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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.

## Considering Attorneys' Fees Using FINRA's Award Information Sheet

By Chrystal Loyer, Case Administrator, FINRA Case Administration



A panel's first step in communicating a decision is to complete FINRA's [Award Information Sheet](#) (AIS). The AIS asks for all information about the case, the claims and the panel's decision.

As such, the AIS is the foundation for the award. Some arbitrators have inquired when, if ever, awarding attorneys' fees is appropriate. This article explores when a panel may award attorneys' fees and discusses recent updates to the AIS.

### Authority to Award Attorneys' Fees

FINRA's [Basic Arbitrator](#) Training explains that arbitrators can award attorneys' fees when:

- the parties' contract includes a clause that provides for attorneys' fees; or
- all of the parties request or agree to such fees; or
- the fees are required as part of a statutory claim.

If the parties are involved in a dispute arising out of a contract that specifically provides for attorneys' fees, arbitrators may award reasonable attorneys' fees. Arbitrators may also award reasonable attorneys' fees if all parties request attorneys' fees during the arbitration proceeding or agree to such fees.

Panels may also award reasonable attorneys' fees to claimants who prevail under statutes that provide for attorneys' fees, including, among others, Title VII actions for discrimination and many state securities statutes. For example, the Alabama Securities Act § 8-6-19 provides that advisors or sellers of securities are liable to their clients for reasonable attorneys' fees resulting from a violation of the act. When considering claims under a state securities statute, the panel should carefully review the applicable statute to determine whether attorneys' fees are provided by the statute and whether their award is justified.

### Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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FINRA does not provide guidance on whether attorneys' fees may be awarded under a particular statute. Such laws vary widely and may require legal interpretation, which is outside of FINRA's role as a neutral forum administrator. Likewise, arbitrators should not conduct outside research. If a prevailing party requests attorneys' fees and it is unclear what authority the panel has to award them, the panel should ask the parties to brief the issue. The briefs should discuss the statutory or other basis for awarding the fees. If the panel determines that there is a contractual or statutory basis for attorneys' fees, the requesting party also must prove the amount of the fees to the panel's satisfaction.

### The Award Information Sheet and Attorneys' Fees

If arbitrators decide that a party should be awarded attorneys' fees, the AIS provides guidance in helping to assess such fees. The AIS was recently updated to clarify that attorneys' fees, interest and other damages may be available in all cases. The section on fees now includes the caption "All Cases" to reflect this change. The panel should complete this section and read through each question to determine whether any of the fees are warranted.

This section begins with a prompt to distill all claims.

#### 14. Award

Use the following pages to ensure that the panel decided all claims and other relief requests.

##### Initial Claim

\_\_\_\_\_ shall  
[Party(ies)]

pay to \_\_\_\_\_  
[Party(ies)]

a. Compensatory damages awarded, if any? \_\_\_\_\_  
\_\_\_\_\_

### New Director of Dispute Resolution: Richard W. Berry

Richard W. Berry was named the Executive Vice President and Director of Dispute Resolution effective December 1, 2014. Rick joined FINRA (then NASD) in 1995 as head of Dispute Resolution's Los Angeles satellite office and was later promoted to director of Case Administration in NASD's New York City office in 2001. In his most recent role as Senior Vice President, Rick oversaw FINRA Dispute Resolution's four regional offices—New York, Boca Raton, Chicago and Los Angeles—and the New York Case Administration unit. Prior to joining FINRA Dispute Resolution, he taught American law for one year in Budapest. Rick began his career practicing law in San Francisco. He is a graduate of the University of California at Santa Barbara and Hastings College of the Law. He is a member of the California Bar. We congratulate Rick on this achievement.

Under the heading, "All Cases," several questions request information on miscellaneous fees and interest.

#### All Cases

- b. Punitive or RICO damages awarded, if any? \_\_\_\_\_
- Authority for punitive or RICO Damages (*e.g.*, brief description of legal citation):  
\_\_\_\_\_  
\_\_\_\_\_
- c. Is interest awarded? Specifically indicated the percentage of interest awarded. \_\_\_\_\_

Specifically, question "d" prompts the panel to consider attorneys' fees.

