovery issues to make certain non-dispositive rulings on behalf of the full panel. Some of the non-dispositive rulings reserved for the full panel include the following:

- Decisions to take actions to enforce compliance with orders to produce documents or witnesses under Rules 12212 and 12409.
- Decisions to accept or reject requests to file amendments after appointing the panel under Rule 12309.
- Final decisions to consolidate arbitration proceedings or to sever claims under Rules 12312-12314.
- Decisions to bar presentation of facts or defenses not included in filed answers or, where answers are not filed in a timely manner, to bar presentation of any defense or argument under Rule 12308.
- Decisions to change the time or location of the second or subsequent hearings under Rule 12600.
- Decisions to exclude documents or witnesses that are part of a party's presentation but which were not exchanged or identified at least 20 calendar days before the first scheduled evidentiary hearing date under Rule 12514.
- Decisions relating to evidence admissibility under Rule 12604.
- Decisions to adjourn hearings under Rule 12601.

Rule 12212: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12212

Rule 12409: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12409-0

Rule 12309: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12309

Rules 12312-12314: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12312

Rule 12308: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12308

Rule 12600: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12600

Rule 12514: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12514

Rule 12604: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12604

Rule 12601: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12601

Discovery Guide in Customer Cases

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 rules.

12505: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12505

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Discovery Guide in Customer Cases (Continued)

A party may object to producing a document on a List because of the cost or burden of production. If the party demonstrates that the cost or burden is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item on the Lists, or determining whether another document can provide the same information. Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide.

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. Rules 12511 and 12212 codify sanction provisions, clarifying the authority for arbitrators to impose sanctions on parties for non-compliance with discovery rules or discovery orders of the panel.

Rule 12505 requires parties to cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration.

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

Rule 12511: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12511

Meeting the Parties' Needs

Tailoring discovery decisions to the submitted issues helps promote more efficient or streamlined evidentiary hearings. For example, arbitrators can decide that certain items in the Discovery Guide's document production lists may not be relevant in cases where unsolicited orders are placed electronically and there is no associated person involved in the transactions. Similarly, arbitrators can order the production of documents not included in the document production lists. Any order made by the panel at the Initial Prehearing Conference for party exchange of documents and information should be entered on the Scheduling Order, or be made part of a separate discovery order.

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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.

Third-Party Subpoenas to Regulatory Authorities—Documents with Personal Confidential Information (PCI)

Third-party subpoenas to regulatory authorities present unique situations. These subpoenas often seek documents that may contain personal confidential information (PCI) about customers who are not parties to the arbitration. PCI includes Social Security numbers, brokerage, bank or other financial account numbers and taxpayer identification numbers. Regulatory authorities may have difficulty complying with such subpoenas because of the presence of PCI and may object to the subpoenas.

If a regulatory authority objects to a subpoena because the responsive documents contain PCI, arbitrators may be asked to resolve the dispute. Arbitrators may, in no particular order:

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- issue protective orders to limit the use of PCI;
- suggest parties enter into confidentiality agreements;
- require a party to redact PCI; or
- modify the scope of the subpoena.

Rule 12512: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12512

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 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 five 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 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.

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.

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.

Unless the panel directs otherwise, the party requesting the appearance of witnesses by or the production of documents from non-parties under Rule 12513 shall pay reasonable costs of appearances and/or production.

Rule 12503: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12503

Rule 12513: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12513

Privileged Documents

Parties often object to the production of documents, or redact documents, on the grounds that they are privileged.

Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege or the attorney work produce doctrine. The arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including attorney work product.

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Like all objections under FINRA Rule 12508, objections based on privilege are subject to the same requirements. The objecting party must specifically identify which document or requested information it is objecting to and the basis for the objection. Objections must be timely, in writing and must be served on all other parties. Parties may not simply fail to respond to discovery on the grounds that a document is privileged. If a party challenges another party's claim of privilege, the arbitrators must determine whether a privilege exists based on the facts and circumstances of the case. Upon request of a party, arbitrators may request that a party asserting the privilege provide information that, without revealing the information itself, would be sufficient for the other parties to assess the privilege claim.

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.

Rule 12508: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12508

Rule 12512: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12512

Prehearing Discovery Conference

To facilitate the management of a Prehearing Discovery Conference, the arbitrator selected to hear discovery issues should do the following:

1. Prepare for the Prehearing Discovery Conference.
2. Manage the Prehearing Discovery Conference.
3. Make specific rulings.
4. Promptly communicate all rulings.

Prepare for the Conference

The following elements are necessary to prepare for a Prehearing Discovery Conference:

- Review Rules 12505-12514 of the Code.
- Review the Scheduling Order, and any other panel orders, to ensure that you are aware of all prior Initial Prehearing Conference agreements or decisions.
- Review the pleadings and the notes you prepared before or during the Initial Prehearing Conference to ensure that you have an informed basis for your discovery decisions.
- Review all documents filed by the parties relating to the discovery dispute.
- If you are serving on a public customer case, review Rule 12506 and the Document Production Lists in the Discovery Guide for guidance on expected documentary production and time frames.
- Make sure your calendar is up-to-date and that it will be available during the conference. It will help you establish discovery time frames in coordination with other dates, such as previously scheduled evidentiary hearing dates.
    - Be cognizant of your decision-making authority to ensure compliance with the Code.
    - Prepare a checklist for the Prehearing Discovery Conference.

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Conference Agenda

Through staff you may request the parties to provide a subject matter agenda and copies of any previously exchanged document requests or responses. These will help to ensure uniform conference expectations by all participants. In addition, the agenda will help you to keep track of your decisions which may include the following:

- Requests for subpoenas or orders of non-party or party witnesses and/or documents.
- Confidentiality issues.
- Early identification of party witnesses and testimony.
- Early identification and pre-marking of party documentary exhibits.
- Scheduling of witnesses, particularly those traveling long distances.

The effective use of a conference agenda also can help you to respond to requests for procedural guidance on other issues that may facilitate the evidentiary hearings, including the following:

- Testimony by telephone.
- Affidavits.
- Depositions.
- Interrogatories.
- Agreements on facts or law.
- Legal briefs.

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Manage the Prehearing Discovery Conference

To manage a fair, efficient Prehearing Discovery Conference the following is necessary:

- Begin by explaining the purpose of the Prehearing Discovery Conference.
- Tell the parties that your goal is to ensure that throughout the conference all parties are afforded the opportunity to state their views on all issues.
- If from your reading of the filed papers you have decided certain discovery issues, inform the parties of the decisions and direct that they focus their oral presentations on the remaining issues.
- Tell the parties that you may request that a draft order or letter containing all decisions or agreements be submitted for your review and signature.
- Tell the parties that you will be following the conference agenda and focusing on discovery issues, which may include the following:

    - Requests to produce additional documents or information not contained in the Discovery Guide.

    - Requests to order the deposition of an essential witness who is physically unable to attend an evidentiary hearing or an essential witness who is physically able, yet unwilling, to attend the hearing and who cannot be ordered to do so.

Non-Discovery Matters

After you make all discovery determinations, address other matters that may facilitate the evidentiary hearings. Some of these matters may include the following:

- Guidelines on admissibility of affidavits or testimony by telephone.
- Appropriateness of legal memoranda or the schedule for filing them.
- Appropriateness of scheduling a Prehearing Conference for the full panel to consider unresolved motions.

Motions

A party may occasionally make a motion to sanction another party for failing to produce an ordered document. When this occurs, the party alleged with non-compliance must be afforded a full and fair opportunity to respond. If the party has an explanation that substantially justifies the failure to produce, the party may be given another opportunity to comply, pursuant to the arbitrator's direction with regard to time and method of production.

If the party failed to produce as directed and does not provide a reason that substantially justifies the failure, Rules 12212 and 12511 provide that the full panel may issue sanctions. Such sanctions may include:

- Assessing monetary penalties payable to one or more parties.
- Precluding a party from presenting evidence.
- Making an adverse inference against a party.
- Assessing postponement and/or forum fees.
- Assessing attorneys' fees, costs, and expenses.
- Initiating a disciplinary referral.
- Dismissing with prejudice a claim, defense, or proceeding.

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Enforcing Compliance with Directives

If the panel believes the noncompliance is serious, it has wide discretion in deciding what actions to take. Under Rule 12212, the panel may initiate a disciplinary referral against any non-complying FINRA member or person associated with a member during or after the arbitration is concluded by award, settlement, or otherwise.

Under Rule 12212, the panel also has the power to dismiss a claim or defense of a non-complying party "with prejudice," meaning with no right to resubmit the claim or defense at any time and in any forum, if the panel determines that the noncompliance is material and intentional and if prior sanctions have not achieved compliance with the order.

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.

Arbitrators may also consider sanctions under Rule 12212 to address a respondent's failure to sign and submit a Submission Agreement (SA), absent a specific jurisdictional challenge.

Pursuant to Rules 12302 and 13302 of the Customer and Industry Codes, 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 Rules 12303 and 13303 of the Codes, 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 a 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)."

Notice to Members: https://www.finra.org/rules-guidance/notices/04-11

IPHC Script: https://www.finra.org/media/document/37

Make Specific Rulings

At the conclusion of the Prehearing Discovery Conference, you must verify all of your decisions and any party agreements by reading them to the parties. Be certain that these decisions or agreements are specific, complete, and clearly understood by everyone. For example, if you order the production of documents or information, you must precisely describe what is to be produced and must specify when. Your actions here will help to ensure accurate and complete compliance with your written order.

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Communicate All Rulings

You must endeavor to provide your written Order to staff quickly for service on all of the parties and the other panel members. If possible, send your Order by fax or electronic mail. Please be aware that all your written communication to the staff will become a permanent part of the case file. Write accordingly!

Be sure to communicate all of your discovery rulings, including production schedule determinations and all other conference decisions. Some of these may include the following:

- Referral of any unresolved discovery issue for panel determination.
- Referral of non-compliance with any discovery order for panel determination of appropriate action.
- Non-discovery scheduling for such matters as additional prehearing conferences, the filing of legal memoranda, or witness testimony.

Your timeliness and thoroughness in this area will help ensure prompt compliance with your written Order and contribute to panel teamwork, a subject that will be discussed in the next section.

When preparing orders, please be sure to sign and date them, including all issues regarding when, where, and who should pay for document production. Send your order only to staff.

Lesson Summary

You have now completed the second lesson of Section 1. Test your knowledge on the following pages before advancing to the next section. You will now receive a series of open-ended questions. Think about each question carefully before reviewing the suggested answer provided.

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Test Yourself

What is the primary purpose of the Discovery Guide?

Question Feedback

The Discovery Guide, including the Document Production Lists, serves as a guide for the parties and the arbitrators. It is designed to streamline the exchange of essential documents among the parties in customer cases without staff or arbitrator intervention.

Test Yourself

How should the Chairperson use the Document Production Lists in the Discovery Guide?

Question Feedback

The Chairperson should tailor the Lists to the issues and circumstances of the case on which he/she is serving. To do so, the Chairperson must read and be aware of all filed claims and defenses when using the Lists to help decide unresolved discovery issues.

Test Yourself

Describe the powers of the single member of the panel appointed under Rule 12503.

Question Feedback

Rule 12503 authorizes the single arbitrator on the panel's behalf to make all decisions relating to unresolved discovery issues under this rule. Some examples of the selected single arbitrator's authority include the following:

- Ordering the appearance of witnesses.
- Ordering the production of documents.
- Setting deadlines for compliance with the orders

Test Yourself

List powers that only the full panel may exercise.

Question Feedback

Rule 12503 does not authorize the single arbitrator to decide claims or defenses. Only the full panel is authorized to make such decisions. In addition, Rule 12503 does not authorize the single arbitrator to make certain non-dispositive rulings. Some of these rulings include the following:

- Actions to obtain compliance with arbitrator orders to produce documents or witnesses.
- Acceptance or rejection of requests to file amendments after panel appointment.
- Consolidation of separately filed cases or the severance of claims.
- Exclusion of facts or defenses not pleaded in an Answer or not pleaded in a timely manner.
- Exclusion of a party's documents or witness lists not identified or exchanged in a timely manner.

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Section One Summary

In this section, you learned how to use FINRA procedures and guidelines to ensure a fair and effective prehearing conference. You also learned the necessary steps to follow in order to manage the prehearing conference smoothly. Finally, you learned the powers of the arbitrator selected to decide unresolved discovery issues, and the powers reserved for a full three-person panel.

In the next section, we will advance from discussions concerning the initial prehearing conference and the prehearing discovery conference to issues concerning the evidentiary hearings.

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Section 2: Managing the Hearing Process

Section Two Overview – Managing the Hearing Process

In this section, you'll cover how a Chairperson facilitates fair and final hearings.

Upon completion of this section, you will be able to:

- Ensure Panel Teamwork: You'll learn that panel teamwork is essential to the process, and will make your job as Chairperson that much easier.
- Open Evidentiary Hearings: An effective opening of the evidentiary hearings sets the tone for the proceeding.
- Resolve Procedural Issues: You'll learn how to deal with issues such as postponement requests, absent parties, and motions to dismiss.
- Ensure Fair Hearings: Fairness is the hallmark of arbitration. You'll learn how to ensure that all parties are given a full and equitable opportunity to be heard on all issues.

