

**LISA MILLER, Esq.**

**FINRA Public Arbitrator**

**Panel Chair**

## **Regulatory Notice 26-06: Comments**

### **A. Customer Disputes**

Request for Comment

A(i).1. Should certain categories of claims (*e.g.*, of a certain complexity or value) or customer dispute types (*e.g.*, those involving institutional customers or holders of institutional accounts) be subject to different requirements under FINRA rules?

Yes. American regulatory and legal schemes have traditionally recognized significant variations in levels of sophistication and risk.

For example:

- a. Should certain categories of claims or customer dispute types be subject to different procedural requirements under FINRA rules, such as allowing the parties to have more control over the administration of their case?

No. This leads to another layer of gamesmanship. This will add to client billing for filings/hearings. This is antithetical to the point and purpose of arbitration.

What customer protection and fairness considerations should be part of evaluating this question?

Program fragmentation

Odd precedents when setting procedures

Impingement on arbitrator neutrality

Layers of procedural complexity interfering with access to justice

- b. For some types of claims in FINRA's arbitration forum, FINRA requires arbitrators to have additional qualifications to be eligible to serve on a panel considering such claims. Should certain other categories of claims or customer dispute types be considered by a panel with additional qualifications or experience?

No.

Narrowing the arbitrator pool increases the appearance of bias and prejudice. The parties should be able to explain the issues and the framework for analysis. Arbitrators who already have mastered the area enter the process with pre-conceived beliefs, which is the opposite of FINRA's mandate.

If so, what types of claims or customer disputes and what should be the minimum additional qualifications or experience of the panel?

The exception would be years of experience as a FINRA arbitrator. More years of service, the more ability to handle more-complicated cases.

What customer protection and fairness considerations should be part of evaluating this question?

Bias, prejudice, conflicts of interest.

A(i).2. Should FINRA no longer allow in its arbitration forum certain categories of claims (*e.g.*, of a certain complexity or value) or customer dispute types (*e.g.*, those involving institutional customers or holders of institutional accounts)? What customer protection and fairness considerations should be part of evaluating this question?

FINRA can run a parallel program for complex/institutional/large claims ("Large/Complex Case Panel"). Courts have traditionally offered "Long-Cause" courtrooms, specifically set up to handle large, complex cases with multiple parties and large numbers of counsel. I have litigated in Long-Cause multiple times and it works well. FINRA arbitrators in Large/Complex program would have long years of experience and extensive civil litigation/jury trial backgrounds.

A(i).3. Should FINRA allow parties to contractually agree in advance to opt out of FINRA arbitration and arbitrate disputes in alternative fora for certain categories of claims (*e.g.*, of a certain complexity or value) or customer dispute types (*e.g.*, those involving institutional customers or holders of institutional accounts)?

No. Parties should be allowed to make a showing that they cannot receive a fair and unbiased hearing experience in order to be allowed out of FINRA's forum and into alternative fora, regardless of size/complexity/specialness.

What customer protection and fairness considerations should be part of evaluating this question?

Unneeded complexity is the antithesis of FINRA's and arbitration's purpose. Perhaps expand discovery slightly (additional depositions, more extensive written discovery) to accommodate larger/more complex cases.

A(i).4. Should customers be allowed to unilaterally choose, post dispute, between arbitration and litigation even if they signed a customer agreement with an alternative forum selection clause?  
No.

It is not FINRA's job to undermine contract law. This would be completely destabilizing on a large scale. The US has a well-documented and lengthy history of favoring arbitration as a dispute resolution mechanism. No reason to go against this well-considered policy.

Alternatively, should FINRA permit arbitration in its forum only where both parties agree to such arbitration post dispute?

No.

The securities industry needs stability and certainty to resolve disputes. All parties must know and understand at all stages what dispute resolution looks like in the securities industry.

What fairness considerations should be part of evaluating this question?

Willful non-participation in FINRA arbitration should result in foreclosure from the litigation process in US courts.

A(i).5. Do participants still experience FINRA arbitration as less expensive and faster than litigation?

Yes.

FINRA arbitration completes in 1 year, generally. Litigation takes literally years and years to achieve finality. FINRA arbitration is ultimately much cheaper than civil litigation. FINRA arbitration is the best dispute resolution option for disputes in the securities industry by a country mile.

Are there changes that FINRA should consider making to its arbitration forum to make it more expeditious and cost effective relative to courts?

FINRA should consider forcing settlements earlier, further in advance of hearing dates.

---

## **(B) Industry Disputes**

### **Request for Comment**

B(i).1. Should FINRA eliminate the eligibility rule and allow eligibility to be determined solely by applicable statutes of limitations?

No.

6 years is a reasonable length of time in which to bring an action. The threshold analysis for statutes of limitations is based on old-fashioned business processes where everything was a paper record and files got “pruned” as part of regular records retirement. Now that everything associated with the securities industry is saved forever in bits and bytes, there is no reason to shorten or eliminate the eligibility rule.

