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## Mission Statement

We publish *The Neutral Corner* to provide arbitrators and mediators with current updates on important rules and procedures within securities dispute resolution. FINRA's dedicated neutrals better serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

## Announcement: Linda Fienberg to Retire



Linda Fienberg, President of FINRA Dispute Resolution and Chief Hearing Officer, is planning to leave FINRA at the end of November. Linda joined FINRA in June 1996 and has responsibility for FINRA's dispute resolution and disciplinary hearing programs.

Under Linda's leadership, FINRA Dispute Resolution has made tremendous advances in delivering fair, expeditious, and affordable services to investors and other parties who use FINRA's forum. Linda shepherded a number of changes that instituted more investor-friendly policies and procedures in FINRA's dispute resolution forum, including the 2007 Code of Arbitration Procedure rewrite, the 2011 rule change that gives all investors who file arbitration claims the option of choosing an all-public panel, and the DR Portal.

In addition to her work as the head of Dispute Resolution, Linda created a new Office of Hearing Officers (OHO). She was instrumental in implementing a new Code of Procedure (which governs FINRA's disciplinary process), hiring a group of professional hearing officers and an administrative staff, and establishing OHO's policies and procedures.

Prior to joining FINRA, Linda was a partner at the Washington, D.C., law firm of Covington & Burling. From 1979 to 1990, she was on the staff of the Securities and Exchange Commission (SEC), where she held several senior staff positions, including Executive Assistant to two Chairmen and Associate General Counsel in the General Counsel's Office, first for the Litigation section and then for the Counseling and Legislation section. She is a recipient of the SEC's Distinguished Service Award.

During her 18 years with FINRA, Linda has been an inspiring and effective leader, and she leaves us with a lasting legacy of excellence. We thank her for her tremendous contributions to the forum and wish her the best as she embarks on a new chapter of her life.

## Comments, Feedback and Suggestions

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Please send your suggestions and comments to:

Jisook Lee, Editor  
The Neutral Corner  
FINRA Dispute Resolution  
One Liberty Plaza  
165 Broadway, 27th Floor  
New York, New York 10006

You may also email Jisook at [Jisook.Lee@finra.org](mailto:Jisook.Lee@finra.org).

## FINRA's Arbitrator Disclosure Efforts



Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Arbitrators must reflect on any experience or relationship that may affect, or even appear to affect, the arbitrator's ability to be impartial when considering disclosures. To maintain the integrity of the arbitration process and provide a fair forum, FINRA is committed to ensuring that the arbitrator disclosure process is transparent and comprehensive.

### FINRA's Disclosure Efforts

FINRA stresses the importance and urgency of providing parties with current and accurate arbitrator disclosures. We employ a complement of disclosure strategies to ensure that we have accurate and current information to provide to parties during arbitrator selection.

### Background Verification

We conduct background verifications for all FINRA arbitrators. Our outside vendor completes a thorough check of the following areas:

- education;
- employment;
- civil records (lawsuits);
- criminal records;
- professional licenses; and
- Social Security number verification.

Periodically, we re-run background verifications for all arbitrators on our roster. This is a large undertaking, but we believe that regularly reviewing the roster is essential. We completed a re-verification project in 2014.

### Technology Enhancements

FINRA is continually working to improve its technology to make the disclosure process as accessible as possible for arbitrators. In 2012, we launched the DR Portal, which allows neutrals to log into a secure website to make their updates. The process allows neutrals to review their current information and make additional updates and corrections on a regular

basis, not only when they are appointed to a case. Arbitrators should be aware that their disclosure reports are sent to potential parties regularly; therefore, it is imperative that they keep their profiles accurate and current.

### Internet Research

In 2013, FINRA began conducting Internet searches of all arbitrators before appointing them to a case. If the parties select an arbitrator, FINRA conducts a search on the arbitrator to determine if there are any additional, relevant disclosures to publish in the arbitrator's disclosure report and to provide to the parties before appointment. FINRA verifies any new information with arbitrators before adding it to their disclosure reports.

The following are examples of information staff looks for online and information arbitrators should disclose:

- disciplinary findings by a professional or regulatory organization;
- malpractice suits;
- current and past legal actions (both investment and non-investment related) in which the arbitrator was personally involved;
- current and past legal actions in which the arbitrator served as counsel in an investment-related case;
- professional licenses;
- memberships in professional organizations;
- publications such as books, articles, blogs; and
- social media accounts, including Twitter feeds. For example, arbitrators often have LinkedIn accounts. They should confirm that their LinkedIn information is consistent with the information they provide to FINRA.