This section takes about 5 hours to complete.

To complete this section, you will need to review the following documents online:

- Code of Ethics
- Hearing Procedure Script
- Arbitrator's Guide
- United States Arbitration Act
- Code of Arbitration Procedure

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

Hearing Procedure Script: https://www.finra.org/arbitration-mediation/hearing-scripts

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

United States Arbitration Act:
https://uscode.house.gov/browse/&edition=prelim

Code of Arbitration Procedure:
https://www.finra.org/arbitration-mediation/code-arbitration-procedure

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Introduction

Successful hearings, like successful prehearing conferences, result from effective Chairperson leadership. Attentive Chairperson leadership helps create an atmosphere of trust and permits the entire panel to focus on the evidence, arguments, issues, parties, representatives, and witnesses.

Each panel member — including the Chairperson — is entitled to one vote on all matters. The Chairperson directs the entire proceeding and his/her competency determines the hearing's success.

To help ensure a fair hearing that results in a final and binding decision, the Chairperson must manage all hearing participants, including co-panelists. To do so effectively, the Chairperson must understand and use the Code as well as the forum's procedures and guidelines.

Executive Session

This lesson examines how executive sessions help ensure effective panel teamwork and hearing management from a proceeding's start to its end.

To help you manage the proceeding, you should conduct an executive session with the other arbitrators before the first evidentiary hearing. This is an important first step to emphasize each panel member's importance in the proceeding.

Panel Teamwork

The Chairperson should set a tone of panel teamwork at the first executive session. This can be especially important if the other arbitrators have little or no hearing experience or if you have not previously served as Chairperson with either of the other arbitrators.

Arbitrators should arrive early to meet in executive session before the first evidentiary hearing begins.

To enable you to tailor your procedural comments appropriately for the other arbitrators during the pre-evidentiary executive session, you need to know their background and hearing experience. As soon as a panel is appointed, staff provides each panel member with the Arbitrator Disclosure Reports of the other arbitrators.

If after reviewing these reports you have any questions about the other arbitrators, call the staff.

Always review the Arbitrator Disclosure Reports of the other arbitrators selected to serve with you.

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What Should the Chairperson Communicate to the other Panel Members?

At the first executive session, you should communicate to the other panel members the following:

- That you will immediately take an executive session if any panel member has any question, concern, or observation at any time during the hearings.
- That you plan to take at least one executive session after all parties complete their evidentiary presentations but before their closing arguments or summations.
- That you seek panel members' permission to make, on their behalf, minor evidentiary or procedural decisions.
- That you will always consult with them in executive session on serious evidentiary or procedural issues and on all substantive issues.
- That disagreements with one another on various issues must be expressed only in the privacy of executive sessions.
- That disruptive behavior by the parties may be addressed by calling an executive session to give the parties an opportunity to cool off.
- That the panel must remain impartial or neutral in fact and in the parties' perception.
- That, unlike jurors, they can ask questions of any witness after consulting with the rest of the panel.
- That if arbitrators require clarification of an issue, they should request a brief from the parties.

Also, as Chairperson, find out ahead of time how late your co-panelists can serve and discuss what time the hearing will probably conclude (i.e., 5:00 or 6:00 p.m.), or whether any arbitrator needs to break at any time during the hearing.

Reporting Discovery Issues

At the first executive session, the arbitrator selected to resolve discovery disputes should report the following to the other panel members:

- discovery decisions;
- unresolved discovery issues requiring panel determination;
- any non-compliance with discovery orders;
- non-discovery scheduling decisions (other prehearing conferences, filing of legal memoranda, etc.); and
- party agreements (for example, agreements on facts or law, identification and pre-marking of documentary exhibits, scheduling of witnesses, etc.)."

Encouraging Executive Sessions

Informing the other arbitrators that they need only ask to have an immediate, private executive session will demonstrate that you are a leader who values all panel member concerns and opinions. This procedure also will serve to emphasize that the key purpose of an executive session is to enable the panel to meet privately, off the record, to discuss procedural and substantive issues. Remember — a good Chairperson knows when to take well-timed breaks.

Schedule an Executive Session before Closing Arguments

An executive session before Closing Statements permits the panel to address issues such as:

- Outstanding or unmarked exhibits.
- Undecided motions.
- Parties' requests for additional evidence.

Normally these issues should have been addressed previously. The arbitrators can also discuss and decide whether the parties have effectively answered all questions and addressed all issues so the panel can render a fair and final award. If not, the panel can decide whether to request additional testimony, documentary evidence, memoranda, or briefs.

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Obtain Panel Consent to Make Minor Decisions

Obtaining panel consent to make minor decisions on their behalf helps to avoid any perceptions or later complaints from the other arbitrators that you made unilateral decisions. It also shows respect for the other panelists and honors Rule 12410, which requires that all panel rulings and determinations be made by a majority of the arbitrators.

Explain to the other arbitrators that their permission will authorize you to simplify or streamline the proceeding by covering such matters as objections to leading or repetitive questions and objections to preventing a witness from fully responding to a question.

In addition, assure the panel that if a minor procedural or evidentiary issue becomes the subject of a heated exchange among the parties or their representatives you will consult with the entire panel in executive session before making a decision.

After you obtain panel consent to make minor decisions on their behalf, inform the other arbitrators that these decisions will be described on the hearing record as panel decisions.

Lastly, to avoid any party/representative perception that you acted unilaterally, you should announce the above procedure to the parties and their representatives on the hearing record before the evidentiary presentations begin.

Rule 12410: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12410-0

Keep Panel Discussions Private

When you assure the other arbitrators that they will have a full opportunity to be heard in executive session on all key issues, be sure to remind them that all panel disagreements must remain private if panel unity is to be maintained. Remind the panel team that all determinations including those made by a majority of the arbitrators must be announced as panel rulings. When announcing panel decisions you should state "the panel has ruled..."

Ensure Neutrality in Appearance and in Fact

Explain that partiality by one panel member may taint all panel members, the fairness of the hearing, and the finality of the award. Inform all panel members that neutrality includes:

- Making no preconceived or premature conclusions based only upon the pleadings or on the absence of a pleading or a party.
- Disclosing at any stage of the proceeding any fact or circumstance that any party might reasonably view as partial or biased, or any fact or circumstance that might change their classification as a public or non-public arbitrator.
- Maintaining neutral conduct before, during, and after a proceeding concludes.

Exercise the Right of Reasonable Inquiry

Explain that arbitrator questions of witnesses must be appropriate in time and neutral in content to maintain arbitrator fairness in perception as well as in fact. Remind the other arbitrators that uncertainty about the timing and content of questions or about who should ask particular questions should be discussed and resolved in executive session.

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Assign Hearing Duties

At the initial pre-evidentiary hearing executive session, you also must explain, assign, and be sure that each arbitrator clearly understands who will be responsible for performing important hearing duties. Some of these arbitrator duties — which cannot be delegated to the parties — include the following:

- Operating the required recording device for all hearings.
- Marking and maintaining documentary exhibits.
- Keeping a record of all hearing participants (e.g., witnesses who have taken their oath or affirmation).
- Making and maintaining a list of all outstanding motions or requests.

Rule 12606 requires that a verbatim record of all evidentiary hearings be kept. The recording is the official record of the proceeding (even if it is transcribed), unless the parties and arbitrators agree to a stenographic record.

If the stenographic record is the official record of the proceeding, a copy must be provided to FINRA, 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 decides that one or more other parties should bear all or part of the costs.

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.

Rule 12606: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12606

Operating the Recording Device

You should be sure that the panel member assigned to operate the recording device tests the recorder before the parties appear in the room.

- Identifying the recordings with the case name and number, the hearing date and the recording number.
- Using different, clearly identified recordings on different hearing dates.
- Assuring that the recording device is functioning properly.
- Asking that the hearing be stopped when the recording must be refreshed.
- Being certain that the recording device is turned off during all executive sessions.
- Assuring that the recording device is operating after lunch, breaks and executive sessions.
- Leaving all recordings in a secure location during lunch and other breaks.
- Returning all recordings to assigned staff at the end of the hearing.

Before moving on to the next lesson, complete the following practice activities to test your understanding of how you can help to ensure panel teamwork throughout the evidentiary hearings.

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Test Yourself

What should the Chairperson do before conducting the first executive session?

Question Feedback

Before conducting the executive session the Chairperson should know the background and hearing experience of the other arbitrators. This will allow the Chairperson to tailor his or her procedural comments to the other arbitrators during the executive session.

Test Yourself

What should the Chairperson do during the first executive session to help ensure panel teamwork?

Question Feedback

During the executive session, the Chairperson can help to ensure panel teamwork by discussing the procedures covered in this lesson, procedures that will demonstrate to the other arbitrators their critical importance to a fair and final proceeding. The Chairperson should:

1. Go over prior decisions that you may have made without the co-panelist.
2. Remind co-panelist that each arbitrator gets one vote but majority rules.
3. Assign duties.
4. Discuss start/end time.
5. Obtain the panel's consent to rule on minor objections.
6. Remind the panel of the importance of avoiding ex-parte communication.
7. Remind panelists of the timing of questions and to only ask appropriate questions.
8. Remind the panel to maintain neutral demeanor— neutral in appearance and in fact.
9. Disclosure, disclosure, disclosure...

Test Yourself

Explain how panel teamwork will help to facilitate the Chairperson's management of the evidentiary hearings.

Question Feedback

The Chairperson who explains to panel members before the first evidentiary hearing the importance of their concerns, questions, views, and neutrality helps to ensure panel teamwork throughout the proceeding.

Willingness to act together facilitates the Chairperson's management of the evidentiary hearing by allowing the panel to focus on the issues and evidence in dispute.

In addition, panel teamwork helps to create an atmosphere of trust that permits the arbitrators to focus on the participants and the conduct of the hearings.

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Prepare for the First Evidentiary Hearing

Before the first evidentiary hearing, you must review the following:

- All filed pleadings and amendments
- All unresolved motions and responses
- Case Information Sheet
- Witness Lists
- Hearing Procedure Script
- Code of Arbitration Procedure

Reviewing these materials will familiarize you with the procedural guidelines and rules used to conduct fair hearings; with the parties, representatives, witnesses, arbitrators expected to participate at the evidentiary hearings; and with all issues or matters that may be presented at the hearing.

Other resources available to help you are the following:

- Code of Ethics
- Arbitrator's Guide
- United States Arbitration Act

Hearing Procedure Script:
https://www.finra.org/arbitration-mediation/hearing-scripts

Code of Arbitration Procedure:
https://www.finra.org/arbitration-mediation/code-arbitration-procedure

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

Arbitrator’s Guide:
https://www.finra.org/arbitration-mediation/arbitrators-guide

United States Arbitration Act:
https://uscode.house.gov/browse/&edition=prelim

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Hearing Procedure Script

You should read the appropriate parts of the prehearing script to the parties at the first evidentiary hearing. Thereafter, review and follow the Hearing Procedure Script at every evidentiary hearing. On the record at the first evidentiary hearing, the Chairperson should state that he or she will be using and referring to the Script throughout the proceeding. If the Script does not arrive with the case materials, you should contact staff.

The Script will help you keep track of the entire proceeding, and help you conduct hearings that comply with the Code and with federal and state arbitration laws. Each part of the Script will help the Chairperson and panel conduct fair hearings that result in binding decisions. This is especially significant because staff often will not be present at the evidentiary hearings.

The Chairperson should identify the arbitration on the record by case name, number, date and time at the beginning of every hearing day.

The Chairperson and panel should rarely stray from the Script. The Script may, of course, be adapted to particular hearing circumstances as long as all parties are allowed a full and fair opportunity to present their respective cases.

Hearing Script flexibility will be discussed in Section 3.

Hearing Procedure Script:
https://www.finra.org/arbitration-mediation/hearing-scripts

Arbitrator Introductions

While procedural issues may arise at any stage in the arbitration process, this section covers procedural issues occurring during the hearing stage.

In the Script, the Chairperson asks the other panel members to introduce themselves on the record. In the presence of all hearing participants, each arbitrator must, after panel introductions, make any disclosures that might reasonably create an appearance of non-neutrality or bias. Your duty to disclose includes disclosing any information about your service on multiple related cases that may involve the same parties and/or products.

Restating previously made disclosures on the record helps to ensure that all parties and representatives know and understand these disclosures. In addition, arbitrators should confirm on the record their current classifications as either public or non-public arbitrators. Restating disclosures helps to eliminate later court complaints of arbitrator bias because of nondisclosure.

Making new disclosures is consistent with a neutral arbitrator's ongoing duty to disclose to all parties at any stage of the proceeding any direct or indirect, past or present interests, relationships, or circumstances that could reasonably be perceived as biased or non-neutral.

The duty to disclose also includes informing the parties of any facts or circumstances that might affect any arbitrator's classification as "public" or "non-public."

Review Rules 12100(p) and 12100(u) for definitions of "non-public arbitrator" and "public arbitrator."