What would be the impacts on parties, if any, including on recordkeeping burdens and forum accessibility?

Records are already routinely automatically saved for any set number of years, so a 6 year retention schedule or a 10-year retention schedule or a 12 year retention schedule wouldn't differ by very much as far as record-keeping burden.

What fairness considerations should be part of evaluating this question?

Access to justice is by far the weightier consideration. Access to justice is served by avoiding technical dismissals based on shortened timelines, and evaluating cases on the merits.

B(i).2. Should FINRA amend the eligibility rule to expressly allow claims in FINRA's arbitration forum that arise from transactions or wrongful events that occurred more than six years prior to the claim being filed if, for example, there are ongoing damages or concealment of the harm?  
Yes.

This theory of continuing harm has been around for at least a couple of centuries.

What fairness considerations should be part of evaluating this question?

Kicking cases out of a dispute resolution forum on technical grounds is strongly disfavored in US law and not in line with FINRA's mandate.

B(i).3. Should FINRA amend the eligibility rule to expressly provide that the rule is a statute of repose, barring claims based on securities transactions or wrongful events that occurred more than six years before a claim is filed?

Why do this? We don't handle construction claims.

How would this approach affect claims related to a continuing occurrence (e.g., allegations of ongoing fraud starting with the purchase of a stock 10 years ago but continuing to a date within six years of the date the arbitration claim was filed)?

The effect would be negative, with little to be gained.

What fairness considerations should be part of evaluating this question?

Is FINRA going to go against years of US legal precedent disfavoring technical dismissals? And for what? A 6-year eligibility rule, and allowing a theory of ongoing harm, is well within traditional US jurisprudence.

B(i).4. Are there other approaches to the applicability of the eligibility rule that FINRA should consider?

Many statutes of repose are actually 20 years. Considering how aged the US population is becoming, I think it's possible to FINRA should extend the eligibility rule to 10 years.

---

(ii) Motions to Dismiss

B(ii).1. Should FINRA change the timing or expand the circumstances under which the panel may act upon a prehearing motion to dismiss a party or claim?

There's no harm in hearing pre-hearing Motions of any sort. It helps educate the Panel about the conflict spots in the case and helps the advocates better understand their arguments and the arguments of opposing counsel.

If so, what should those changes be?

Motions to Dismiss should be available till after the taking of evidence in the hearing.

What customer protection and fairness considerations should be part of evaluating this question?

The burden of proof is preponderance, which is sufficient in almost all civil settings.

---

## C. Arbitrator Qualifications

Request for Comment

C.1. What is the appropriate composition of the arbitrator roster in FINRA's arbitration forum for customer disputes and intra-industry disputes?

Arbitrators should be required to submit 2 analytical writing samples (research, analysis, advocacy, Decisions, etc.). This will allow arbitrators of diverse backgrounds, who all have the requisite analytical skill, to participate in FINRA dispute resolution. Arbitrators who cannot or will not produce competent analytical written work cannot be expected to adequately analyze FINRA disputes and are properly excluded.

Should the arbitrator rosters be the same or different?

One subject matter expert per panel is sufficient.

Should FINRA continue to seek candidates from a variety of backgrounds, or should FINRA be guided more by other considerations such as specific types of expertise?

FINRA should recruit across-the-board, but the selection process should include a writing sample or two.

C.2. What further changes, if any, should FINRA make to its arbitrator standards? How should FINRA identify minimum employment, experience and educational qualifications that would assure a broad candidate pool while maintaining its decision-making quality?

For example, should FINRA accept equivalent professional certifications or specialized credentials in lieu of a four-year college degree?

More and more candidates are attending college, so eliminating the college degree requirement is going in the wrong direction. I think a focus on quality of analytical ability is the key to both quality and diversity.

---

## D. Arbitrator Classification and Selection

Request for Comment

D.1. Should FINRA amend the definition of “public arbitrator” provided in Rules 12100(aa) and 13100(x) to modify or remove any of the criteria that disqualify an arbitrator from service as a public arbitrator to expand the public roster?

No.

The industry relies on truly public arbitrators to bring their valuable perspectives to the arbitration process. Re-categorizing insiders as public arbitrators does not provide the valuable insights that public arbitrators are expected to provide. All the re-categorization does is move numbers around on a page so that statistics can be adjusted for policy reasons. The re-categorization does not provide an improved process or experience for stakeholders.

If so, which criteria and why?

N/A

D.2. Should FINRA amend Rule 12403(c)(1)(A) to remove parties’ ability to strike all the arbitrators from the non-public list for any reason?

I see no harm in this. Arbitrator names are presented based on a random name generator, so the generator can easily generate 3 more names. Weighed against providing a user-friendly, efficient dispute resolution mechanism that actually results in finality, with due process and apparent fairness, the burden is negligible.

What customer protection and fairness considerations should be part of evaluating this question?

