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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.

Additional Safeguards to Ensure Proper Disclosure

By Kristine Antoja, Case Administrator II, FINRA Case Administration



Disclosure is the cornerstone of FINRA arbitration. Arbitrators must reflect on all aspects of their professional and personal lives when considering disclosures. Disclosures can arise from a variety of relationships and experiences that may affect—or appear to affect—an arbitrator's impartiality. Arbitrators must not only be impartial in fact but must also appear to be impartial. Parties must know that an arbitrator is able to render a fair decision.

In keeping our commitment to provide fair and impartial arbitrators to resolve disputes, FINRA conducts a thorough background review of all arbitrator candidates. This review includes background verification by a third-party vendor as well as a staff Internet search for each arbitrator candidate. This article will review FINRA's verification process and what arbitrators can do to meet their disclosure obligations.

Initial Background Verification

FINRA requires arbitrator candidates to consent to a background search conducted by an outside vendor. The verification report includes confirmation of education and employment history, criminal background information, lawsuits and professional licenses.

FINRA also requires arbitrators to submit to a Social Security number verification. This additional measure verifies whether a name and Social Security number combination matches the data maintained in the Social Security Administration's master file.

As part of the initial application process, staff also conducts an Internet search of all arbitrator candidates. This additional step helps FINRA ensure that applicants disclose relevant information that might affect their ability to serve impartially or might create an appearance of bias. Additional information might include, but is not limited to: lawsuits (even non-investment related lawsuits); publications (even if they appear only online);

Comments, Feedback and Suggestions

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professional memberships; and service on boards of directors. Staff verifies any new information with the candidate before adding the information to the candidate's record.

Internet Search Prior to Appointment

Since June 2013, FINRA has expanded its verification procedures to include Internet searches immediately prior to an arbitrator's appointment to a case. FINRA believes that this approach helps mitigate the occurrence of disclosure issues that arise after the proceedings have begun. When staff finds information that appears to involve the arbitrator—but which is not included in the arbitrator's disclosure report—staff contacts the arbitrator to verify the information and to seek permission to include it on the disclosure report. If an arbitrator confirms that he or she is the subject of the Internet finding, but does not authorize FINRA to disclose the information, staff may seek the arbitrator's recusal from the case and/or removal from the roster.

The following are examples of the types of information that the staff searches for in doing Internet searches and that should be disclosed by arbitrators:

- disciplinary findings by a professional or regulatory organization;
- malpractice suits;
- current and past legal actions (both securities and non-securities related) in which the arbitrator was a party;
- current and past legal actions in which the arbitrator served as counsel to a party in a securities-related case;
- publications such as books, articles, blogs and Twitter accounts; and
- memberships in professional organizations (*e.g.*, bar or CPA associations).

It is not uncommon for parties to conduct online research of potential arbitrators during the selection process. For example, parties may review websites associated with the arbitrator and/or the arbitrator's employer and search social media sites. Arbitrators with personal or corporate websites should be particularly careful to ensure that the information on those sites is consistent with the information on their disclosure reports.

We have updated the Arbitrator Disclosure page, DR Portal update form and the Arbitrator Information Update Form to remind arbitrators of the importance of disclosure and share examples of disclosures they should make before, during and after serving on a case.

Periodic Background Verification

In August 2013, FINRA began the process of re-verifying background information of active arbitrators. This review included criminal background checks, lawsuits, and verification of professional licenses, among other information.

Consequences of Incomplete Disclosure

FINRA has removed arbitrators from the roster based on information found during the background verifications and Internet searches. Arbitrators should know, however, that it is not always the disclosure itself that causes removal. The failure to have disclosed the information may also result in removal.

Incomplete disclosure can have far-reaching consequences for the dispute resolution process and the forum, such as:

- challenges to an arbitrator's service after appointment to a case;
- loss of confidence in the arbitration process;
- vacatur of an arbitration award; and
- reputational harm to FINRA as a fair and impartial forum.

How to Comply With Disclosure Requirements

FINRA continues to evaluate and enhance the arbitrator disclosure process to ensure that it provides parties with accurate and timely information about an arbitrator, but FINRA cannot accomplish this alone. Arbitrators and parties must play an active role as well. Arbitrators have an obligation to maintain the accuracy and currency of their disclosure reports.

As arbitrators, you can comply with your ongoing obligation to disclose by doing the following:

- Consider all aspects of your life—professional, personal and social—as possible disclosure areas.
- Regularly review your disclosure report to ensure that all information is accurate and current. Even if you are not currently serving on a case, your name and profile information continue to be sent to potential parties as part of the list selection process. You can quickly review and submit updates through the DR Portal. If you have not

registered with the portal, please send an email to the department of Neutral Management at finraDRNM@finra.org with “Request Portal Invitation” in the subject line.

