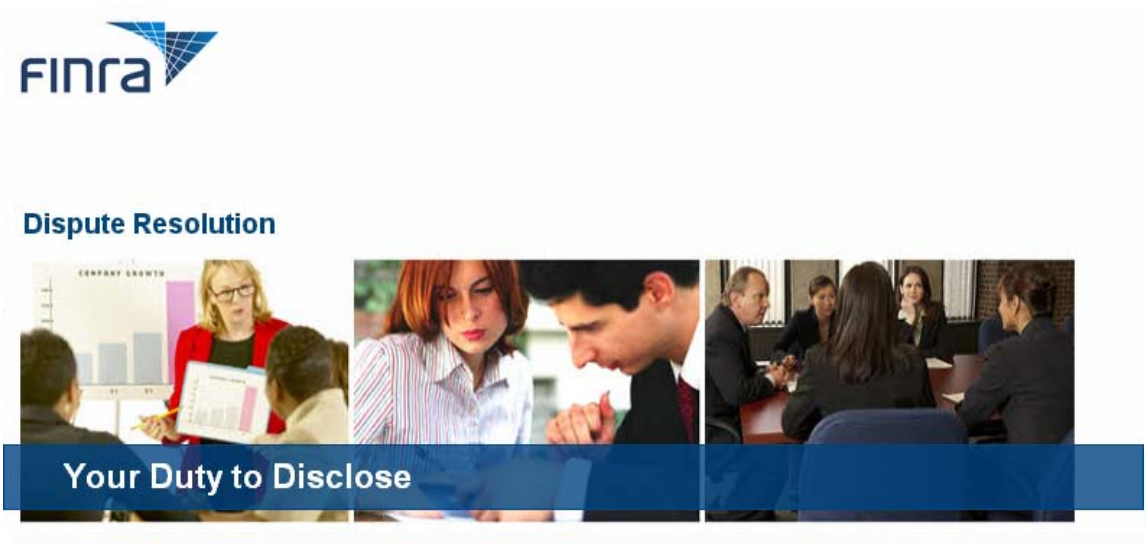

Version: August 2013

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Your Duty to Disclose Training and Exam

Dear Arbitrator:

The following is a print version of the Your Duty to Disclose Training. You can elect to complete this course and exam either through this printable version (instructions below) or online, depending on your individual preference and/or computing environment. Most arbitrators will be able to review the material, and complete the enclosed exam in one hour.

Please review the course material and complete the exam. After you complete the exam, you must send it to FINRA's Department of Neutral Management for grading. There is no minimum score required for the course; however, **you must complete and return the exam to receive credit**. We strongly recommend that you maintain a copy of the exam for your own records.

You may submit your exam to FINRA by fax or mail:

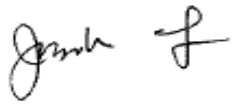
By Fax: FINRA Department of Neutral Management – FAX # 646-625-6028.

By Mail: FINRA
Attn: Luis Cruz – Neutral Management
One Liberty Plaza
165 Broadway, 27th Floor
New York, NY 10006

Since there is no minimum score required, please do not expect a pass/fail letter from FINRA. After grading your exam, you can be assured that FINRA will update your arbitrator disclosure report to reflect your completion of the Your Duty to Disclose Training. **Nothing further is required of you with regard to this course**.

We hope you enjoy the course.

Very truly yours,



Jisook Lee

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FINRA reserves the right to amend the “FINRA Dispute Resolution Your Duty to Disclose” training at its discretion.

FINRA shall not have any tort, contract or any other liability to any user and/or any third party. Under no circumstance will FINRA be liable for any lost profits or lost opportunity, direct, indirect, special, consequential, incidental or punitive damages whatsoever, even if FINRA has been advised of the possibility of such damages. The terms of this disclaimer may only be amended in a writing signed by FINRA.

Additional Notice

FINRA Dispute Resolution attempts to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding concerning a rule in the Customer or Industry Code of Arbitration Procedure, the rule language prevails.

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Course Objectives

The Financial Industry Regulatory Authority, Inc. (FINRA) developed a series of courses as part of its comprehensive Arbitrator Training Program. Upon completion of this course, you will be able to:

- understand the forum's arbitrator disclosure requirements and their importance to the neutrality of the process;
- follow the steps for correctly making a disclosure; and
- continue to meet your disclosure obligations.