Arbitrators should be aware that parties conduct in-depth research on FINRA arbitrators. They use online search engines (*e.g.*, Google); review websites associated with an arbitrator or an arbitrator's employer; look up arbitrators on LinkedIn and other social media sites; and employ legal search engines such as Pacer, Westlaw or Lexis Nexis. We urge arbitrators to search their names on the Internet and review the results to ensure that the information is consistent with the information they provide to FINRA.

### Recent Case

***Chester v. Merrill Lynch*, 12 CIV. 3078 GBD, 2014 WL 2111690 (S.D.N.Y. May 13, 2014).**

A federal district court in New York denied a motion to vacate the FINRA arbitration award because it determined that the arbitrator made appropriate disclosures about his wife's investment account with the respondent firm. The court found that the petitioner failed to demonstrate that a "reasonable person would have to conclude that the panel's Chairman was partial to Respondent" because his wife maintained an investment account with Merrill Lynch. This case highlights the importance of making disclosures and that erring on the side of disclosure will more likely protect the finality of the award and an arbitrator's reputation during post-award litigation.

### Training and Education

FINRA devotes significant resources to educating and training arbitrators, staff and parties about the importance of disclosure. We update our trainings to highlight important issues regarding arbitrator disclosure and include tips on making disclosures. We publish articles in *The Neutral Corner*, develop audio workshops and send emails on the topic of disclosure. Staff encourages and reminds arbitrators of their duty to disclose at every opportunity. We often mention disclosure when we participate in programs with constituent groups and bar associations. FINRA is serious about disclosure and works continuously to let arbitrators know that disclosure is a requirement, not an option.

In addition to the various types of outreach about disclosure, FINRA has recently formed a dispute resolution task force to consider possible enhancements to FINRA's forum, including arbitrator disclosure. (See the "Dispute Resolution and FINRA News" section of this newsletter for more information about the Task Force.)

### Consequences of Incomplete Disclosure

It is in the best interest of the parties and arbitrators, and in the best interest of preserving the finality of the arbitrators' award, that arbitrators fully disclose all situations that might reasonably be perceived to affect their impartiality. Failure to disclose may result in the arbitrator's permanent removal from FINRA's roster.

Failure to disclose may also result in vacated awards, which undermine the efficiency and finality of the arbitration process. Even though arbitrators may not believe that a disclosure is necessary or required, they should make the disclosure. For example, parties have filed motions to vacate because arbitrators failed to disclose:

- account with a brokerage firm involved in the case;
- lapse of a professional license;
- prior employment with a law firm that represented a party;
- spouse's employment with a broker-dealer;
- spouse's, or spouse's employer's, legal representation in securities issues; and
- spouse's investment account.

Failure to disclose can result in reputational harm for the arbitrator and for the forum.

### Recent Case

***PFS Investments Inc. v. DeShazor*, No. 13-28369-CA-25 (Fla. 11th Cir. Ct. October 10, 2013).**

A Florida state court vacated a FINRA arbitration award because two of the arbitrators on the panel failed to make adequate disclosures. One arbitrator failed to share a similar experience that was at issue in the arbitration. Specifically, he failed to disclose that he had a negative experience involving the same employee benefit plan. The second arbitrator failed to disclose his representation of claimants in securities litigation as well as a malpractice claim against his law firm. The court stated that is not necessary to show “that an arbitrator had an actual conflict of interest. It is sufficient if the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict would exist. When that showing has been made, vacatur is required.”<sup>1</sup> The court found that the undisclosed circumstances “create the impression of possible, if not actual, bias” and at a minimum “demonstrate an appearance of partiality.”

<sup>1</sup> *Citigroup Global Markets, Inc. v. Berghorst*, No. 11-80250-CIV, WL 5989628, \*3 (S.D. Fla. Jan. 20, 2012).

### How to Comply With Disclosure Requirements

The ultimate responsibility for disclosure lies with the arbitrators. However, FINRA works with the arbitrators to ensure that disclosures are timely and accurate.