- Determine what information is available publicly about you and ensure that it is consistent with the information on your disclosure report.
- Cooperate when staff contacts you to verify information found during a background verification or an Internet search.
- Make a good faith effort to thoroughly complete the [Oath of Arbitrator and Checklist](#) when you are appointed to an arbitration case. The 41 questions on the checklist will help you comply with the disclosure requirements. We are currently reviewing the checklist to ensure that it effectively elicits arbitrators’ disclosures.
- After making your disclosures to FINRA, repeat them at the first prehearing conference to confirm the parties’ acceptance of your appointment. You should memorialize the parties’ acceptance in the prehearing order.

Parties can meet their obligations by reviewing the backgrounds of proposed arbitrators and performing their own due diligence during the list selection process.

Conclusion

We cannot overstate the importance that disclosure plays in maintaining the integrity and fairness of FINRA’s dispute resolution process. If you have to think about whether a disclosure is appropriate, you should make the disclosure. In other words, when in doubt, disclose.

Dispute Resolution and FINRA News

Case Filings and Trends



2013 Year-End Statistics

Arbitration [case filings](#) in 2013 reflect a 14 percent decrease compared to cases filed in 2012 (from 4,299 cases in 2012 to 3,714 cases in 2013). Customer-initiated claims decreased by eight percent in 2013 compared to 2012.

In 2013, arbitration cases filed identified the following types of securities (listed in order of decreasing frequency): common stock, mutual funds, variable annuities, annuities, options, corporate bonds, preferred stock, limited partnerships, certificates of deposit and auction rate securities. The top two causes of action alleged were breach of fiduciary duty and negligence.

January to February 2014

Arbitration case filings from January through February 2014 reflect a 14 percent increase compared to cases filed during the same two-month period in 2013 (from 590 cases in 2013 to 672 cases in 2014). Customer initiated claims increased by 19 percent through February 2014, as compared to the same time period in 2013.

FINRA Annual Conference

FINRA's 2014 Annual Conference will take place in Washington, D.C., May 19 – 21. During the event, financial industry practitioners and regulators will exchange ideas on timely compliance and regulatory topics.

On Monday, May 19, from 2:45 p.m. to 4:00 p.m., there will be a session titled "Arbitration, Expungement and Arbitrator Disclosure." The session is designed for participants in the arbitration process, including attorneys who represent parties in arbitration cases. Panelists will discuss changes to the expungement rules and guidance on expungement procedures. They will also discuss modifications to arbitrator definitions, the impact on list selection strategies and arbitrator disclosure requirements.

On Tuesday, May 20, Daniel Gallagher, Commissioner, Securities and Exchange Commission, will deliver the keynote address.

Please visit our [website](#) for more information about the conference.

DR Portal: Register Now

We strongly encourage arbitrators and mediators to register with the DR Portal to take advantage of the numerous benefits it provides, such as:

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

Registration with the DR Portal is particularly important and useful in cases that are being processed through the portal. Accordingly, we are actively reaching out by letter, phone calls and emails to arbitrators assigned to cases administered through the portal to encourage registration.

If you have not received your invitation and would like to register with the DR Portal, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

California State Bar Rules for Arbitrators and Mediators

Arbitrators and mediators available to hear cases in California must be on active status to serve as an arbitrator or mediator in California cases **if they are members of the California State Bar**. Rule 2.30 of the Rules and Regulations of the California State Bar prohibits an inactive bar member from working as a private arbitrator, mediator or other dispute resolution provider. Specifically, Rule 2.30 states that “no member practicing law, or occupying a position where he or she is called upon in any capacity to give legal advice or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

If you are an attorney admitted in California, and are on active status with the State Bar, you need not take action. If you are on inactive status with the State Bar or if your current bar status differs from what is reflected on your Arbitrator and/or Mediator Disclosure Report, please notify [Neutral Management](#) and include “California Bar Requirement” in the subject line of your email.

If you are an arbitrator or mediator available to hear cases in California but you have NEVER been a member of the California State Bar, you can bypass this notice.

For further information about Rule 2.30, please contact the State Bar of California at (213) 765-1000.

SEC Rule Filings

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

On January 29, 2014, FINRA refiled with the Securities and Exchange Commission (SEC) a proposed rule change to amend Rule 12104 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rule 13104 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to allow arbitrators to make regulatory referrals during an arbitration proceeding in very limited defined circumstances.

FINRA believes that mid-case referrals would provide it with an important tool to protect investors by alerting FINRA to potentially serious wrongdoing earlier than is currently possible. FINRA believes that the

current proposal contains stringent criteria for making mid-case referrals, which should make them an extremely rare occurrence in its forum. Comments were due on or before March 12, 2014.

Please visit our website for more information about [SR-FINRA-2014-005](#).

