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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.

## The 20-Day Exchange: Identification of Expert Witnesses

By Ryan K. Bakhtiari and Greg Curley



**Rule 12514** of the Code of Arbitration Procedure for Customer Disputes requires parties, at least 20 days before the first hearing, to serve on each other copies of documents that they intend to present at the hearing and to identify witnesses they intend to call, including expert witnesses. FINRA staff sends the witness lists to the arbitrators to review prior to a hearing. FINRA asks arbitrators to look for any potential conflicts when reviewing names on the witness lists.

It has come to our attention that some expert witnesses have been designated as witnesses on a 20-day list when in fact they have not actually been retained. This practice has a number of potential adverse consequences. A phantom listing can lead to unnecessary arbitrator recusals. Such practice can also lead counsel to retain a rebuttal expert unnecessarily or perhaps to prepare for the examination of a witness that will never testify at the actual arbitration hearing. Phantom listings can also contribute to the miscalculation of the duration of the hearing and cause the scheduling of witnesses to be more burdensome and difficult than necessary.

The phantom designation of an expert witness in a FINRA arbitration compromises the integrity of the process. We remind parties that best practices dictate that a party only identify and designate expert witnesses that a party has retained. Arbitrators should be aware of this practice. FINRA has updated the [Initial Prehearing Conference Script](#) for arbitrators to remind parties to identify only those expert witnesses they have actually retained. FINRA has also updated the letter that notifies parties of the location of the hearing to remind them of best practices in connection with the designation of expert witnesses.

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### Comments, Feedback and Suggestions

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## Expedited Proceedings for Seniors and Seriously Ill Parties

*By Kelly Unger, Regional Manager, FINRA Office of Dispute Resolution's Northeast Regional Office*



FINRA provides expedited proceedings for senior and seriously ill parties. As soon as FINRA learns that a matter involves an elderly or seriously ill party, the case is flagged as an expedited case, and staff endeavors to complete the arbitrator selection process, schedule the Initial Prehearing Conference (IPHC) and serve the final award on an expedited basis.

FINRA recently formed a committee to examine its procedures to look for ways to process expedited cases more efficiently. Although staff cannot change the time requirements set forth in the Code of Arbitration Procedure, the committee identified several opportunities to shorten the processing time on expedited cases. As a first step, FINRA modified its internal reports to help staff identify expedited cases and get them on the expedited track. In addition, we put several procedural improvements in place.

The committee also created an Expedited Procedures Stipulation that staff sends to parties in expedited cases. The parties can agree to reduce the deadline to submit arbitrator ranking forms, waive the required 20-day notice of the IPHC, provide mutually agreeable hearing dates and direct FINRA to appoint arbitrators who are available on the parties' agreed hearing dates.

Staff will notify arbitrators when contacted to serve on a case whether the case is proceeding on an expedited track. To keep the case moving, arbitrators should let staff know as quickly as possible if they are available to serve. After appointment, arbitrators will receive a letter with the case packet that discusses the expedited procedures in more detail.

Arbitrators are expected to be sensitive to the needs of senior or seriously ill parties, and every effort should be made to expedite these cases particularly in the areas described below.

### Discovery Deadlines

Arbitrators should take all steps within their authority to help expedite the exchange of documents and the identification of witnesses. During the IPHC, the panel should establish a discovery cut off as close to the IPHC as possible. FINRA recommends that the panel set the deadline to file discovery motions no more than three months after the IPHC.

### Scheduling the Hearing

Arbitrators should schedule dates that will expedite the process but still provide a reasonable amount of time for case preparation. FINRA encourages parties and arbitrators to schedule the hearing within six months from the date of the IPHC. FINRA also recommends setting aside extra hearing dates to avoid unanticipated delays.

### Adjournments

When deciding adjournment requests, arbitrators should be mindful of the age and health of parties or key witnesses. In addition, arbitrators are expected to avoid causing postponements absent a genuine emergency.

### Direct Communication

Parties and arbitrators should consider agreeing to direct communication if all parties are represented by counsel.

### Decisions

As with all cases, arbitrators should return orders and decisions to FINRA as soon as possible, preferably by email or through the portal (on DR Portal cases). To facilitate prompt return, arbitrators can sign orders and awards electronically.

FINRA intends for these measures to speed the processing of cases involving senior or seriously ill parties, while maintaining procedural balance and fairness for all parties. Arbitrators should contact the case administrator with any questions about serving on an expedited case.