It is essential that you get the parties to agree to the constitution of the panel — ON THE RECORD — after any additional disclosure is made.

Rules 12100(p) and 12100(u): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12100

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Motion to Recuse

Although Rule 12406 makes it clear that requests for arbitrator recusal are decided by the arbitrator who is the subject of the request, you should recuse yourself if you believe that:

- You cannot decide the case impartially and fairly, AND
- Reason for the recusal is substantial.

If an arbitrator is not completely comfortable about serving on a matter, he or she should withdraw from the case. If all parties agree, the arbitrator should not hesitate to withdraw from the case.

Although you alone must decide whether to withdraw from service on the case, you should consult with the other arbitrators and staff on this issue. The Chairperson always must inform staff when an arbitrator has been challenged or when an arbitrator decides to withdraw from a case.

Here is an example of an arbitrator disclosure made during evidentiary hearings. Read the example and see if you can answer the questions that follow.

> Example:
>
> After six days of hearings, the claimant calls an expert witness with whom you are familiar. This expert is a rebuttal witness, and you had no idea this person would be called to testify in this matter.
>
> The expert witness and you disclose that you served together on the Securities Industry Conference on Arbitration (SICA) as public and industry members, respectively, for almost 15 years. There never has been any family, social, financial, business, or other professional relationship between the two of you. While you respect each other's views, disagreements are not uncommon.
>
> You state on the record that you can remain completely impartial and objective. One party objects to your continuing to serve as an arbitrator on this case.

Rule 12407 authorizes the Director to remove an arbitrator for cause based on newly discovered information after the first prehearing or hearing session, whichever is held first.

Rule 12407: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12407

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Test Yourself

If you decide to remain as the Chairperson in this example, does the panel have the authority to preclude this expert's testimony or order the claimant to call another expert? If so, should the panel do so? Why? Why not?

Question Feedback

The counsel calling the rebuttal witness may have been aware of the potential conflict that he/she was creating. It is not advisable for the panel to direct a party to call another expert. As Chairperson, you should suggest that the panel seek voluntary solutions to the situation. For example, you could suggest that the panel inquire about the parties' agreeing to the expert's testimony. Or you could suggest that the panel ask counsel to consider calling another similarly qualified expert.

Test Yourself

Assume that you decide, after consulting with the panel, to remain as the Chairperson on this case. What should you do next and why?

Question Feedback

On the record you should announce this decision and the underlying reasons unless the party that asked for your removal withdraws this request on the record.

Allegations of arbitrator bias or partiality constitute a legal basis that may be asserted subsequently in court to set aside an award. By clearly stating your decision and reasons on the record, you provide a court with information on which to uphold your decision. The second place a court may look after it reads the award is the hearing record.

In addition, this decision and its underlying rationale should be included in the "Other Issues Considered and Decided" section of the award because a reviewing court always reads the award. By doing so, you facilitate a court upholding your decision.

Test Yourself

If all parties request that you recuse yourself from the panel, what does Canon II G recommend?

Question Feedback

Canon II G of the Code of Ethics states that if an arbitrator is requested to withdraw, the arbitrator must do so.

Here is another example of an arbitrator disclosure made during an evidentiary hearing. Read the example and see if you can answer the question that follows.

> Example:
>
> Assume that you are selected to serve as the Chairperson on an arbitration involving a public customer. You are appointed to serve as one of the two neutral public arbitrators on a three-person panel, the third panel member being a neutral non-public arbitrator.
>
> A month before the first evidentiary hearing, your employer announces that it will be adding a new client, which is a firm, bank, or financial institution that transacts a securities business. Assume that this entity is completely unconnected to the arbitration parties, representatives, witnesses, or subject matter.
>
> For the past five years your professional work on behalf of securities clients has been under five percent. However a senior partner informs you that at least one-third of your professional time will be spent acting as a legal advisor to this new client.

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Test Yourself

What arbitrator duty do you have?

Question Feedback

You are required to disclose the prospective client and the change in your professional work effort.

Under these facts, the additional client may not create a conflict per se. However, your classification as a public arbitrator under Rule 12100 will be affected.

Arbitrator classification is important in this case because parties in a public customer arbitration are entitled to a panel of three neutral arbitrators—two public and one non-public—unless they agree otherwise.

If the example had involved a statutory employment discrimination claim, the parties would be entitled to a panel of public arbitrator(s) only—unless all of the parties agree otherwise.

You always must disclose changes in employment, job functions, or clients that may change your arbitrator classification. As the Chairperson, you also should encourage your co-panelists to make similar disclosures.

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Neutral Demeanor

The Arbitrator's Guide states that arbitrators must conduct the entire hearing in a neutral fashion and be unbiased at all times. The arbitrators always must avoid comments, body language, grimaces, frowns, signals, or gestures that might be perceived as disbelief or preference for one side or another.

Proper demeanor is especially critical to hearing fairness and process finality when important procedural issues or motions are argued before a panel. As Chairperson, you must do the following:

- Stay calm and focused.
- Demonstrate genuine interest and remain attentive to the arguments presented.
- Ensure that the other arbitrators listen to all views before the panel deliberates and decides these issues in executive session.
- Maintain proper panel demeanor.

Continuing Duty of Neutrality

The importance of neutral demeanor continues after a case closes. Canon I C of the Code of Ethics provides that for a reasonable time period after the proceeding you should avoid entering into any financial, business, professional, family, or social relationship, or from acquiring any financial or personal interest with any party. To do otherwise might create an appearance that you had been influenced in the earlier arbitration in anticipation or expectation of an ensuing relationship or interest.

Oath of Arbitrator

After arbitrator disclosures, if any, are made, and the parties, lawyers, or other representatives accept the panel, the Script requires that the Chairperson on the hearing record either administer the Oath of Arbitrator or Affirmation (Oath) or state that the Oath was executed by the arbitrators. For additional information, see also the Arbitrator's Disclosure Checklist found at the end of the Oath and Criteria for Temporary/Permanent Removal or Affirmation (Oath) or state that the Oath was executed by the arbitrators. Rules 12402 and 12403 require that arbitrators take the Oath, which will be included in the case materials sent to you by Staff.

Although each arbitrator has typically signed the Oath before the first hearing, you as Chairperson might explain the oath that the panel has taken. The Chairperson should follow this procedure because it demonstrates the seriousness that arbitrators attach to their neutrality and their duty to hear and decide the controversy fairly. Impartiality in appearance, as well as in fact, is of paramount importance to the parties because arbitration is a final process at this forum. Needless to say, if a co-panelist has not yet taken the oath you should administer the oath on the record, before the parties.

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

Oath of Arbitrator: https://www.finra.org/arbitration-mediation/oath-arbitrator

Criteria for Temporary/Permanent Removal:
https://www.finra.org/arbitration-mediation/disqualification-criteria

Rule 12402: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12402

Rule 12403: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12403

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Avoiding Ex Parte Conduct

The Script calls for the Chairperson to read a statement that requests all parties, their representatives, and witnesses to refrain from any ex parte conversation or other contact with any panel member unless everyone is present in the hearing room.

Rule 12210 prohibits any party or representative form communicating with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present. Canon III of the Code of Ethics concurs with Rule 12210. Canon III requires that arbitrators avoid impropriety and the appearance of impropriety by not discussing the dispute with any party in the absence of the other parties.

For guidance on ex parte communication, review Rule 12210 of the Code and Canon III of the Code of Ethics.

The Chairperson should caution against ex parte communications at the start of every hearing to remind arbitrators and parties alike of the importance of neutrality and its perception throughout a proceeding.

In addition, the Script calls for the Chairperson at the end of the hearings to read statements that instruct all participants to communicate only with staff and to leave the hearing room at the same time. In the latter regard, the Chairperson should make certain that the arbitrators always avoid being in the hearing room with less than all of the parties.

Consistent with Rule 12210 and Canon III, the Chairperson should caution the other arbitrators against any conversation with hearing participants in hallways, restrooms, and restaurants. All arbitrators should also avoid all casual conversation unrelated to the dispute (e.g., music, sports, politics, etc.) with any party, even when all parties are present. The panel should avoid such conversations to eliminate any perception of favoritism to one party or another. In addition, the Chairperson should remind the other arbitrators to save all comments about the issues, parties, representatives, and witnesses for a private executive session.

The Chairperson's use of these guidelines and procedures will help to alleviate party motions to vacate an award on grounds of perceived or real arbitrator bias. These guidelines and procedures also will help to preserve this forum's most valuable asset, its reputation for integrity.

When Ex Parte Conduct Occurs

As the Chairperson, if you observe ex parte communication or if an arbitrator informs you of such communication, you should be sure the communication ends and be certain that it does not reoccur. You also should ascertain the content or nature of the communication and determine from the arbitrator whether it may affect his/her impartiality.

If the arbitrator's neutrality may be affected in any way, encourage the arbitrator to withdraw from the case and contact staff. If the arbitrator's impartiality is not affected, determine the seriousness of the communication and disclose it on the record. Generally, it is best to err in favor of disclosure.

The arbitrator who engaged in the ex parte communication should be the one to disclose it on the record.

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Hearing Participants

The Script requires that the Chairperson elicit on the record the identity of all parties, lawyers, or other representatives at the beginning of the first hearing. The Chairperson should also follow this procedure at the beginning of every hearing. This recitation allows new representatives, witnesses as well as the arbitrators to make any additional disclosures resulting from a possible conflict of interest or appearance of bias.

The Chairperson should identify on the record every person who is present at every hearing.

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.

Witnesses

Rule 12602 also provides that absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. However, you and the other panel members have the authority to rule on the attendance of anyone else.

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 all 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. Expert witnesses are generally permitted to attend all hearings.

Rules 12402 and 12403 require that all witnesses take an oath or affirmation before testifying. The Chairperson ordinarily administers the witness oath or affirmation. The Script also requires that the Chairperson have the witness state on the record their name, address, and if applicable, business affiliation.

Before you move to the next lesson, complete the practice activities below to test your understanding of how a Chairperson can use the Hearing Procedure Script to help ensure fair evidentiary hearings.

Rule 12402: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12402

Rule 12403: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12403

Rule 12602: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12602

Rule 12208: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12208

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Test Yourself

Why should the Chairperson consult and use the Script at every evidentiary hearing?

Question Feedback

Since staff often will not be present at these hearings, the Script contains procedures and guidelines to help Chairpersons conduct fair hearings that result in binding procedural and substantive panel decisions. The Script also will help Chairpersons keep track of the entire proceeding.

Test Yourself

List some of the important procedures or guidelines contained in the Script that will help the Chairperson manage fair, final evidentiary hearings.

Question Feedback

The Script provides important procedures and guidelines, including the following:

- Introduction and acceptance of the arbitrators by the parties or representatives.
- Arbitrator disclosures.
- Required acknowledgment that the panel read the filed pleadings.
- Formal admission into evidence of the filed pleadings and the executed submission agreements.
- Required arbitrator and witness oaths or affirmations.
- Ground rules for opening statements, presentations, and closing arguments.
- Demeanor expected of all participants.
- Important inquiries at the end of the evidentiary hearings.

Test Yourself

How must the Chairperson conduct himself or herself during party or representative arguments on key procedural issues such as motions to postpone scheduled hearings?

Question Feedback

The Chairperson always must ensure that all divergent views are fully heard and that the entire panel exhibits interest in those views. Proper panel demeanor is particularly important when arguments become disruptive.

Test Yourself

As Chairperson, should you remind your co-panelists of their continuing duty or obligation to disclose?

Question Feedback

Yes. As Chairperson, you should encourage your co-panelists to always disclose any fact or circumstance that might reasonably be perceived as partiality or bias no matter when the potential conflict becomes known. Such disclosures are required under Rule 12405.

While disclosures do not always constitute a basis for valid causal challenges to arbitrators, disclosures help to preserve arbitrator and forum integrity. In addition, full and early disclosure allows this neutral process to work as intended. When disclosures are made, parties are obligated to object immediately or risk waiving their right to do so later.

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Test Yourself

If a co-panelist mentions that she or he switched employers, took on new clients, or changed job functions, what should you, as Chairperson, encourage the co-panelist to do? Why?

Question Feedback

You should encourage your co- panelists to disclose changes in job functions, clients, and employment, because these might result in changes to their arbitrator classification. Explain that arbitrator classification changes might violate a party's right to a specific panel composition under the Code. You should encourage the other panel members to review the definitions of non-public and public arbitrators under Rule 12100 and to make full and early disclosure of any circumstances that might change their arbitrator classification.

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Ruling on Procedural Issues

A number of important procedural issues may arise during a proceeding. The Chairperson must be prepared to lead the panel in resolving these issues fairly, which means ensuring that all parties are given a full and equitable opportunity to be heard on all issues.

All parties must be allowed to obtain evidence as discussed in Section 1. In addition, they must be provided with the opportunity to offer, examine, object, and comment upon testimony and other evidence; and to argue pertinent facts and applicable law. These subjects are covered later in this Section. All parties also must be heard on the serious procedural motions and related issues discussed in this lesson.