Protecting Personal Confidential Information

On February 12, 2014, FINRA filed with the SEC proposed amendments to Rules 12300 and 12307 of the Customer Code and Rules 13300 and 13307 of the Industry Code to provide that any document that a party files with FINRA Dispute Resolution that contains an individual's Social Security number, taxpayer identification number or financial account number must be redacted to include only the last four digits of any of these numbers. The proposed amendments would apply only to documents filed with FINRA. They would not apply to documents that parties exchange with each other or submit to the arbitrators at a hearing on the merits. In addition, the amendments would not apply to cases administered under the [Simplified Arbitration](#) rules. The comment period ended on March 21, 2014.

Please visit our website for more information about [SR-FINRA-2014-008](#).

Rulemaking Items Approved at the FINRA Board of Governors February 2014 Meeting

FINRA's Board of Governors considered [two rulemaking items](#) pertaining to Dispute Resolution, authorizing FINRA to file with the SEC amendments to the Customer and Industry Codes for the following items. FINRA plans to file these proposed changes with the SEC during the second quarter of 2014, after which the SEC will publish for comment.

Prohibiting Conditioning Settlements of Customer Disputes on a Customer's Agreement Not to Oppose Expungement

The Board authorized FINRA to file with the SEC proposed FINRA Rule 2081 (Prohibited Conditions Relating to Expungement of Customer Dispute Information). The proposal would prohibit firms and associated persons from conditioning or seeking to condition settlement of a dispute with a customer on, or otherwise compensating the customer for, the customer's agreement to consent to, or not to oppose, the firm's or associated person's request to expunge the customer dispute information from FINRA's Central

Registration Depository (CRD®) system. The proposed rule will help ensure that the CRD system continues to contain information that is critical to investor protection. Please see the [press release](#) for more information about this proposal.

Definitions of Public and Non-Public Arbitrators

The Board authorized FINRA to file with the SEC proposed amendments to the Customer and Industry Codes to refine and reorganize the definitions of “non-public” and “public” arbitrator. The amendments would, among other matters, provide that individuals who worked in the financial industry for any duration during their careers would always be classified as non-public arbitrators. Professionals who represent investors or the financial industry as a significant part of their business would also be classified as non-public, but could become public arbitrators after a cooling off period. The amendments would reorganize the definitions to make it easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.

Mediation Update

Mediation Statistics



2013 Year-End Statistics

In 2013, parties initiated 482 mediation cases, and FINRA closed 558 cases. Approximately 79 percent of these cases concluded with successful settlements, and the average case turnaround time was 95 days.

January to February 2014

From January to February 2014, parties initiated 89 mediation cases. FINRA closed 80 cases during this time. Approximately 80 percent of these cases concluded with successful settlements, and the average case turnaround time was 74 days.

First Year Anniversary: Mediation Program for Small Arbitration Claims

FINRA's Mediation Program for Small Arbitration Claims reached its one-year anniversary in January 2014 with positive feedback from the parties and neutrals. The program provides parties in arbitration cases with claims of \$50,000 or less the option of conducting mediations by telephone at no or low cost with a FINRA mediator. Under the program, mediators serve on a pro bono basis on cases alleging \$25,000 or less in damages. FINRA offers significantly reduced fee mediation at \$50 per hour on cases alleging damages between \$25,000.01 and \$50,000. Please note that parties may not seek expungement as a remedy in mediation.

To date, parties in 77 cases have agreed to have their cases proceed under the program with a settlement rate of 80 percent. This success rate is consistent with all matters that have been mediated through FINRA's Mediation Program to date.

Many cases that are eligible for the mediation program are paper cases—those that would not have an in-person hearing in arbitration. The program benefits forum users by:

- providing parties an opportunity to tell their story to an experienced FINRA mediator who can enhance the parties' understanding of the strengths and weaknesses of their case and offer the prospect of reaching a settlement with the opposing side;

- giving parties more control over the results of their cases;
- providing an alternative for senior, seriously ill and physically challenged parties who may find traveling to and attending an in-person mediation especially difficult;
- reducing travel and preparation costs; and
- offering parties in small cases an efficient and cost-effective option to meet their needs within our forum.

Separately, the program provides newer mediators with an opportunity to demonstrate their mediation skills. We have noticed that approximately half of the settled cases in the program are employment disputes involving promissory notes.

We look forward to another successful year offering parties in small cases an affordable option with the convenience and scheduling flexibility of telephonic mediation.

Please visit our website to learn more about the [Mediation Program for Small Arbitration Claims](#).

Mediation Outreach

In January, FINRA mediation staff served as a role-play coach in a basic mediation training sponsored by the New York State Bar Association.