Weighing the burden of parties striking arbitrators is not significant and there seems to be no injury to due process.

D.3. At initial panel selection, should each separately represented party strike and rank arbitrators, or should FINRA amend its rules to provide that all claimants, collectively, and all respondents, collectively, share the same number of strikes during arbitrator selection? This should be seriously considered.

Multiple parties on 1 side need to work together anyway (coordinating limited discovery to maximize efficiency, for example), so might as well start early.

D.4. To increase parties’ choice of arbitrators during the selection process, should FINRA increase the number of arbitrators on each list and the proportional number of strikes for each list?

This could be workable.

---

## **E. Arbitrator Training**

Request for Comment

E.1. Should FINRA implement additional training requirements on the arbitration process for all arbitrators beyond the Basic Arbitrator Training Program?

FINRA should offer "Annual Updates in Arbitration" or something similar for all arbitrators to address the developing law of arbitration, as well as offering "SRO Arbitration: Best Practices" to address trends in advocacy.

If so, what elements should be added or reinforced?

FINRA should try to identify trends and issues in the industry and at FINRA and focus on trying to get ahead of trends.

E.2. Should FINRA implement additional training requirements for arbitrators who decide certain categories of claims (e.g., of a certain complexity or dollar amount) beyond the Basic Arbitrator Training Program (e.g., like how certain arbitrators must complete the enhanced expungement training FINRA provides prior to considering certain requests to expunge customer dispute information)?

Yes, as well as requiring additional years of activity in the industry.

If so, what should that training encompass?

Theory as well as practice (best practices, practice tips, etc.)

Should it be focused on process issues or include substantive elements?

Both, as these topics are developing in the practice of SRO arbitration.

E.3. Should FINRA implement additional training requirements on substantive elements of law or complex investment products for all arbitrators beyond the Basic Arbitrator Training Program?

This depends on the nature of the design of the training module. If the material includes viewpoints from all sides, and takes a process approach without gratuitous judgements, then the training products should be fairly neutral yet comprehensively informative.

If so, would this raise concerns from forum participants with respect to FINRA maintaining neutrality as the administrator of the forum?

Yes, and it always will.

These objections would be logged and considered as part of the comment process, if FINRA decides to go in this direction. So no sector of the industry that wants to have input into the design of the new training would be sidelined or marginalized.

E.4. To what extent should additional training be voluntary versus mandatory?

Voluntary is usually more effective than mandatory. The voluntary training would allow arbitrators to handle more complex matters, so the arbitration panel would be self-selecting. Arbitrators who are not interested in upping their game would opt out of additional training that would put them on the Complex Case Panel.

What might be the potential impact on arbitrators' willingness to serve in FINRA's arbitration forum if FINRA imposes additional mandatory training requirements to serve on cases in FINRA's arbitration forum?

Most FINRA arbitrators understand the need for training and want to be up-to-date, so I expect that participants would be willing to keep their training current, as needed and required by the program. FINRA's training modules are generally excellent, so I would expect less push-back from FINRA arbitrators than some other SROs experience.

## **F. Discovery**

Request for Comment

F.1. Are the Document Production Lists in the Discovery Guide appropriately tailored to facilitate the efficient exchange of relevant information in customer arbitrations?

Yes, they are very well-crafted, but as the practice of law evolves, the Rules can also be further tailored.

Generally, arbitrators have broad authority to limit discovery that is cumulative, duplicative, or disproportionate to the amount in controversy. Similarly, FINRA Arbitrators should be vested with authority to impose proportionality guided limits on discovery. FINRA would need to develop these protocols, and once administrative implementation procedures are completed and the new guidelines are put in place, arbitrators and practitioners would need to be trained.

The overall guiding limits would be to ensure due process and access to justice while balancing the burden on due process and access to justice implicated in disproportionate or improperly over-broad discovery practice. There are a lot of cases in the Circuits addressing administrative due process so there is a lot of solid guidance as a jumping off point for this project.

Another issue that comes up occasionally in the context of discovery is ESI management. FINRA might consider guidance on ESI protocols that address format, metadata, deduplication. FINRA discovery rules should consider how to handle discovery disputes resulting from technology-assisted review (TAR/predictive coding) for large document sets.

At times, FINRA arbitrators must consider privilege review assignments. In this context, perhaps the rules could contemplate a sample review protocol to ease arbitrators' privilege review burden and accelerate case processing.

FINRA could also consider encouraging Declarations as substitutes for live testimony in some situations. This works well for authentication of particular items of evidence, many of which are otherwise fairly reliable. This occurs sometimes with regard to video and audio-video evidence, which has already been exchanged per FINRA rules. Consequently, both sides have had a chance to evaluate reliability (deep fakes, etc.). This could accelerate case processing.

