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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.

## Subpoenas and Orders of Appearance and Production

By Barry Temkin and Kate DiGeronimo\*



### Introduction

Two commonly used third-party discovery mechanisms available to parties in FINRA arbitrations are the subpoena and the order of production. While the functional purpose of these tools is the same and the procedure to obtain them is similar, they derive their power from different rules. Their utility depends upon the relationship between FINRA and the third party from whom discovery is sought. Understanding the differences is crucial. Using the wrong device may increase costs and lead to a procedural quagmire. This article addresses the differences between arbitrator-issued subpoenas and orders of production, and explains the circumstances in which a party should use each device.

### Orders of Production Under Rules 12513 and 13513

The order of production is unique to FINRA arbitrations. Authority for an arbitrator's ability to issue an order of production is found in [Rule 12513](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and [Rule 13513](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code). An order of production is the discovery mechanism that a party uses to obtain relevant testimony and documents from nonparty FINRA associated persons and firms. FINRA has jurisdiction over those individuals and entities and has the power to compel associated persons and employees of firms to testify or produce documents in arbitrations before FINRA.

An associated person or firm served with an order of production must comply at risk of incurring sanctions or disciplinary action. There are no geographical limitations to the arbitrator's authority to compel an associated person or a firm to provide documents or testimony. However, the requesting party must reimburse the responding nonparty for the reasonable costs of the appearance or production unless the panel directs otherwise.

### We Want to Hear From You

*The Neutral Corner* strives to provide useful and timely information to FINRA arbitrators as they serve in our forum. To ensure we are responsive to what you want to see in this publication, we invite you to share your suggestions and comments. Please feel free to suggest training topics and ways we can improve this publication. Please submit your suggestions to [Neutral Management](#). We look forward to hearing from you.

Although an order of production serves the same functional purpose as a subpoena, it cannot be applied to a non-registrant. The arbitrator's power to issue the order is derived solely from FINRA's authority over the persons and entities it regulates. FINRA is unable to enforce an order of production against an unaffiliated third party, and courts will not enforce an order of production because it is not a judicial order or subpoena.

FINRA Rules 12513 and 13513 govern the "Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas." According to Rules 12513 and 13513, a party requesting the order of production must file a motion with FINRA requesting an order directing "the appearance of any employee or associated person of a member of FINRA or the production of any documents in the possession or control of such persons or members." The motion must include a draft order of production for the arbitrator's signature, and be served upon all parties. The other parties to the arbitration are given 10 days to file an opposition to the request, and then the moving party is given five days to file its reply. If the arbitrator(s) decides to issue the order of production, FINRA will transmit the signed order of production to the moving party to serve on the third party. The recipient of the order of production is then given 10 days to file its own objections to the order of production.

### Subpoenas Under Rules 12512 and 13512

Unlike orders of production, subpoenas are not unique to FINRA arbitration. They are a common mechanism for third-party discovery used throughout U.S. courts and arbitration. A subpoena is a judicial order that directs a nonparty to provide discovery in a legal proceeding. Although the law governing the validity and enforcement of subpoenas issued by arbitration panels is far from settled and beyond the scope of this article, there are federal and state statutes that may authorize courts to enforce a subpoena issued by a FINRA arbitrator to a third party.

For example, New York Civil Practice Law and Rules Section 7505 permits New York courts to enforce arbitrator-issued subpoenas directing a nonparty to testify and produce documents at the final hearing of an arbitration. Likewise, the Federal Arbitration Act provides federal courts with the authority to enforce some subpoenas issued by arbitration panels, though what kind of subpoena and to what extent it will be enforced is

subject to the laws of the particular jurisdiction in which the arbitration is venued and the third party resides. These laws often contain geographical limitations on the authority to compel compliance from a third party and require the requesting party to reimburse the nonparty for the costs of complying with the subpoena.

FINRA provides parties with a procedure to obtain a subpoena from the arbitration panel, which is similar to that of obtaining an order of production. The party requesting the subpoena must make its request in the form of a motion to the panel, which should include a draft subpoena. The motion must be served upon all parties, who are then given 10 days to oppose the request, which is followed by a five-day period for the moving party to file a reply. If the arbitrator issues the subpoena, FINRA will transmit the signed subpoena to the moving party to serve on the nonparty in accordance with the rules for service of subpoenas in the applicable jurisdiction. FINRA provides the nonparty 10 days to object to the subpoena, although the nonparty may also choose to file a motion to quash the subpoena in court. If the nonparty ignores the subpoena, the moving party can seek to have the subpoena enforced in a court. FINRA rules provide that the party requesting the subpoena must pay the nonparty for the reasonable costs of complying with the subpoena, unless the panel directs otherwise.