#### d. Attorney's Fees.

- 1) Did any party request attorneys' fees? If so, which party(ies)?  
\_\_\_\_\_  
\_\_\_\_\_
- 2) Were any attorneys' fees requests granted or denied? Which party(ies)?  
\_\_\_\_\_  
\_\_\_\_\_
- 3) Authority for attorneys' fees (*e.g.*, statute, contract):  
\_\_\_\_\_

The above section also includes questions on punitive or RICO damages, interest, costs, other damages, specific performance and injunctive relief. The panel should carefully consider all damage requests and, when applicable, reference the legal authority for such damages. The section immediately following the above section on attorneys' fees addresses counterclaims, cross claims and third party claims. The panel must complete this section on fees if the case includes any counter, cross or third party claims.

### Rendering the Award

After the panel has completed the AIS, FINRA staff will use the information collected to prepare the award for the panel's review and signature. The window in which to render an award is short—30 business days from the date the case record is closed. Thus, arbitrators can help staff meet this deadline by using the AIS appropriately. For additional information on rendering awards, or on any of the topics in this article, please contact the assigned case administrator. You may also refer to the [Basic Arbitrator Training](#) and [Arbitrator's Guide](#) for additional information.

## Awarding Attorneys' Fees in Florida Arbitrations

*By Jessica Hathaway, FINRA Corporate Intern, and Steeve Encaoua, Case Administrator, FINRA Dispute Resolution Southeast Region*



Florida is the eighteenth state to adopt the 2000 Revised Uniform Arbitration Act (RUAA).<sup>1</sup> The RUAA updates the Uniform Arbitration Act of 1955 (1955 Act) and “endeavors to render the arbitration process efficient, expeditious, and economical in a manner which is fair to the parties, and which promotes finality of the decision of the dispute submitted to arbitration.”<sup>2</sup> Adoption of the RUAA may change prior law. Therefore, arbitrators may see briefs from the parties that address questions of law based on the RUAA.

### The 2000 Revised Uniform Arbitration Act (RUAA)

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the original Uniform Arbitration Act in 1955. It was adopted by 49 jurisdictions and remained the fundamental source of law governing agreements to arbitrate in the United States. As arbitration became the preferred method for resolving disputes, it became clear that the limited procedural provisions of the Uniform Arbitration Act were no longer adequate.<sup>3</sup> For that reason, the NCCUSL promulgated the RUAA.

In an effort to make arbitration more efficient and complete, the NCCUSL drafted the RUAA to update the arbitration procedures to meet the current needs of the parties. For example, the RUAA expressly allows for consolidation of separate arbitration proceedings, whereas the 1955 Act was silent on the issue. In addition, the RUAA immunizes arbitrators from civil liability. The RUAA also expressly permits the arbitrator to award punitive damages and attorneys' fees “if such an award is authorized by law in a civil action involving the same claim.”<sup>4</sup> This provision may have an impact on arbitration awards in states that have adopted the RUAA. Florida is the latest state to adopt the RUAA and serves as an example of how the award of attorneys' fees can be affected.

### Awarding Attorney's Fees in Florida Arbitrations Under *Moser*

FINRA Dispute Resolution previously provided guidance regarding the award of attorneys' fees in Florida arbitration proceedings based on the Florida Supreme Court holding in *Moser v. Barron Chase Securities, Inc.*<sup>5</sup> In 2001, the Court in *Moser* determined that if an arbitration panel awarded attorneys' fees, the arbitration award must specify the theory under which the claimant prevailed that would permit an award of attorneys' fees. If the award failed to include such a finding, the circuit court could remand the matter to the arbitration panel to resolve the issue. The court believed that this decision supported its interpretation of Fla. Stat. 682.11 to "vest jurisdiction for the award of attorney's fees in the circuit court."

### Awarding Attorneys' Fees in Florida Under RUAA

In 2013, the Florida Legislature revised Florida's Arbitration Code by adopting the RUAA which includes substantial changes to the provision governing the award of attorneys' fees. Fla. Stat. 682.11(2) now states, "[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." The revised statute appears to authorize arbitrators to decide whether attorneys' fees may be awarded.

Since it is unclear how the new law affects the *Moser* holding, arbitrators would be responsible for interpreting the provisions in the Revised Florida Arbitration Code. Arbitrators are not permitted to conduct outside research; therefore, they must rely on the parties to provide briefs on the issue of attorneys' fees.

