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Mission Statement

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

Guidance to Pro Se Parties During the Initial Prehearing Conference



By Paul Weinberg

More frequently, parties in small value arbitration cases are choosing to represent themselves rather than hire an attorney or another professional who may charge fees. While parties may enjoy having the option to represent themselves, these cases can present challenges to arbitrators. A pro se party may expect assistance from the arbitrator, and a party represented by counsel may believe that the arbitrator is showing preference to the pro se party. Either or both results would be detrimental to the arbitration process.

Although arbitrators may educate pro se parties about the arbitration process, they must never advocate for them. Any hint of doing so would taint the hearings and may lead parties to question the fairness and impartiality of the arbitrators and the proceedings. Regardless of the outcome, arbitrators must ensure that the parties believe that the process was fair.

For cases with pro se parties, I find it helpful to make an opening statement to reinforce the arbitrators' commitment to fairness and impartiality and provide clarity about the arbitration process. At the Initial Prehearing Conference (IPHC), as chairperson I use the following script after I have confirmed that all arbitrators have submitted their oaths.

I initially ask the pro se party if the party wants to proceed without counsel. If the answer is "yes," I continue with the following:

As arbitrators, our ultimate responsibility is to resolve all claims to the dispute in a fair and just manner.

To the extent ethically permissible, we will provide you with procedural guidance and direction to ensure that all parties receive a fair hearing. We will not and cannot be an advocate for any party, nor can we offer legal advice or recommend a specific course of action.

Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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You may also email Jisook at Jisook.Lee@finra.org.

Each party may object to particular evidence but must give a basis for the objection. Any statement supposedly made by a person who is not a witness (i.e., hearsay testimony) may be admitted but will only be given the weight that the panel thinks it deserves.

The claimant presents its claim first, followed by the respondent presenting its defense. If the respondent has a counterclaim, it will then present its counterclaim followed by the claimant's defense.

All parties will have an opportunity to present their cases fully, therefore, we ask parties to refrain from interrupting while the other parties are presenting evidence, unless by objection.

Each party and the arbitrators have the right to question the witnesses.

After all the witnesses have been heard and all exhibits have been received, the parties will have an equal opportunity to summarize their respective cases. Once the summations are concluded, we will close the hearing. I emphasize that once we close the hearing record the parties may no longer be heard on the merits of the case.

Finally, we remind all parties and representatives to treat each other with respect.

Are there any questions?

On occasion, a pro se party will ask questions. For example, in hearings I have conducted, pro se parties have asked to change the hearing location, preferably to a location closer to their business or residence. The panel should refer to the Codes of Arbitration Procedures (in this situation using either [Rule 12213](#) or [13213](#)) for guidance in making a decision. The panel should listen to all parties before making a decision.

A pro se party might request an adjournment to obtain counsel. Arbitrators should generally grant this request pursuant to [Rule 12208](#). However, the panel should be cautious of multiple requests by a pro se party to seek counsel if it unduly delays the proceedings to the detriment of the other parties. To maintain fairness, the panel should consider applying time restrictions on a pro se party's multiple requests to postpone a hearing to retain counsel.

After responding to all questions, the chairperson should, once again, ask if there are any further questions and then proceed to conclude the IPHC. Regardless of whether the parties are represented by counsel or proceeding pro se, the panel should always be fair, firm and respectful when conducting the hearing.

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

This article is based on personal experiences and material taken from the American Arbitration Association course titled Pro Se: Managing Cases Involving Self-Represented Parties. Thanks are given to the American Arbitration Association and its education department, AAAU, for allowing me to use material from that course.

Paul Weinberg, a retired naval officer, professional engineer, contractor and author, has been arbitrating cases with the American Arbitration Association for 37 years and has been an arbitrator for NASD/FINRA for 15 years.

It is impossible to come up with an exhaustive list of activities or statements that will “always” be viewed as harassing and those that will “always” be viewed as benign. The fact is that identical conduct may or may not be sexual harassment depending on the sensitivity or tolerance of the victim.