Questions and Answers: Subpoenas and Orders and Expungement

Issuing Subpoenas and Orders

Question I received a letter from FINRA with a request from an industry party that I sign certain subpoenas. The subpoenas seek documents from a brokerage firm and an associated person. Neither the brokerage firm nor the associated person is a party to the case. The letter from FINRA that accompanies the request states in part: “As a reminder, FINRA rules direct arbitrators, in most instances, to issue orders, instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons. It would only be appropriate for an arbitrator to issue a subpoena (rather than an order) to a non-party firm when (for example) a firm failed to produce documents pursuant to an arbitrator order, or if a former associated person of a firm has left the industry and the arbitrator believes that an order would not be effective.”

I think the subpoenas are meritorious but I don't know whether I can sign them in light of the information contained in FINRA's letter. What should I do?

Answer Rule 12512(a)(2) and Rule 13512(a)(2) of the Customer and Industry Codes, respectively, provide that “unless circumstances dictate the need for a subpoena, arbitrators *shall not* issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rules 12513 and 13513” (emphasis added).

In addition to the Codes' strong language in preference for arbitrator orders, *Regulatory Notice 13-04* discusses the advantages of using orders instead of subpoenas. Arbitrator orders offer an efficient mechanism for obtaining the appearance of witnesses and production of documents from firms and their employees. While the Codes provide an enforcement mechanism for subpoenas and orders, typically,

once an arbitrator issues a subpoena, non-compliance is handled away from the arbitration forum through the courts. However, non-compliance relating to an arbitrator order is handled by the arbitrators who are familiar with the case. Another advantage to using an order is that orders are not subject to the geographical limitations contained in subpoena statutes.

Since you believe that the substance of the subpoena has merit, you should issue an order for production of the documents by completing one of the following:

1. Modify the subpoena to reflect that it is an order. In other words, you can cross out the word “subpoena” and write in the word “order.” Thereafter, you can sign the “order” and return it to FINRA for distribution to the propounding party.
2. Send an order to the assigned case administrator advising the requesting party that the subpoena request does not comply with Rules 12512 and 13512 and direct counsel to draft a new request in accordance with Rules 12513 and 13513. The case administrator will forward your order to all parties in the case, and the requesting party can submit a new request to issue an order of appearance or to produce documents.

If you determine that circumstances require a subpoena, you may sign the subpoena and return it to FINRA. You might order a subpoena if, for example, a firm failed to produce documents pursuant to an arbitrator order, or if a former associated person of a firm has left the industry and you believe that an order would not be effective.

The prohibition on executing subpoenas in Rules 12512 and 13512 does not apply to requests for documents by investors/customers who may request that arbitrators issue a subpoena or an order.

Expungement Requests After Settlement

Question I am serving on a case in which the parties settled prior to a hearing on the merits. The broker is seeking an expungement of the arbitration from his CRD record. The parties have indicated that the claimant will not appear at the expungement hearing. If the claimant does not appear at the expungement hearing, can the panel consider the claimant's lack of participation in the expungement hearing as a factor in recommending expungement?

Answer No. The panel should not rely on the fact that the claimant did not appear at the expungement hearing as a factor weighing in favor of or against recommending expungement. Even if the claimant does not appear at the expungement hearing or does not oppose the expungement, the broker seeking expungement must still demonstrate to the arbitrators that expungement would be appropriate under one of the grounds in [Rule 2080](#). Particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing, arbitrators should request a copy of the settlement document and any documentary or other evidence (including the broker's BrokerCheck report) that they believe is relevant to the expungement request.

Expungement is an extraordinary remedy that arbitrators should recommend only under appropriate circumstances. Information should be expunged only when it meets the criteria of Rule 2080 and has no meaningful investor protection or regulatory value. Once information is expunged from the CRD system, it is permanently deleted and thus no longer available to the investing public, regulators or prospective broker-dealer employers. Therefore, even if the claimant does not appear at the expungement hearing or does not oppose the expungement, arbitrators must still find and document one of the narrow grounds specified in [Rule 2080](#) and satisfy the procedural requirements under [Rules 12805](#) and [13805](#) before recommending expungement.

Please contact your case administrator with any questions about expungement. We urge all arbitrators to review the [Notice to Arbitrators and Parties on Expanded Expungement Guidance](#) and take the updated expungement training to refresh their knowledge of FINRA's expungement process. Please see the training notice under the Education and Training section of this issue.

Education and Training



Updated Online Arbitrator Training: Expungement

FINRA updated its expungement training to further emphasize the extraordinary nature of expungement and the important role of arbitrators in maintaining the integrity of the information in CRD. The training also provides additional guidance as arbitrators conduct expungement hearings, especially in cases involving settlement of a customer dispute. We urge arbitrators to review this updated training, particularly before conducting expungement hearings. Arbitrators may access this free training through [FINRA's Learning Management System](#) or download the PDF version from the [Written Materials for Arbitrator Training Courses Web page](#).

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