Phased discovery should also be considered. The most prevalent issue litigated in FINRA arbitration forum is the eligibility/statute of repose issue. Discovery could be limited to this issue initially, so that if a matter is determined to be ineligible, no further discovery is needed/allowed. This could apply to other similar defenses based on threshold issues (jurisdiction, liability before damages). Phased discovery could eliminate costly discovery if these issues are resolved first. This would foster access to justice and speed resolution.

To further accelerate dispute resolution, while also honoring due process, page-limited letter briefing, one per party, should be encouraged for most discovery issues in controversy. This could be followed by a Zoom hearing for oral argument, if requested by either side.

Do the Document Production Lists impose burdens associated with overly broad or duplicative document production requirements?

Document production practice in FINRA arbitrations is frequently over-broad. However, this probably cannot be cured by fine-tuning the Rules. The over-broad discovery practice seems strategic, so I would expect advocates to continue to issue over-broad requests. Thus, the Document Production Lists themselves do not impose burdens on the dispute resolution process via overly broad or duplicative document production requirements.

F.2. Should FINRA establish a process or resource to assist arbitrators in resolving complex discovery disputes?

No.

Would such a mechanism improve consistency and efficiency, or would it create routine delays and undermine arbitrator decision making?

FINRA arbitrators who cannot resolve complex discovery disputes should be removed from the list of eligible arbitrators. Research databases are free and on-line. Intellectually lazy arbitrators have no place at the head of the table.

F.3. Should FINRA impose limitations or heightened standards for making discovery requests beyond the Document Production Lists?

Yes.

Good cause must be shown.

How should FINRA balance efficiency and cost effectiveness of the arbitration process with parties' desire to obtain more information to present their cases?

If more discovery is actually needed, and not just desired, then a Motion supported by briefing and oral advocacy should be required. The moving party must show by a preponderance that the material is essential and otherwise unavailable.

F.4. Should FINRA amend the Discovery Guide—and more specifically, Document Production List 1—to require members and associated persons in customer disputes to produce, on a confidential basis during discovery, documents concerning the existence and extent of any insurance coverage?

If this could be used to assist with resolution before hearing, there is value to requiring disclosure of insurance coverage. However, this would implicate the existence of 3<sup>rd</sup> party funding for the litigation as well.

How would this impact the efficiency and fairness of the arbitration process?

I don't see significant additional burdens on efficiency if insurance coverage and 3<sup>rd</sup> party funding agreements must be produced. I do not see impairment of fairness. It is more likely that parties prefer not to disclose closely held financial decisions. Perhaps the information could be provided under seal and be required to remain under seal for the entire duration of the proceeding.

F.5. Should FINRA consider additional methods to address discovery abuses?

Yes.

If so, what methods should be considered?

The usual method is sanctions, both monetary and otherwise. Arbitrators may impose adverse inferences, exclusion of evidence that was withheld or produced late, preclusion of a witness whose documents were not produced, striking claims or defenses tied to discovery that was withheld. Arbitrators may impose monetary sanctions, such as awarding fees/costs caused by the discovery abuse, shifting the cost of a additional discovery necessitated by misconduct, and requiring reimbursement of motion practice caused by non-compliance. Case-dispositive sanctions might also at times be appropriate. A default determination or dismissal might be called for in cases of egregious misconduct, such as bad faith/willful destruction or deliberate concealment. These are rare, but in the right circumstances, have been upheld by courts reviewing arbitration awards.

Procedural sanctions might also be used by FINRA arbitrators in cases of discovery misconduct. Arbitrators could extend deadlines at the offending party's expense, order additional discovery the abusing party must fund, and/or restricting the offending party's future discovery rights.

FINRA arbitrators already shift fees and assign fees based on their own judgement regarding the advocates' conduct. The bigger issue is whether these sanctions would be required to be reported to the Bar Associations for possible discipline of the sanctioned counsel.

## **G. Hearing Oversight and Efficiency**

Request for Comment

G.1. Should FINRA establish a central contact point or support system to assist arbitrators with procedural or evidentiary questions during proceedings?

No.

This impairs neutrality and the appearance of neutrality. Arbitrators who cannot figure out procedural or evidentiary questions during proceedings are not sufficiently trained experienced or competent for the role of FINRA arbitrator. If FINRA is actually having problems with this then FINRA needs to pick better arbitrators.

What should that resource look like?

N/A

How should FINRA balance the possibility of that resource improving efficiency and consistency with the possibility that it could result in delays or undermine arbitrator decision making?

Do not initiate this terrible idea. Why are you hiring boobs who can't handle the basic requirements of the job? If you're having trouble recruiting arbitrators, triple the compensation.

G.2. Should FINRA implement more stringent case management requirements?

Most advocates comply with the case management guidelines. I am not finding that they are flouting the rules. From a meta standpoint, what you are suggesting is that FINRA arbitrators take a more active role in shaping the hearings for each file. I am in favor of this, as it is in line with FINRA's mission of efficient dispute resolution. However, from a purely reality based standpoint, most arbitrators are too tentative or disconnected to work to shape their hearings, or just not interested in working that hard intellectually. It takes preparation and thought to truly manage the process in the best way possible for all participants, and I don't see this effort in most arbitrators. Unfortunately, I find that most advocates welcome thoughtful case management from the arbitrator, creating gaps in case processing as the cases head toward hearing.