### Endnotes

- 1 Other jurisdictions that have adopted the RUAA include Alaska, Arizona, Arkansas, Colorado, District of Columbia, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington.
- 2 See Uniform Law Commission, *Policy Statement for the Revised Uniform Arbitration Act*.
- 3 See *The National Conference of Commissioners on Uniform State Laws (2014)*.
- 4 *Id.*
- 5 *Moser v. Barron Chase Securities, Inc.*, 783 So. 2d 231 (Fla. 2001).

## DR Portal Update

As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

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

Registration with the DR Portal is particularly important for cases that FINRA administers through the portal. FINRA is actively reaching out to arbitrators serving on portal cases to encourage them to register. Portal registration will be noted on the arbitrator disclosure report that parties review during arbitrator selection.

If you have not registered with the DR Portal, please send an email to Dispute Resolution Neutral Management to request an invitation. Please include “request portal invitation” in the subject line.

*continues on page 8*

## Dispute Resolution and FINRA News



### Case Filings and Trends

Arbitration [case filings](#) from January through November 2014 reflect a three percent increase compared to cases filed during the same 11-month period in 2013 (from 3,443 cases in 2013 to 3,538 cases in 2014). Customer initiated claims increased by 12 percent through November 2014, as compared to the same time period in 2013.

### Update: FINRA Dispute Resolution Task Force

FINRA 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. At its first in-person meeting in October 2014, the task force agreed that it would be open to examining any issue that might affect the face of arbitration or mediation in the next 20 years and that no issue was off the table for discussion. It identified the initial topics (which are available on the [DR Task Force webpage](#)) for review and established subcommittees to gather information and viewpoints on those topics to report back to the full task force for consideration. The task force will meet again in January 2015.

### Results of the Sixth Annual Securities Dispute Resolution Triathlon

On October 18-19, 2014, FINRA and the Hugh L. Carey Center for Dispute Resolution of St. John’s University School of Law held the [Sixth Annual Securities Dispute Resolution Triathlon](#) in New York City. Twenty teams of law students from 16 schools competed in the triathlon demonstrating their advocacy skills in negotiation, mediation and arbitration of a securities dispute. Sixty-nine FINRA neutrals donated their time to engage in critical roles during the contest as judges, mediators and arbitrators.

Congratulations to this year’s triathlon winners:

- **Negotiation:** Marshall-Wythe School of Law at the College of William & Mary
- **Mediation:** Texas A&M University School of Law
- **Arbitration:** University of Pittsburgh School of Law

### Expiration Dates

Arbitrators and mediators should be aware that DR Portal accounts expire after 17 months of inactivity. To avoid having to re-register in the portal, be sure to log in within 17 months. You can check on the status of cases and make updates to your profile. Also, note that passwords expire after 120 days.

- **Advocate’s Choice:** Marshall-Wythe School of Law at the College of William & Mary
- **Overall Winner:** American University Washington College of Law

Staff members from DR’s New York office helped administer the program and conducted a “town hall” meeting for the neutrals. The one-hour session focused on arbitrator honoraria, arbitrator definitions, arbitrator disclosure, expungement, mid-case referrals and technology upgrades.

For more information about the triathlon, please visit the St. John’s University website.

### Ohio Securities Conference

On October 31, 2014, Ken Andrichik presented at the Ohio Securities Conference sponsored by the Ohio Division of Securities and the University of Toledo College of Law. Ken discussed FINRA’s expungement procedures.

### SEC Rule Approvals

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

On October 8, 2014, the Securities and Exchange Commission (SEC) approved FINRA’s proposed amendment to [Rules 12104](#) and [13104](#) of the Customer and Industry Codes to allow arbitrators to make a disciplinary referral during the pendency of an arbitration case. The amended rules permit arbitrators to make a referral, during an arbitration, of any matter or conduct that has come to the arbitrator’s attention during a hearing, which the arbitrator has reason to believe poses a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken.

On October 17, FINRA published [Regulatory Notice 14-42](#) to announce that the amendments would become effective on October 27 for any case that has scheduled hearings remaining.



## Increase to Arbitrator Honoraria

On September 29, 2014, the SEC approved FINRA's proposed rule change to amend the Customer and Industry Codes to increase payments that FINRA makes to its arbitrators for the services they provide to FINRA's dispute resolution forum, as well as the fees assessed to the parties for arbitration proceedings. Specifically, the amendments to [Rules 12214](#) and [13214](#) and [12800](#) and [13900](#) would increase the honoraria arbitrators receive for participating in hearing sessions, serving as a chairperson, deciding contested subpoena motions, and deciding simplified arbitration cases.

