

What's Inside

Office of Dispute Resolution and FINRA News	4
Mediation Update	7
Questions and Answers	9
Education and Training	12
Arbitrator Tips	13
Arbitrator Disclosure Reminder	14

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.

Developing an Effective Med-Arb/Arb-Med Process

**By Edna Sussman*



In its final report, the [FINRA Dispute Resolution Task Force](#) recommended the use of alternatives to mediation such as combinations of arbitration and mediation where the parties agree to use it. This article defines these hybrid approaches—Med-Arb and Arb-Med—and provides practice techniques for using them effectively.

Developing an Effective Med-Arb/Arb-Med Process

As parties search for more expeditious and less costly means to resolve their disputes, attention is increasingly being paid to hybrid processes. These combined processes are not new. Arbitrators attempting to settle cases (arb-med) and mediators serving as arbitrators if settlement is not achieved (med-arb) have been used for many years.

Parties may be hesitant to try a hybrid process because of concerns related to confidentiality when the same neutral serves as both arbitrator and mediator. First, it is generally accepted that confidentiality is an essential element to a successful mediation as parties reveal their true interests and perspectives on the dispute. If the parties know that the mediator will serve as the arbitrator if the mediation fails, they may not confide in the mediator and instead try to “spin” the would-be arbitrator to achieve a better result in the arbitration. Second, there is concern that the mediator-arbitrator will be privy to confidential information from private caucus sessions. Because the opposing party will not know what was said, the party will not have the opportunity to rebut the information in the arbitration phase. Some practitioners argue that these concerns are insurmountable and that a hybrid of mediation and arbitration jeopardizes both processes. However, these issues can be overcome.

Combinations and Permutations of Hybrid Processes

The mediation and arbitration processes have been combined in a variety of ways. These include:

- **Med-arb:** if an impasse is reached, the mediator serves as the arbitrator.
- **Arb-med or arb-med-arb:** the appointed arbitrator attempts to mediate (or conciliate) the case but returns to his or her role as arbitrator if mediation is unsuccessful.
- **Co-med-arb:** the mediator and the arbitrator hear the parties' presentations together, but the mediator tries to settle the dispute without the arbitrator. The arbitrator is called back only to enter a consent award or to serve as an arbitrator if the mediation fails.
- **MEDALOA (Mediation and Last Offer Arbitration):** if the mediation fails, each party presents a proposed ruling, and the mediator-now-arbitrator must decide between the two, similar to baseball arbitration.

Techniques to Avoid Confidentiality Concerns

There are several techniques to avoid potential problems of using the same neutral in med-arb and arb-med:

- Conduct the mediation without caucus sessions. This assures that all parties are aware of the information presented to the neutral with a full opportunity to respond.
- The arbitrator can complete the award following the hearing and keep it sealed and confidential pending the mediation.
- Two party-appointed arbitrators can co-mediate the dispute without the chair. The chair would then be available for the arbitration if the parties do not reach settlement, untainted by confidential communications.
- Parties can choose a separate arbitrator and mediator.

These and other process refinements can ameliorate the challenges of combining arbitration and mediation.

Do You Have the Right Neutral?

Arbitration and mediation are two very different processes. Arbitrators are charged with managing the proceeding efficiently, providing a fair opportunity to each side to present its case and analyzing the facts and the law based on the evidence to render an award. Mediators are charged with working with the parties to uncover the parties' interests, understand their relationship and their motivations, explore the strengths and weaknesses of their respective positions, assist in developing workable solutions and help parties overcome psychological barriers to settlement. The mediator's role requires skills of a psychologist, while the arbitrator's role requires skills of a judge.

Trainings for each discipline focus on different aspects of the dispute resolution process. For example, arbitration training instructs arbitrators on how to manage the prehearings and hearings efficiently, while mediation training focuses on overcoming impasse. Mediators and arbitrators use different approaches and tools in each role. Not every arbitrator is qualified to be a good mediator and vice versa.

In selecting a neutral, it is not only important to consider the qualifications of the neutral. Equally important is the selection of a neutral with a reputation for integrity that the parties trust and respect to handle the challenges of combining the roles of arbitrator and mediator.

Conclusion

Combining mediation and arbitration in a hybrid process with the same neutral can be an effective mechanism for reducing costs, increasing efficiency and maximizing the possibility of achieving the best resolution for all parties.

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

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Office of Dispute Resolution and FINRA News

Case Filings and Trends



[Arbitration case filings](#) from January through May 2018 reflect a 40 percent increase compared to cases filed during the same five-month period in 2017 (from 1,365 cases in 2017 to 1,908 cases in 2018). Customer-initiated claims increased by 32 percent through May 2018, as compared to the same time period in 2017.

Portal Reminder

We strongly encourage arbitrators and mediators to register with the DR Portal. The portal allows users to:

- file case documents like the electronic Oath of Arbitrator and Disclosure Checklist;
- access information about assigned cases, including case documents, upcoming hearings and payment information;
- schedule hearings;
- update profile information;
- view and print the disclosure report;
- update the last affirmation date; and
- review 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.