Arbitrators can enhance disclosure by doing the following:

- Consider all aspects of your life—professional, personal and social—as possible disclosure sources.
- Regularly review your disclosure report to ensure that all information is accurate and current. Even if you are not currently serving on a case, FINRA is sending your disclosure report to parties who are choosing arbitrators for list selection purposes. You can quickly review and submit updates through the DR Portal.
- Determine what information is available publicly about you and ensure that it is consistent with the information on your disclosure report.
- Cooperate when staff contacts you to verify information found during a background verification or Internet search.
- Thoroughly complete the Oath of Arbitrator and Checklist when you are appointed to a case. Do not assume that questions remain static, and only require “no” responses; the form changes frequently.
- Review your disclosure report before affirming its accuracy.
- After making any additional, updated disclosures to FINRA, repeat them at the first prehearing conference to confirm the parties’ acceptance of your appointment. You should memorialize the parties’ acceptance in the prehearing conference order.
- If a conflict arises during a case, make the disclosure immediately.

Parties can bolster the disclosure process by reviewing the backgrounds of proposed arbitrators and performing their own due diligence during the arbitrator selection process.

### Conclusion

It is not always easy to determine when arbitrators should have made a disclosure. To avoid post-award litigation and maintain the integrity of the arbitration process and finality of the award, arbitrators should err on the side of disclosing any relevant information. If you need to think about whether a disclosure is necessary, then make the disclosure. When in doubt, disclose.

## Mediator Disclosure

By Asha Pandya, FINRA Dispute Resolution Extern



Mediators begin each mediation session by disclosing any relationships or associations they may have with the parties. Only after the parties have agreed to continue with the particular mediator would they proceed with the mediation.

To engage in earnest negotiations, parties must have confidence in the mediation process and share information with the mediator that might not be publicly available or available to the other side. Mediators are bound to confidentiality with few exceptions. Generally, anything that is said in the mediation room may not be used as evidence or testimony in litigation or arbitration proceedings.

Because of the intimate relationship between mediators and parties, mediators must be free of any hint of bias or partiality. Mediators are required to disclose a potential conflict whenever there are facts and circumstances that could reasonably be seen as raising a question about the mediator's impartiality.<sup>1</sup>

### CEATS v. Continental Airlines

In *CEATS v. Continental Airlines*,<sup>2</sup> a non-FINRA mediation, the court found that a mediator should have disclosed his relationship with an attorney before serving as a mediator in a case where the attorney's firm represented a party. Mediator Faulkner and attorney Johnson of the law firm, Fish & Richardson, began their friendship when they clerked for the same judge years earlier. They continued their friendship which included attending basketball games with their families and dinners with their spouses. In an unrelated arbitration in 2008, Faulkner arbitrated a case where Johnson served as lead counsel for a party. Faulkner entered a \$22 million award including \$6 million in attorney's fees, in Johnson's favor. Faulkner and Johnson both pretended they did not know each other during that arbitration, and Arbitrator Faulkner did not disclose the friendship to the other party. However, after learning of the relationship, the other party sought more information about the relationship, and ultimately, the court vacated the arbitration award.

In 2010, Faulkner mediated *CEATS v. Continental Airlines* in which the law firm, Fish & Richardson represented Continental. Again, Faulkner did not disclose his personal or professional ties to Fish & Richardson. The mediation was unsuccessful, and the case went to trial where a jury found in favor of Continental. In its appeal, CEATS argued that Faulkner's failure to disclose his relationship with Fish & Richardson posed a "risk of injustice" whereby Faulkner could have released confidential information gained during the mediation to Continental's counsel. Although the court ultimately ruled that CEATS had a fair opportunity to present its case and did not set aside the final judgment, it concluded that Faulkner should have disclosed his relationship with Johnson and Fish & Richardson and stressed the importance of a mediator's neutrality.

This case illustrates the consequences neutrals face when deciding whether to disclose a relationship. Neutrals should consider the aftermath of nondisclosure which may include sanctions, challenges to awards and damage to their reputation. If neutrals are in a situation similar to Faulkner, or any other potential conflict of interest, they should ask themselves whether the short term benefits of working on one case outweigh the reputational consequences. When unsure, it is always safer to err on the side of caution and make the disclosure.

### Endnotes

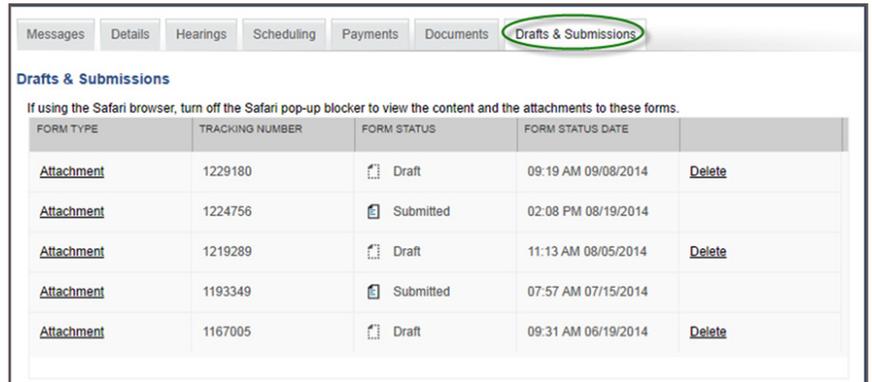
- 1 ABA Standards for Mediators §III.C.
- 2 *CEATS, Inc. v. Cont'l Airlines, Inc.*, 2013-1529, 2014 WL 2848630 (Fed. Cir. June 24, 2014).