## All in the Details: Award Information Sheet

By Narielle Robinson, Analyst, FINRA Securities Helpline for Seniors\*



Pursuant to [FINRA Rule 12904](#), after an evidentiary hearing has concluded, arbitrators have 30 days to render an award. Rendering an award includes:

- post-hearing deliberations;
- the chairperson's completion and submission of the [Award Information Sheet](#) (AIS) to FINRA;
- staff preparation of the award with information from the AIS;
- panel review and execution of the award; and
- FINRA's service of the award on the parties, which happens simultaneously with case closure.

Arbitrators can help expedite the process by submitting a completed and detailed AIS and providing staff with all necessary clarifications immediately upon request.

The AIS contains questions to ensure that the panel has reviewed and considered all necessary items to render the award. Certain questions may have clear answers; however, some questions require more detailed responses. For example, granting attorneys' fees or punitive damages requires arbitrators to cite authority (provided by the parties) and provide a brief explanation. Arbitrators and staff must work closely to ensure that the award reflects all accurate and relevant information. The following suggestions provide guidance for common questions during the award stage.

### Damages

The AIS specifically asks if a party changed its final damage request at the hearing on the merits from the amount requested in the pleadings. If so, the panel must explicitly note any changes in the AIS.

### Award Offsets

If there is an award to both parties, the arbitrators should note whether amounts should be offset. Arbitrators should review the recent [rule filing](#) and refer to the article on this topic previously published in [The Neutral Corner - Volume 1—2013](#).

### Motions

If a party files a motion to dismiss, arbitrators should note whether the party made the filing before or after the conclusion of the non-moving party's case-in-chief. If the party filed the motion before the conclusion of the claimant's case-in-chief, the panel's decision to grant the motion must be unanimous and a brief written explanation must accompany any decision to grant the motion. If the party filed the motion after the claimant's case-in-chief, the majority decision prevails and no explanation is required.

If there were any motions pending prior to the hearing, the panel must address them with the parties and reflect its final resolution in the AIS.

### Expungement

[FINRA Rule 12805](#) requires the panel to indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement recommendation and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case. Therefore, arbitrators must specifically cite the ground and provide an explanation of its findings in the AIS.

The panel should note in the AIS all of the documents it reviewed when making its decision on expungement. This will include, among other things, the associated person's most recent BrokerCheck report and any settlement documents. The panel should specify whether the party seeking expungement contributed to the settlement and state that the panel considered the amount of payments made to any party in the settlement and any other terms and conditions of the settlement. Arbitrators should review [FINRA's Expanded Expungement Guidance](#) for the latest information about addressing expungement.

FINRA hopes these reminders will help arbitrators complete the AIS thoroughly and efficiently in order to render an award expeditiously. Arbitrators should feel free to contact the assigned case administrator if they require any additional information or need assistance in completing the AIS.

*\*Until recently, Narielle worked as a Case Assistant for FINRA Office of Dispute Resolution's Southeast Regional Office.*

## DR Portal Update

### Neutral Portal

As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

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

### Submitting Documents Through the Portal

***Please note that FINRA cannot retrieve documents through file-sharing sites such as Google Docs or Dropbox. Documents must be uploaded directly to the portal to ensure that FINRA receives them.***

FINRA is actively reaching out to arbitrators serving on portal cases to encourage them to register. Portal registration will be noted on the arbitrator disclosure report that parties review during arbitrator selection.

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## Dispute Resolution and FINRA News

### Case Filings and Trends



Arbitration [case filings](#) from January through May 2016 reflect a 20 percent increase compared to cases filed during the same five-month period in 2015 (from 1,243 cases in 2015 to 1,486 cases in 2016). Customer-initiated claims increased by 29 percent through May 2016 compared to cases filed in 2015 (from 811 cases in 2015 to 1,050 cases in 2016).

### Updated Dispute Resolution Statistics Page

FINRA has updated the Dispute Resolution Statistics page. The new page now includes an interactive map displaying all hearing locations, cases per hearing location and arbitrators per hearing location. In addition, FINRA has added new charts detailing the top 15 most common case filing controversy types and security types in customer and industry cases.

### Practising Law Institute's Securities Arbitration 2016: September 28, 2016

PLI's Securities Arbitration 2016 provides an opportunity to hear about the latest developments and hot topics directly from FINRA Office of Dispute Resolution leadership, arbitrators, noted academics and experienced attorneys who represent both customers and industry players. PLI's distinguished faculty will provide you with best practices from an arbitrator's perspective, tips for preparing for employment disputes and a practicum on the use of experts and crafting effective closings. In addition, attendees will take away a top-ten list of ethics issues practitioners should always keep in mind.