Absent Respondent

Rule 12603 authorizes arbitrators to begin or continue a hearing in the absence of a party if the panel is satisfied that the absent party had due notice of the hearing. Therefore, the panel must determine whether there was due notice of the hearing before continuing. When a Respondent is absent at the hearing, the Chairperson should ask Staff if there is an explanation. The response to this question might assist the panel in deciding whether the respondent received due notice of the hearing. Two other important threshold issues that a panel must decide are:

- Is there proper jurisdiction over the absent respondent?
- Was there proper service of the claim on the absent respondent?

FINRA's responsibility to find a member or associated person to effect service is limited to the information contained in FINRA's Central Registration Depository (CRD). Ultimately the responsibility for service — and proof of service — is the responsibility of the claimant.

Example:

Suppose you are serving as the Chairperson on a case involving a claimant public customer who has named as respondents the FINRA member firm where the account was located together with the account executive who handled his account. Assume that the account executive no longer works at the member firm and has not filed an answer or an executed Submission Agreement. In addition, the account executive does not appear at the evidentiary hearing. Assume that the claimant wants to proceed with the hearing.

Rule 12603: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12603

Under the circumstances, the panel can determine whether it has jurisdiction over the absent respondent by:

- Deciding whether the respondent is obligated to arbitrate this claim at this forum. Since the claimant is a public customer, the panel should examine Rule 12200 to determine who must arbitrate at a public customer's request.
- Determining whether the account executive was an associated person or employee of the FINRA member at the time this dispute arose.

If this was a pure intra-industry arbitration (i.e., one in which no party is a public customer), the panel would examine Rule 13200 to determine who is required to arbitrate.

If the panel concluded that there was no jurisdiction over the account executive, and if the account executive was the only respondent, the panel should ask the staff to draft an award for the arbitrators' signatures dismissing the case "without prejudice." "Without prejudice" means a party's claim may be refiled within the applicable limitations period.

Rule 12200: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12200

Rule 13200: https://www.finra.org/rules-guidance/rulebooks/finra-rules/13200

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Absent Respondent (Continued)

Assuming that the panel finds there is proper jurisdiction over the account executive, it should determine whether the initial claim was served on this respondent.

The panel should ascertain from the staff if the FINRA case file contains any correspondence from this respondent that evidences knowledge or receipt of this claim. In addition, the panel should ask staff for proof of claim service on this respondent. See Rules 12300-12301. The arbitrators also may request that staff use the CRD to compare the current home and business address of this respondent with the service address in deciding whether service was properly effected. In addition, the panel should inquire as to the claimant's efforts to effect service.

If the immediate example involved proper service of a claim by a respondent on a party (e.g., counterclaim, cross-claim, third-party claim), the arbitrators should question the respondent that served the claim rather than the staff.

Member firms and associated persons have a continuing obligation to keep their CRD information current, including the two year period after they leave the industry.

If the panel directs that FINRA or the claimant reserve the initial claim, the panel should postpone the hearing. This will allow time for FINRA or the claimant to attempt to locate and serve this respondent with the claim. It also will provide time for the respondent to answer the claim under Rule 12303.

Notice of Hearing

If the panel finds that the initial claim was properly served on this respondent, the panel then should decide whether FINRA or the claimant provided due notice of the first hearing to the absent respondent. To do so, the panel must ask the staff if the FINRA case file contains evidence of due notice (e.g., affidavit of service). If the panel determines that FINRA or the claimant must reserve notice of the hearing, the panel should postpone the hearing to a date that will allow proper notice.

Arbitrators may, in their discretion, proceed with an absent party because once service is effected, parties have a continuing obligation to keep their contact information current.

If the absent respondent is found liable, and the claimant seeks to enforce the award in a court of law, the respondent may assert that there was no obligation to arbitrate. In addition, the absent respondent might assert that even if he/she was obligated to arbitrate this dispute at FINRA, the claim was not properly served and due notice of the first hearing was not provided as required by the Code.

Since each of these assertions constitutes a legal basis upon which a court might vacate the award, the panel should act to safeguard the hearing record and award from later judicial attack by doing the following:

- Making a record—meaning that each document the arbitrators relied upon in making these procedural decisions be marked as Arbitrator Exhibits (and the next sequential number) and admitted into evidence at the hearing.
- Stating on the hearing record the panel's procedural decisions and reasons.
- Including the panel's procedural decisions and reasons in the "Other Issues" section of the award. See the Award Information Sheet.

Read Chapter 1, Section 10(a) of United States Arbitration Act for grounds on which a court may vacate an award.

United States Arbitration Act:
https://uscode.house.gov/browse/&edition=prelim

Default Procedures

FINRA's Default Procedures are discussed in Rule 12801.

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All claimants — whether customers, associated persons, or FINRA member firms — may agree to elect to pursue arbitration under these procedures against any respondent associated person whose registration has been terminated, revoked, or suspended and who has failed to answer in the arbitration.

All claimants also may agree to elect to pursue arbitration under these procedures against any FINRA firm whose membership has been terminated, suspended, canceled, revoked, or that has been expelled from membership, or that is otherwise defunct and that has failed to answer in the arbitration.

Under the default procedures, the case proceeds with one arbitrator (e.g. the Chairperson if there is a three-person panel) who must decide the default case — without a hearing. To obtain a favorable award in a default case, however, the claimants must present a sufficient basis — by means of the filed claim(s) and/or additional documentary submissions. Claimant(s) cannot obtain a favorable award based solely on the non-appearance of these respondents.

If any defunct, non-answering respondent files a late answer — after notification that the default procedures are being applied, but before an award is rendered — the default procedures terminate, and the arbitration proceeds under regular FINRA procedures. In this event, however, the respondent joins the arbitration where he/she/it finds the case — meaning that respondent may have missed the prehearing and panel selection stages of the process, and may, in the discretion of the presiding arbitrators, be barred from presenting certain matters.

Absent Claimant

If a claimant does not appear at a hearing and the reason for the nonappearance is not immediately known, the Chairperson should suggest that the staff ascertain why the claimant is absent. Depending on staff's response, the Chairperson may suggest that the hearing be adjourned to a future date.

If a respondent moves to dismiss or moves for reasonable costs because of the claimant's absence, the Chairperson should suggest that the panel reserve decision on both of the motions pending claimant's explanation and its reasonableness.

Postponements

In deciding whether to grant a postponement, a panel may consider the following factors:

- Fairness to the parties.
- Merits of the requests.
- Consent or objection of the opposing parties.
- Previous postponements.
- Panel ability to conduct a productive hearing.

In addition, the arbitrators may consider the burden a postponement will place on the panel. However, this should not be a primary factor when deciding to grant or deny a motion to postpone. Under Rule 12601, if all parties agree to the postponement, the hearing must be adjourned.

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Non-Consensual Motion to Postpone

In certain instances the parties will not consent to a motion to postpone. Under Rule 12601, 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. This provision is intended to reduce the number of last minute postponement requests, which can result in unnecessary delay and unfairness to parties.

In the following scenarios, you will learn what to do when parties do not consent to a postponement request.

> Example:
>
> You are the Chairperson of a panel in which all parties are represented by a lawyer except for the claimant, a former employee of the respondent brokerage firm. Before the first hearing, you reminded the claimant of her right to be represented by a lawyer. Claimant responded that she understood her right, but did not need representation. On the third day of hearings, after the claimant presented her case, and half way through the respondent's presentation, the claimant requests a postponement to retain a lawyer.
>
> In reply, respondent's attorney objects vehemently, reminding the panel that the claimant knew her rights and could have exercised them months earlier. Respondent argues that it has incurred substantial costs in defending this matter, including travel costs for three witnesses. You call an executive session.

Under the circumstances, the panel should consider the following:

- Rule 12208 which states that parties have the right to representation by counsel at any stage of the proceeding;
- The Arbitrator's Guide which describes the right to representation by an attorney as absolute; and
- Canon IV C of the Code of Ethics which provides that arbitrators should not deny any party the opportunity to representation.

In the example given, the panel should grant the motion to postpone. Courts have held that a panel's failure to grant a party's request for a postponement or adjournment to obtain counsel constitutes serious arbitrator misconduct and valid grounds to vacate an award.

See Chapter 1, Section 10(a) of United States Arbitration Act for the grounds upon which awards may be vacated.

The panel's decision and its underlying reasons to grant the postponement should be made a part of the hearing record. The record also should include a reasonable time frame within which the panel expects the claimant to inform staff and the respondent of counsel's appearance. In addition, the panel and the parties should schedule hearing dates for the case to reconvene. It might be reasonable to obtain alternate sets of dates to afford claimant a reasonable time and opportunity to secure available counsel.

Rule 12208: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12208

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Repeated Postponement Requests

On occasion, arbitrators will be confronted with repeated postponement requests. Very often, these postponement requests are valid yet they delay the resolution of a dispute. When considering another postponement in a string of past requests the panel should make a detailed hearing record before granting or denying the request. State on the record:

- How many times and at what stages of the arbitration postponements were granted.
- That although the panel may grant this adjournment, the panel has an obligation of fairness to all participants under Canon I of the Code of Ethics.
- If the postponement is granted, the panel should obtain alternate sets of dates to reschedule the hearings.

This detailed record will be essential if the arbitrators decide to deny this or future postponement requests. The panel may determine that the motion is unreasonable, dilatory, or constitutes a genuine abuse of the arbitration process and, consequently, violates Canon I of the Code of Ethics. If the panel denies this motion to postpone, you should suggest to the other arbitrators that this decision and the underlying reasons be included in the "Other Issues" section of the award. When deciding issues concerning postponements, remember to address all issues including requests for fee waivers.

Taking the time to suggest all of the above helps to preserve the rights of all hearing participants and the integrity of the panel and this forum. It also helps to protect the finality of the award by providing a court with a basis on which to uphold the decision if a later motion to vacate is made on grounds that the panel unreasonably denied a party's motion to postpone.

If under Rule 12309 the panel grants a motion to amend claims or defenses at the evidentiary hearing, the opposing party might request a postponement by asserting that it cannot present its defenses or claims adequately without additional witnesses or documentary evidence.

In executive session you should remind the other panelists of the obligation to decide such motions reasonably after considering all of the facts or circumstances. It may help to explain that federal and state arbitration laws protecting the finality of awards rendered under the Code do so only if the arbitrators conducted the proceeding in a reasonable, fair manner.

Rule 12309: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12309

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Test Yourself

When considering a postponement request, what should the panel discuss in executive session?

Question Feedback

The panel should examine the totality of circumstances and decide what is reasonable. You should remind your co-panelists that it always should grant reasonable postponement requests or risk having the award vacated. For example, if counsel has an actual court conflict, particularly if he/she did not cause it and is unable to alter the conflict, the panel should grant the motion to postpone. The panel also should ask all parties, representatives, and witnesses to provide their definite availability for hearings during a time frame subsequent to the estimated time for the trial. Finally, the panel must decide which party or parties should bear the cost of the postponement.

Arbitrators may be faced with motions to postpone hearings for a variety of other reasons, such as:

- Incomplete discovery.
- Medical or personal emergencies.
- Unavailability of expert or other witnesses.
- Severe weather conditions.

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Consensual Motions to Postpone

In certain situations, all parties will consent to a postponement. In such a case, the hearing shall be postponed pursuant to Rule 12601.

There are other actions that the panel can consider taking if it concludes that numerous motions to postpone-whether non-consensual or consensual-are unreasonable or abuse the process. If all parties jointly request, or agree to, more than two postponements, Rule 12601(c) authorizes arbitrators, on their own initiative, to dismiss a proceeding without prejudice.

12601(c): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12601

Dismissing the Proceeding Is a Last Resort

This dismissal is "without prejudice"- meaning that the dismissal is not intended to interfere with any existing rights to file the dismissed claims or defenses at a later time. See Rule 12601 on Postponement of Hearings. If the panel decides to dismiss the claims or defenses "without prejudice," the hearing record should include the panel decision and underlying reasons.

Although a decision to dismiss "without prejudice" does not constitute a final decision on the merits or substance of the submitted claims or defenses, advise the staff that an award dismissing such claims "without prejudice" should be signed by the panel and served on the parties. The award should include the reasons for the dismissal.

Consensual Motions to Postpone for Mediation

Under Rule 12601(b), all parties can agree to stay or postpone the arbitration in order to mediate the dispute without having to seek or obtain permission from the arbitrators. Rule 12601(b) additionally provides that no adjournment fees will be charged where there is an arbitration adjournment to mediate and the parties use FINRA mediation. If the parties do not use FINRA mediation, then a postponement fee will be charged to the parties, unless, at the parties' request, the panel waives the fee.

Before you move to the next lesson, complete the practice activities below to test your understanding of how the Chairperson can help ensure the fair and final resolution of serious procedural issues.

Rule 12601(b): https://www.finra.org/rules-guidance/rulebooks/finra-rules/12601

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Test Yourself

You may serve as the Chairperson at evidentiary hearings that present a variety of serious procedural issues requiring panel determinations. These are important issues because a party may subsequently contend in a court that these panel decisions are valid legal grounds to set aside or vacate the award. Some of these issues were discussed in this lesson, including motions to postpone. After the panel reviews, discusses, and decides these procedural issues in executive session, what actions should you, as the Chairperson, suggest that the panel take? Why?

