

The Neutral Corner

Volume 5 – 2010

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 serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

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Telephonic Mediation: An Overview

By Joan Stearns Johnsen*

Introduction

With its high settlement rates and positive reviews from parties, mediation has proven to be a viable way to resolve securities disputes. And while mediation is generally cost effective, the expense of bringing the parties and mediator together for cases with smaller amounts in dispute may seem impractical. In some cases meeting face-to-face can pose logistical challenges, especially when parties live far apart or a party cannot participate in person due to illness or disability. For cases with logistical challenges or when the amount in dispute is small, parties should consider telephonic mediation. Telephonic mediation offers an effective and less expensive means to settle cases and produce results comparable to in-person mediation.

What Is Telephonic Mediation?

Mediation is often described as a facilitated negotiation. It is an informal, voluntary and non-binding (until the parties settle and sign an agreement) approach to resolve disputes. An independent, trained neutral—a mediator—facilitates negotiations between disputing parties and helps them reach an acceptable resolution.

While each mediator is different and has an individual style to resolving disputes, FINRA mediations tend to follow the same steps. Before the mediation, most FINRA mediators require the parties to submit a confidential memorandum, which summarizes their cases and desired settlement. At the mediation, mediators usually start with introductions and establish ground rules that aim to keep the parties' communication respectful toward one another during the process, regardless of how contentious their dispute may be. Many mediators

Message from the Editor

Comments, Feedback and Submissions

In addition to comments, feedback and questions regarding the material in this publication, we invite you to submit suggestions for articles and topics you would like addressed. We reserve the right to determine which articles to publish.

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start with their own opening statement and allow the parties or their representatives to explain the issues in greater detail. Mediators then spend most of their time in private caucuses (a private meeting between the mediator and one party), and mediation concludes in settlement (80 percent of the time) or an impasse. Telephonic mediation uses many of the same methods as a traditional mediation.

Preparing for a Telephonic Mediation

Preparing for a telephonic mediation is similar to preparing for an in-person mediation. Counsel should prepare their clients for the negotiation process, discuss potential settlement terms and explain what will happen during the mediation. Attorneys also will need to discuss opening statements with their clients and decide whether the clients should speak during the opening statements. Most attorneys prefer to conduct a telephonic mediation with their client in the same room, but that is not always possible. The attorney should discuss when and how the client will communicate with the mediator and the other side if the attorney and client will not be in the same office.

Mediators sometimes conduct pre-mediation calls with parties to prepare for the mediation. During these calls, the mediators may ask if the parties plan to discuss or present any documents during the mediation. If parties plan to discuss or present documents during the mediation, the mediator may ask to review the documents in advance; and, if the parties agree, they will share them with the other side to facilitate an efficient mediation. Documents identified during the course of the mediation, or which the parties no longer deem confidential, can be sent to the mediator and the other side by email or fax as necessary.

Since the pace of a telephonic mediation is often similar to that of an in-person mediation, parties should reserve the entire day. If the telephonic mediation does not conclude during the initial session, the mediator will follow up with the parties by telephone, in the same manner as the initial sessions. While it varies with each case, often the lawyers only participate in these follow-up telephone calls.

Differences—Not Disadvantages

The most obvious difference between a telephonic mediation and an in-person mediation is the nature of the interaction that takes place between the parties. Over the telephone, the parties cannot sit across the table from each other or shake hands. In an in-person mediation, the parties meet face-to-face and can gauge how the other side will come across in a hearing. However, after traveling across the country to attend an in-person mediation, shaking hands and getting a glimpse at each others' faces may be the only thing that a party learns about the other side. Many lawyers remain reluctant to allow their clients to speak to the opposing party in a joint discussion. In such instances, the trip to the mediation for purposes of evaluating how the other side may perform at a hearing may be limited.

In a private caucus, there is no advantage to being in-person rather than on the telephone. The mediator's job is to evaluate the parties' statements. Because there are no non-verbal cues, such as facial expressions or body language, the mediator can focus on what the parties are saying rather than how the parties are saying it.

In any mediation, it is not unusual for parties to reach a point where they may become frustrated with the process. When this happens in an in-person mediation, the mediator will encourage parties to remain at the mediation and to continue working. In a telephonic mediation, the mediator can approach similar challenges with the same determination.