If so, what would those requirements look like and how should possible gains in efficiency be balanced with a party's ability to present their case?

Arbitrators need to center the fact that how advocates choose to present their cases is entirely the advocates' prerogative. This case presentation must then have a gloss of complying with FINRA's rules. In that order.

Inarguably, thoughtful arbitrator management of the Arbitration process, starting with the IPHC, results in more focused, less wasteful, more efficient dispute resolution. But this relies to a great extent on arbitrators being well-prepared for the IPHC and sharing their procedural insights with the participants, based on the pleadings. This includes thinking the case all the way through to the Final Award, and noting and considering a lot of the possibilities inherent in the case. In my experience, many FINRA arbitrators don't do this, either because they lack confidence or they lack fundamental insight. Either way, IPHCs could be consistently used in a more comprehensive and productive way, with a view toward strengthening FINRA's overarching commitment to efficient dispute resolution.

G.3. Should FINRA increase its direct oversight of arbitrators and arbitration proceedings to identify and address case management and other issues in real time? If so, how should these issues be addressed?

No.

Arbitrators need to be neutral and appear to be neutral. This suggestion impairs the appearance of neutrality and might actually impair actual neutrality. Bad idea.

It is the arbitrators' job to address case management and other issues in real time. Arbitrators already have mechanisms to manage giant messes that need research, briefing, and oral advocacy that do not seem amenable to immediate, real-time management.

The universe of issues that FINRA arbitrators face is limited, so the idea that arbitrators are getting so overwhelmed by doing the basic requirements of their job, to the extent that they need to get a their hands held in real time by an internal FINRA authority, makes me question our Chair training.

G.4. What technological enhancements to FINRA's dispute resolution systems (e.g., the DR Portal) would further improve case efficiency, accessibility or user experience?

The Portal functions exceptionally well. Maybe upgrade the user interface/UC experience a bit to make it look a bit more modern? But the underlying functionality is superb. It's not broken, so maybe we don't need to fix it?

Are there further features that FINRA should consider implementing?

LURV the app! Great work on the app. Many thanks for that.

## **H. Punitive Damages**

Request for Comment

H.1. Should FINRA maintain the current framework that allows arbitrators to award punitive damages?

Yes.

The possibility of punitive damages is an important tool in the toolbox of efficient dispute resolution. It lines up well with FINRA's mission. The lack of availability of this tool does not enhance FINRA's ability to provide efficient dispute resolution.

Punitive damages have been around for many, many years and the intellectual analysis is well-drawn at this point. There is currently nothing mysterious or opaque about the punitive damages analysis in American law.

If the Circuits or the Supremes fundamentally change the punitive damages analysis at some point, then FINRA can update arbitrators by circulating a Practice Pointer or providing a 60-minute on-line seminar.

H.2. Should FINRA permit parties to agree in pre-dispute arbitration agreements to preclude or limit punitive damages?

Yes.

This is a common and popular option in alternate dispute resolution mechanisms.

What customer protection and fairness considerations should be part of evaluating this question?

Self-represented parties will need additional protection. Arbitrators will be tasked with the additional responsibility of ensuring fundamental fairness.

H.3. Should FINRA impose a cap on punitive damages awards to address concerns about excessive awards in the absence of judicial safeguards?

No.

If the parties are so deeply concerned about “runaway” arbitrators imposing outrageous punitive damages then this should motivate them to negotiate punitive damages limits with opposing parties and/or settle before arbitration. FINRA rules already encourage parties to cooperate.

Punitive damages caps at the institutional level undermine the utility of the possibility of punitive damages. Let’s not shoot ourselves in the foot for no real reason.

If so, how should FINRA structure such a limitation or cap?

N/A

What customer protection and fairness considerations should be part of evaluating this issue?

N/A

H.4. When punitive damages are awarded, are there procedural safeguards that FINRA should consider in response to this issue — such as:

Bifurcated hearings for liability and damages

Yes. Where the parties would like a separate hearing on damages, the proceeding should be bifurcated, or even tri-furcated in some situations.

Some cases lend themselves to bifurcation/tri-furcation, and to effectively present a damages case, the advocates need to know what the arbitrators' determinations are, issue by issue. Phased narrowing can save resources. If causation fails for some claims, those damages arguments can be avoided entirely. This focuses the damages case and shortens it, adding to efficient but accurate dispute resolution.

Parties should be free to make the motion for bifurcation, arguing that liability and damages involve distinct sets of facts/evidence, bifurcation promotes efficiency by fostering settlement once liability is determined, and on balance no substantial prejudice would result from bifurcation.