## DR Portal Update

### Advantages for Neutrals

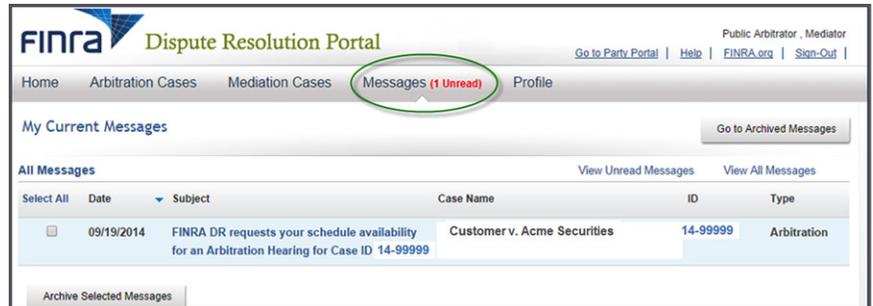


FINRA recently enhanced the DR Portal to allow neutrals to submit documents related to some cases through the portal. Currently, arbitrators may submit documents related to cases involving Wells Fargo, Morgan Stanley, UBS, Raymond James, Merrill Lynch and Ameriprise through the portal. For example, you may submit your Oath of Arbitrator and Arbitrator Disclosure Checklist through the portal rather than faxing or mailing the document. The oath and checklist are now available in a fillable PDF format. After you complete the form online, you may save the document as a PDF on your computer. Once you are in the portal, select the case you are working on and upload the PDF document to send to FINRA through the portal. You may confirm that you submitted the document by reviewing the “Drafts and Submissions” tab.



FORM TYPE	TRACKING NUMBER	FORM STATUS	FORM STATUS DATE
<a href="#">Attachment</a>	1229180	Draft	09:19 AM 09/08/2014
<a href="#">Attachment</a>	1224756	Submitted	02:08 PM 08/19/2014
<a href="#">Attachment</a>	1219289	Draft	11:13 AM 08/05/2014
<a href="#">Attachment</a>	1193349	Submitted	07:57 AM 07/15/2014
<a href="#">Attachment</a>	1167005	Draft	09:31 AM 06/19/2014

FINRA implemented a new message feature that allows users to see a copy of all of the automated DR Portal emails they receive from FINRA (e.g., when FINRA publishes a document or requests a response to a scheduling poll). Portal users can log in to see all of their messages rather than tracking individual emails they receive from FINRA. Users can archive their messages for future reference. This enhancement also allows FINRA to broadcast important announcements regarding updates to the DR Portal. You will receive an email when an announcement is made and can also find them displayed in the blue banner at the top of the Home Page. If you have any questions about navigating the portal, please refer to the [DR Portal User Guide](#) found on the [DR Portal Web page](#).



As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal to take advantage of the numerous benefits it provides, such as:

- viewing and updating your current profile information;
- viewing and printing your disclosure report;
- accessing information about your cases, including upcoming hearings and payment information;
- scheduling hearing dates;
- viewing case documents; and
- submitting case documents.

Registration with the DR Portal is particularly important and useful in cases that are being processed through the portal. Accordingly, we are actively reaching out to arbitrators serving on cases administered through the portal to encourage registration. Registration with the portal will be noted on the arbitrator disclosure report. This information will be viewable by parties when they review arbitrators' profiles during arbitrator selection.

If you have not registered yet with the DR Portal, please send an email to [Dispute Resolution Neutral Management](mailto:Dispute Resolution Neutral Management) to request an invitation. Please include "request portal invitation" in the subject line.

### **Paperless Initiative**

In portal cases, FINRA is replacing the paper-based arbitration files with electronic documents. Being paperless or having digital files means that staff will be processing work electronically rather than using hard copies. Any paper documents received will be converted to an electronic format and all case documents will be stored in electronic arbitration case files. The initiative involves the use of an electronic mailbox for organizing and distributing internal staff assignments. The initiative also includes using more electronic communication among staff, parties and arbitrators.