Advantages

The most obvious advantage of telephonic mediation is cost savings. When the parties and counsel must travel long distances to attend, there are substantial savings to mediate telephonically. Parties also avoid the need to pack and ship case files and documents. The parties do not need to pay for plane tickets, hotels, meals or taxi fares. In smaller cases, the savings from travel might cover the cost of the mediation or contribute to settlement calculations. FINRA can also introduce talented but underused and less expensive mediators to parties for telephonic mediations in smaller cases.

As an alternative, FINRA offers video conference mediations from any of its regional offices. This benefits parties who would prefer to see their adversaries and save on travel expenses. Parties have taken advantage of this option and have been pleased with its ease and cost savings.

Physical limitations a party may have cannot be underestimated. For example, senior or seriously ill parties—who are physically unable to attend in-person—are able to participate telephonically. Telephonic mediation enables them to participate in their own settlement discussions—unlike an in-person mediation, where they would have to give their representatives settlement authority in their absence.

Telephonic Mediation: An Overview continued

Another advantage is productivity. People tend to be more productive in their own offices than on the road. When the mediator is caucusing with the other side, parties can work from their desks—even make and receive phone calls. Participants can also avoid the down time associated with traveling. Factors like transit difficulties, delayed or cancelled flights and weather are no longer relevant.

Often, the logistics of conflicting schedules can make getting everyone together in the same city on the same day especially challenging. I have mediated with parties via telephone as far away as Hawaii and Europe. Other than the challenges presented by different time zones, parties can participate fully and may be able to resolve their disputes sooner.

When the mediation is telephonic and the client and attorney are sitting together, the attorney can manage a client during a joint session outside the presence of the other parties. When a party chooses to speak during the opening statement, it conveys a lot to the other side regardless of whether the mediation is in-person or telephonic. In the privacy of his or her office, an attorney can more subtly remind the client not to go on too long, and can stop the client from discussing certain matters. This sort of guidance can be more difficult when everyone is in the same room.

Another advantage of telephonic mediation is the anonymity of the telephone. Mediations can be stressful because the parties' conflict and emotions may have escalated over time. The telephone may help to reduce anxiety. Often people are more comfortable telling their stories to a mediator who is

on the telephone rather than sitting in front of them. Telephonic mediation is also helpful for parties, such as some pro se parties (parties who are representing themselves), who may be uncomfortable challenging their adversaries in person. There is some measure of safety when the party does not have to sit across the table from the opposing party. In many situations, the distance and anonymity of a telephonic mediation can be advantageous.

Conclusion

Telephonic mediation is its own best advocate because it works. It offers considerable cost benefits and convenience to the parties while preserving the same, effective results as traditional mediation. In my experience, telephonic mediations produce results comparable to those of in-person mediations.

The views expressed in this article are solely the author's, and do not necessarily reflect FINRA's views or policies.

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Dispute Resolution and FINRA News

Case Filings and Trends

Arbitration case filings from January through November 2010 reflect a 21 percent decrease compared to cases filed during the same 11-month period in 2009 (from 6,601 cases in 2009 to 5,241 cases in 2010). Customer-initiated claims decreased by 29 percent in 2010 from 2009.

From January through November 2010, arbitration cases filed identified the following securities (listed in order of decreasing frequency): mutual funds, common stock, corporate bonds, preferred stock, annuities, options, limited partnerships and certificates of deposit. In 2010, the top two causes of action alleged have been breach of fiduciary duty and negligence.

Second Annual Securities Dispute Resolution Triathlon

The Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and FINRA Dispute Resolution hosted the Second Annual Securities Dispute Resolution Triathlon (Triathlon) on October 2 – 3, 2010, in New York City. The Triathlon provided aspiring attorneys from law schools around the country an opportunity to build their advocacy skills in the three key areas of dispute resolution: negotiation, mediation and arbitration. By combining these skills in a single event, the competition tested student advocacy skills in a comprehensive and realistic securities dispute resolution experience.

One hundred FINRA neutrals volunteered as judges, mediators and arbitrators during the event, and provided the competitors with feedback to build their advocacy skills.