Question Feedback

To preserve the finality of the panel's decisions on important procedural issues, you should always suggest two actions:

First, suggest that you make a hearing record of the panel's decision and reasoning. If specific Code provisions or Canons in the Code of Ethics underlie the panel's decision, say so on the record. If the panel's decision involves documentation, state this fact then mark and admit the documentation into evidence as arbitrator exhibits. Explain to the panel that in a court a dissatisfied party may assert the panel's decisions on these procedural issues as grounds upon which to set aside or vacate the award under federal or state arbitration laws, the very laws intended to uphold the finality of your award. Remind your co-panelists that the second place a court might review is the hearing record.

Second, since a reviewing court will always read the award, you also should suggest that panel decisions and reasons on critical procedural issues be included in the "Other Issues" section of the award. By suggesting and acting in the above manner, the panel provides information that facilitates a reviewing court's upholding its procedural decisions and, consequently, the award.

Test Yourself

You may serve as Chairperson on a case where all parties or their representatives request that the hearing be postponed to allow the parties to mediate the dispute. What does Rule 12601(b) provide in this situation? Can the arbitrators assess a postponement fee?

Question Feedback

Rule 12601(b) provides that postponements to mediate do not require arbitrator consent. If the parties mediate at this forum, no postponement fee must be paid according to Rule 12601(b). However, if they mediate elsewhere, the postponement fee must be paid, unless, at the parties' request, the panel waives the fee.

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Guidelines for Evidentiary Presentations

This lesson describes guidelines for determining objections to offered evidence and discusses how to express these rulings to the parties. The lesson also includes procedures for dealing with attorney demeanor during the hearings. Lastly, it provides guidance for managing fair hearings that involve pro se parties.

Before the parties are asked to begin their evidentiary presentations, the Chairperson must perform essential duties on the hearing record. As noted previously, these important responsibilities are contained in the Hearing Script and include the following:

- Introduction of the arbitrators, parties, representatives, and witnesses.
- Arbitrator disclosures.
- Party acceptance of the panel.
- Arbitrator and witness oaths or affirmations.
- Hearing ground rules.
- Declaration that the arbitrators read the claims.
- Admission into evidence of the executed submission agreements and pleadings as the arbitrators' exhibit.
- Panel consideration of threshold issues such as those discussed in the previous lesson.

Subsequent to executing these important duties, and after the parties finish their opening statements, the Script provides for the Chairperson to ask the claimants and then respondents to present documents and testimony in support of their claims or defenses.

Deciding Objections to Admissibility

While arbitrators are obligated to allow all parties a fair and full opportunity to present their evidence, arbitrators are not obligated to admit into evidence every document or all testimony offered by the parties, even if the panel previously ordered the document produced or the witness to appear.

Rule 12604 authorizes arbitrators to determine whether they will admit into evidence documents or testimony presented by the parties. This rule also makes it clear that in making these determinations arbitrators are not bound to apply the legal rules governing the admissibility of evidence.

See "Admissibility" in the Discovery Guide.

Rule 12604: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12604

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

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Admissibility Guidelines

Courts rarely vacate awards where arbitrators disallowed evidence. On occasion, courts have set aside awards because arbitrators refused to consider pertinent and material evidence and the courts believed that such refusal interfered substantially with a party's right to a fundamentally fair hearing. Neither the Code nor the courts provide any specific evidentiary guidance to arbitrators. The Code empowers arbitrators to make evidentiary rulings and the following are guidelines the Chairperson may offer to the panel when discussing objections to evidence:

1. Evidence should in some way tend to prove or disprove claims and defenses or relate to the credibility of the evidence. While the Federal Rules of Evidence do not as a general matter govern the conduct of arbitration hearings, the rules of evidence nevertheless provide practical guidance in regard to what evidence may be probative.

2. Arbitrators should consider fairness and its perception-above all else-when deciding objections to evidence. Since FINRA arbitration is a final process resulting in a binding award, arbitrators should conduct every part of the proceeding in a manner that allows all parties to feel they were afforded a fair and full opportunity to be heard. This is difficult to achieve, especially when any party appears at a hearing without a lawyer.

3. Arbitrators should make even-handed and consistent evidentiary rulings. When ruling on the admissibility of evidence, arbitrators should be cognizant of their previous rulings and apply the reasons behind those rulings consistently. For example, if the panel decides to sustain certain objections based upon the legal rules governing the admissibility of evidence, this should be done consistently throughout the proceeding.

If, after considering guidelines (1) and (2) above, arbitrators are not certain whether to consider evidence, they should always err on the side of admitting the documents or testimony into evidence, particularly since arbitrators determine the value or importance of all admitted evidence within the context of the issues they must decide.

Majority Decisions

Rule 12410 provides that a panel majority makes all determinations. As discussed earlier in this section, the Chairperson should secure the other arbitrators' permission to make minor evidentiary and procedural decisions on their behalf. The Chairperson should obtain such permission in an executive session before the first evidentiary hearing begins.

To prevent any party misperception that you are making unilateral rulings, you, as Chairperson, should announce this procedure to the parties on the hearing record before the evidentiary presentations begin.

Rule 12410: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12410-0

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Minor Procedural Issues

Among the minor evidentiary or procedural issues that the panel can authorize the Chairperson to decide may be the following:

- Answers that are not responsive to questions.
- Argumentative questions.
- Leading questions.
- Speaking objections.
- Questions already asked and answered.
- Questions that are convoluted or improper in form (for example, compound).
- Questions that are abusive.
- Questions that assume facts not yet in evidence.
- Questions that mischaracterize testimony.
- Testimony that is provided without questions or volunteered.
- Witness arguments with the examiner or another hearing participant.
- Witness questions of the examiner.

A speaking objection occurs when counsel is aiding his/her witness on cross-examination through an objection that states a possible answer.

More on Executive Sessions

Serious objections to evidence will require panel consultations in executive sessions. Whenever any panel member disagrees with a prospective evidentiary ruling in an executive session, the Chairperson always should take time to ascertain and discuss the reasons for the disagreement. The Chairperson also should make sure that the dissenting arbitrator understands the reasons for the majority view.

If the disagreement remains, the Chairperson might suggest that the panel reserve decision on the objection until later in the proceeding. If this is not workable, the Chairperson should remind the dissenting arbitrator that, while it is not unusual for reasonable persons to disagree, Rule 12410 provides that a panel majority makes all decisions.

Before reconvening the hearing, the Chairperson should remind the other arbitrators that-to preserve panel unity-this ruling and all others will be announced as panel rulings.

Explaining Evidentiary Rulings

As a general rule, the Chairperson is not required to explain the panel's evidentiary rulings. However, if the parties do not understand the ruling, or an explanation can serve to guide the parties as to future evidence or questioning, the Chairperson can provide an explanation. In addition, if the panel decides to decline the admission of evidence that a party insists is critical, the panel should consider stating the decision and the reasons on the hearing record and in the "Other Issues" section of the award. Keep in mind that the decision to exclude such evidence could provide a legal basis on which a court may vacate the award.

Evidence Not Exchanged

Rule 12514 provides that at least 20 calendar days before the first evidentiary hearing date, all parties must serve on each other copies of documents and lists of witnesses they intend to present at the hearing. Parties are required to exchange only those documents they intend to use at the hearing that have not been exchanged previously. The arbitrators may exclude from evidence any such documents not exchanged or witnesses not identified.

Rule 12514 does not require service of copies of documents or identification of witnesses that parties may use for cross-examination or rebuttal.

Rule 12514: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12514

Objections to Evidence Not Exchanged

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You may encounter a situation where the claimant explains that he/she never received copies of the documents that were required from the respondent under Rule 12514. Respondent requests that the documents be admitted into evidence because of their relevance and importance to the issues in this case. When deciding the claimant's objection to the admission of the evidence, the arbitrators may consider the following:

- Consider the specific type of non-compliance. Was the required exchange late, and, if so, how late?
- Consider the reason for non-compliance. When did the non-complying party obtain the evidence? After the evidence was obtained, how quickly was it exchanged?
- Most important, consider the relevance of the evidence, the risk of prejudice to the objecting party, and how the panel might eliminate that risk. If the panel decides that the evidence is relevant and important, it can adjourn the hearing to allow the objecting party a reasonable opportunity to examine, evaluate, and prepare for the evidence.
- If the panel decides that the non-compliance was not justified, it can consider assessing the adjournment fee, forum fees, and other appropriate costs or expenses in the award at the conclusion of the case.

As Chairperson, you should reaffirm the important nexus between this rule and a fair proceeding by declaring at a prehearing conference that you expect all parties to fully comply with this rule. In addition, you should make it clear that, absent extraordinary reasons justifying any failure to exchange evidence in a timely manner, non-compliance may result in the panel not admitting the evidence.

Admitting Evidence of Prior Proceedings

Some of the factors that you, as Chairperson, should suggest that the panel consider in deciding whether to admit the evidence of a prior proceeding includes the following:

- Are the parties identical?
- Are the issues identical?
- Was a there a final order or judgment, or was the matter appealed?
- Is the evidence helpful in resolving any material or important issues in the case? To rule fairly, the panel must know the purpose of the evidence or why it is being offered. Is the evidence being offered to prove a claim? Is it being offered to prove a pattern of conduct that is necessary to establish a claim? Is the evidence being offered to establish a defense? Is the evidence aimed at challenging the credibility of testimony or the validity of documentary evidence?
- Does the prejudice of admitting the evidence outweigh the relevancy of the evidence?

Once the purpose of the evidence is clear, the panel should discuss its relevance and value in terms of the submitted issues as measured against the risk of any unfairness to the objecting party.

Whether deciding objections that relate to prior proceedings, evidence not properly exchanged, testimony by telephone or affidavit, or the contents of newspaper or magazine articles, arbitrators should always discuss and consider the purpose of the evidence, its relevance to the issues, and its effect on fairness to all parties.

Rule 14109 provides that in any arbitration, lawsuit, or other proceeding all mediating parties and the mediator must not communicate anything disclosed or obtained during the mediation, including opinions, suggestions, proposals, offers, or admissions, unless authorized in writing by all mediating parties or compelled by law.

Rule 14109: https://www.finra.org/rules-guidance/rulebooks/finra-rules/14109

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Chairperson Demeanor

As noted earlier in this Section, as Chairperson, you must continually and consistently show genuine interest, but remain above the fray, no matter the time of day or the length of hearing. You also must ensure that all parties or their representatives are fairly and fully heard and that the other panel members remain calmly attentive to divergent views. It is especially important that the Chairperson's demeanor be worthy of imitation by all hearing participants-arbitrators, parties, representatives, and witnesses.

Since party intensity can be highly infectious, the Chairperson — in addition to displaying exemplary conduct — should remind the other arbitrators to avoid any reactions, comments, questions, sounds, facial expressions, or body language that might be perceived as bias.

Panel Demeanor

As emphasized throughout this Section, the Chairperson can facilitate appropriate arbitrator demeanor throughout a proceeding by conducting executive sessions to set a tone of responsible leadership and to continually stress the vital role of arbitrator cohesiveness in resolving all issues.

Participant Demeanor

In the vast majority of cases where the parties are represented by counsel, the Chairperson will ordinarily be able to maintain proper participant conduct by occasional directions or appropriately-timed breaks during the hearings. If a participant acts disruptively, the Chairperson must know and understand what actions the panel may consider taking.

What if you are presiding at a hearing involving public customers and FINRA member firms, during which it becomes apparent to the panel that the parties' attorneys intensely dislike each other? You previously requested that the name-calling, and shouting cease, and that all objections and comments be directed to the panel and not to the opposing counsel. Notwithstanding your firm, but courteous instructions, the disruptions continue or worsen. You appropriately call an executive session.

Keeping in mind the arbitrator's duty of fairness to all participants and to the process under Canon I of the Code of Ethics, you should suggest to the panel that you advise the offending attorneys on the record that such misconduct will not be tolerated.

Read Canon I of the Code of Ethics.

Explain to the other arbitrators that on the record you will describe the counsels' misbehavior and your prior admonitions. For example, you might inform counsel that while zealous advocacy is expected and acceptable, you have cautioned them that their conduct interferes with the fair and orderly presentation of evidence.

In addition, during executive session, explain to the other arbitrators that you will advise offending counsel of the consequences of their continued misconduct.

If a party or witness is disruptive, the panel should caution the appropriate attorney regarding the inappropriateness of the disruptive behavior.

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Responding Pro-Actively to Abusive Behavior

While arbitrators might not be authorized to sanction an attorney directly, explain to the other panel members that a client can be held responsible for the disruptive conduct of their attorney.

Actions the panel can consider taking against the parties because of their attorney's misconduct include the following: an assessment of postponement fees if counsel's actions cause postponements or an assessment of appropriate forum fees, attorney's fees, or other expenses and costs in the award payable to the other party or parties.

If the panel believes that the attorney's conduct is extraordinarily disruptive, Rule 12409 gives the arbitrators wide discretion to take appropriate action to obtain compliance with any panel order.