### **Practical Considerations When Seeking Non-party Discovery**

Parties in FINRA arbitration who seek discovery from a third party should first consider whether that third party is subject to FINRA's jurisdiction. If the third party is an associated person or firm, parties should seek discovery using an order of production under Rules 12513 or 13513. Under those circumstances, FINRA has the ability to enforce compliance with the order of production through its regulatory powers, obviating any need for judicial intervention to secure compliance. Although it is possible to obtain a subpoena directed at an associated person or firm, FINRA rules explicitly direct parties and arbitrators to use an order of production unless there are unusual circumstances dictating the need for a subpoena.

If the third party is not subject to FINRA's jurisdiction then the only procedural option available is to move the panel to issue a subpoena under Rule 12512 or 13512. Prior to requesting a subpoena, the party should ascertain whether it will be able to obtain court enforcement of the arbitrator-issued subpoena. As mentioned, the law regarding enforceability of arbitrator-issued subpoenas varies among jurisdictions. For example, although the federal courts of the Sixth and Eighth Circuits interpret the Federal Arbitration Act as authorizing courts to enforce arbitrator-issued subpoenas directing the production of documents prior to a final hearing, the federal courts of the Fourth Circuit will enforce such subpoenas only if the requesting party can demonstrate a "special need" for the discovery, while the courts of the Second and Third Circuits will not enforce arbitrator-issued subpoenas for prehearing document production. State law may also provide a basis for enforcing subpoenas issued by an arbitration panel, as is the case in New York and Ohio where there are state statutes authorizing some forms of arbitrator-issued subpoenas. However, every state has its own rules governing the enforceability of arbitrator-issued subpoenas.

### Conclusion

Whenever possible, parties should use an order of production to obtain discovery from a third party because it is the easiest and most cost effective way to do so. When a party cannot avail itself of an order of production, it should proceed with caution and consider the practicalities of enforcement prior to requesting an arbitrator-issued subpoena. There may be less costly, non-judicial means available to the party to obtain the sought-after information such as determining whether another document or documents can provide the same information, or whether an associated person or firm has the same information. If a party requests a subpoena from the panel, it should be careful to make its request pursuant to the correct FINRA rule to ensure proper judicial enforcement, and also consult the law of the local jurisdiction to ascertain the enforceability of an arbitration subpoena.

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## Award Information Sheet

Arbitrators should use the most current version of the Award Information Sheet when preparing an award at the end of a hearing. This ensures that arbitrators provide all required information to FINRA to be included in the award. The most updated version is always available on our [website](#). Arbitrators should contact their case administrator with any questions about completing the Award Information Sheet.

## Office of Dispute Resolution and FINRA News

### Case Filings and Trends



[Arbitration case filings](#) from January through August 2017 reflect a nine percent decrease compared to cases filed during the same eight-month period in 2016 (from 2,507 cases in 2016 to 2,286 cases in 2017). Customer-initiated claims decreased by 14 percent through August 2017, as compared to the same time period in 2016.

### Expanded Statistics

To increase forum transparency, FINRA updated its website to include archives of the last five years of year-end arbitration and mediation statistics. Website visitors can now access year-end statistics for 2012 – 2016 on FINRA's statistics page. FINRA will keep these figures updated so that the last five years of statistics are always available online.

### Notice on Expanded Expungement Guidance

FINRA has updated the [Notice to Arbitrators and Parties on Expanded Expungement Guidance](#) regarding requests for expungement prior to the conclusion of an underlying arbitration. A broker may not file a request for expungement of customer dispute information arising from an underlying customer arbitration until the underlying customer arbitration has concluded. To ensure that the underlying customer arbitration is resolved before any subsequent request to expunge customer dispute information is considered, the Director will deny the forum as to the second expungement-only case.