This year's Triathlon winners are:

- **Overall Triathlon Winner:** Seton Hall University
- **Advocate's Choice Award:** Fordham University
- **Negotiation:** University of Vermont
- **Mediation:** Quinnipiac University
- **Arbitration:** Seton Hall University

Plans are already underway for the Third Annual Securities Dispute Resolution Triathlon in 2011. For more information about the Triathlon, visit St. John's University's [website](#).

Notable Decisions

Panels Award Nearly \$25 Million In Three Cases

In September and October, FINRA arbitration panels awarded more than \$25 million to investor claimants in three cases which involved disputes about stock, insurance and corporate bonds, and one of which alleged "selling away." These cases—Case No. 09-02961, Healthright Partners, LP and Gifford vs. Lincoln Financial Advisors Corporation; Case No. 09-00683, Garrett, Stein, et al. vs. Morgan Keegan & Company; and Case No. 09-03251, Larry Hagman et al. vs. Citigroup Global Markets, Inc.—represent some of the largest awards issued this year in FINRA arbitration cases. You may visit FINRA's [Arbitration Awards Online Database](#) to view the awards in their entirety.

*Dispute Resolution and FINRA News continued****California Court of Appeals Vacates Arbitration Award***

In a case involving a dispute over attorneys' fees, a California court of appeals vacated an arbitration award because it found that the chief arbitrator failed to disclose relevant information about his personal law practice. The court found that the arbitrator should have disclosed that he regularly represents law firms in fee disputes, which might have led the defendant to "reasonably entertain a doubt" that the arbitrator would be able to arbitrate the dispute impartially. Visit www.law.com for more information about this case and a link to the [full opinion](#).

This case serves as a reminder to arbitrators that they have an ongoing duty to make relevant disclosures throughout an arbitration, and when in doubt, arbitrators should err on the side of disclosure.

Effect of Arbitration Awards on Net Capital Accounting

FINRA requires firms to cease operations if they have insufficient reserves to meet net capital requirements set forth by the Securities and Exchange Commission (SEC). In August, FINRA informed Pyramid Financial Corp that, as a result of an arbitration loss, it was in violation of net capital requirements and was required to cease operations. Pyramid filed a lawsuit in federal court seeking to enjoin FINRA from closing the firm down immediately after FINRA issued the award (see *Pyramid Financial Corp. v. Financial Industry Regulatory Authority*, 2010 U.S. Dist. LEXIS 90543). The firm argued that it had 30 days under FINRA rules

to pay the award. The court determined that it lacked jurisdiction over the action and, accordingly, it denied Pyramid's application for a temporary restraining order, and dismissed the case without prejudice.

Updated Hearing Scripts

FINRA updated its [Initial Prehearing Conference Script](#) and [Hearing Procedure Script](#) to encourage parties and counsel to exchange voluntarily, in writing, information concerning any potential conflicts between the arbitrators and any party, counsel or witness in their cases.

To address concerns regarding information security and identify theft, FINRA also updated the hearing scripts to inform parties and their counsel of steps they can take to protect personal confidential information contained in documents filed with FINRA or brought to a hearing for use during an arbitration. For more information on FINRA's Information Security Policy and ways in which arbitrators and parties can protect confidential information, please review the Information Security Policy [Neutral Workshop](#) and [Notice to Parties](#) on our website.

SEC Rule Filings

Update to Proposed Rule Change to the Discovery Guide

FINRA extended the time, until January 11, 2011, for SEC action on a proposed rule change to expand the guidance that FINRA provides to parties on the discovery process and update the Document Production Lists. FINRA filed the proposed rule change (SR-FINRA-2010-035) with the SEC on July 12, 2010. The proposed rule change would amend the Discovery Guide, which includes Document Production Lists, and make conforming changes to Rules 12506 and 12508 of the Customer Code.

Please visit our website for more information about [SR-FINRA-2010-035](#).

Proposal to Give Investors the Option of All-Public Arbitration Panels in All Cases

On October 26, 2010, FINRA filed a rule proposal (SR-FINRA-2010-053) with the SEC that would give investors the option of having an all-public panel, greatly increasing investor choice in the FINRA arbitration program. The rule proposal is based on the two-year-old [FINRA pilot program](#) that gives investors filing an arbitration claim against certain firms the option of choosing an all-public panel. If approved by the SEC, the rule would give all investors the option of choosing an arbitration panel that has two public arbitrators and one non-public arbitrator, as is now the case, or an all-public panel. The proposed rule is broader than the pilot program as it would apply to all investor disputes with any firm and any individual broker.