Rules 12212 and 12700 authorize arbitrators to dismiss a claim or a defense "with prejudice" — meaning with no right to resubmit the claim or defense at any time and at any forum — if they determine that a failure to comply with its order is material and intentional and if lesser actions have not achieved compliance with the order.

Rules 12212 and 12700 also authorize the arbitrators to dismiss a proceeding "without prejudice," meaning the dismissal will not interfere with a party's existing right to resubmit a claim or defense at this or another forum.

In addition Rule 12212 has been interpreted to allow a panel at the end of the proceeding to refer industry clients to an appropriate FINRA district office for possible discipline because of their attorney's failure to comply with the panel's order to refrain from the seriously disruptive conduct.

The panel should make a hearing record of the decision and include in the award any actions the panel takes to obtain compliance with its orders, together with the reasons for the actions. As mentioned throughout this training, the recorded reasons will help protect the award from legal attack by providing a reviewing court with information on which to uphold your actions.

After you make the attorneys aware of the consequences for continuing misconduct, but before you continue the evidentiary hearing, take another executive session to allow the clients and counsel to digest the panel's message.

Rule 12409: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12409-0

12212: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12212

12700: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12700

Pro Se Parties

This section includes suggestions and procedures aimed at helping the Chairperson and panel manage hearings that involve pro se parties. To conduct these hearings effectively, the Chairperson must ensure that all parties — those who have a lawyer and those who do not — are treated fairly in fact and in appearance. Experience has demonstrated that conducting fair hearings perceived as fair by everyone is easier when all parties are represented by an attorney in contrast to those in which one or more parties represent themselves.

The Arbitrator's Guide says the following about arbitrator guidance to the party not represented by counsel: Arbitrators should be sensitive to a party who is not represented by counsel. This individual most likely will not be experienced in either litigation or the arbitration process and will usually need some guidance from the panel. The panel should use its judgment to determine how much guidance to provide such a party. Although the panel at all times must be careful to maintain its neutrality, it must often take an active role in such cases. The panel may at times find it helpful to:

- Explain the purpose of an opening statement.
- Assist the party in maintaining proper focus during the hearing.
- Remind the party that cross examination should consist of specific questions or, ensure that the party has had an opportunity to present all evidence.

All efforts to assist a party should be balanced against the need to remain impartial.

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Procedural Assistance

A panel's procedural assistance to a pro se party must never interfere with the panel's neutrality. All procedural assistance must be delivered neutrally.

Since pro se parties, like other parties, have different backgrounds, education, and experience, the Chairperson should lead the panel in determining what is the most appropriate way to assure that these participants experience a fair hearing.

For example, a pro se party, by virtue of education, training, or employment, may be proficient at making statements but not adept at asking questions to elicit testimony.

When the arbitrators review the filed claims, motions, and responsive papers, they might be able to assess a pro se party's presentation abilities. However, these documents might not be helpful in such an assessment if someone other than the pro se party prepared or helped to prepare them. Arbitrators should ordinarily be able to gauge the relative sophistication of brokers or public customers who decide to represent themselves by how they handle telephone prehearing conferences or evidentiary hearings.

Finally, the Chairperson and the other panel members should decide how active a role the panel will take in offering procedural guidance to a pro se party. This will depend largely on the pro se party's ability to effectively participate during the hearing. Arbitrators should be flexible since the panel's assistance might have to vary and could prove unworkable or ineffective.

To facilitate your role as the Chairperson in pro se cases, always remember that you are not alone. Consult regularly with the other panelists and the staff for their ideas.

At the beginning of the hearing, you may wish to remind a pro se party of his/her fundamental right to counsel under Rule 12208. Always do this on the record.

Additional Guidance

The Arbitrator's Guide encourages arbitrators to provide guidance to pro se parties who need it and to provide such guidance in a neutral fashion. The Chairperson should provide clear, understandable, sensitive explanations to a pro se party throughout a proceeding.

Some of the questions requiring explanations may include the following:

- What will take place during the hearing?
- When will actions occur during the hearing?
- What are opening and closing statements?
- What are the procedures for offering and admitting into evidence documents or testimony?
- What is the difference between the production, admission, and weight of the evidence?
- Why is disclosure important?
- Why must all hearing participants avoid at all times any conduct that may be perceived as biased?

Answers to these and other questions must be delivered in a manner that does not in any way compromise panel neutrality in the perception of all of the parties.

Before providing explanations to a pro se party, the Chairperson should take the time to explain on the record the purpose and propriety of the explanations. This courtesy will help to preserve panel fairness, particularly if the participants present are not familiar with the arbitration process.

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Simplified Arbitration

Rules 12600 and 12800 provide three options for administering cases with claims of $50,000 or less, excluding interest and expenses. The default option is a decision by a single arbitrator based on the pleadings and other materials submitted by the parties. There are two hearing options. In addition to a regular, full hearing with a single arbitrator, parties have the option to select a Special Proceeding.

Special Proceeding

A Special Proceeding is an intermediate form of adjudication that allows parties to argue their cases before a single arbitrator in a shorter, limited telephonic hearing format with the following hearing procedures:

- Hearing will be conducted by telephone conference call, unless the parties agree to another method of appearance.
- Claimants, collectively, and respondents, collectively, each have two hours to present their cases and one-half hour for rebuttal and closing statements.
- Hearing will be completed in one day with no more than two hearing sessions.
- Parties may not question or cross-examine opposing parties' witnesses.
- Parties may not call an opposing party as a witness.
- The arbitrator may ask questions.
- The arbitrator may cede some of his or her allotted time to the parties.
- At least 20 days before the hearing, parties must provide the other side with copies of all documents they intend to use at the hearing that have not already been produced. The parties should also file the documents with FINRA at the same time so that FINRA can send the documents to the arbitrator before the hearing. Parties will need to have all exhibits available while they testify telephonically. The arbitrator and parties should determine a deadline for exchange of these documents during the IPHC.

Order of Special Proceedings

Special Proceedings follow the usual order of a hearing. Starting with the claimant, parties will present opening statements. They will then present their cases followed by any rebuttal. The arbitrator will ask the parties questions. The parties will then present closing statements. With the exception of the requirements for Special Proceedings, an arbitrator may vary the hearing procedure in his or her discretion, provided all parties are allowed a full and fair opportunity to present their respective cases. Arbitrators can watch the training video for more information about Special Proceedings.

Before moving to Section 3, complete the practice activities below.

Rules 12600: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12600

12800: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800

training video: https://www.finra.org/arbitration-mediation/special-proceedings-simplified-arbitration

Test Yourself

What guidelines should the Chairperson suggest to the panel before it makes evidentiary rulings?

Question Feedback

The guidelines the panel should consider before ruling on objections to evidence are these:

Whether the evidence somehow relates to the claims, or the defenses, or the credibility of evidence.

- Whether the evidence is clearly extraneous, repetitive, cumulative, or immaterial.
- The effect of the panel ruling on fairness and its perception by all disputants.

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Test Yourself

Which guideline for deciding objections to evidence is most important? Why?

Question Feedback

Most important of the evidentiary guidelines is fairness and its perception by all parties. All participants should feel that they have received the opportunity to present their respective cases fully. Arbitrators determine the value of all evidence they decide to admit or consider, and the FINRA arbitration process results in a final, binding award. Therefore fairness is the most important evidentiary guideline.

Test Yourself

What factors should the panel consider when it is deciding appropriate procedural assistance to a pro se party?

Question Feedback

When the panel is deciding the appropriate procedural assistance to provide a pro se party, it should consider:

- The pro se party's ability to perform hearing functions.
- The form of procedural assistance.
- How to provide this assistance neutrally or without compromising panel impartiality.

Test Yourself

At the start of the first evidentiary hearing, a pro se party requests that his sister be permitted to remain throughout the hearings. She is neither a party nor a witness in the proceeding. The attorney for the opposition objects to her remaining during the hearing. You call an executive session. What may you suggest to the panel?

Question Feedback

You may suggest to the panel that you confirm with the pro se party on the record the precise role of the sister.

If she is not a witness and is present only to provide moral support and advice to the pro se party, you may also suggest that the panel overrule the objection and permit her to remain with the pro se party.

Explain to the panel that this decision will contribute to fairness because it will enhance the pro se party's feeling that he is receiving fair treatment in this process. In addition, this decision will not prejudice the rights of the represented parties to a full and fair hearing.

When you reconvene the hearing, be sure that the substance of the above is stated on the hearing record and remind all participants to maintain decorum.

Test Yourself

Assume that the pro se party continues to testify in her opening statement and the opposing side continues to object. You try unsuccessfully on several occasions to explain what an opening statement should be and when the pro se party may testify. You call an executive session. What might you suggest to the panel?

Question Feedback

Explain to the other panel members that sometimes careful explanations are not sufficient to get a party to understand the difference between testimony and argument.

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You may suggest that since the pro se party has already taken the witness oath the panel treat her entire opening statement as testimony subject to cross-examination by the other side.

Rather than frustrate the pro se party and the process, this procedure will permit her to present her case fully, without interruption and without prejudicing the rights of the represented party to cross- examine, to make an opening statement and to present evidence.

Be sure this decision is stated on the record.

Test Yourself

Assume that a pro se party is presenting his case by testifying in narrative form. You are having a great deal of difficulty following and understanding the events described in the testimony. You call an executive session to ascertain if the other arbitrators are experiencing the same problems. They tell you that they are having the same difficulty. When the hearing reconvenes, what action might you take?

Question Feedback

When the hearing reconvenes, the Chairperson may interrupt the claimant and explain that the panel has read all filed claims, answers, and other pleadings. He/she should state that the arbitrators would like the claimant to take this opportunity to describe the events in a chronological manner-offering or referring to supporting documents. The Chairperson also should tell the claimant that he/she may interrupt the story to ask clarifying questions.

Test Yourself

Assume that a pro se party calls a witness to testify. Although he attempts to question the witness, he is unsuccessful. Counsel for the opposing side objects to the manner in which direct examination is being conducted. You call an executive session. What might you suggest to the panel?

Question Feedback

You may suggest that the panel:

- Call a recess to allow the pro se party time to formulate her questions.
- Advise the other parties that the pro se party will be allowed more leeway when asking questions.
- Advise the other parties that they may still object to pro se party's questions, and the panel will rule on the objection.

Test Yourself

Assume that a pro se party calls as his expert someone who was employed as a broker in the securities industry for two years. Counsel for the opposing party objects to the qualifications of the witness as an expert after listening to the witness testify about his experience. The pro se party responds to this objection by stating to the panel that his expert witness is an important part of his case. You call an executive session.

What might you suggest to the panel?

Question Feedback

Since pro se parties should feel that they have been treated fairly in this final process and since this pro se party asserts that the testimony of this witness as an "expert" is critical to his presentation, you may suggest to the panel that the objection be overruled and that the witness be permitted to testify as an expert.

In addition, inform counsel for the other side that the panel will consider all of the comments objecting to the expert's

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qualifications in deciding the value or weight of the expert's testimony. If you believe it might be helpful, you might also remind counsel of her right to cross-examine the witness and to comment on the expert's testimony in a closing statement.

Test Yourself

Assume that during an attorney's presentation of evidence you come to believe that evidence is totally extraneous to the filed claims or defenses are being offered into evidence. Although he is given the opportunity to do so, the pro se party is neither objecting to the admission of the evidence nor commenting on its value. You call an executive session to see if the other arbitrators agree with your observations. Assume that the other arbitrators agree.

Is there anything you can suggest to the panel?

Question Feedback

You may suggest that you be permitted to inquire the counsel as to the relevance of the evidence to the claims or defenses in this matter. Assure your co-panelists that you will do the above in a manner that will not in any way jeopardize panel actual or perceived neutrality.

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Section 3: Modifying the Procedures

Section Three Overview – Modifying the Procedures

This section covers how the Chairperson helps the panel tailor the hearing and award processes to a particular arbitration.

Upon completion of this section, you will be able to:

- Use the hearing script procedures.
- Adapt the hearing script procedures to meet the needs of individual cases.
- Follow the award content requirements set forth in the Code.
- Understand panel discretion to include reasons or explanations in the award.
- Facilitate deliberations.

This section takes about one hour to complete.

To complete this section, you will need to review the following materials online:

- Arbitrator's Guide
- Code of Arbitration Procedure
- United States Arbitration Act

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

Code of Arbitration Procedure: https://www.finra.org/arbitration-mediation/code-arbitration-procedure

United States Arbitration Act: https://uscode.house.gov/browse/&edition=prelim

The Importance of Arbitrator Training

The goal of arbitrator training is to help qualified individuals know and perform the fundamental duties of FINRA arbitrators.

Among these basic arbitrator obligations are the following:

- Preparing for and conducting prompt, fair, efficient prehearing conferences and evidentiary hearings;
- Deciding all properly submitted claims, defenses, or other issues;
- Being continuously neutral in fact and in the parties' perception;
- Maintaining the confidentiality of the process.

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Unique Chairperson Duties

Since every arbitrator must continually demonstrate appropriate demeanor, skills, and performance, the Chairperson must not only demonstrate these fundamentals but must also oversee their performance by the other panel members. As important, the Chairperson must lead and encourage a panel to do what circumstances require. The goal of Chairperson training is to help capable Chairpersons demonstrate such leadership.