Tri-furcation might be appropriate where the issue of causation is separate from both liability and the quantum of damages. This occurs occasionally in complex regulatory matters, such as those tried in FINRA arbitration hearings. Further, in FINRA hearings, it is common that multiple respondents are involved, and thus causation attributable to each respondent must be determined, before individual damages can be calculated.

Because hearings are virtual/remote, the burden on the parties is minimal. No travel. And the parties were going to have to pay their advocates for a damages case anyway, so this eliminates expensive advocacy that ultimately might never be needed.

enhanced standards for awarding punitive damages

Enhanced standards for awarding punitive damages already exists: To successfully argue for punitive damages, the moving party must prove that the defendant acted with one of the following states of mind: malice, oppression, fraud, or wanton or willful misconduct. The punitive damages issue is extensively litigated so there is much available guidance from Circuit and Supreme cases. No additional layers of guidance are needed.

mandatory explained decisions

Explained decisions are available on request. If an advocate knows that punitive damages are a possibility, the advocate is free to request an explained decision. If an advocate chooses not to receive an explained decision, there is no value in forcing it on them by making it mandatory where punitive damages are awarded. The current availability of explained decisions, on-demand, sufficiently protects the interest of the participants, and supports FINRA's mission of efficient dispute resolution.

Are there other procedural safeguards FINRA should consider?

FINRA should consider optional in-house reconsideration of punitive damages awards – a kind of administrative appeal that honors FINRA's commitment to efficient dispute resolution, but also allows for a second look where more than *de minimis* punitive damages are awarded. This process would require a separate filing fee by the appealing party and an optional sole arbitrator or panel of arbitrators. The appeal could be on the papers only, with a fairly short turnaround time, such as 30 calendar days.

What customer protection and fairness considerations should be part of evaluating this question?

It's an extension of due process, so the analysis is well-litigated.

## **I. Explained Decisions in Awards**

Request for Comment

I.1. Should FINRA require explained decisions in all, or certain categories of, arbitration cases?

No.

Participants can always request an explained decision, if a party thinks that would be helpful. The grounds to overturn an arbitration award are very narrow and can be asserted even absent an explained decision. This proposal is a needless requirements that would only increase appeals, many of them frivolous, which is entirely antithetical to FINRA's stated dispute resolution goals.

Would explained decisions increase transparency and improve the quality of decision-making and consistency among awards?

No, unless FINRA establishes a Review Board to keep track of all awards and issue a "Best Practices" manual or something similar.

The Review Board could be seen as at odds with arbitrator independence, because arbitrators would always be concerned about what the Review Board would be considering during review and advising after review. This is a cumbersome additional layer of administrative friction.

What impact would explained decisions have on the finality of arbitration awards?

This would likely undermine the finality goal.

I.2. Should arbitrators be required to provide additional detail in explained decisions?

Sufficient detail is enough detail to support the ultimate determination on the particular issue. Additional detail on top of this requirement would be mere surplusage and a distraction that could increase the number of appeals.

If so, what information should be required? N/A

I.3. If FINRA were to require explained decisions in all, or certain categories of, arbitration cases, what impact, if any, would there be on the efficiency of the program including case resolution timelines?

Principal drafters would need at least 30 days to create a draft determination, and then 2 other arbitrators who are too inarticulate to write a decision themselves would be in a position to make the decision look like a camel instead of a horse. The camel would require an additional 30 days, most likely. None of this is going in the direction of efficient decision-making. Bad idea.

I.4. Would mandatory or expanded use of explained decisions impact arbitrator recruitment? Probably not. Most recruits don't think about decision-writing tasks when they sign up. Sometimes they are even surprised when they are asked to participate in decision-writing.

and

retention, particularly among chairperson-eligible arbitrators?

Chairpersons won't quit over writing a decision. Chairpersons are, essentially, volunteering to lead, so being the principal drafter on a decision would not be offensive to their sensibilities.

The real problem is always, and "always" means *always*, the abysmally poor quality of the writing. Unless FINRA is going to open a Legal Writing Academy and require attendance and a passing grade of at least a B+, and dedicate a staff of at least 3 people to track deadlines and incessantly demand timely written work product, FINRA is going to open a can of delay, distraction, and discord with this proposal. Get ready for a lot of AI slop.

If so, would higher compensation make up for the additional workload?

Compensation is already woefully low. Compensation would have to at least be tripled for this to even be worth the conversation.

I.5. FINRA currently provides guidance to arbitrators on writing explained decisions.

This training material is excellent.

Should FINRA provide additional guidance or training?

To what end? To make poor writers into acceptably poor writers? FINRA would be dealing with writers who think they're great but aren't and never were. And these writers haven't had to try to improve their writing skills since literally the last day of their Bar exams.

And keep in mind that not all FINRA arbitrators speak English primarily. Many of them grew up speaking another language primarily and to some extent still speak their native languages in their homes. Would FINRA's new writing skills curriculum somehow take all of this into account, while not excluding otherwise conscientious arbitrators simply on language grounds?