Dispute Resolution's Mission Statement

FINRA Dispute Resolution's mission is to have all of its constituents—the investing public, brokerage firms, and their employees and neutrals (arbitrators and mediators)—view FINRA's forum as the preeminent provider of dispute resolution services. To accomplish this goal, it is our standing pledge to provide impartial arbitrators who are dedicated to delivering fair, effective dispute resolution services.

For more on FINRA and its services, see FINRA's website.

FINRA's website
http://www.finra.org/index.htm

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Course Home

You must review each section, in the order presented, to complete the course.

1. **Disclosure Basics**
2. **Disclosure Milestones**
3. **How to Make a Disclosure**
4. **Party Responses to Disclosures**
5. **Consequences of Nondisclosure**
6. **Conclusion**

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Section 1: Disclosure Basics

Understanding the Arbitrator's Primary Duties

FINRA Dispute Resolution arbitrators have three primary duties:

- to be neutral in fact and appearance;
- to conduct fair hearings; and
- to make final and binding decisions in a timely fashion.

The duty of neutrality is essential because it permeates all arbitrator actions at every stage of the arbitration process. Neutrality starts with complete and accurate disclosures in FINRA's arbitrator application. FINRA uses the application as the foundation for the Arbitrator Disclosure Report (Disclosure Report)—a summary of an arbitrator's background—which is provided to parties to help them make informed decisions during the arbitrator selection process. Please see the Arbitrator Application and sample Disclosure Report on our website.

FINRA cannot emphasize enough the importance of arbitrators disclosing each and every fact—from the point of view of any participant—that might affect the arbitrator's objectivity, or even create a **perception** that the arbitrator cannot be impartial. FINRA Rule 12405 of the Code of Arbitration Procedure (Code) requires each arbitrator to disclose any circumstances that might preclude an impartial determination or create even an **appearance** of partiality or bias.

Please also review the Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics) for additional guidance. Pursuant to the Code of Ethics, "An arbitrator has an obligation to disclose certain factors that might reasonably give rise to an appearance of partiality or bias." The Code of Ethics further suggests that "not every disclosure gives rise to a challenge for cause. However, prompt, complete disclosure might permit a party to make a more informed decision."

Finally, we encourage you to request a copy of your Disclosure Report from FINRA at least once a year to review it for accuracy.

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Arbitrator Application

http://www.finra.org/ArbitrationMediation/Neutrals/BecomeAnArbitrator/index.htm

Sample Disclosure Report

http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p122952.pdf

FINRA Rule 12405

http://www.finra.org/finramanual/rules/r12405

Code of Ethics

http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525

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Disclosure Defined

Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Disclosure includes any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision. When making disclosures, arbitrators should consider all aspects of their professional and personal lives and disclose all ties between the arbitrator, the parties and the matter in dispute, no matter how remote they may seem. If you need to think about whether a disclosure is appropriate, then it is: MAKE THE DISCLOSURE.

An arbitrator's job is not to determine the significance of a disclosure or to determine whether the disclosure may be perceived to be a conflict. The arbitrator's job is to make reasonable efforts to discover potential conflicts and to disclose to the best of the arbitrator's ability.

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Required Disclosures

FINRA Rule 12405 of the Code requires arbitrators to make a reasonable effort to learn of, and disclose to FINRA, any circumstances that might preclude them from rendering an objective and impartial determination in the proceeding, including:

- Any direct or indirect financial or personal interest in the outcome of the case.
- Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, representative, or potential witness, that is likely to affect impartiality or might reasonably create an appearance of partiality or bias.
- Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners or business associates.
- Any existing or past service as a mediator for any of the parties in the case for which the arbitrator has been selected.

Arbitrators must also disclose any circumstance that would require their temporary or permanent removal from the roster, in accordance with the Arbitrator Disqualification Criteria (Disqualification Criteria).

In addition, individuals employed in the securities industry should disclose whether their firm makes a market in the securities involved, and whether they have placed clients in the same or similar investment. All arbitrators should consider whether they hold (or have held) a position in the security/investment involved and disclose this information to FINRA.

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The obligation to disclose interests, relationships or circumstances that might preclude an arbitrator from rendering an objective and impartial determination is a continuing duty that requires an arbitrator who accepts an appointment to disclose—at any stage of the proceeding—any such interests, relationships or circumstances that arise, or are recalled or discovered. In addition to relationships, it is advisable to disclose any life experience that may raise any doubt about your ability to be impartial.

