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

## Electronic Discovery

By Irene C. Warshauer



Today, most business and personal records are kept electronically, whether on individual computers, servers, smart phones, tablets or otherwise. Documents such as account statements, CRD<sup>®</sup> records, emails and written communications between customers and registered representatives or between brokerage firms are generally stored in an electronic format.<sup>1</sup> While the ease of electronic record storage has helped businesses and individuals maintain more accurate records, it has also caused a proliferation of documents and records that is often the source of e-discovery issues. E-discovery relates to the discovery and production of electronically stored information (ESI). This article discusses the e-discovery process and issues that may come up during arbitration.

### Discovery in FINRA Arbitrations

Discovery in FINRA arbitration is more limited than discovery under the Federal Rules of Civil Procedure or state discovery rules. Discovery in FINRA arbitrations is governed by [Rules 12505-12514](#) of the Code of Arbitration Procedure for Customer Cases (Customer Code), [Rules 13505-13514](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code) and the [Discovery Guide](#), which is applicable in customer cases.<sup>2</sup> The Discovery Guide specifically delineates which documents are presumptively discoverable in disputes between customers and associated persons and their brokerage firms. In addition, FINRA's [Notice to Parties—Discovery Rules and Procedures](#) also provides guidance in FINRA arbitrations.

### Parties' Obligation to Retain Documents

Once a party becomes aware that a claim is reasonably anticipated, the party must save related documents. It is important for counsel or pro se parties to place a litigation (arbitration) hold on material related to the claim, that is, not to delete or destroy their documents, including email.

### Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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Parties must notify anyone who may have information relating to the matters at issue about the arbitration hold—including supervisors, employees, document custodians, outside consultants and others, such as family members who may share computers. To the extent that related data may be routinely transferred to back-up tapes, the parties should suspend that process or make copies of relevant data. Parties must conduct searches for responsive documents, and produce the documents in response to discovery requests once arbitration begins.<sup>3</sup>

### Agreement on Preservation and Production of ESI

Parties and their counsel should consult on the preservation of evidence early in the arbitration. Counsel should also meet to discuss discovery, particularly electronic discovery, shortly after the arbitration begins. They should make every effort to agree on the electronic media the parties must search, the relevant search terms and methods, data that should be produced and the acceptable types of documents and time frames. Agreement on these matters can help streamline the process and contain costs.

Parties should test the search terms and time frames to ensure that they are generating the correct responses. This will avoid the additional cost and time required to repeat or start a new search on the same database and storage device. If needed, a discovery conference with the chairperson may be helpful to set reasonable parameters for the production.

When the information or data that is produced does not contain the expected documents, issues may arise as to whether a search was made of the “correct” databases, using appropriate search terms and mechanisms. For example, if all of the telephone logs about the transactions at issue are not produced by the broker, or the customer does not produce all of the financial statements, additional searching may be requested. Though the parties should try to resolve these types of issues on their own, the arbitrators must be prepared to make any necessary rulings should the parties seek intervention by the panel.

### Production of the Data and its Format

Parties should produce documents, including ESI, in a manner that is generally more convenient and less expensive for all parties, while providing the information that is relevant to the claims and defenses at issue. Some providers of alternative dispute resolution services have guidelines for production of e-discovery. For example, the International Centre for Dispute Resolution (ICDR) guidelines state:

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form.

**Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible...(emphasis added)<sup>4</sup>**

### The Concept of Proportionality is Important

FINRA arbitrations can range in size from a small claim to a multimillion dollar claim. No matter the size and complexity of the claim, e-discovery can be the most expensive part of preparing for an arbitration hearing. E-discovery and its costs should be reasonably proportional to the amount at stake. This refers to the type of documents on hold, as well as the method of searching and production.