If so, what additional guidance or training would be most beneficial to arbitrators?

Clear and concise guidelines in a short manual, with several perfect samples attached as appendices. As a condition of continued eligibility to serve, all arbitrators should be required to submit an entirely original writing sample based on a random prompt, for evaluation of drafting mastery. Arbitrators would be specifically prohibited from receiving any help at all with this assignment, either human or robotic. Any grade below B+ should result in immediate suspension of eligibility to serve. Sloppy drafting reflects sloppy thinking, which benefits no one.

## **J. Arbitration Awards Online**

Request for Comment

J.1. Who currently uses AAO and for what purposes?

I use the material for context. I find reviewing others' approaches triggers helpful analyses and approaches in my mind as I prepare to draft my own work.

J.2. Should FINRA consider amending its rules so that FINRA could remove awards from AAO or redact information from awards published on AAO?

Publishing a Note regarding subsequent treatment of the material should be sufficient. The exception would always be a Court Order.

If so, in what circumstances would it be appropriate for FINRA to remove awards from AAO or redact information from awards published on AAO?

A Court Order should always be obeyed. If a party wants this remedy, the party can petition a court of competent jurisdiction and seek review.

What impact would such removal of awards or redaction of information from awards have on transparency into FINRA's arbitration process and the utility of displaying awards to parties and users of AAO?

I do not see any concerning negative impact on FINRA. other than perhaps an increase in internal administrative obligations.

What customer protection and fairness considerations should be part of evaluating these questions?

Customers should be protected from incorrect or out-of-date data. Even the 1<sup>st</sup> Amendment to the US constitution does not protect untruths. Accurate data is what makes the AAO valuable.

J.3. Currently, users can search AAO by arbitration case identification number, keyword, name, date of award (by date range), forum, document type, panel composition or a combination of search parameters. Awards can be viewed online, printed or downloaded as text-searchable PDF files. Are there ways in which FINRA could enhance the search capabilities of AAO to be more helpful to users?

Annotated summaries are helpful in directing legal research efforts.

## **K. Unpaid Awards**

Request for Comment

K.1. In its Discussion Paper on customer recovery, FINRA identified potential approaches to enhancing the resources available to pay awards, including policy considerations these approaches raise and the need for Congressional and SEC involvement or action. How should these approaches be considered?

The hierarchy of need should place customer protections at the top.

K.2. Are there any considerations not identified by FINRA in the Discussion Paper on customer recovery that should also be identified?

Perhaps consideration of integrating financial elder abuse legislative language and policy considerations.

K.3. Are there other approaches that would enhance member resources to pay awards that FINRA should consider?

Annual victim compensation assessment for all licensed entities.

What regulatory, legislative, or other steps would be required to implement those approaches?

Proposed rule-making and comment-gathering would be enlightening.

## L. Form U5 Defamation Claims

### Request for Comment

L.1. How should the regulatory need for the reporting of complete and accurate information to CRD be balanced with concerns from members regarding adverse arbitration awards based on required reporting and associated persons' expectation for recourse if they believe the reported information is untrue or misleading?

FINRA should provide a due process hearing.

L.2. Should FINRA amend its rules to require that before making an award of monetary damages for Form U5 defamation claims, arbitrators should be required to find that the alleged defamatory statement is a false statement of fact and was made in bad faith and with malice in fact?

No.

This is not the appropriate standard.

Is this the appropriate standard for damages claims based on allegations of defamation? No.

The burden of proof should be "by a preponderance" for damages claims, other than punitive damages. If a party wants to try to prove fraud, malice, or oppression, that is a necessary preliminary finding for an award of punitive damages. Punitive damages should be available upon a sufficient showing.

Are there other standards FINRA should consider?

FINRA should carefully track the Federal court standards.

L.3. Should FINRA implement guidance, training or instructions to arbitrators on the substantive elements of defamation claims?

Yes.

If so, what form should such guidance, training or instructions take given concerns regarding FINRA maintaining neutrality as the administrator of the forum?

Stick to training using the case study method. It was good enough to make all of us lawyers! 😊  
Send updates as cases are decided by the Circuits and the Supremes. Summarize in The Neutral Corner.

L.4. For some types of claims in FINRA's arbitration forum, FINRA requires arbitrators to have additional qualifications to be eligible to serve on a panel considering such claims. Should FINRA

require that arbitrators considering Form U5 defamation claims have additional experience and qualifications?

No.

If so, what would be the appropriate additional experience and qualifications?

N/A.

L.5. Should FINRA retain the long-standing position that it will expunge from CRD without a court order employment termination information if a panel explicitly states in the award that the basis for expungement is the defamatory nature of the information? [Yes](#).

Should FINRA apply a different standard to requests to expunge employment termination information?

[No. This standard is sufficient.](#)

L.6. Should FINRA and other regulators revisit the question of providing members with further immunity against Form U5 defamation claims?