Sexual Harassment Notice



Gary Lipkin, Associate Vice President and Associate General Counsel, FINRA Office of General Counsel

Sexual harassment is an area in which FINRA has adopted a “zero tolerance” policy for its employees and contractors. FINRA arbitrators should be aware that this policy extends to them and any violation of the policy will result in their removal from the roster.

Sexual harassment is difficult to define and describe because the offensiveness of the conduct at issue can vary with the sensitivity of the victim. For example, a 21-year-old, a 45-year-old and a 75-year-old will each have very different sensitivities, and thus each is likely to react differently to the same statement or action.

The victim must be taken as he or she is found. Other than a few blatantly obvious examples (like the classic lewd proposition or groping), whether or not a statement or action will be viewed as harassment can and does vary from person to person.

This uncertainty can also be exacerbated by the role of locale and/or time of day. When considering these matters, reviewing authorities pay as much attention to where and when a statement was made as to its actual content. A comment or action can, for example, take on an entirely different meaning when made in a lonely garage, dimly lit bar or empty office after hours instead of a crowded restaurant at lunch time or in the office in the middle of the day.

The tone and demeanor of the speaker are also critical. While difficult to convey in print, there are many ways to compliment someone’s attire or appearance, and when spoken, the compliment may take on an entirely different tone—one that the speaker may not have intended. The practice of calling someone “babe,” “sweetheart” or “honey” is simply offensive and should be avoided in a FINRA business context at all times. While it is likely that nothing may be meant by such comments, the reality of the modern workplace makes them problematic and likely to result in a harassment claim.

The solution? Simply avoid comments on dress and appearance. Additionally, avoid any kind of ex parte conversations with parties and counsel. Above all, treat colleagues, associates and staff with the same degree of respect and professionalism in manner and speech that you expect to receive in business matters.

New Neutral Management Telephone Number

To enhance customer service to FINRA neutrals, the department of Neutral Management has installed a new centralized phone number: **(212) 858-3999** or **toll free at (855) 209-1620**. Neutrals may use this general number to reach a Neutral Management staff member with questions about their disclosure reports, arbitrator training and other roster-related inquiries. Applicants may also use this number if they have questions about the arbitrator application process. Neutrals should continue to contact their regional offices for case-specific inquiries.

Dispute Resolution and FINRA News



Case Filings and Trends

January to August 2012

Arbitration [case filings](#) from January through August 2012 reflect a seven percent decrease compared to cases filed during the same eight-month period in 2011 (from 3,310 cases in 2011 to 3,094 cases in 2012). Of the total cases filed through August, 1,824 (59 percent) were customer-initiated claims. The remainder of the cases, 1,270 (41 percent), were intra-industry claims.

Arbitration cases filed identified the following securities (listed in order of decreasing frequency): common stock, mutual funds, corporate bonds, options, annuities, preferred stock, variable annuities, limited partnerships, certificates of deposit, auction rate securities and derivative securities. The top two causes of action alleged were breach of fiduciary duty and negligence.

FINRA DR Portal

This year, FINRA began a new technology project to develop an online portal for both the neutrals (arbitrators and mediators) and parties in our forum. Over the course of this year and next, FINRA will be implementing a variety of self-service features for the DR Portal in several releases. Once completed, neutrals and parties will be able to view details of their assigned cases, update their contact information and personal profiles, file and view case documents and schedule hearings.

We plan to roll out the first release of the DR Portal beginning on October 1, 2012. This initial release focuses on neutrals and will allow them to:

- view and update their current profile information;
- view their entire disclosure report online while making changes;
- access information about their assigned cases, including upcoming hearings and payment information; and
- view information about all cases on which they have served—regardless of whether the case resulted in an award.

Starting on October 1, neutrals will start receiving email invitations with instructions on how to access the DR Portal and create an account.