The burdens and costs for preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information.<sup>5</sup>

The District Court in *Rimkus Consulting Group, Inc. v. Cammarata* noted that <sup>6</sup>

It can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information and in conducting discovery, either prospectively or with the benefit (and distortion) of hindsight. Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—

### Guidelines for Counsel Under *Zubulake*

The court outlined the following guidelines for counsel when dealing with e-discovery issues:

- determine the scope of the litigation hold and the information that must be preserved;
- understand the client's document retention policies and systems;
- issue the litigation hold at the onset of the litigation or whenever litigation is reasonably anticipated;
- communicate, discuss and reissue the litigation hold; and
- implement full production.

Failing to comply with these guidelines may result in sanctions.

was *proportional* to that case and consistent with clearly established applicable standards. ... [T]hat analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable (footnotes omitted).

The concept of proportionality is particularly important in FINRA arbitrations, which are designed to provide a fair and efficient means of resolving securities disputes.<sup>7</sup> A party may object to producing a document on the list because of the cost or burden of production. If a party demonstrates that the cost or burden of production is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If so, the arbitrators should consider whether there are alternatives that can minimize the impact.

### Discovery Abuse

A framework for the obligations and responsibility of parties and counsel in connection with e-discovery is discussed in a series of decisions involving Laura Zubulake, who sued UBS Warburg LLC for discrimination.<sup>8</sup> District Court Judge Scheindlin, who presided over the case, established a standard of necessary steps that must be taken to preserve and produce electronic data.

The court also set forth the following factors to determine whether to shift the costs of e-discovery:

- extent to which the request is specifically tailored to discover relevant information;
- availability of such information from other sources;
- total cost of production, compared to the amount in controversy;
- total cost of production, compared to the resources available to the parties;
- relative ability of the parties to control costs and their incentive to do so;
- importance of the issues at stake in the litigation; and
- relative benefits to the parties of obtaining the information.

The *Zubulake* decisions have set the standards nationwide for courts dealing with e-discovery, and the concepts outlined in these opinions may be applicable to arbitrations when addressing e-discovery issues.

### Spoliation of Evidence

Parties may claim spoliation of evidence when there are major gaps in the production of ESI. “Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation [arbitration].”<sup>9</sup>

### Sanctions

Sanctions have been imposed in litigations where courts have found intentional spoliation or grossly negligent preservation or destruction of data. Recent court decisions, such as *Pension Committee*, set forth some of the court sanctions for spoliation of evidence. The Court stated that it would give a jury charge that the

plaintiffs were grossly negligent in performing discovery obligations and failed to preserve evidence after a preservation duty arose; ... [and]... that ...[the jury] could presume that the lost evidence was relevant and would have been favorable to the defendant...<sup>10</sup>

Arbitrators may impose similar sanctions during an arbitration proceeding. [Rules 12212](#) and [13212](#) outline sanctions available to arbitrators:

- 1) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel.

Unless prohibited by applicable law, sanctions may include, but are not limited to:

- assessing monetary penalties payable to one or more parties;
- precluding a party from presenting evidence;
- making an adverse inference against a party;
- assessing postponement and/or forum fees; and
- assessing attorneys’ fees, costs and expenses.

- 2) The panel may initiate a disciplinary referral for an industry party at the conclusion of an arbitration.
- 3) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Cooperation between or among the parties and their counsel is preferable to requests for sanctions, which delay the arbitration and divert the focus from the matters at issue.

### Conclusion

Discovery should be conducted in a cost efficient way to allow all parties to have a fair and efficient hearing. Agreement on production methods and limiting the relevant dates for searching can streamline the arbitration process and the costs, which ultimately help parties resolve their dispute quickly and efficiently.