### Accommodations for Hearings Scheduled in Puerto Rico

FINRA Office of Dispute Resolution is administratively staying all cases venued in Puerto Rico **until October 20, 2017**. This includes canceling all hearings, conference calls and deadlines scheduled during this time. FINRA will begin the process of rescheduling any impacted hearings and prehearings as soon as reasonably practicable, once the stay is lifted.

Notwithstanding the foregoing, if parties mutually agree otherwise, they should communicate that agreement to FINRA at their earliest convenience.

Cases not venued in Puerto Rico may also be affected by the events in Puerto Rico. For example, parties, witnesses or records necessary to a case may be located in Puerto Rico and may be unavailable. In such an instance, the parties may agree to stay the case. If such an agreement is reached, the parties should notify FINRA in writing at their earliest convenience. FINRA will then alert the panel in the affected case of the agreed upon stay.

FINRA will continue to monitor the situation in Puerto Rico and will make any necessary adjustments to the foregoing as conditions warrant.

## **ADTRAV: FINRA’s New Travel Service**

When traveling to a hearing location more than 75 miles from their primary address, arbitrators now have the option to book airfare and hotel accommodations through ADTRAV—FINRA’s corporate travel provider. Arranging travel through ADTRAV offers benefits for FINRA and arbitrators alike:

- Airline tickets can be billed directly to FINRA, reducing out-of-pocket expenses for which arbitrators will need to seek reimbursement.
- FINRA can prepay hotel room fees and taxes at the designated hotel, further reducing the amount of out-of-pocket expenses charged to an arbitrator’s personal card. (A personal credit card is required at check-in to cover all other items, such as meals and incidentals.)
- ADTRAV can track travel, notify an arbitrator of changes or delays and revise itineraries if needed.
- ADTRAV provides a dedicated toll-free number for all FINRA-related travel needs.
- Agents can book travel with an arbitrator’s preferred carriers.
- Arbitrators may still earn airline/rail reward points.
- A 24-hour emergency call service is available.

Learn more about this new option, and how to contact ADTRAV, in a new video, [Using ADTRAV for Travel](#). The page also includes frequently asked questions and Guidelines for Arbitrator Reimbursement.

## DR Portal Enhancements

### New Online Portal Oath of Arbitrator and Arbitrator Disclosure Checklist

Arbitrators can now submit the Oath of Arbitrator and Arbitrator Disclosure Checklist to FINRA directly through the DR Portal. By doing so, all Portal-registered parties and arbitrators on the case will receive a copy of the Oath and Disclosure Checklist electronically via the Portal. Additionally:

- the new Oath and Disclosure Checklist are broken down by section (*e.g.*, subject matter disclosures, personal disclosures), providing a quick overview;
- arbitrators can save a draft and return to it later;
- the system alerts arbitrators if information is missing before submitting the Oath and Disclosure Checklist; and
- a copy of the Oath and Disclosure Checklist is saved in the Portal for review.

Arbitrators can submit an electronic Oath and Disclosure Checklist using the Portal by going to the Drafts & Submissions tab of the case and selecting “Oath of Arbitrator” as the submission type. Arbitrators with questions about using the new Portal Oath and Disclosure Checklist can contact FINRA staff for assistance at (800) 700-7065.

### Last Affirmation Date on Arbitrator Disclosure Report

FINRA enhanced arbitrator disclosure reports by publishing the date that arbitrators last affirmed the accuracy of their disclosure reports. The affirmation date appears prominently at the top of the disclosure report that parties review when selecting arbitrators. Parties may consider the last affirmation date as a factor when they choose arbitrators, so it is important for arbitrators to regularly review their disclosures on the DR Portal.

Arbitrators can affirm the accuracy of their disclosures in two ways:

- submitting an update through the DR Portal; or
- submitting an Oath of Arbitrator when assigned to a case.

Even if there are no changes, arbitrators can affirm the information and update their affirmation date by submitting an update through the DR Portal. If arbitrators send new information to FINRA outside of those two methods (*e.g.*, email, fax, telephone), the update will not trigger a new affirmation date.

### New Password Requirement

As part of the enhancements, password requirements have changed. Strengthening the requirements provides a more secure portal and helps FINRA better protect arbitrator information.