In January 2014, the Southeast Regional Office became the first to launch a paperless office initiative. In July 2014, the West Regional Office launched its own paperless office initiative. By the end of 2014, all of Dispute Resolution's offices will be paperless. FINRA believes that the paperless initiatives will strengthen our administrative efficiency, customer service capabilities and further enhance the DR Portal. FINRA is excited about the ongoing enhancements to the forum's technological capabilities and welcomes arbitrators to join in the paperless initiative.

## Sixth Annual Securities Dispute Resolution Triathlon

The [Sixth Annual Securities Dispute Resolution Triathlon](#) will take place October 18 – 19, 2014, at the St. John's University School of Law, Manhattan Campus. The Triathlon provides student teams from participating law schools an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute. FINRA invites local FINRA neutrals to serve as judges, mediators and arbitrators. Note that all FINRA arbitrators and mediators are eligible to serve as judges in any round. Judges for the negotiation and mediation rounds observe the students and score the performances. We use only experienced mediators to mediate during that round of the competition. For the arbitration round, the three arbitrators will also submit scores as judges. If you are interested in participating in the event, please visit the [triathlon page](#) to submit a participant form.

## Dispute Resolution and FINRA News

### Case Filings and Trends



Arbitration case filings from January through August 2014 reflect a five percent increase compared to cases filed during the same eight-month period in 2013 (from 2,522 cases in 2013 to 2,660 cases in 2014). Customer initiated claims increased by 15 percent through August 2014, as compared to the same time period in 2013.

### FINRA Forms Dispute Resolution Task Force

FINRA has formed a 13-member [Dispute Resolution Task Force](#) to consider possible enhancements to its arbitration and mediation forum to improve the transparency, impartiality and efficiency of FINRA's dispute resolution forum for all participants. Among other agenda items, the task force will discuss arbitrator disclosure. The task force is comprised of six public members, five industry members and two neutrals. At the conclusion of its review next year, the task force will make recommendations to the National Arbitration and Mediation Committee (NAMC), FINRA's Standing Board Advisory Committee.

### Cases Involving Puerto Rico Bonds

FINRA has increased the number of arbitrators available to hear cases filed in Puerto Rico involving the sale of Puerto Rico bond funds. In the first phase of roster expansion FINRA invited Florida-based arbitrators to serve on Puerto Rico bond fund cases. In April, FINRA began the second phase and reached out to arbitrators from hearing locations in Atlanta, Birmingham, New Orleans, Dallas, Houston and Jackson. In April, FINRA staff visited Puerto Rico and met with numerous professional organizations to recruit additional Puerto Rico-based arbitrators. Our recruitment efforts have resulted in 170 applications from Puerto Rico residents to serve on our roster. These applications are being handled with priority to accelerate the review and approval process. Recently, FINRA reached out to arbitrators from hearing locations in Baltimore, Charlotte, Columbia, Little Rock, Memphis, Nashville, Norfolk, Raleigh, Richmond, Washington D.C. and Wilmington to further expand the roster. To date, we have over 700 arbitrators available to serve on cases involving Puerto Rico bond funds.

### Spanish Language Resources

FINRA has updated information and [resources available in Spanish](#) on its website. The enhanced information includes Spanish versions of the Code of Arbitration Procedure for Customer Disputes (Customer Code), the Mediation Code, the Uniform Forms Guide, Resources for Investors Representing Themselves, and Filing a Claim—Frequently Asked Questions.

FINRA provides information and a translation of the Customer Code and Mediation Code in Spanish as a service to customers in our forum. If you have questions concerning the meaning or application of a particular rule or law, please consult with an attorney who specializes in securities law. The English versions of the FINRA Dispute Resolution Codes serve as the official versions of our rules.

### Updated Award Information Sheets

FINRA revised the Award Information Sheet and created a new document, Award Information Sheet—Sole Topic is Determination of Expungement of Customer Dispute Information. These forms contain the revised expungement guidance that was updated on our website in July 2014 and also contain a new question that asks if the party seeking expungement contributed to any settlement. These forms are available on the [Forms and Tools page](#) of the website. Please see the notice on Expanded Expungement Guidance for more information about expungement.

### Practising Law Institute: Securities Arbitration 2014

On July 31, FINRA participated in the Practising Law Institute's (PLI) Securities Arbitration 2014 program. The program featured FINRA staff, FINRA arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. Among other topics, faculty discussed proposed rule changes, recent case law trends and post-hearing practices. The faculty also provided practical tips on handling employment disputes such as wrongful termination and promissory note cases and examined the ethics of mediation compared to arbitration.