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

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### Endnotes

- 1 The Central Registration Depository (CRD) is a computerized database that contains information about securities firms and brokers maintained by FINRA.
- 2 On April 1, 2011, the SEC approved FINRA's proposal to amend its Discovery Guide. The updated Discovery Guide will become effective on May 16, 2011 and will apply to all customer cases filed on or after the effective date. Please see the article on the new Discovery Guide on page 8.
- 3 "The Sedona Conference Commentary on Legal Holds: The Trigger & The Process," *The Sedona Conference Journal*, Volume 11 (Fall 2010).
- 4 Rule 4. Electronic Documents. The International Centre for Dispute Resolution (ICDR) is the international arm of the American Arbitration Association.
- 5 "The Sedona Conference Commentary on Proportionality in Electronic Discovery," *The Sedona Conference Journal*, Volume 11 (Fall 2010), including "Principles of Proportionality," 289-302 at 291.
- 6 *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (Dist. Court, SD Texas 2010).
- 7 "Best Practices, Recommendations & Principles for Addressing Electronic Document Production," *The Sedona Principles*, Second Edition (June 2007), while not directed specifically to arbitration, provide an excellent guide to e-discovery.
- 8 *Zubulake v. UBS Warburg*, 02 Civ. 1243 (SAS) May 13, 2003 [*Zubulake I*]; *Zubulake v. UBS Warburg*, 216 F.R.D. 280, 290 (2003) [*Zubulake III*]; *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2004) [*Zubulake IV*], *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) [*Zubulake V*].
- 9 *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F.Supp.2d 456, 466 (S.D.N.Y. 2010).
- 10 *Pension Committee* at 620.

## FINRA's Revised Discovery Guide and Document Production Lists for Customer Arbitration Proceedings

*By Margo Hassan, Assistant Chief Counsel, FINRA Dispute Resolution*



On April 1, 2011, the Securities and Exchange Commission (SEC) approved FINRA's proposed rules to amend the [Discovery Guide](#). The rules become effective on May 16, 2011, and apply to all cases filed on or after the effective date. In about six months, FINRA will establish a Discovery Task Force under the auspices of FINRA's National Arbitration and Mediation Committee. The Task Force will review substantive issues relating to the Discovery Guide on an on-going basis with an eye towards keeping the Discovery Guide current as products change and new discovery issues come to light. At the request of FINRA constituents, first on the Task Force's agenda will be a review of issues relating to electronic discovery, or "e-discovery."

In 1999, FINRA adopted the Discovery Guide, which includes the Document Production Lists, for use in customer arbitration proceedings.<sup>1</sup> The guide provides direction on which documents parties should exchange without arbitrator or FINRA intervention. FINRA revised the guide to update the lists and to expand the guidance it gives to parties and arbitrators on the discovery process.

The previous guide contained 14 lists—two general lists and 12 separate lists for specific types of claims. FINRA replaced the 14 lists with two lists of presumptively discoverable documents—one for firms/associated persons to produce and one for customers to produce. Many of the documents on the previous lists are included in the revised guide. In addition, the revised guide requires parties to produce additional types of documents that users indicated they need to develop a case. Although each item on the lists (with a few exceptions) is presumptively discoverable in every customer case, the guide encourages arbitrators to tailor the lists to the facts and circumstances of each case. FINRA is also making conforming changes to Rules 12506 (Document Production Lists) and 12508 (Objecting to Discovery Requests; Waiver of Objection) that reflect the list consolidations.

FINRA revised the guide to expand the guidance generally given to parties and arbitrators on the discovery process, and to clarify how arbitrators should apply the guide in arbitration proceedings. The guide addresses, among other matters:

- **Flexibility**—The parties and arbitrators retain their flexibility in the discovery process. For example, arbitrators can order the production of documents not included in the lists, order that parties do not have to produce certain documents on the lists and alter the production schedule.
- **Objections Based on Cost/Burden**—A party may object to producing a document on the list because of the cost or burden of production. If a party demonstrates that the cost or burden of production is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If so, the arbitrators should consider whether there are alternatives that can minimize the impact.
- **Requests for Additional Documents**—Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are not expressly listed in the guide.
- **Party and Non-party Production**—Only named parties must produce documents pursuant to the guidelines. Non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order.
- **Consideration of Firm Business Models and Customer Claims**—Not all firms have the same business operations model, and certain items on the lists may not apply to a particular case when the firm's business model is considered. Certain items on the lists may not apply to a particular case depending on the claims asserted.
- **Electronic Discovery**—Electronic files are “documents” within the meaning of the guide. For more information about electronic discovery, please review the article on page 1.
- **Confidentiality**—When deciding contested requests for confidentiality orders, arbitrators should consider factors specified in the guide, including whether disclosure would constitute an unwarranted invasion of personal privacy, or whether the information contains proprietary confidential business plans and procedures or trade secrets.