For more information about the portal, please view the video on the [Neutral Workshop Web page](#).

Fourth Annual Securities Dispute Resolution Triathlon

October 13 – 14, 2012

FINRA and the Hugh L. Carey Center for Dispute Resolution of St. John's University School of Law present the Fourth Annual Securities Dispute Resolution Triathlon. The triathlon provides student teams from participating law schools an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute. FINRA neutrals volunteer each year to serve as judges, arbitrators and mediators in this competition. The students and neutrals consistently report finding the experience rewarding.

Please visit our website for more details about the [triathlon](#).

FINRA Launches Pilot Program for Large Arbitration Cases

In July, FINRA launched a [pilot program](#) specifically designed for large arbitration cases involving claims of \$10 million or more. The program allows parties to customize the administrative process to better suit special needs of a larger case. Participation in the pilot program is voluntary and open to all cases; but in order to be eligible, all parties will be required to pay for any additional costs of the program and must be represented by counsel.

In participating cases, the parties will have greater flexibility and control over the administration of their case. Examples of how parties may customize the process include having the option to:

- have additional control over the method of arbitrator appointment and the qualifications of arbitrators;
- hire non-FINRA arbitrators for their case;
- develop their own procedures for exchanging information prior to the hearing;
- have expanded discovery options such as depositions and interrogatories; and
- choose from a wider selection of facilities.

Information About FINRA Dispute Resolution

Several arbitrators in our forum have requested presentation materials that succinctly summarize FINRA's dispute resolution forum. If you are interested in obtaining these materials, please send an email to [Anna Lyons](#) in the department of Case Administration.

FINRA is actively reaching out to parties in appropriate cases to notify them of the availability of these specialized procedures. We will continue to share information about this new pilot as we monitor its progress.

You may learn more about the pilot by reviewing the [Large Case Pilot FAQ](#) on our website.

Practising Law Institute (PLI) Securities Arbitration Program

On August 2, several FINRA staff members participated on panels at the [Practising Law Institute's \(PLI\) Securities Arbitration 2012 program](#). They discussed the impact of recent rule changes, proposed changes to arbitration rules and practices, plans for continued enhancement of the arbitrator selection process, discovery, the proposed In Re expungement rules, the large arbitration case pilot and the DR Portal.

SEC Rule Filing

Arbitrator Authority to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

On August 24, 2012, FINRA filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend the Customer and Industry Codes of Arbitration Procedure (collectively Codes), to provide that when specified industry parties seek the appearance of witnesses or the production of documents from FINRA members (and individuals associated with the members) that are not parties to the arbitration, FINRA arbitrators shall issue orders for the appearance of witnesses or the production of documents, instead of issuing subpoenas.

Please visit our website for more information about [SR-FINRA-2012-041](#).

SEC Rule Approvals

Simplified Arbitration

Effective July 23, 2012, the dollar limit for simplified arbitration increased to \$50,000 from \$25,000. Raising the threshold for simplified arbitration to \$50,000 benefits forum users by reducing forum fees; saving parties the time and expense of preparing for, scheduling and traveling hearings; providing customers who are unable to retain an attorney the option of

having their claims decided on their written submissions; and reducing the case processing time because arbitrators and parties do not need to coordinate their calendars to schedule hearings.

The new limit affects cases filed on or after July 23. For additional information, see [Regulatory Notice 12-30](#).

Mediator Selection

Under FINRA [Rule 14107](#) (Mediator Selection) of the Code of Mediation Procedure, parties to a mediation may select a mediator from FINRA's roster or from a source of their own choosing, including a mediator who is not on FINRA's mediator roster. In limited instances, the director of Mediation may assign a mediator. The SEC approved amendments to the Mediation Code granting the Mediation director discretion to accept or reject the parties' selected mediator if the mediator is not on FINRA's mediator roster.

The amendments are effective on August 6, 2012, for all mediation cases filed on or after the effective date. For additional information, see [Regulatory Notice 12-35](#).