Please visit [PLI's website](#) for more information about the Securities Arbitration 2016 program.

If you have not registered 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.

### Arbitrator List Statistics

You may now review your list selection statistics in the portal. By selecting “view my Arbitrator List Statistics” from the left hand menu, you can see how often your name has appeared on arbitrator ranking lists sent to parties and how often you are ranked or struck on those lists.

### Updating Email Addresses in the Portal

FINRA has simplified email maintenance by removing the ability to store multiple email addresses in a neutral’s profile. Therefore, each neutral will have only one email address on file, which is the same email address used to register in the DR Portal. All other email addresses have been deleted.

FINRA staff cannot make any changes to a neutral’s email address after the neutral has registered in the portal. If you have already registered in the [portal](#) and need to update your email address, you must update

*continued*

## SEC Rule Filing

### Award Offsets in Arbitration

FINRA filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend [Rule 12904](#) of the Code of Arbitration Procedure for Customer Disputes and [Rule 13904](#) of the Code of Arbitration Procedure for Industry Disputes (Codes) to address award offsets in arbitration. Specifically, the proposal provides that, absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards would offset, and the party that owes the larger amount would pay the net difference. Please view rule proposal [SR-FINRA-2016-015](#) for more information.

## Rulemaking Items Approved at the May 2016 FINRA Board of Governors Meeting

### Broadening Chairperson Eligibility in Arbitration

The Board authorized filing with the SEC proposed amendments to [Rules 12400](#) and [13400](#) (Neutral List Selection System and Arbitrator Rosters) to revise the arbitration forum chairperson eligibility requirements. Specifically, an attorney arbitrator would be eligible for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration, instead of two arbitrations, administered by a self-regulatory organization in which hearings were held.

### Motions to Dismiss in Arbitration

The Board authorized filing with the SEC proposed amendments to [Rules 12504](#) and [13504](#) (Motions to Dismiss) to provide that arbitrators in its forum may act upon a motion to dismiss prior to the conclusion of a party’s case-in-chief if the arbitrators determine that the non-moving party previously brought the same dispute against the same party, and the dispute was fully and finally adjudicated on the merits.

it by logging into the [portal](#). From the homepage, select the “manage my account” link from the left-hand navigation panel. After you update your email address, press the “save” button and confirm that your data has been saved.

We strongly recommend that you use a personal email address rather than a work address. This will ensure that despite any changes in employment, your email address will remain current.

Please contact the Neutral Management department by [email](#) or by telephone (855-209-1620) if you have any questions. You may also review the [Frequently Asked Questions and User Guides](#) for any help with the portal.

### Panel Selection in Customer Cases with Three Arbitrators

The Board authorized filing with the SEC proposed amendments to [Rule 12403](#) (Cases with Three Arbitrators) to increase the number of public arbitrators on the list that FINRA sends parties during the panel selection process in customer cases. Specifically, FINRA would increase the number of public arbitrators on the list from 10 to 15. FINRA would also increase the number of strikes to the public list from four to six, to keep the proportion of strikes the same under the amended rule as it is under the current rule.

## Mediation Update

### Mediation Statistics



From January through May 2016, parties initiated 285 mediation cases, an increase of 43 percent compared to cases filed in 2015. FINRA closed 266 cases during this time. Approximately 73 percent of these cases concluded with successful settlements, and the average case turnaround time was 109 days.

### **FINRA Small Claims Mediation Program**

FINRA's [Small Claims Mediation Program](#) continues to offer parties in active arbitration cases free or low-cost telephone mediation for cases with initial claim amounts of \$50,000 or less. Claims of \$25,000 or less are eligible for mediation at no cost, while claims over \$25,000 through \$50,000 are eligible for mediation at a reduced fee of \$50 per hour (divided equally by the parties). FINRA collects no mediation filing fees for these cases.

Telephone mediation provides parties with convenience and flexibility. The program also offers seniors or those with difficulty traveling, the option to participate in a mediation without having to travel to an on-site meeting. To date, more than 90 percent of the cases that mediate through this program have reached a settlement. The settlement rate is higher than in mediations conducted through our regular program and emphasizes that mediations can be conducted telephonically with great success.

Not only do FINRA parties benefit from working with a qualified, experienced FINRA mediator, but FINRA mediators with fewer opportunities to mediate cases due to their geographic location, or who are new to the roster, increase their visibility with party representatives that mediate in our forum. If you are a FINRA mediator and want more information about this program, please email [SmallClaims@finra.org](mailto:SmallClaims@finra.org).