To lead in this manner, the Chairperson should endeavor to tailor procedural guidelines or tools to the particular case. This course has previously addressed a number of occasions when the Chairperson could suggest adjustments.

> Example:
> After considering the hearing experience of the other panel members, the Chairperson should tailor the procedural comments made to the other arbitrators before the first evidentiary hearing, particularly comments aimed at ensuring panel teamwork throughout the hearings. See Section 2.

Some other examples where the Chairperson and panel should adjust procedures to the case issues or key hearing participants include the following:

- Tailoring the Discovery Guide Document Production Lists to the filed claims and defenses. See Section 1.
- Making a detailed record at the hearing and in the award when a panel decides serious procedural issues. See Section 2.
- Managing representative misconduct in an appropriate manner. See Section 2.
- Providing an appropriate level of procedural assistance to a party who appears without a lawyer. See Section 2.

This Section suggests that the Chairperson and panel tailor the Hearing Script to the case. It also suggests that the Chairperson and the other arbitrators be flexible when determining whether to provide a reasoned award and to be aware of situations under Rule 12904 when an explained decision is required.

Hearing Script Flexibility

As noted earlier in this course, the Hearing Script was designed to help Chairpersons facilitate fair, efficient hearings that comply with the Code and with state and federal arbitration laws. The exercise of appropriate panel discretion under the Script should not lessen its continuous use throughout the evidentiary hearings.

Arbitrator discretion is grounded in Rule 12409, which authorizes arbitrators to make final and binding decisions on applicability, interpretation of, and compliance with all the Code.

Arbitrators should tailor the script only in unique cases, and where they believe it necessary. Check with staff about procedural issues.

Rule 12409: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12409-0

For example, if two separately filed arbitrations are consolidated for hearing and award purposes under Rules 12312-12314, and there is a dispute as to which of the parties should be designated as the claimant and proceed first with evidence, arbitrators are authorized to make this determination.

Before deciding which party proceeds as the claimant, arbitrators should examine the particular allegations and all pertinent circumstances. After making this decision, arbitrators should give assurances of a fair hearing to all parties.

The Script confirms the panel's discretionary authority during the evidentiary hearings when it states:

"The hearing procedures set forth below may, in the discretion of the arbitrators, be varied provided all parties are allowed a full and fair opportunity to present their respective cases…".

Review the Hearing Procedure Script.

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Rules 12312-12314: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12312

Hearing Procedure Script:
https://www.finra.org/arbitration-mediation/hearing-scripts

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Hearing Script Procedures

The Hearing Script states that the claimant proceeds first with the presentation of evidence.

If, during the claimant's presentation of evidence, a respondent requests that the arbitrators allow one of its witnesses to testify for the convenience of the witness or to alleviate expenses, the panel may permit this deviation from the usual witness order.

The Chairperson, on behalf of the panel, should make it clear that the arbitrators will consider reasonable claimant requests to recall the respondent's witness at a later time or date.

The Script -- pursuant to Rule 12607 -- provides that the claimant may make the last closing argument. If a respondent asks the arbitrators for permission to make additional comments on the content of the claimant's closing statement, the arbitrators may permit such comments, but should, in the interest of fairness, give the claimant an opportunity to have the last word.

The Script provides for closing arguments after all of the parties complete their evidentiary presentations.

Request to Reopen Hearings

What if, after all the parties make their closing statements and the Chairperson has closed the hearings, a party requests the panel's permission to introduce additional witnesses or documents? For example, suppose after the hearing concludes the claimant's counsel returns to her office and finds a fax finally containing the documents she had subpoenaed earlier. The fax contains evidence of another customer complaint against the respondent broker, despite the fact that the broker stated at the hearing that he had no other customer complaints. In response, claimant's counsel faxes a letter to the administrative staff, and to all other parties, requesting that the hearing be reopened because she now has documentary evidence that rebuts a material statement made during the hearing. The respondent's counsel replies that the record has been closed.

After the administrative staff forwards the applicable correspondence from the parties on the issue, what should you do as Chairperson?

Under Rule 12609, arbitrators may, in their discretion, reopen the hearings and permit the introduction of new evidence, as long as the request to reopen is made before the signed award is served.

Before doing so:

- Contact your co-panelists to determine whether the case should be re-opened to consider these submissions.
- Ask your co-panelists for their views.
- Suggest that the evidence appears relevant to you, plus it goes to the broker's credibility.
- Suggest that the hearings be reconvened in order to provide both sides an opportunity to address this matter.

You may believe this is significant enough that you want to see the parties to assess credibility.

Read Rule 12609.

Before deciding whether to consider the offer of evidence, the panel must hear the reasons for and the objections to the late offer.

If the arbitrators reopen the hearings and consider the new evidence, they must provide all of the parties a reasonable opportunity to examine, object, and comment upon the evidence and to introduce countervailing testimony or documents.

Rule 12609: https://www.finra.org/rules-guidance/rulebooks/finra-rules/12609

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Managing the Deliberation

After the hearing has concluded and the parties have left the room together, the arbitrators generally commence deliberating on the merits of the case. It's best to begin deliberating immediately because the panel has just heard the parties' summations; and, the evidence is fresh in everyone's minds. From a logistical standpoint, you are sitting with your co-panelists surrounded by the evidence and tapes, which will make your deliberations easier. If the panel does not deliberate immediately after the hearing, they will be in the unenviable position of trying to set up a conference call to deliberate at a later date.

If the panel can't deliberate after the hearing, schedule a teleconference to be held as soon as possible, while the events of the hearing are still fresh.

Although deliberations may begin immediately, the panel has to be careful not to rush through the deliberation process, especially at the expense of being unfair, partial, or doing an inadequate job. The parties probably presented their case for hours, days or even weeks. The panel owes it to the parties, and to the arbitration process, to engage in full and fair discussions concerning the issues raised by the parties.

Once claimant and respondent have presented everything, you have an obligation to resolve all issues submitted and complete the Award Information Sheet, including the assessment of forum fees. The Award Information Sheet is discussed further in the next section.

As Chairperson, you should state precisely and exactly the rulings and determination by the panel. You should also ask the other panel members to speak their views totally, freely and candidly before you give your views.

Why do you think you might want your co-panelists to provide their views before you present your own?

As Chairperson, you have made a lot of rulings concerning the procedural aspects of the case. In order to show your co-panelists that you all are working as a team; you will emphasize the idea of teamwork by asking for their views first. Also, by reserving your views until last, you minimize the chance of unduly influencing the others simply because of your position as the Chairperson.

As stated above, it is very important that the Panel does not come to a quick conclusion. Whether the Panel is leaning toward claimant or leaning toward respondent, it is critical to look at the case from each parties' perspective, to bounce ideas back and forth among the panel, and to play devil's advocate. At times Chairpersons might need to remind co-panelists that views worth having are worth being tested. Also, keep in mind that although ideas should be challenged, people should not. When arbitrators talk among themselves they should strive to use phrases such as "please explain," or "what evidence supports that idea?"

As Chairperson, during the deliberation process you should listen carefully to the thoughts of your co-panelists. With your leadership, the panel will work together and become focused; share their sense of the case; discuss what happened; and decide what facts are in dispute. You, as Chairperson, can do this by asking the panel on the following questions:

- What is claimant asking that would give relief to claimant?
- What are the elements that claimant would have to prove?
- Did claimant prove those elements?

After the panel has discussed the facts of the case, they may determine that there is liability. If the panel determines that the facts of the case demonstrate liability, then the panel must next determine the issue of damages.

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Award Contents

The duty to render a final, binding award on all submitted issues is another critical reason the Chairperson and panel must know all the claims filed by the parties.

Since arbitration, unlike litigation, is a matter of contract, the claims and valid amendments set the limits of a panel's final decision-making authority. An award that exceeds these limits provides a legal basis for its being vacated because arbitrators are authorized to decide only the claims or defenses that the parties have actually submitted. For example, if the claimant has brought a claim for failure to execute a trade and the panel believes the trade was unsuitable given the claimant's education, sophistication and stated objectives, the panel should not issue an award based on a cause of action that was never submitted to the panel. This is true because the respondent did not come prepared to defend this claim. It is beyond the scope of the panel's authority to decide matters not placed before them by the parties. On the other hand, an award that fails to determine all submitted issues also provides a legal basis for its being vacated.

See Chapter 1, Section 10(a) of the United States Arbitration Act for the grounds to vacate awards.

To help ensure award finality, the Chairperson and panel must, therefore, read and maintain an awareness of all claims or defenses. This will help to facilitate panel deliberations and decisions on all and only those matters that the parties submitted for disposition.

Before you sign an award, as Chairperson, review its contents and encourage the other arbitrators to also check that it includes:

- All parties.
- All and only those issues submitted or presented to the panel for disposition in the Summary of the Issues.
- All decisions regarding requested relief, other important issues that the panel considered, and fees, expenses, and other costs.

The arbitration panel must complete the Award Information Sheet at the conclusion of the case. The Award Information Sheet is not the document sent to the parties; instead, staff uses the information provided in it when drafting the award to be executed by the arbitrators. If you are unsure about any section of the Award Information Sheet, please contact staff. The award is an expression of the panel's views in the matter submitted and should be taken very seriously, especially in light of the parties' limited abilities to vacate an arbitration award.

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.
- The chairperson of the arbitration panel will write the explained decision and will receive an additional honorarium of $400 for doing so.

If you have any concerns about the completeness, accuracy or clarity of award contents, please contact staff.

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Test Yourself

Are there times when the Chairperson should ask the panel to consider giving a reasoned award, or at least a brief explanation for the award?

Question Feedback

Yes, if the Chairperson believes that the circumstances warrant or justify an explanation of the award, the panel may include a written decision in 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.
- The chairperson of the arbitration panel will write the explained decision and will receive an additional honorarium of $400 for doing so.

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Other Scenarios

In any matter where the arbitrators decide — before the respondent presents evidence — to grant a motion to dismiss a claim "with prejudice," the Chairperson should tell the panel that it should include in the award a statement explaining why the motion is granted. Doing so may facilitate the claimant's understanding of the dismissal at this early stage of the proceeding.

In addition, to help avoid possibly having such an award vacated on grounds that the panel manifestly disregarded proper legal standards in summarily granting the motion to dismiss, the Chairperson should suggest to the panel that the award statement include how the arbitrators complied with legal standards before dismissing the claim. When a motion to dismiss "with prejudice" is granted, it must be put into the form of an award. Check with staff.

If flagrant conduct is attributable to FINRA brokerage firms or persons associated with brokerage firms, any arbitrator is authorized to refer the conduct for regulatory review by FINRA for possible disciplinary action.

In an arbitration where the panel finds that an executed settlement agreement or release is invalid and then finds for the claimant on a claim that is the subject of the agreement or release, the Chairperson should suggest that the arbitrators explain the reasons for their determinations of invalidity or of liability.

Similarly, if the arbitrators find that the settlement agreement or release constitutes a valid defense to a claim, the reasons for that determination should also be included in the award.

Reasoned awards or explanations should be considered in cases where other absolute defenses or bars to a claim are asserted. These defenses may include, to cite two examples, the expiration of a legal time period within which to file a claim or a prior determination of the identical claim.

Under Rule 13802, if the arbitration includes a statutory employment discrimination claim, the panel must issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

Before concluding this section, please complete the practice activities below to test your understanding of how the Chairperson helps to tailor award contents to the particular case.

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Test Yourself

Before signing any award, what should the Chairperson and the panel members always review?

Question Feedback

Before signing an award, the Chairperson and panel must always read the award and check its contents for the following:

- All parties are included.
- All and only those issues submitted or presented to the panel for disposition are included in the Summary of the Issues.
- All of these elements are specifically, accurately, and clearly decided:
    - Requested relief
    - Other important issues that the panel considered
    - Fees, expenses, and other costs

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Conclusion

Closing Remarks

The suggested guidelines and procedures contained in this course should help Chairpersons facilitate fair and efficient proceedings. Chairpersons who consider these suggestions and encourage their appropriate use will help to alleviate successful motions to vacate awards because of arbitrator misconduct and will thus help to preserve award finality.

We hope that this course will inspire you, when you serve as Chairperson, to suggest and to be open to other appropriate guidelines and adjustments. We also hope that you will serve the interests of fairness, efficiency, and finality, and that you will enhance user confidence in this forum's integrity. All Chairpersons respond to cases in their own way, given their own style and personality. There is no "one way" to chair a panel. Do what is most comfortable to you but always keep in mind that good arbitrators act in a way that is above reproach, that is unimpeachable, and always maintain the professionalism that the arbitration process requires.

Next Steps

To test your understanding of the course material, please complete the attached Chairperson Training Exam and mail or fax it to FINRA for grading. To successfully complete the Chairperson training and receive credit, you must score at least 80 percent on the exam. Thereafter, FINRA will update your Arbitrator Disclosure Report to reflect that you have completed this course.