Please visit our website for more information about [SR-FINRA-2010-053](#) and to read the [news release](#) about this rule proposal.

SEC Rule Approval

Update to Rules Supporting Changes to FINRA's Online Arbitration Claim Filing System

This fall, FINRA deployed a major improvement to its voluntary Online Arbitration Claim Filing System that permits claimants to pay their initial fees online. Previously, claimants were required to complete claim filing by mailing a check. With this new feature in place, a claimant filing an arbitration claim online can complete electronically all of the steps necessary to file a new case, including filing Submission Agreements, uploading exhibits and paying the initial filing fee. This will expedite the claim submission process and create clarity as to the date a claim was filed, an issue of importance in cases involving eligibility or statute of limitation issues.

In September, FINRA filed with the SEC a proposed amendment to Rule 12302 of the Customer Code and Rule 13302 of the Industry Code to update the rules to be consistent with these technology improvements. Under the rule change FINRA will now deem online claims filed on the date when the claimant submits the claim online. The rule became effective on the date FINRA filed the proposed rule change, September 27, 2010.

Please visit our website for more information about [SR-FINRA-2010-50](#).

Tips for a Successful Arbitration Hearing

As you know, FINRA's goal is to provide arbitration services that result in fast and cost-effective resolution of disputes. Here are some reminders to help arbitrators conduct a successful arbitration hearing—by minimizing delays and disruptions and maximizing efficiency.

- **Review the Code of Ethics for Arbitrators in Commercial Disputes.** The Code of Ethics provides relevant and valuable guidance, and we urge you to review the Canons carefully and adhere to them.
- **Accept cases only if you have time.** Before accepting a case, you should decide whether your schedule allows you to participate. Accept only those cases that you can properly conduct within the anticipated time limits.
- **Make necessary disclosures.** To avoid challenges and recusals during the arbitration, which could delay the proceedings, be sure to review the information provided by FINRA and timely make all disclosures about relationships that might affect your impartiality or might reasonably create the appearance of bias. Your impartiality extends to relationships you might have with the parties, counsel, agents, witnesses, panel members and the type of case involved.
- **Be prepared.** Before attending a hearing, make sure that you have read all case-related materials, including the parties' pleadings, motions and prehearing briefs.
- **Appear at all prehearing conferences and hearings.** Check your personal and business calendars and confirm your availability before committing to a particular hearing date. Hearing dates include not only regular hearings but also any telephonic prehearing conferences in preparation for the hearing. Contact FINRA immediately if a scheduling conflict comes up.
- **Be prompt.** Arrive at the hearing prior to the scheduled start time to discuss any preliminary matters with your co-arbitrators. If you are running late, notify FINRA immediately and advise them of your anticipated arrival time.
- **Commit to the scheduled hearing dates.** When scheduling a hearing, specify the exact time of the hearing, e.g., 9 a.m. – 5 p.m., and commit to the schedule. The parties should be able to rely on the arbitrators to appear on time and stay for the duration of the day as initially agreed upon.
- **Take reasonable breaks.** During the hearing day, abide by the break schedule that you set out at the beginning of the proceeding. The parties have expended a great deal of time and money in preparing for the hearing and deserve to have their case heard by committed, serious arbitrators who respect everyone's schedules.

- **Avoid postponements.** FINRA does not consider non-emergency conflicts to be valid reasons for cancelling a previously scheduled hearing. If a postponement is unavoidable, please inform FINRA immediately so that the parties can be notified. If the conflict is business-related, consider delegating the conflicting event to a colleague so you can attend the hearing and meet your obligations to the parties and your co-arbitrators. Finally, consider withdrawing from the case to prevent the delay of the hearing, especially if scheduling the hearing was particularly difficult. An arbitrator who causes scheduling delays may be removed from the roster.
- **Conduct fair and orderly hearings.** Insist that the parties and fellow arbitrators maintain a professional and civil demeanor during the hearing. Be impartial and preside with an even hand and allow the parties ample opportunity to present their cases.
- **Remain alert.** Hearings can be long and exhausting; however, parties expect no less than 100 percent of the arbitrators' attention while they're presenting their cases. Be sure to listen attentively to the parties and witnesses and remain alert. You may find it helpful to take notes and to ask questions, at appropriate times during the presentations, to clarify your understanding. Avoid distraction with other matters, which includes refraining from using your personal communication devices, such as BlackBerries and mobile phones.