### **Mediator Tip: Keep It Current**

Keeping your mediator disclosure report current—including the number of times you have mediated cases, your success rate and types of cases mediated—matters to parties selecting a mediator. Mediators frequently update their mediator rate, present employment, disclosure/conflict information, current cancellation policy, but sometimes forget to describe their success as a mediator. For the quickest way to update your mediator report, use the [FINRA Dispute Resolution Portal](#).



## Question and Answer

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### Electronic Signatures

**Question:** I am about to upload the Oath of Arbitrator through the DR Portal. Do I need to sign the Oath before I upload it?

**Answer:** No, when you submit the Oath and other documents through the portal, you are using your unique and secure DR Portal account. Therefore, there is no need to physically sign the document by hand or to insert a digital signature or graphic image of your signature before you upload the document. You can simply type your name on the signature line by entering your first name, middle initial and last name, preceded by /s/: “/s/ Jane Q. Public.” After you save the document on your computer, you can upload it in the portal. For more information about submitting documents through the portal, please review the portal [FAQ](#) and [User Guide](#).

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## Arbitrator Disclosure Reminder

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As a reminder, arbitrators should review their disclosure reports regularly to ensure that all information is accurate and current. Even if arbitrators are not currently assigned to cases, their disclosure reports may be sent to parties in their hearing locations during arbitrator selection. Parties should have the most current and complete information about an arbitrator to make an informed decision when selecting arbitrators.

## Education and Training

### Spring 2016 Neutral Workshop—Practical Tips For Arbitrators From Arbitrators



FINRA's latest [Neutral Workshop video](#) features tips for arbitrators. In this workshop, Anna Lyons, Associate Director of the Office of Dispute Resolution's Southeast Regional Office, discusses best practice tips with FINRA arbitrators: Nancy Cliff, Steve Goerke and B.J. Krintzman. Based on their years of experience conducting FINRA arbitrations, the panelists provide guidance on how to conduct efficient initial prehearing conferences and successful hearings, discuss tips for working with co-panelists and share their experiences using the Dispute Resolution Portal.

### FINRA Regulatory Trainings

In addition to [arbitrator trainings](#), FINRA offers podcasts and webinars on timely regulatory and compliance topics. Please visit [FINRA's online learning page](#) for more information about these training opportunities.

## Arbitrator Tips

### Managing the Deliberation



After the hearing has concluded and the parties have left the room together, the arbitrators generally should commence the deliberation on the merits of the case. It is best to begin immediately because the panel has just heard the parties' summations, and the evidence is fresh in everyone's minds. While deliberating, the arbitrators should carefully listen to their co-panelists. Each panel member's observations and opinions should be heard, acknowledged and considered. The panel should work as a team and exchange ideas freely.

To help facilitate discussion, be sure to:

- present your views in turn;
- openly discuss your differences;
- do not judge other panel members' opinions; and
- use phrases such as, "please explain" or, "what evidence supports that idea?" when questioning other panelists.

The panel owes it to the parties, and to the arbitration process, to engage in full and fair discussions concerning the issues raised by the parties and to ensure that every panel member's opinions are heard and considered in the deliberation.

### Turn the Recorder *Off* During Executive Sessions and Deliberations

FINRA cannot emphasize enough the importance of turning off the recorder during executive sessions and deliberations. Like the importance given to turning on the recorder to ensure that the proceedings are recorded pursuant to the Code of Arbitration Procedure, turning off the recorder during executive sessions and deliberations is equally important.

During these private conversations, arbitrators generally feel free to speak openly about the merits of the case with their co-panelists knowing that the parties are out of the room, and their conversations will not be recorded. This is exactly what should happen. Unfortunately, if arbitrators forget to turn the recorder off, their candid conversations will be recorded.

Consequently, if parties request copies of the recordings to review the testimony or prepare for a possible challenge to the award, they will not only receive the hearing record but also the arbitrators' private conversations. If the deliberation is recorded, parties might use this information in support of a motion to vacate.

Recording these private sessions has the potential to weaken the finality of an arbitration award. Further, it reveals the workings of the deliberative process that should remain private, so that arbitrators can talk freely and exchange ideas. To avoid these unintended consequences, arbitrators should always make sure that the recorder is turned off before engaging in executive sessions, deliberations or any off-the-record conversations. Arbitrators should also consider leaving the hearing room to deliberate in a secure location outside the range of the recorder.

The recorder shows a red light when it is on and recording. Be sure to look for the red light and confirm that it is **off** before starting a private conversation with your co-panelists. For further guidance, please review the article, Properly Recording the Arbitration Hearing previously published in [Volume 2, 2012 of The Neutral Corner](#).

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