Portal registration will be noted on the disclosure reports that parties review when selecting arbitrators and mediators. Use of the portal became mandatory for all parties (except for *pro se* investors) in April 2017. Although the portal is not mandatory yet for arbitrators, we encourage arbitrators to register and take advantage of the benefits of the portal.

Practising Law Institute's (PLI) Securities Arbitration 2018: September 26, 2018

PLI's Securities Arbitration 2018 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 parties. PLI's

distinguished faculty will provide practical tips on using experts and managing discovery. The faculty will explore technology, security and ethical challenges in arbitration and mediation, and will also discuss diversity, inclusion and the elimination of bias in the forum. Finally, the faculty will look at trends in securities arbitration for 2018.

The program will be presented live in New York City on September 26 at 9 a.m. Eastern Time. It will also be available simultaneously via webcast, which can be accessed remotely. A recorded version may be viewed later. CLE credit is available.

FINRA arbitrators and mediators will receive a 25 percent discount off the regular registration fee. Please [use this link to PLI's website](#), which contains the special pricing, for more information about the program.

SEC Rule Approval

Special Proceeding for Simplified Arbitration

On May 17, 2018, the Securities and Exchange Commission (SEC) approved a rule amendment to create an intermediate form of adjudication for small claims. The proposal amends [Rules 12600](#) and [12800](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and [Rules 13600](#) and [13800](#) of the Code of Arbitration Procedure for Industry Disputes (Industry Code), to provide parties with claims of \$50,000 or less an opportunity to argue their cases before a single arbitrator in a shorter, limited telephonic hearing format.

There will be two options for hearings. Option One will follow the regular provisions of the Codes relating to prehearings and hearings, including all fee provisions. If parties choose Option One, they will continue to have in-person hearings without time limits, and they will continue to be permitted to question opposing parties' witnesses.

Option Two will be the new Special Proceeding subject to the regular provisions of the Code relating to prehearings and hearings, including fee provisions, with several differences:

- An arbitrator will hear the case by telephone conference call unless all parties agree as to another method of appearance;
- Claimants, collectively, and respondents, collectively, each have two hours to present their cases and one-half hour for rebuttal and closing statements;

- Arbitrators will have up to three hours to ask questions.
- The hearing will be completed in one day with no more than two hearing sessions;
- Parties may not question an opposing parties' witnesses;
- Parties may not call an opposing party as a witness.

The *Regulatory Notice* will be posted shortly, and the rule will become effective on September 17, 2018, for cases filed on or after that date. We will provide additional arbitrator training regarding the Special Proceeding hearing option.

SEC Rule Filing

Late Cancellation Fee for Prehearing Conferences

FINRA filed a proposed rule change with the SEC to amend FINRA [Rules 12500](#) and [12501](#) of the Customer Code and FINRA [Rules 13500](#) and [13501](#) of the Industry Code, to charge a \$100 per-arbitrator fee to parties who request cancellation of a prehearing conference within three business days before a scheduled prehearing conference. The proposed rule change would also amend FINRA [Rules 12214\(a\)](#) and [13214\(a\)](#) of the Codes to create a \$100 honorarium to pay each arbitrator scheduled to attend a prehearing conference that was cancelled within three business days of the prehearing conference.

The comment period ended June 8, 2018. Please review [SR-FINRA-2018-019](#) for more information about this rule filing.

Mediation Update

Mediation Statistics



From January through May 2018, parties initiated 228 [mediation cases](#), a decrease of 23 percent for the same period in 2017. FINRA also closed 290 cases during this time.

Approximately 76 percent of these cases concluded with successful settlements.

Mediation Settlement Month

Due to popular demand, this year's [Mediation Settlement Month](#) promotion will be extended. Parties can take advantage of special rates for mediation services from September 15, 2018, through November 15, 2018.

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. We are looking forward to your participation.

The following special rates will apply during Mediation Settlement Month

Amount of Claim	Length of Mediation	Mediation Session Fee Paid to Mediator*
\$25,000 and under	4 hours	\$200
\$25,000.01 – \$100,000	4 hours	\$400
Over \$100,000	8 hours	\$1,000

Here are some additional guidelines for participating in Mediation Settlement Month:

- Parties can mediate telephonically or in-person.
- Unspecified claim amounts will be assessed at the \$25,000.01 – \$100,000 mediation session bracket.
- Parties pay mediators at their regular hourly rates for any time spent beyond the above listed hours.*

Mediation Program for Small Arbitration Claims

The [telephonic mediation program](#) is 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 have been pleased with the process. 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.

Become a FINRA Mediator

Do you have mediator experience? Consider joining the FINRA mediator roster. Please email the [mediation department](#) for more information.



Questions and Answers

Stipulated Awards

Question The parties reached a settlement with the firm agreeing to make a monetary payment to the claimant. The parties have asked the arbitrators to sign a stipulated award that reflects their settlement. Why do parties request that arbitrators issue stipulated awards?

Answer A stipulated award reflects the parties' agreement to settle the case. There is nothing for the arbitrators to decide. A stipulated award imports the parties' settlement into an award. A party can ask a court to convert the stipulated award into a judgment and pursue collection, if necessary. Stipulated awards must include the relief requested and the amount awarded and otherwise comply with [Rules 12904](#) and [13904](#) of the Codes. FINRA will make a copy of the stipulated award publicly available on [Arbitration Awards Online](#).