Please visit [PLI's website](#) for more information about the Securities Arbitration 2014 program.

### SEC Rule Approval

#### Prohibited Conditions Relating to Expungement of Customer Dispute Information

The Securities and Exchange Commission (SEC) approved [FINRA Rule 2081](#) to prohibit member firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the firm's or associated person's request to expunge such customer dispute information from the Central Registration Depository (CRD®). The rule became effective on July 30, 2014.

Please visit our website for more information about [SR-FINRA-2014-020](#).

### Expanded Expungement Guidance

#### Conditioned Settlements

In October 2013, FINRA issued [expanded expungement guidance](#) for arbitrators to use when considering requests from brokers to expunge customer dispute information from their CRD records. The guidance states expressly that expungement is an extraordinary remedy that should be granted only under appropriate circumstances, and provides a list of best practices for arbitrators when they are considering expungement requests. One such practice requires that the arbitrators inquire and fully consider whether a party conditioned a settlement of the arbitration upon agreement to consent to or not to oppose the request for expungement. The SEC approved FINRA Rule 2081, which prohibits conditioned settlements, and it became effective on July 30, 2014.

To further assist arbitrators in deciding expungement requests in settled customer arbitrations, FINRA has updated the guidance by creating a separate section to address settlement payments and prohibited conditions relating to expungement of customer dispute information. In addition to the current practice of inquiring and considering whether a party conditioned a settlement of the arbitration upon agreement to consent to or not to oppose the request for expungement, this section of the updated guidance would require arbitrators to consider whether the party seeking expungement contributed to the settlement. Further, the updated guidance provides that if arbitrators learn of prohibited conditions, as described in FINRA Rule 2081, they should consult FINRA's procedures on disciplinary referrals.

### Allowing Customers and Their Counsel to Participate in the Expungement Hearing

The updated expungement guidance also includes a separate section that reminds arbitrators of the importance of allowing customers and their counsel to participate in the expungement hearing in settled cases. Specifically, arbitrators should allow parties to appear at the expungement hearing, make opening and closing statements, testify, conduct cross-examinations of the broker and other witnesses and introduce documents and evidence. Please review the [expanded expungement guidance](#) on our website for more information.

### SEC Rule Filings

#### Defining the Arbitrators' Authority to Make Regulatory Referrals During an Arbitration Proceeding

On January 29, 2014, FINRA filed a proposed change to amend Rules [12104](#) and [13104](#) of the Customer and Industry Codes. The proposal would permit arbitrators to make regulatory referrals during an arbitration proceeding in very limited, defined circumstances. On May 19, 2014, FINRA responded to the ten comments the SEC received on the proposal and filed a partial amendment to clarify the timeframe within which a party must make the recusal request after the Director notifies the parties of the mid-case referral. On May 20, 2014, the SEC published a Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings on whether to approve or disapprove the proposed rule change (Notice).

On August 14, 2014, FINRA responded to the eight comments the SEC received on the Notice and extended the time for the SEC to act on the proposal until October 17, 2014.

FINRA believes that mid-case referrals would provide it with an important tool to protect investors by alerting FINRA to potentially serious wrongdoing earlier than is currently possible.

Please visit our website for more information about [SR-FINRA-2014-005](#).

### Increase to Arbitrator Honoraria

On June 18, 2014, FINRA filed with the SEC a proposed rule change to amend the Customer and Industry Codes (Codes) to increase arbitration filing fees, member surcharges and process fees, and hearing session fees for the primary purpose of increasing arbitrator honoraria. Specifically, to increase the arbitrator honoraria, FINRA would amend Rules [12214](#) and [13214](#) and [12800](#) and [13900](#) of the Codes. The following table illustrates the proposed increases and the percentage changes from the current rates:

Arbitrator Honoraria	Current	Proposed	Percentage Change
Per arbitrator, per hearing session	\$200	\$300	50%
Chairpersons (per day of hearing)	\$75	\$125	67%
Contested Subpoena Requests	\$200	\$250	25%
Simplified Arbitration Cases (flat rate)	\$125	\$350	180%

To cover the costs of the increased arbitrator honoraria, the proposed rule change would amend Rules 12900 and 13900 (Fees Due When a Claim Is Filed), 12901 and 13901 (Member Surcharge), 12902 and 13902 (Hearing Session Fees and Other Costs and Expenses) and 12903 and 13903 (Process Fees Paid by Members) of the Codes.