The following table illustrates the honoraria increases and the percentage changes from the old rates:

Arbitrator Honoraria	Old Rates	New Rates	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 fund the increase in the payments to arbitrators, the SEC approved amendments to the Codes to increase certain arbitration fees, such as the arbitration filing fees, member surcharges and process fees, and hearing session fees.

FINRA published [Regulatory Notice 14-49](#) to announce that the amendments became effective for arbitration cases filed on or after December 15, 2014. The arbitrator honoraria and fee increases will not apply to arbitration cases filed prior to the effective date.

### SEC Rule Filing

#### 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 22 comment letters on the proposed rule change, 21 of which were unique letters, and one which was submitted on behalf of 295 independent financial advisors. On September 30, 2014, FINRA filed its responses to the comments. On October 1, 2014, the SEC published an Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change Relating to Revisions to Definitions of Non-Public Arbitrator and Public Arbitrator. The SEC’s time to conclude the proceedings has been extended to February 28, 2015.

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

## FINRA Board of Governors Meeting

### Arbitration Hearing Cancellation Fees

At its December 4, 2014, meeting, the [FINRA Board of Governors](#) considered amendments to [Rules 12601](#) and [13601](#) of the Codes of Arbitration Procedure to increase late cancellation fees, which are assessed against the parties when they postpone or cancel a hearing at the last minute. The proposed amendments would require the parties to give more advance notice than is currently required before cancelling or postponing a hearing, and would assess a higher cancellation fee if such notice is not provided. Specifically, the proposed amendments would require that if a postponement or cancellation request is made by one or more parties less than 10 days before a scheduled hearing session and granted, the party or parties making the request would pay an additional fee of \$600 per arbitrator. The fee would be passed through to the arbitrators. The purpose of the proposal is to encourage parties to provide more advance notice of postponements and settlements, or, in the alternative, to compensate arbitrators more than they are currently paid for lost time and opportunities in the event of a last-minute postponement or cancellation. The Board authorized FINRA to file the proposed amendments with the SEC.

## A Closer Look at Motions to Consolidate or Sever Claims

*By William Cassidy, Case Administrator, FINRA Dispute Resolution Southeast Region*



FINRA Dispute Resolution recently observed an increase in the number of motions to consolidate or sever claims. To provide a refresher, this article addresses the role of FINRA and arbitrators in deciding motions to consolidate or sever and the factors to consider when deciding these motions.

### Role of FINRA and Arbitrators

Parties may file motions to consolidate at any time during a case. [Rules 12314](#) and [13314](#) of the Customer and Industry Codes allow the Director of Arbitration to combine separate but related claims for hearing and award purposes. Typically, the director will defer ruling on motions to consolidate or sever to the arbitration panel.

### Code of Arbitration Procedure Rules

#### Multiple Claimants

Consolidation and severance are two sides of the same coin. [Rules 12312](#) and [13312](#) provide that one or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

- the claims assert any right to relief jointly and severally; or
- the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

#### Multiple Respondents

[Rules 12313](#) and [13313](#) provide that one or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

- the claims are asserted against the respondents jointly and severally; or
- the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

If a party files a motion to consolidate or sever, the panel in the lower-numbered case will decide the motion, unless the parties agree otherwise.

### Factors to Consider

In some cases, the facts clearly demonstrate that certain claims should not be consolidated. For example, claims that have no common facts, parties, transactions or occurrences should not be joined. Likewise, counsel may join largely dissimilar claims in the name of efficiency but overlook the potential harm to the case to an improperly joined respondent. In that instance, severing a party from the case may be the most equitable solution.

In other cases, however, the panel must weigh the equities when deciding whether to consolidate cases. The panel must determine whether the potential judicial economy gained by consolidating multiple cases outweighs the challenges of administering a case with numerous parties, witnesses and exhibits.

Possible advantages of consolidating cases may include having witnesses testify once during a consolidated matter, rather than repeating the testimony over multiple cases. Similarly, parties could avoid producing duplicative discovery if the same information is needed for multiple cases. Avoiding duplicative testimony and discovery could help reduce costs for parties as they prepare for hearings. Ultimately, consolidating cases could produce more consistent results among cases with common facts, parties and transactions.