- **Privilege**—Parties are not required to produce documents that are otherwise subject to an established privilege.
- **Affirmations**—If a party responds that there are no responsive documents in the party's possession, custody or control, the customer, or the appropriate person in the brokerage firm who has knowledge, must: 1) state in writing that the party conducted a good faith search; 2) describe the extent of the search; and 3) state that, based on the search, there are no requested documents in the party's possession, custody or control.
- **No Obligation to Create Documents**—Parties are not required to create documents in response to items on the lists.
- **Admissibility**—Production of documents in discovery does not create a presumption that the documents are admissible at the hearing.

FINRA believes that the revised Discovery Guide will provide greater guidance to parties and arbitrators on the discovery process. Please review the [Regulatory Notice](#) for more information about the amended Discovery Guide and the complete production lists of presumptively discoverable documents.

### Endnote

- 1 See [Notice to Members \(NTM\) 99-90](#) (November 1999).

## Case Filings and Trends

Arbitration case filings from January through March 2011 reflect a 14 percent decrease compared to cases filed during the same three-month period in 2010 (from 1,483 cases in 2010 to 1,273 cases in 2011). Customer-initiated claims decreased by 18 percent through March 2011 as compared to the same three month period in 2010.

Through March 2011, arbitration cases filed identified the following securities (listed in order of decreasing frequency): common stock, mutual funds, options, preferred stock, annuities, corporate bonds, limited partnerships and certificates of deposit. The top two causes of action alleged are breach of fiduciary duty and negligence.

## Dispute Resolution and FINRA News

### Arbitrator's Guide



FINRA developed the new Arbitrator's Guide to provide arbitrators with a single resource for case guidance. It replaces the Arbitrator's Reference Guide (National Edition) and the SICA Arbitrator's Manual and focuses on the procedures specific to arbitrations administered by FINRA.

The new Arbitrator's Guide is consistent with FINRA's Basic Arbitrator Training materials. As previously reported in this newsletter, the National Arbitration and Mediation Committee (NAMC) and FINRA Dispute Resolution worked together to revise the Basic Arbitrator Training materials. After a year-long process, the NAMC, which included representatives from all viewpoints in the arbitration process, and FINRA staff reached consensus on the materials. The new Arbitrator's Guide provides case guidance consistent with the updated training materials.

The Arbitrator's Guide is available only in an electronic format on our website. Please review the new [Arbitrator's Guide](#) by the time of your next case appointment and refer to it frequently during your service in our forum.

### Contingency Plans Due to Severe Weather

On rare occasions, FINRA Dispute Resolution must operate with reduced staff or close an office due to severe weather. Whenever possible, FINRA will contact the affected parties and arbitrators before the severe weather event to determine whether the scheduled hearing or prehearings will take place. When the operations of an office are affected by an unexpected event, FINRA will do its best to contact the hearing participants and notify them of the status of a hearing as quickly as possible.

FINRA also suggests that the parties and arbitrators use the direct communication rule—if only for the limited purpose of notifying each other of last-minute cancellations—so all participants can communicate with each other about proceeding with a scheduled meeting should FINRA be unable to contact the parties and arbitrators. Please see the Question and Answer section featured in [Volume 1, 2011](#) for more information on this limited use of the direct communication rule.