The SEC received eight comments on the proposal. FINRA reviewed the comments and filed a response on September 18, 2014.

Please visit our website for more information about [SR-FINRA-2014-026](#).

### Revisions to Arbitrator Definitions

On June 18, 2014, FINRA filed with the SEC a proposed rule change to amend Rules [12100](#) and [13100](#) of the Customer and Industry Codes to refine and reorganize the definitions of “non-public” arbitrator and “public” arbitrator. The amendments would, among other matters, provide that persons who worked in the financial industry for any duration during their careers would always be classified as non-public arbitrators. Additionally, persons who represent investors or the financial industry as a significant

part of their business would be classified as non-public, but, unlike persons who worked in the industry, they could become public arbitrators after a cooling-off period. The amendments would reorganize the definitions to make it easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.

The comment period ended on July 24, 2014. The SEC received 23 comment letters on the proposed rule change, 22 of which were unique letters, and one which was submitted on behalf of 293 independent financial advisors. FINRA's response to the comments will be posted to our website. The SEC has until October 1, 2014, to act on the proposed rule change.

Please visit our website for more information about [SR-FINRA-028](#).

## Mediation Update

### Mediation Statistics



From January to August 2014, parties initiated 293 mediation cases. FINRA closed 372 cases during this time. Approximately 83 percent of these cases concluded with successful settlements, and the average case turnaround time was 98 days.

### Annual Mediator Fee

The deadline for FINRA mediators to submit their \$200 annual mediator renewal fee was September 1. If you have not submitted your \$200 renewal fee but are interested in remaining active on the roster, please contact [Marilyn Molena](#) regarding your mediator availability status.

### Mediation Settlement Month

October is [Mediation Settlement Month](#). FINRA invites all active mediators on the roster to participate in this event to help promote mediation. During this annual event, mediators reduce their rates to encourage parties to explore FINRA's mediation program. At the same time, parties who are familiar with FINRA's mediation services may be encouraged to try new mediators on our roster.

The following special rates will apply during Mediation Settlement Month:

Amount of Claim	Length of Mediation	Mediation Session Fee
\$25,000 and under	4 hours	\$100/party
\$25,00.01 - \$100,000	4 hours	\$200/party
Over \$100,000	8 hours	\$500/party

Here are some additional guidelines for participating in settlement month:

- Parties can mediate telephonically or in-person.
- Unspecified claim amounts will be assessed the \$25,000.01 – \$100,000 mediation session rate.
- Parties will pay mediators at their regular hourly rates for any time spent beyond the four or eight hours listed above.

### **Mediation Settlement Day: October 16, 2014**

This annual event is sponsored by FINRA Dispute Resolution, the New York State Unified Court System and a coalition of over 100 alternative dispute resolution programs, bar associations, community based programs, schools, public and non-profit organizations concentrated in the New York City area, and extending beyond to upstate New York, New Jersey, Illinois, California and Washington, DC. Mediation Settlement Day will take place on Thursday, October 16, 2014, with the Kick-Off Celebration Event on Tuesday, October 7, 2014, at the New York Law School, 185 W. Broadway, New York, NY.

### **Mediation Settlement Day: Frontline Champion Award**

As part of the kick-off celebration, the Mediation Settlement Day working group will announce the recipient of this year's Frontline Champion Award. The Frontline Champion Award recognizes individuals who have made a meaningful impact on the field of mediation or helped others through their commitment to the effective practice of mediation. This year, FINRA is especially pleased that the 2014 Frontline Champion Award will be presented to Kenneth L. Andrichik, Senior Vice President, Chief Counsel and Director of Mediation and Strategy of FINRA Dispute Resolution. Ken has been a tireless advocate for mediation, and we congratulate him on this well-deserved award.



## Questions and Answers

### Expungement

**Question** I am serving on a case where the registered person has requested an expungement of customer dispute information from his CRD record. I notice that there are two provisions under [Rule 2080](#) containing standards for expungement. Can we rely solely on the standards set forth in [Rule 2080\(b\)\(2\)](#) in determining whether to recommend expungement?

**Answer** No. [Rule 2080\(b\)\(2\)](#) sets forth the standards that FINRA uses when determining whether to waive the obligation to be named as a party in a court confirmation proceeding when there is an arbitral finding for expungement other than on one of the three grounds identified in [Rule 2080\(b\)\(1\)](#).

In determining whether to recommend expungement, arbitrators should consider the grounds set forth in [Rule 2080\(b\)\(1\)](#):

1. the claim, allegation or information is factually impossible or clearly erroneous;
2. the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
3. the claim, allegation or information is false.