New requirements and features:

- Auto Unlock—accounts will lock after five incorrect password attempts within 24 hours. Accounts will now be automatically unlocked after a waiting period of one hour. Accounts can be unlocked sooner if users contact the FINRA Call Center (301-590-6500).
- Length—character minimum is now 10 characters, up from eight characters. The maximum character length is 32.
- Special Characters—all special characters are now acceptable. Previously, “&,” spaces, “\*” and “%” were prohibited.
- Common Words—to prevent the use of guessable passwords, some common words are now prohibited.
- Reusing passwords—the past 10 passwords cannot be reused, up from seven passwords.

### Requirements that remain the same

- Password complexity—remains the same, requiring at least one:
  - lower case character;
  - upper case character; and
  - special or numeric character (*i.e.*, non-alphabetic).
- Password expiration—passwords expire after one year and must be reset.
- Current security question lockout—accounts will lock after five incorrect attempts to answer security challenge questions. The lockout will remain in effect until users contact the FINRA Call Center (301-590-6500).



## Portal Reminder

We strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

- viewing and updating profile information;
- viewing and printing the disclosure report;
- accessing information about assigned cases, including upcoming hearings and payment information;
- scheduling hearings;
- viewing case documents;
- filing case documents like the new electronic Oath and Checklist;
- reviewing list selection statistics to see how often an arbitrator's name has appeared on arbitrator ranking lists sent to parties and how often an arbitrator has been ranked or struck on those lists; and
- updating the last affirmation date.

FINRA encourages all arbitrators to register. Portal registration will be noted on the arbitrator disclosure report that parties review when selecting arbitrators. Registering in the portal is more important than ever. In April 2017, use of the portal became mandatory for all parties (except for *pro se* investors).

## Demographic Survey

In October, we will once again conduct a demographic survey of the neutral roster. As in previous years, the survey will be administered by a third-party consultant, Alight (formerly part of Aon Hewitt). Participation in the survey is voluntary and all responses will be confidential.

FINRA has embarked on a [campaign](#) to recruit individuals from varied backgrounds to serve as arbitrators. The data received from this annual survey helps us track our progress in enhancing the diversity of the roster and helps to inform future recruitment events. We are not attempting to assess the quality of the roster or rulings or awards made by arbitrators.

The results of the 2015 and 2016 demographic surveys are now published on our [website](#). Thank you to those who participated in the survey.

Please look out for an email from Alight in October with instructions to complete the survey.

## Ninth Annual Securities Dispute Resolution Triathlon

The Ninth Annual Securities Dispute Resolution Triathlon (DR Triathlon) will take place October 14-15, 2017, at the St. John's University School of Law, Manhattan Campus. The DR 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 invites local FINRA neutrals to serve as judges, mediators and arbitrators. Note that all FINRA arbitrators and mediators are eligible to serve as judges in any round. Judges for the negotiation and mediation rounds observe students and score their performances. We use only experienced mediators to mediate during that round of the competition. For the arbitration round, the three arbitrators will also submit scores as judges. Please complete the participation form on FINRA's website to be considered to serve as a judge or neutral for the competition.

## SEC Approvals

### Expedited List Selection in Arbitration

The Securities and Exchange Commission (SEC) approved a proposed change to amend Rules [12402](#) and [12403](#) of the Customer Code and Rule 13403 of the Industry Code to provide that the Director of FINRA's Office of Dispute Resolution will send the list or lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due. The lists will be sent within this time, regardless of the parties' agreement to extend any answer due date.

The amendments became effective for cases filed on or after on September 18, 2017. Please view [Regulatory Notice 17-25](#) for more information.

### Amendments to the Non-Public Arbitrator Definition

The SEC approved a rule change to revise the non-public arbitrator definition. Specifically, the proposal amended [Rule 12100](#) of the Customer Code and [Rule 13100](#) of the Industry Code, to define a non-public arbitrator as someone who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under the Codes.

The amendments will become effective October 9, 2017. Arbitrators who are currently ineligible because they no longer qualify as a public arbitrator under the previous definition may contact [FINRA](#) if they are interested in becoming active again on the roster. Please view [SR-FINRA-2017-025](#) for more information.