Suitability Rule

FINRA's suitability rule, Rule 2111(a), requires, in part, that a broker-dealer or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.

In general, the rule retains the core features of the previous NASD suitability rule, NASD Rule 2310, codifies several important interpretations of the predecessor rule and imposes a few new or modified obligations.

FINRA's new suitability rule became effective July 9, 2012. For additional information, see [Regulatory Notice 12-25](#).



Questions and Answers

Arbitrator Honorarium for Motions Decided Without a Hearing

Question: I have decided several motions without convening prehearing conferences with the parties and have not received an honorarium. Likewise, I have conducted a prehearing conference with the parties and arbitrators where the panel considered several motions during the call but was only paid an honorarium of \$200. How does FINRA compensate arbitrators for prehearing motions?

Answer: FINRA pays each arbitrator an honorarium of \$200 to decide discovery-related motions without a hearing session.¹ Additionally, FINRA pays a one-time \$200 honorarium per case for each arbitrator who decides contested motions for subpoenas without a hearing. FINRA does not pay an honorarium for any other non-discovery or non-subpoena related motions decided without a hearing session. For example, if the panel decides a motion to amend the statement of claim or postpone the hearing without a hearing session, FINRA does not pay an honorarium.

If the panel needs to conduct a prehearing conference with the parties before deciding a motion, FINRA will pay an honorarium of \$200 to each arbitrator for participating in a single hearing session pursuant to [Rules 12214](#) and [13214](#). Even if the panel hears oral argument on more than one motion during the prehearing, FINRA will pay the participating arbitrators an honorarium based on the number of hearing sessions held. While the panel has discretion to hold a prehearing conference with the parties, it should weigh the necessity of the prehearing conference against the participants' time and the hearing session fees they would incur.

Arbitrator Performance

Question: What is my obligation as an arbitrator if I believe that a fellow arbitrator is unable to perform his or her duties?

Answer: If you believe that a fellow arbitrator is not able to carry out his or her arbitrator duties, you should contact your case administrator immediately. In addition, we continually evaluate arbitrators to improve the effectiveness of our arbitration program. We urge you to complete the [Arbitrator Experience Survey](#) at the end of each case, to assist us in our continuing evaluation of the roster.

Likewise, arbitrators are under an ongoing, affirmative duty to assess their own abilities, and they have a concurrent duty to withdraw from cases if they cannot arbitrate competently. Paragraph B of Canon I of the [Code of Ethics for Arbitrators in Commercial Disputes](#) states in pertinent part: “One should accept appointment as an arbitrator only if fully satisfied: ... (3) that he or she is competent to serve; and (4) that he or she can ... devote the time and attention ... that the parties are reasonably entitled to expect.” The duty to serve competently continues after appointment and remains in effect until the case concludes.²

Disclosure of Continuing Benefits

Question: I no longer receive a salary from my former law firm. However, the firm allows me to retain my title, “Of Counsel,” and to use the firm’s office space and equipment, company email and letterhead, administrative services, etc. Should I disclose this information to FINRA?

Answer: Yes. Even though you no longer earn a salary from your former firm, by receiving these non-monetary accommodations, you continue to derive benefits from your firm. You should disclose this to FINRA and provide this information on the [Arbitrator Disclosure Checklist](#) when you are appointed to a case.

Endnotes

- 1 [Rules 12100](#) and [13100](#) of the Codes define “hearing session” as any meeting between the parties and arbitrators of four hours or less.
- 2 Paragraph G of Canon I provides: “The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding.”

Mediation and Business Strategies Update



2012 Mediation Case Statistics

From January through August 2012, parties initiated 387 mediation cases. FINRA also closed 539 mediation cases during the same eight-month period. Approximately 79 percent of these cases concluded with successful settlements.