Discovery Delays

Question What can arbitrators do to mitigate discovery delays during arbitration?

Answer Discovery delays can derail an arbitration. To keep discovery on track, arbitrators can set a briefing schedule at the outset. During the initial prehearing conference, the panel should set a schedule with specific deadlines to complete discovery. The schedule should allow enough time for parties to submit responses and to schedule a prehearing conference with the chairperson if necessary. If an order on a discovery motion requires additional action by the parties, make sure they have enough time to comply before the hearing. The schedule should also include a status conference, in case the parties need to confer with the panel to resolve outstanding discovery issues. This will help the case stay on schedule and avoid delays.

Arbitrator Disclosure Report (ADR) Review

Question I recently received an email from FINRA’s department of Neutral Management with several disclosure-related questions. Why is FINRA reviewing my disclosure report? Do I need to answer the questions?

Answer To provide current information to parties and to minimize the likelihood of future motions to vacate, FINRA proactively reviews arbitrators’ disclosure reports (ADR) and conducts internet searches. We review Google, publicly available information in databases such as Lexis and state and federal court sites to ensure that required information has been disclosed on the ADR. For arbitrators who have CRD records, we compare the information in CRD against the ADR.

Based on our findings, we will send an email to the arbitrator to verify the information. We understand that the initial email can seem overwhelming. We ask lots of questions, many of which may be related to events that have occurred years ago. However, it is important to respond to each question, even if you cannot remember specific details. We appreciate your patience and willingness to help us ensure the integrity of arbitrator records and maintain the quality of the forum. Please contact [Neutral Management](#) if you have any questions.

Mock Arbitrations

Question I was recently asked to serve as an arbitrator in a mock arbitration organized by a large law firm that frequently practices in FINRA’s forum. Can I participate in this mock arbitration?

Answer Arbitrators can participate in mock arbitrations. However, if arbitrators choose to participate in mock arbitrations, they must disclose information about their participation immediately and thoroughly, so potential parties are aware of this activity during arbitrator selection. Arbitrators should disclose as much information as possible about the mock arbitration, including but not limited to:

- the names of the law firms, litigation preparation companies and/or brokerage firms involved;
- the causes of action raised;
- any procedural and substantive issues considered; and
- any products involved.

If arbitrators are appointed to an arbitration case involving similar issues addressed in the mock arbitration, they should restate the details of the mock arbitration to the parties on the Oath of Arbitrator and Checklist and during the initial prehearing conference.

LinkedIn and Twitter Accounts

Question I have outdated LinkedIn and Twitter accounts. Do I need to disclose these accounts on my arbitrator disclosure report?

Answer Even if you no longer use the accounts or have never posted information on them, you should disclose them. FINRA wants to be as transparent as possible about arbitrator disclosures, especially information that is publicly available like social media accounts. We want to alert parties upfront of any information available about arbitrators and let them determine whether they think it might affect an arbitrator's ability to serve impartially.

In addition to LinkedIn and Twitter, arbitrators should disclose any other social media accounts.

Education and Training

DR Portal How-to Videos



If you need assistance updating your profile or submitting the Oath of Arbitrator in the DR Portal, the new [how-to videos](#) are here to help. These videos are quick tutorials for arbitrators on navigating to the Update Form and the Oath of Arbitrator. They also include information on how to disable pop-up blockers in different internet browsers. We will add new videos as needed. Please contact the [Neutral Management department](#) with any questions about accessing the [DR Portal](#).

Arbitrator Tips

Revised Initial Prehearing Conference Script—Service of Subpoenas and Arbitrator Orders on Non-Parties



Parties often serve subpoenas or arbitrator orders on non-parties to secure documents they need to present their cases. In an effort to keep cases on track and avoid adjournments caused by non-parties who do not produce documents before the hearing, FINRA has updated the arbitrator's [Initial Prehearing Conference Script](#) with the following language:

N. Arbitrator Orders and Subpoenas to Non-Parties

Will the parties agree to a cutoff date (absent extraordinary circumstances) that is _____ days before the first scheduled hearing, for serving subpoenas and arbitrator orders on non-parties?

If parties agree to specify a cut-off date, arbitrators should memorialize the parties' agreement in the [IPHC Scheduling Order](#), which has been updated with corresponding language on page four.

Reminder to Use the Most Current Version of Scripts and Forms

Arbitrators should use the most current version of the prehearing and hearing scripts and forms. This ensures that arbitrators provide accurate information to the parties about their obligations during the arbitration.

Arbitrators have been re-using old scripts and forms from previous cases. However, we regularly update scripts and forms to reflect new procedures. Therefore, arbitrators should use the latest versions available on the [Forms and Tools](#) page for each new case. Arbitrators should contact their case administrator with any questions about using the correct scripts and forms.

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 2017, FINRA enhanced arbitrator disclosure reports by publishing the date arbitrators last affirmed the accuracy of their entire 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 arbitrators have no changes to their profile, they 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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