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FINRA Office of Dispute Resolution
Chairperson Training Exam

Name: _____ Arbitrator ID#: A_____

After reviewing the course, you must complete and submit the following exam. **You must score at least 80 percent to receive credit for completing the course.** Upon successful completion of the course and exam, FINRA will automatically update your disclosure profile to reflect that you completed the course. If, however, you do not receive the minimum score, FINRA will notify you, and you may attempt the exam again.

CLEARLY mark your answer.

Include your name and arbitrator ID# on EVERY page.

When you have completed the exam, please FAX your pages to FINRA – Neutral Management Department at 646-625-6020 or email to luis.cruz@finra.org.

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1. During the Initial Prehearing Conference (IPHC), the respondent states that the claimant failed to produce documents according to the Document Production Lists in the Discovery Guide and requests that the panel issue sanctions against the claimant. The claimant replies that the requested documents are irrelevant or privileged and should not be produced. Which statement describes the best approach for the panel to take at the IPHC?

   A. Deny the request for sanctions, schedule discovery motion deadlines. After reviewing the discovery motions, the Chairperson should either rule on the document production issues or schedule a conference to hear arguments from the parties before ruling.
   B. Grant the request for sanctions because of the claimant's failure to comply with the Discovery Guide.
   C. Postpone the IPHC until the parties reach an agreement regarding the exchange of documents.
   D. Do not take any action at this time.

2. Which is true about discovery?

   A. Discovery relates only to requests for documents.
   B. Discovery occurs only in the prehearing stage of a proceeding.
   C. The Discovery Guide was designed to help facilitate the exchange of documents in customer cases.
   D. The Discovery Guide lessens arbitrator authority to determine unresolved discovery issues.

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Name: _____ Arbitrator ID#: A_____

3. During your review of the pleadings, you find that the respondent's answer is missing. Which statement best reflects what you should do?

   A. Note that the party failed to answer, and prepare a default award.
   B. Note that the party failed to answer, and wait to see if the party appears at hearing.
   C. Note that the party failed to answer, contact assigned FINRA staff, and request that staff confirm the status of claim service on the party.
   D. Note that the party failed to answer, contact the other panel members, and issue a subpoena ordering the party's appearance.

4. The Initial Prehearing Conference (IPHC) allows the arbitration panel and the parties to organize the arbitration. Which activity that is not a primary objective of the IPHC?

   A. Scheduling evidentiary hearing dates.
   B. Facilitating the resolution of documentary discovery issues.
   C. Deciding motions to dismiss claims.
   D. Discussing mediation.

5. At the start of the second day of hearing, the claimant arrives with a new attorney. You realize for the first time that you attended the same college with the claimant's attorney more than 25 years ago. You did not and do not have any social, business or professional relationship with the new counsel. Under these circumstances, which statement is false relating to arbitrator disclosure?

   A. You are obligated to disclose the above fact to the parties.
   B. Disclosure of the above fact will automatically result in your removal from the arbitration panel.
   C. When you disclose the above fact you also need to indicate to the parties whether you can be completely impartial in deciding the dispute.
   D. If you believe you would be uncomfortable acting as an arbitrator in this matter, you may recuse yourself from serving on the case.

6. Which statement is true about FINRA Default Procedures?

   A. The arbitrator can proceed under the default award procedures after the terminated respondent files a late answer in the proceeding.
   B. If a terminated respondent fails to serve and file an answer in a proceeding, any claimant, absent agreement among all claimants, may request that the arbitrator follow the default award procedures.
   C. If a terminated respondent fails to serve and file an answer in a proceeding, all claimants may request that the arbitrator follow the default award procedures.
   D. The panel may issue an award based solely on the nonappearance of a party.

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Name: _____ Arbitrator ID#: A_____

7. In the reception area before the third evidentiary hearing begins, you observe and hear one of the parties ask a co-arbitrator if he has change of a $20 bill. Which of the following statements is true about this exchange?

   A. Because the occurrence is completely innocent, it can never affect the appearance of arbitrator neutrality.
   B. This occurrence should be disclosed on the hearing record to avoid any perception of arbitrator bias.
   C. The arbitrator who provided the party with change must remove himself from the panel.
   D. The parties' perception of arbitrator neutrality is not important to the FINRA arbitration process.

8. Which statement is false regarding the authority of FINRA arbitrators?

   A. Arbitrators are not authorized to deny a request by all parties to postpone a scheduled hearing to mediate the controversy.
   B. Arbitrators may proceed with a hearing in the absence of a party if that party was properly notified of the scheduled hearing.
   C. Arbitrators may render an award against an absent party provided the missing party was required to arbitrate the dispute at this forum and was provided with due notice of the scheduled hearing.
   D. Arbitrators are authorized to render a default award based solely on a party's absence provided the missing party is required to arbitrate and received due notice of the scheduled hearing.

9. Which statement is true about deciding postponement requests?

   A. Arbitrators should never grant a postponement request to allow a party to change counsel if it will result in a delay of the hearings.
   B. Arbitrators should consider all circumstances and then make a reasonable decision.
   C. A panel's decision to deny a postponement request will not provide a legal basis upon which a court can set aside or vacate the award.
   D. If arbitrators decide to deny a postponement request, they should never consider making a record of the decision and the reasons at the hearing and in the award.

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Name: _____ Arbitrator ID#: A_____

10. Which statement is true about an arbitrator's duty to disclose?

    A. When you are not sure whether to disclose a relationship or interest, there is no need to disclose it.
    B. At the outset of a hearing, you should make new disclosures; however, repeating on the record disclosures that you previously made to the parties is a waste of time.
    C. You must disclose to FINRA changes in your employment, job functions, or clients, only when these changes are related to the parties, representatives, witnesses, or subject matter of cases in which you are selected to serve.
    D. When you are in doubt as to whether you should disclose, always disclose.

11. If a party's attorney causes serious disruptions during the hearing, the panel may consider which of the following actions?

    A. The Chairperson could call an executive session to discuss the issue in private with the panel.
    B. The Chairperson could call a recess.
    C. The Chairperson could make a record at the hearing of the misconduct, prior warnings and the actions the panel is considering.
    D. All of the given options.

12. Suppose you are the Chairperson of a proceeding that involves a statutory employment discrimination claim. One of the other public arbitrators tells you that she has accepted employment with a broker-dealer. The employment will commence in six months. Assume that the broker-dealer has nothing to do with the claims, defenses, other important issues, parties, and witnesses in the arbitration. In addition, the arbitrator making the disclosure tells you that she can be completely impartial and fair. Under these circumstances, which statement is false?

    A. Disclosure of the new employment to the parties is required even if it is completely unrelated to the submitted issues, the parties, and the witnesses in the arbitration.
    B. As long as the arbitrator believes that she can be neutral and fair, there is no need to disclose the new employment to the parties.
    C. As Chairperson, you should encourage the arbitrator to disclose the employment to the parties, and if the arbitrator refuses to do so, you should make the disclosure.
    D. Cases involving statutory employment discrimination claims require three public arbitrators.

13. During the executive session conducted before the first evidentiary hearing, the Chairperson should explain and assign important duties to the other arbitrators. Which tasks are the arbitrators responsible for?

    A. Operating the recording device to keep the required record of the hearings.
    B. Marking documents that are offered into evidence.
    C. Keeping a record of admitted documents and sworn witnesses.
    D. All of the given options.

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Name: _____ Arbitrator ID#: A_____

14. Which statement is false regarding hearing procedures?

    A. A Chairperson may consult with the entire panel in executive session when minor issues become the subject of a heated exchange among the parties or their representatives.
    B. Panel discussions on important procedural and substantive issues should always take place in executive sessions.
    C. Arbitrators must maintain neutrality when posing questions during the hearing.
    D. Biased conduct by one panel member will not affect the overall fairness of the proceeding or the finality of award.

15. Suppose that you served as Chairperson in a matter that resulted in a dismissal of all claims against multiple respondents. Ten months after service of the award on all parties, one of the respondents makes you an offer of employment. Under these circumstances, which of the following is true?

    A. Because the award has been served and made publicly available, you may speak to anyone and everyone about panel deliberations.
    B. As soon as the award is rendered, your duty of neutrality ceases.
    C. Accepting this offer of employment will never violate your ethical obligation of neutrality.
    D. Entering into this business or professional relationship might create an appearance that you were influenced in the earlier arbitration in anticipation of this relationship.

16. Jurisdictional, service, and notice issues relating to absent parties are examples of serious procedural issues that arbitrators may have to decide. Arbitrator rulings on these issues are important because they can provide a legal basis upon which a court may set aside an award. Such issues should be discussed and decided in executive sessions. Which statement best describes what the panel should do in order to preserve hearing fairness and award finality on serious procedural issues?

    A. Include the panel decision in the award.
    B. State the panel decision and reasons on the hearing record.
    C. State the panel decision and reasons on the hearing record and include both the decision and reasons in the award.
    D. Include the panel decision and reasons in the award.

17. As the Chairperson of a panel, you must demonstrate proper demeanor at all times. You also must help ensure that the other arbitrators conduct themselves properly throughout the proceeding. Which statement is false relating to arbitrator demeanor?

    A. No matter how disruptive a party, representative, or witness becomes the arbitrators must remain calm and polite.
    B. Arbitrators must listen attentively to the arguments of all parties.
    C. Arbitrators should never ask questions of witnesses.
    D. Arbitrators should reserve all comments on the evidence for an executive session.

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Name: _____ Arbitrator ID#: A_____

18. Which statement is true regarding proper arbitrator conduct?

    A. Arbitrators may ask clarifying questions, in a neutral manner, at any time.
    B. Conversations between an arbitrator and a party that relate to news, sports, theater or other non-case subject matter is permissible provided all parties are present.
    C. If an arbitrator has not taken the Oath of Arbitrator, he/she may make decisions provided it is executed and filed before the award is rendered.
    D. A completely innocent ex parte conversation between an arbitrator and a party need not be disclosed to the parties.

19. Which statement is false regarding arbitrator questioning of witnesses?

    A. Arbitrators should not verbally communicate disagreement with a witness at the hearing, even if it is done in a courteous manner.
    B. Some arbitrator questions of witnesses can affect the perception of neutrality.
    C. Arbitrators can ask judgmental questions of a witness provided they are aimed at eliciting relevant facts.
    D. Arbitrators may ask questions of witnesses after the parties have finished with their questions.

20. Which statement is false regarding an arbitrator's assistance to a pro se party?

    A. Arbitrators can explain the meaning of direct and cross-examination of witnesses.
    B. Arbitrators can explain the meaning of opening and closing statements.
    C. Arbitrators can allow a pro se party additional time to prepare questions for the direct and cross-examination of witnesses.
    D. Arbitrators can provide a name of a good attorney to represent the prose party in the arbitration hearing.

21. Arbitrators must take the Oath of Arbitrator (Oath) every time they are selected to serve on a case. Which statement is true about the Oath?

    A. Before arbitrators execute the Oath they must review the Arbitrator Disqualification Criteria, Arbitrator Disclosure Checklist and their Arbitrator Disclosure Report.
    B. Arbitrators cannot make any decisions unless and until they have taken their Oath.
    C. The Arbitrator Disclosure Checklist requires a complete explanation of all possible conflicts with any party to the proceeding.
    D. All of the given options.

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Name: _____ Arbitrator ID#: A_____

22. Which statement is true regarding the filing of legal briefs by parties in arbitration?

    A. Parties should always file legal briefs after the conclusion of the evidentiary hearings.
    B. Arbitrators can cause delays by scheduling the filing of legal briefs before the evidentiary hearings.
    C. Parties may provide legal briefs to explain their arguments and provide case law that supports their claims or defenses before the evidentiary hearings.
    D. Legal briefs are never helpful in arbitration.

23. When must the panel provide an explained decision of its award?

    A. If one party requests an explanation at least 20 days before the first scheduled hearing, the panel should include one in the body of the award.
    B. If the claimant requests an explained decision, even after the panel has already deliberated, it must provide one in the award.
    C. If the parties jointly request an explained decision at least 20 days before the first scheduled hearing date, the panel must provide one.
    D. If the parties request an explained decision after the panel has deliberated, the panel must provide one.

24. Which statement is false regarding arbitrator deliberations?

    A. All arbitrators are obligated to take part in the deliberations to determine all properly submitted claims and defenses.
    B. When the arbitrators deliberate to determine the facts of the case, they need to decide the credibility of the testimony and the value of the documents.
    C. When the arbitrators deliberate to determine the application of law to the facts of the case, they are not bound by legal precedent.
    D. If arbitrators are not certain about the facts and law in a case, they should "split the baby."

25. Which statement is false regarding awards?

    A. Because FINRA makes awards publicly available, arbitrators are free to discuss their award after it is served on all of the parties or their representatives.
    B. Before signing an award, an arbitrator should read it to be sure it contains specific, accurate, and clear decisions on all relief requests, other important issues and fees.
    C. Although the assigned staff will check award contents before sending it to an arbitrator for signature, the arbitrator should still carefully review the award before signing it.
    D. If, after the award has been served, an arbitrator is contacted by a party, witness or representative to discuss the panel's decision, or any aspect of the case, the arbitrator should not discuss the case, but should immediately refer the person to assigned staff and inform staff of the communications.

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