Annual Membership Fee Due September 1, 2012

FINRA mediators must submit their \$200 annual membership renewal fee by September 1 to remain active on the roster. If you have not already submitted your annual mediator membership fee, or have questions regarding the status of your membership, please email [Marilyn Molena](#).

Mediation Settlement Month

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

Amount of Claim	Length of Mediation	Payment to Mediator
\$25,000 and under	4 hours	\$200
\$25,000.01 - \$100,000	4 hours	\$400
Over \$100,000	8 hours	\$1,000

Parties will pay mediators at their regular hourly rates for any time spent beyond the above listed hours. FINRA receives no revenue from the mediator payments, and all mediation filing fees will be reduced by 50 percent for this special event. To participate in Mediation Settlement Month, parties must agree to mediate by October 31, 2012, and conduct their mediation by December 31, 2012.

FINRA welcomes the opportunity to partner with our mediators in making this annual event a success. Please indicate your interest by sending an email to the appropriate mediation administrator in your region.

Midwest and Northwest regions: [Rosari Domenick](#)

Northeast and Mid-Atlantic regions: [Edward Sihaga](#)

Southeast and Southwest regions: [Leon de Leon](#)

Mediation Survey

FINRA provides mediation parties the opportunity to evaluate the services of the staff and mediators. FINRA uses the Mediation Questionnaire to review the impact of mediation on the settlement of arbitration cases and to enhance the mediation program. In [Volume 2—2012 of The Neutral Corner](#), we provided results from the “Mediation Process” section from surveys received between January 2010 and January 2012.

In this issue, we will summarize the responses to the “Mediator” section of the survey from the same time period. Parties evaluated mediators by answering eight questions and assigning numerical values for each. For example, one of the questions asked whether the parties believed that the mediator clearly explained the mediation process and the mediator’s role, and parties were allowed to provide a numerical response on a scale of “1” to “5.” A numerical evaluation of “1” indicates that a party strongly agreed, whereas a numerical response of “5” indicates that a party strongly disagreed with the question asked.

The following results are the average numerical ratings for each of the eight questions in the “Mediator” section of the survey:

- 1.2: The mediator behaved professionally.
- 1.2: The mediator clearly explained the mediation process and the mediator’s role.
- 1.2: The mediator allowed each party to fully present its case.
- 1.3: The mediator conducted in-person and/or phone sessions efficiently.
- 1.3: The mediator was fair and unbiased.

- 1.3: The mediator understood all of the material presented.
- 1.3: The mediator was skilled in facilitating settlement.
- 1.5: The mediator helped me understand the strengths and weaknesses of my case.

Mediators received the lowest rating for their ability to help the parties understand the strengths and weaknesses of their case. This slight deviation may be a result of the parties' desire to seek mediators with an evaluative/directive style to mediation. Parties in securities mediations often request this style and expect mediators to provide a thorough evaluation of their respective cases' strengths and weaknesses.

Overall, parties rated FINRA mediators very highly on the numerical scale—with average scores in the “strongly agrees” end of the spectrum. The high numerical ratings in this section attest to the quality of mediators on the roster, which is the foundation of FINRA's successful mediation program.

Mediation Outreach

On June 15, FINRA Dispute Resolution staff attended the 25th ADR Annual Conference in Greenbelt, MD. They spoke with attendees about FINRA's dispute resolution forum and the benefits of serving on the mediator and arbitrator rosters.

Arbitrator Training



Neutral Workshop

FINRA has posted two Neutral Workshops:

1. **FINRA DR Portal.** The [September 17th Neutral Workshop](#) is a video that provides a preview of the soon-to-be released FINRA DR Portal. The DR Portal is a secure website that will provide you with easy online access to view and update your neutral profile. It will also display assigned case information, including party and counsel names, date, time and location of hearings, and a view of all payments received on a case. This will be the first portal release of several scheduled over the next year.