## Update to Online Claim Filing: Payment by ACH Bank Transfer

The Arbitration Online Claim Filing System allows claimants to pay filing fees online by ACH bank transfer. The ACH bank transfer payment method will debit the filing fees directly from the claimant's checking account. With this addition, claimants may now pay filing fees online using either an ACH bank transfer or a credit card.

## SEC Rule Filings

### Update to the Proposed Rule Change Relating to Disciplinary Referrals Made During an Arbitration Proceeding

FINRA is reviewing the comments received on its proposed rule concerning disciplinary referrals made during an arbitration proceeding and is considering changes in light of those comments. To that end, FINRA extended the time, until May 18, 2011, for SEC action on the proposed rule change. FINRA filed the proposed rule change with the SEC on July 12, 2010 (SR-FINRA-2010-036). The proposal would amend Rule 12104 of the Customer Code and Rule 13104 of the Industry Code to permit arbitrators to make a disciplinary referral during the pendency of an arbitration when they have reason to believe that conduct poses a serious, ongoing, imminent threat to investors that requires immediate action.

Please visit our website for more information about [SR-FINRA-2010-036](#).

### Update to the Proposed Rule Change Relating to Replying to Responses to Motions

On February 4, 2011, FINRA filed SR-FINRA-2011-006 with the SEC to amend Rules 12206, 12503 and 12504 of the Customer Code and Rules 13206, 13503 and 13504 of the Industry Code to provide moving parties with a five-day period to reply to responses to motions. Parties would have five days from the receipt of a response to a motion to reply to the response, unless the responding party agrees to an extension of time, or the Director or the panel decides otherwise. FINRA is reviewing the comments received on this rule proposal and will respond to them in a letter to be filed with the SEC.

Please visit our website for more information about [SR-FINRA-2011-06](#).

## SEC Rule Approval

### Amended Discovery Guide

On April 1, 2011, the SEC approved FINRA's proposed rules to amend the Discovery Guide. Please see the article on page 8 for more information about the revised Discovery Guide.



## Questions and Answers

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### Arbitrator Classification

**Question:** I am currently classified as a non-public arbitrator. If my employment changes in the future, can I be reclassified as public?

**Answer:** The answer to this question depends on the facts and circumstances concerning the arbitrator's individual situation. A non-public arbitrator can be reclassified as public, but only if the arbitrator:

- has been out of the securities industry for five years or more;
- did not spend a substantial part of his/her career in the securities industry;
- does not receive or expect to receive continuing benefits from a securities firm (*e.g.*, pension, health care); and
- does not have any other underlying issues that would warrant classification as non-public or that would preclude classification as public.

All arbitrators should notify FINRA immediately of changes in their employment status, as it may affect their classification as public or non-public. In doing so, arbitrators should also notify FINRA whether they are receiving, or expect to receive, benefits. As indicated in the third bullet above, if a non-public arbitrator continues to receive benefits, the arbitrator's classification will remain non-public.

**Question:** An article in *The Neutral Corner* (see [Scheduling Hearing Dates Within Nine Months From the Initial Prehearing Conference](#) in Volume 2, 2010) explained that arbitrators should schedule evidentiary hearings within nine months of the Initial Prehearing Conference (IPHC). If parties agree to hearing dates that are past the nine-month mark, should arbitrators accept the parties' mutually agreed upon hearing dates?

**Answer:** The arbitration process belongs to the parties, and if they agree to hearing dates beyond nine months from the IPHC, the arbitrators should defer to the parties' agreement on scheduling.

If, however, the parties are not in agreement about scheduling hearing dates beyond nine months, arbitrators may consider the following options:

- Confirm that the case will require the number of hearing days requested by the parties.
- Ask the parties or their counsel to specify why they are unavailable for earlier hearing dates and closely review the parties' and counsel's schedules to identify open days.
- Suggest that another attorney or representative from the same firm appear at the hearing in order to resolve the case in a timely manner.
- Consider scheduling hearings on non-consecutive days if a preference for consecutive hearing days is causing the delay.
- Suggest that hearings be scheduled in the evening or on weekends.