As part of their analysis, arbitrators should consider whether the recommendation for expungement and the accompanying findings on which it is based are meritorious and that the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements pursuant to [Rule 2080\(b\)\(2\)](#). However, before making a recommendation for expungement in the award, arbitrators must explicitly find that the request meets one or more of the grounds under [Rule 2080\(b\)\(1\)](#). Arbitrators must then indicate the specific basis for expungement and provide a written explanation of the reasons for recommending expungement.

Please also review [FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance](#) referenced in the DR News section and on our website.

**Question:** As an arbitrator, I have noticed lately that parties seeking expungement of customer dispute information from the CRD have been filing the request based on a statute of limitations argument of the underlying claim. For example, brokers have argued that because the alleged claims brought by the claimant are barred by applicable statutes of limitations, the expungement request meets one of the grounds under Rule 2080(b)(1). Can we rely on this argument to recommend expungement?

**Answer:** No. Even if the panel determines that the underlying claims are barred by an applicable statute of limitations, that does not satisfy the requirements under Rule 2080. Expungement is an extraordinary remedy that should be recommended only when the information to be expunged has no meaningful investor protection or regulatory value. Therefore, before recommending expungement, arbitrators have an obligation to consider whether the facts and evidence justify a recommendation of expungement, separate from the statute of limitations argument. Arbitrators should also keep in mind that prevailing in arbitration is not, by itself, a sufficient reason for recommending expungement of the complaint from the broker's record. The party seeking expungement must still prove to the arbitrators that expungement is appropriate, based on the facts of the case. If the panel does not provide an adequate explanation, FINRA may choose not to waive the broker's obligation to name FINRA as a party when the broker seeks to confirm the arbitration award in court.

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## Education and Training

### Neutral Workshop: July 31, 2014—The Importance of Arbitrator Disclosure



Linda Fienberg, president of FINRA Dispute Resolution, and Barbara Brady, vice president of Neutral Management, discuss the importance of arbitrator disclosure, provide tips to assist arbitrators to meet their disclosure obligations and explain what

FINRA does to enhance arbitrator disclosure. You may access the workshop, along with previous workshops, on the [Neutral Workshop page](#) of our website.

### Expungement Training: Updated to Include Rule 2081

FINRA updated the online Expungement Training to include additional guidance about new Rule 2081, which expressly prohibits conditioning settlements on a customer's consent to agree, or not to oppose, expungement. You may access the training on FINRA's [Learning Management System](#) or download the PDF version from the [Written Materials page](#). [The Arbitrator's Guide](#) was updated to incorporate additional guidance related to Rule 2081. In addition, we updated the Award Information Sheet (AIS) to incorporate additional guidance regarding this new rule and created a new AIS when expungement is the sole issue to be determined. Please see the [Forms and Tools page](#) of the website.

## Directory

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Management and Editor of  
*The Neutral Corner*

## FINRA Dispute Resolution Offices

**Northeast Region**  
FINRA Dispute Resolution  
One Liberty Plaza, 27th Floor  
165 Broadway  
New York, NY 10006  
Phone: (212) 858-4200  
Fax: (301) 527-4873  
[neprocessingcenter@finra.org](mailto:neprocessingcenter@finra.org)

**West Region**  
FINRA Dispute Resolution  
300 S. Grand Avenue, Suite 900  
Los Angeles, CA 90071  
Phone: (213) 613-2680  
Fax: (301) 527-4766  
[westernprocessingcenter@finra.org](mailto:westernprocessingcenter@finra.org)

**Southeast Region**  
FINRA Dispute Resolution  
Boca Center Tower 1  
5200 Town Center Circle, Suite 200  
Boca Raton, FL 33486  
Phone: (561) 416-0277  
Fax: (301) 527-4868  
[fl-main@finra.org](mailto:fl-main@finra.org)

**Midwest Region**  
FINRA Dispute Resolution  
55 West Monroe Street, Suite 2600  
Chicago, IL 60603-1002  
Phone: (312) 899-4440  
Fax: (312) 236-9239  
[midwestprocessingcenter@finra.org](mailto:midwestprocessingcenter@finra.org)

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Send all correspondence to Jisook  
Lee, Associate Director of Neutral  
Management and Editor of *The Neutral  
Corner*:

FINRA Dispute Resolution  
One Liberty Plaza  
165 Broadway, 27th Floor  
New York, NY 10006

Or call (212) 858-4400.

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