## Rulemaking Items Discussed at the FINRA Board of Governors July 2017 Meeting

### Unpaid Arbitration Awards

At its July meeting, [FINRA's Board of Governors](#) authorized FINRA to publish a *Regulatory Notice* soliciting comment on proposed amendments to FINRA's Membership Application Program rules to provide FINRA staff with rule-based authority to presumptively deny a new membership application if the applicant or its associated persons are subject to pending arbitration claims.

In addition, the proposed amendments would require a member firm to seek a materiality consultation with FINRA if the member is not otherwise required to file a continuing membership application and the member is seeking to effect a business expansion or asset transfer and the member or an associated person has a substantial level of pending arbitration claims, an unpaid arbitration award or an unpaid settlement related to an arbitration. The proposal would provide that the safe harbor in IM-1011-1 for business expansions would not be available for any member under these circumstances. FINRA staff would review the submission and determine whether the member is required to file a continuing membership application in accordance with Rule 1017.

## Mediation Update

### Mediation Statistics



From January through August 2017, parties initiated 424 [mediation cases](#), an increase of five percent for the same period in 2016. FINRA also closed 499 cases during this time. Approximately 83 percent of these cases concluded with successful settlements.

### 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.

### Discontinuation of Mediator Annual Fee

We remind FINRA mediators that the Office of Dispute Resolution discontinued the annual \$200 fee requirement. This is a good opportunity for mediators, who are unavailable because of non-payment, to become active again. Interested mediators should send an email to [mediate@finra.org](mailto:mediate@finra.org).

### Mediation Program for Small Arbitration Claims

The [telephonic mediation program](#) remains available to parties in active arbitration cases with claims of \$50,000 or less.

The program offers free or low cost mediation (depending on the claim amount) with a FINRA mediator. It provides parties, many who find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute. Parties and mediators report satisfaction with the process, and the settlement rate for cases in the program has averaged 80 percent, which is consistent with the settlement rate for all cases over the lifetime of FINRA's Mediation Program.



## Questions and Answers

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### Independent Research

**Question** Are arbitrators permitted to conduct independent research?

**Answer** No. Arbitrators should not conduct independent factual investigations or research when serving on a case. If arbitrators are in doubt about an issue, legal or otherwise, they should request briefs from the parties. If cases are cited in a party's motion or brief, and the arbitrators wish to read the full court opinions, arbitrators should ask the parties to provide copies. Generally, arbitrators should review only those materials presented by the parties.

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### Jurisdiction Over Terminated Members and Associated Persons

**Question** Does FINRA have jurisdiction over terminated members and associated persons in arbitration cases?

**Answer** Yes. Terminated members and associated persons are subject to FINRA's arbitration jurisdiction regardless of the number of years since the termination of their FINRA registration or membership. This is in contrast to the two-year jurisdictional limit for terminated members and associated persons in FINRA's disciplinary proceedings.

However, terminated members are prohibited from enforcing predispute arbitration agreements with its customers to arbitrate at FINRA, unless the customers agree in writing to do so after the claim has arisen. Therefore, a claimant may, but is not required to, arbitrate the claim involving a terminated member or associated person in FINRA's arbitration forum. See [Rule 12202](#) of the Customer Code. If the customer elects to proceed in arbitration, FINRA retains jurisdiction over such terminated member.

[Rules 12100](#) and [13100](#) provide definitions of a "member" and a "person associated with a member."

- **Member:** For purposes of the Code, the term "member" means any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled; and any broker or

dealer admitted to membership in a self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of FINRA for purposes of the Code, whether or not the membership has been terminated or cancelled.

- **Person Associated With a Member:** For purposes of the Code, a person formerly associated with a member is a person associated with a member.

## Arbitrator Disclosure Reminder



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. Arbitrators should log into the [DR Portal](#) to update their disclosure reports.

In September, FINRA enhanced arbitrator disclosure reports by publishing the date arbitrators last affirmed the accuracy of their disclosure reports. Arbitrators can affirm the accuracy of their disclosure reports and refresh the affirmation date by submitting an update through the DR Portal.

The affirmation date appears prominently at the top of the disclosure report that parties review during the arbitrator selection process. Parties may consider the last affirmation date as a factor when choosing arbitrators. Therefore, arbitrators are encouraged to review and affirm regularly the accuracy of their disclosure reports using the DR Portal. Even if there are no changes, arbitrators can affirm the information and update the affirmation date on their disclosure reports by submitting an update through the DR Portal.

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