FINRA also encourages arbitrators to remind parties about FINRA's successful, voluntary mediation program. Mediation proceeds on a parallel track with arbitration, and need not interfere with the scheduled arbitration hearing dates.

## Mediator Recruitment

FINRA is looking for qualified mediators to join the roster in our underserved [locations](#). If you are interested in becoming a mediator for FINRA and meet the mediator criteria, please email [Marilyn Molena](#) or contact her at (212) 858-5280. You may also visit the [Become a Mediator](#) pages on our website for more information about the application process.

## Mediation and Business Strategy Update

### Mediation Case Statistics



From January through March 2011, parties initiated 184 mediation cases, a 16 percent decrease from the same three-month period in 2010. FINRA also closed 164 cases, a 22 percent decrease from 2010. Approximately 82 percent of these cases concluded with successful settlements, and the average case turnaround time during this three-month period was 106 days.

### Continuing Disclosure Obligation

Like arbitrators, mediators have a continuing obligation to notify FINRA of new disclosures. Required mediator disclosures include changes to contact information, hourly rates, employment, conflicts, training and any updates to the background narrative. Parties rely on this information during the mediator selection process, and FINRA must be confident the information is current. Please send your disclosures to [PanelUpdate@FINRA.org](mailto:PanelUpdate@FINRA.org). You may request a copy of your Mediator Disclosure Report by emailing [Marilyn Molena](#) or contacting her at (212) 858-5280.

### Mediation Outreach

In March, FINRA's Mediation staff lectured at PACE Law School's Investor Rights Clinic and at Albany Law School's Securities Arbitration Clinic. FINRA presented mock mediations during the lectures, giving students first-hand experience into the mediation process.

On April 1, the Mediation staff spoke at St. John's University Law School Securities Arbitration Clinic/St. Vincent de Paul Legal Program, Inc. about FINRA's mediation program.

## Arbitrator Training

### Completing Your Arbitrator Expense Report

This new online training course reviews key reporting requirements that will help you comply with FINRA's expense reporting procedures and ensure that your reimbursement is processed quickly. The training provides an overview of the [Guidelines for Arbitrator Reimbursement](#) and offers step-by-step instructions on completing expense reports. This voluntary training is free of charge and may be accessed without prior registration on the [Advanced Arbitrator Training page](#).

### Basic Arbitrator Training

Please visit our [website](#) for information about the Basic Arbitrator Training Program.

## Arbitrator Tip: FINRA Encourages Arbitrators to Answer Parties' Requests for Additional Information



During the arbitrator selection process, parties may request more information about an arbitrator's background than what is provided in the Arbitrator Disclosure Report. To facilitate a transparent and fair arbitration process, we encourage arbitrators to answer reasonable questions in a timely manner.

Before making their final selections and returning the lists of potential arbitrators to FINRA, parties may request additional information from potential arbitrators pursuant to FINRA [Rules 12402](#) and [12403](#) of the Customer Code and [Rule 13403](#) of the Industry Code. The Rules state that the Director of Dispute Resolution will request the additional information from the arbitrator and send any response to all of the parties at the same time.<sup>1</sup>

As advocates, party representatives must act in the best interest of their clients and may on occasion ask for additional information from arbitrators. For example, they may inquire about an arbitrator's knowledge of or experience with a particular security product. Depending on the type of case and allegations involved, this information may be very relevant to the parties as they select their panel. Thus, we encourage arbitrators to answer reasonable questions posed to learn relevant information related to the arbitration. FINRA believes that responding to such questions promptly will aid the parties during the selection process.

### Endnote

- 1 Rules 12402(c)(2), 12403(d)(2)(B) and 13403(c)(2) also state that when a party requests additional information, the director may, but is not required to, toll the time for parties to return the ranked lists.

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