[Yes](#).

[Fundamentally, firms need room to report candidly, but brokers also need protection from abusive or retaliatory filings. Thus, truthful required disclosures should receive broad protection, but falsehoods should not. Firms would then presumably have the confidence to file complete U5s, but people harmed by reckless or malicious U5 statements would still retain their remedy.](#)

[The change should center on a qualified immunity analysis. A middle-ground qualified immunity standard best balances disclosure quality with fairness. If the new defamation rule is too weak, firms may under-disclose out of fear of lawsuits. If it is too strong, false or retaliatory disclosures that cause serious reputational harm without an effective remedy. This would protect firms when they make good-faith, rule-required U5 disclosures supported by reasonable factual bases. But this approach would also allow defamation claims for knowingly false statements or statements made in reckless disregard for the truth.](#)

If FINRA and other regulators were to revisit such a proposal, what would a national, uniform standard look like and why?

[Form U5 serves a national regulatory function; it feeds BrokerCheck and other national disclosure systems that are used across state lines. Consequently, the legal standard should not turn on where the firm or broker happens to be located.](#)

A uniform rule would offer qualified immunity for mandatory U5 disclosures, but not blanket immunity; protection for statements of fact made in good faith and based on contemporaneous documentation; liability only for knowingly false statements, reckless disregard, or maliciousness; standardized narrative fields/check-box disclosures to try to limit unhelpful subjective wording; and solely the existing FINRA-administered forum with its own standard for defamation-related relief.

What regulatory authority would support such a standard?

FINRA already requires the Form U5 filing and administers the dispute-resolution system that handles related claims. A national standard could be justified as part of FINRA's rulemaking on member obligations and the operation of its arbitration forum, subject to SEC approval under the Exchange Act framework.

The shortest distance between these two points is a FINRA rule, approved by the SEC, that defines the filing obligation and the evidentiary standard for U5-related disputes, toggled to a federalized arbitration remedy.

## **M. General Request for Comment**

In particular, FINRA requests comment on the following questions:

M.1. Are there any other FINRA rules, guidance, operations or administrative processes that should be updated or amended that would help ensure that customers, members and their associated persons are treated fairly and support an efficient and transparent arbitration forum?

Un-PC spoiler alert: certain categories of arbitrator tend to always give great weight to testimony from witnesses who resemble the arbitrator in certain fundamental ways. As a result, not all witness testimony is weighed fairly. This needs to be investigated and addressed with the arbitrators who tend to conduct evidentiary hearings in this manner.

If so, what has been your experience with these rules, guidance, operations or processes and what are your suggestions for improving them?

FINRA training is truly excellent. I appreciate all the obvious care and thought that FINRA puts into its training material. Very helpful.

M.2. Where have FINRA rules related to arbitration been particularly effective or ineffective, and why?

Bifurcation of expungement proceedings is especially effective and well-timed.

Are there areas where a revised approach might enhance the effectiveness and efficiency of the dispute resolution process while preserving customer protection?

Bifurcate the damages portion of U5 defamation hearings. Issue clear guidance on damages and punitive damages analyses.

M.3. What ambiguities in FINRA rules related to arbitration should FINRA address?

Timeliness of claims could use further clarification.

Are there any other modifications to FINRA rules related to arbitration that should be considered to clarify their application?

Cases could be settling earlier, and they will settle earlier, if the timeframe for assessment of fees is extended back to 30 days before the 1<sup>st</sup> scheduled day of hearing.

M.4. Can FINRA make any of its administrative processes or interpretations related to the arbitration process more efficient and effective while protecting customers? *Yes.*

If so, which ones and how?

FINRA needs to clarify if additional queries to potential arbitrators is a violation of FINRA rules, or not. Arbitrators should not be threatened by parties who subtly signal that arbitrators who cooperate in one side's supplemental query process during arbitrator selection will be automatically disqualified from selection by the other side. FINRA might want to consider making a clear rule on this controversy.

Are there any processes or interpretations that should be added?

Further development of FINRA's internal administrative U5/defamation processes.

M.5. Are there interdependencies among the topics identified in this *Notice* such that addressing certain concerns would reduce or eliminate the need to address others? For example, would enhanced arbitrator qualifications or training, or an arbitration appeals process, address concerns about punitive damages awards, explained decisions or case management efficiency? Please identify which issues you believe are most interdependent and explain how addressing one would impact the need to address the other(s).

All writing issues should be segregated into a single, stand-alone training topic. This topic is mostly mechanics-heavy.

U5/defamation should be its own topic, both substantively and procedurally.

Ethics needs to be its own training topic, including elimination of bias and implicit bias.

M.6. Are there areas identified in this *Notice* that FINRA should prioritize when considering initial steps that may be most impactful?

No.

M.7. Is there any additional data that FINRA could provide to help inform discussion around the issues presented in this *Notice*?

All accurate data is useful data.