Question and Answer: FINRA's Information Security Policy

Question: I listened to the [July 21 Neutral Workshop on FINRA's Information Security Policy](#). I thought the workshop was very informative, but it raised another question. I often get case-related information from FINRA through an email account that I share with my spouse. Is this a violation of the Information Security Policy?

Answer: Yes, a spouse having access to case-related information via a shared email account is a violation of FINRA's information security practices. Arbitrators should establish an email account for their sole use. Spouses—as well as anyone other than the appointed arbitrators—are not authorized to view any correspondence or materials related to a FINRA arbitration case, and, accordingly, they should not have access to an arbitrator's email account containing such information. Since email accounts are generally available at no cost, FINRA strongly recommends that arbitrators create an email account for their sole use or to be used solely for FINRA arbitrations.

Question and Answer: Out-of-State Attorney Appearing in Florida Arbitration

Question: What should arbitrators do if they notice that an out-of-state attorney is representing a party in a Florida arbitration?

Answer: In some jurisdictions, an out-of-state attorney cannot represent a client in arbitration. In these jurisdictions, it is considered the unauthorized practice of law to provide such legal representation without being admitted to the appropriate bar. In Florida, the law requires attorneys from other states who are not members of The Florida Bar to submit a Verified Statement and a \$250 fee to The Florida Bar, which limits out-of-state practitioners of domestic arbitration to three appearances within a 365-day period. For more information about the rules that govern this limited practice of law in Florida, parties and arbitrators may visit [The Florida State Bar website](#).

At their discretion, arbitrators may raise the issue of the appearance of an out-of-state attorney in a Florida arbitration. However, absent a court order, [Rule 12208\(d\)](#) of the Customer Code and [Rule 13208\(d\)](#) of the Industry Code provide that an arbitration proceeding will not be stayed or otherwise delayed for resolution of such issues. If arbitrators have further questions regarding out-of-state representation, they may direct the parties to submit briefs on the issue, or contact [Betty Brooks](#) in FINRA's Office of General Counsel for further clarification.

Visit our [website](#) for additional information about out-of-state attorney rules applicable to FINRA arbitrations.

Mediation and Business Strategies Update

2010 Case Statistics

From January through November 2010, parties initiated 788 mediation cases, a 54 percent increase from the same 11-month period in 2009. During this same time, FINRA closed 877 cases, a 42 percent increase from 2009. Approximately 83 percent of these cases concluded with successful settlements. The average case turnaround time during this 11-month period was 95 days.

FINRA Mediation Settlement Month

FINRA held its annual Mediation Settlement Month event during October, offering incentives designed to promote mediation and educating potential parties about the benefits of the program. Hundreds of mediators agreed to reduce their normal fees for Settlement Month, allowing FINRA to present substantial savings to parties. This year's event experienced strong demand due to the increase in arbitration case filings from last year.

During the month, FINRA also participated in a Mediation Settlement Day event in New York City, which featured Raymond W. Kelly, Honorary Chairperson and New York City Police Commissioner.

Arbitrator Recruitment Update

As part of its 2010 recruitment initiatives to expand and diversify the roster, Dispute Resolution partnered with FINRA's Office of Investor Education and Human Resources department to attend the following conferences:

National Black MBA Association—
September 23 - 24, Los Angeles, CA

AARP Annual Conference—
September 30 - October 2, Orlando, FL

National Society of Hispanic MBA Association—
October 22 - 23, Chicago, IL

National Asian-Pacific Bar Association—
November 17 - 21, Los Angeles, CA

Arbitrator Tip: Postponement Fee Waiver

During the course of an arbitration, the parties may decide to postpone an arbitration hearing and mediate their disputes. To encourage parties to explore mediation, FINRA waives the postponement fee to adjourn an arbitration hearing if the parties choose to mediate at FINRA. However, parties will continue to be responsible for the additional fee of \$100 per arbitrator, pursuant to [Rule 12601](#), if the postponement occurs within three business days of the scheduled hearing even if they proceed to FINRA-sponsored mediation. The arbitrators will determine how to allocate the \$100 per arbitrator fee among the parties.

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