2. **Current Events.** The [September 12th Neutral Workshop](#) provides an update on ongoing and emerging topics that affect neutrals. Workshop faculty, Linda Fienberg, discusses:

- rule change to increase the threshold for simplified arbitration;
- rule change to whistleblower disputes;
- rule change to preclude collective action claims in arbitration;
- rule change to mediator selection;
- proposed rule change to address expungement requests by unnamed persons;
- proposed rule change to the definition of "public" arbitrator;
- reducing extended list appointments—"short list";
- update on the customer option rule;
- large case pilot;
- arbitrator performance reminders; and
- new FINRA DR Portal.

Note: FINRA's neutral workshops are pre-recorded, which allows neutrals to pause and playback the audio file.

Arbitrator Tip



Information Security

Arbitrators must take precautions to safeguard the confidentiality of case-related material. As an arbitrator, this is an important part of your responsibilities. Information that needs to be safeguarded includes, but is not limited to:

- Social Security numbers;
- individual taxpayer identification numbers;
- driver's license numbers;
- party and arbitrator addresses;
- banking and brokerage account numbers;
- criminal history information;
- fingerprint cards;
- expunged records;
- attorney-client communications; and
- medical records.

Arbitrators should be aware of information security concerns and follow [FINRA's guidelines](#) when transporting and storing case materials—some of which may contain personal confidential information. You can protect this sensitive information by taking the following steps:

- Do not leave case-related material out in the open where others can see it. Be sure to secure case material in a locked drawer when you are not working on the case.
- Do not leave case-related material unattended in a car for an extended period. If you anticipate that you will be away from your car for more than a short time, you should take the materials with you. However, you may want to leave materials in your car trunk—and lock the doors and windows—if you know you will be away from your car briefly.

- Be aware of your surroundings when participating in prehearings or hearings by conference call to ensure that others cannot eavesdrop. This is particularly important if you are participating by cell phone in a public area (*i.e.*, train, courthouse corridor, etc.).
- If you are serving on multiple cases, exercise extra caution to avoid sending information about one case to parties in another case.
- Verify that you are sending the correct order and enclosures to the intended recipients; confirm all email addresses and fax numbers before hitting the send button. Be sure to specify both a case number and case name when transmitting orders and rulings, even when transmitting them to FINRA.
- Keep FINRA apprised of your current contact information. For example, if you provide an incorrect fax number or neglect to update your disclosure report, FINRA may inadvertently send confidential information to an unauthorized person. You may update your contact information quickly and easily on our website using the [Arbitrator Information Update Form](#).
- Do not use shared email accounts to receive or send case-related information. Only arbitrators assigned to a case should have access to case-related information. Individuals who are not involved with a particular matter are not authorized to view any correspondence or materials related to a FINRA arbitration case. Accordingly, no one other than the arbitrator should have access to the arbitrator's email account containing such information.
- Any time the hearing room is not occupied it should be locked and/or secured. Thus, hearing rooms should be locked or secured during a short term recess, lunch breaks and of course overnight.
- At the conclusion of a hearing, you may leave behind case materials, which must be clearly marked to be shredded, only if the hearing is held at a FINRA office or in a Regus meeting room. For hearings that take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents remaining in the room are marked to be shredded. Regus will bill FINRA directly to shred the arbitrators' documents. Arbitrators should not expense these costs.

- For hearings in all other locations, you should encourage the parties to take their respective materials with them. Likewise, you should take your copies of the case-related materials with you when you leave and either shred them at home or return them to FINRA for proper disposal. Do not dispose of case materials in a regular trash receptacle.
- The chairperson should return the official set of exhibits, including the digital recorder, to FINRA. FINRA will provide a return mailing label to facilitate the return of these case materials. If the arbitrators have not concluded their deliberation, the chairperson should return the official record immediately following the final deliberation.

If arbitrators believe that the confidentiality of sensitive information has been compromised or if they have any questions about safeguarding case-related materials, they should contact their case administrator immediately. For more information, listen to the [July 21, 2010, neutral workshop on Information Security](#).

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