Arbitrators should weigh these benefits against the possible downsides of consolidation. A case with many parties can be difficult to administer and may cause delays. For example, a case with numerous claimants or respondents may require additional hearing sessions to accommodate the testimony and evidence, thus, increasing the time to conclude the case. Further, bifurcated hearing sessions may be required to accommodate the schedules of parties, attorneys and arbitrators, further delaying the hearing process. The panel should also note that some customers may be concerned that their confidential financial information, such as brokerage statements and tax returns, would be accessible to other claimants if cases are consolidated. They may not want other claimants present during testimony concerning their personal financial matters.

If the panel requires more information before ruling on a motion to consolidate, it should request such information from the parties. The panel may convene a telephonic conference to hear the parties' arguments on consolidation.

### **Conclusion**

One of the hallmarks of arbitration is its efficiency, which may be a compelling reason to consolidate cases. However, arbitrators must be aware of the potential prejudice to parties if their claims are improperly consolidated. Arbitrators should contact the assigned case administrator with any questions about motions to consolidate or sever.

## Mediation Update



### Mediation Statistics

From January to November 2014, parties initiated 408 [mediation cases](#). FINRA closed 499 cases during this time. Approximately 81 percent of these cases concluded with successful settlements, and the average case turnaround time was 105 days.

### Annual Mediator Fee Reminder

December 31, 2014 is the deadline for FINRA mediators to submit their \$200 annual mediator fee and remain available to mediate on FINRA's roster. Mediators who have not submitted payment by that date will be made unavailable to serve. If you have not submitted your \$200 mediator fee and are interested in remaining on the roster, please contact [Marilyn Molena](#).

### Mediation Settlement Month—October 2014

During [Mediation Settlement Month](#), FINRA mediators offered mediation services at reduced rates. The reduced costs encouraged many parties to mediate and attracted parties, who have not tried mediation, to participate in the program. The parties appreciated resolving their disputes quickly and efficiently. We would like to thank the participating mediators for contributing their skill and expertise to make this year's Mediation Settlement Month another great success.

### Mediation Program for Small Arbitration Claims

As a reminder, the [telephonic mediation program](#) is available to parties in active arbitration cases with claims of \$50,000 or less.

The program offers free or low cost mediation (depending on the claim amount) with a FINRA mediator. It provides parties, many who find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute. Parties and mediators report satisfaction with the process, and the settlement rate for cases in the program has averaged 80 percent, which is consistent with the settlement rate for all cases over the lifetime of the Mediation Program.



## Question and Answer

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### Mid-Case Referral

**Question** Can arbitrators make a disciplinary referral at any point during the arbitration process or must they wait until after the presentation of evidence at the final hearing?

**Answer** FINRA believes that a mid-case referral should be an extremely rare occurrence in the forum. Typically, in those instances that warrant a disciplinary referral, an arbitrator should wait until after the case concludes to make a post-case referral, under [Rule 12104\(e\)](#).

However, if an arbitrator believes that the conduct or a matter, revealed during a hearing, poses a serious threat, whether ongoing or imminent, and that the conduct is likely to harm investors unless immediate action is taken, then the arbitrator should make a referral pursuant to [Rule 12104\(b\)](#) before the case has concluded. A mid-case referral should not, however, be made solely based on allegations in the pleadings, because Dispute Resolution routinely provides copies of pleadings to other FINRA divisions to analyze for fraudulent security activity or other possible rule violations. If a case is nearing completion, an arbitrator may wait until the case concludes to make the referral if, in the arbitrator's judgment, investor protection will not be materially compromised by the delay.

Please review [Regulatory Notice 14-42](#) for more information on mid-case referrals.



## Arbitrator Tip: Stay on Schedule



We remind arbitrators to stay on schedule during an arbitration hearing. A hearing session is a meeting with parties that is four hours or less. To be efficient and to avoid unnecessarily higher forum fees for parties, we encourage arbitrators to use the maximum time for each hearing session. Arbitrators are paid for four-hour sessions, and they should avoid reducing the allotted time by starting late or leaving early.

Arbitrators can also conserve hearing time by limiting discussion about schedules and future hearing dates. Arbitrators should ask counsel to consult and agree on future hearing dates and jointly propose agreed upon hearing dates to the panel. Arbitrators might also suggest that parties consult in an effort to agree on the admission of hearing exhibits and resolve possible issues about authentication of exhibits and the scheduling of witnesses' testimony.

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