It is important to remember that not every arbitrator disclosure will result in your disqualification, but failing to disclose even a minor conflict may jeopardize your award. When in doubt, arbitrators should always err in favor of disclosure.

FINRA Rule 12405
http://www.finra.org/finramanual/rules/r12405

Arbitrator Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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Additional Disclosure Requirements

The duty to disclose extends to the nature of the subject matter submitted to arbitration. Arbitrators must disclose any opinion, belief or position they may have regarding any substantive issue in dispute. For more on required disclosures, read “The Arbitrator's Role—Ethical Considerations, Duty to Disclose, Challenges and Disqualification” in the Arbitrator's Guide.

Arbitrators must also disclose any facts or circumstances that may affect their classification on the roster. These required disclosures include changes in employment, job functions, clients, etc.—personally as well as changes affecting spouses and immediate family members (defined under Rule 12100(u)(8)). The Code defines the public and non-public classifications of arbitrators at FINRA, in addition to describing the special arbitrator qualifications to serve on the chairperson roster and to hear employment discrimination disputes. These classifications are important because parties have a right to arbitration panels composed of properly classified arbitrators under the Code.

Never forget: Regardless of your classification—whether it is public or non-public—you are a neutral arbitrator, and thus obligated to serve without bias or partiality. Your role is not to serve one side more than another, or to favor one position. Your duty is to serve all parties fairly and impartially.

Arbitrator's Guide
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/ArbitratorsReferenceGuides/

Public and Non-Public Arbitrator Definitions
http://www.finra.org/finramanual/rules/r12100

Chairperson Roster
http://www.finra.org/finramanual/rules/r12400

Employment Discrimination Disputes
http://www.finra.org/finramanual/rules/r13802

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Obligations to Ascertain Disclosures

The Code requires arbitrators to make all reasonable efforts to ascertain the interests, relationships and circumstances discussed previously. Additionally, the duty to disclose is a continuing one. Information that should be disclosed may not be evident initially, or circumstances may change and later require a disclosure. In such events, arbitrators must make the disclosure as soon as the information comes to their attention. For example, during a witness's testimony, a statement may be made that leads to an arbitrator's need to disclose.

Additional information: Canon II (H) of the Code of Ethics provides that when required disclosures involve information which is confidential or privileged, the prospective arbitrator must either secure the consent of the holder of the privilege or confidence, or withdraw from the process.

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To Recap

Pursuant to Canon I (G) of the Code of Ethics, "the ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding."

Accordingly, throughout the proceeding, arbitrators have an obligation to make timely disclosures including, **but not limited to**, the following:

Interest in the Matter in Dispute

- Direct or indirect financial or personal interest in the outcome of the case.
- Brokerage or banking accounts associated with any of the parties or their related entities.
- Existing or past financial, business, professional, family, social or other relationships or circumstances with any party or related entity, representative or potential witness.

Relationships

- Relationships or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners or business associates and any party or related entity, representative or potential witness.
- Whether a spouse or immediate family member has an unrelated claim against a client represented by counsel in the current case.
- Current or prior representation for (or against) any of the parties in the arbitration or their related entities.
- Service as an expert witness for (or against) any of the parties, their related entities or counsel to the arbitration.
- Existing or past relationship with any other selected arbitrator, including prior arbitrator service together.
- Existing or past service as a mediator for any of the parties in the case.

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To Recap (continued)

Potential Perception of Bias

- Opinions, beliefs or positions that an arbitrator may have regarding any of the parties, counsel or subject matter of the arbitration.
- Whether an arbitrator, spouse, immediate family member or close social or business associate has invested in any of the same securities or has been involved in a dispute involving the same or similar subject matter as the arbitration.
- Securities-related disputes involving an arbitrator, spouse or immediate family member as a party or representative.
- Membership in a securities-related organization.

Eligibility and Classification

- Facts or circumstances that may affect an arbitrator's classification—either public or non-public—on the roster.
- Whether an immediate family member is affiliated with the securities industry.
- Whether an arbitrator, spouse or immediate family member is a director or officer of an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business.
- Whether an arbitrator, spouse or an immediate family member is employed by an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business.
- Current professional licenses, including licenses that have lapsed or have been revoked, suspended or otherwise restricted in any way.
- Financial disclosures (*e.g.*, bankruptcy or unsatisfied judgments or liens).
- Circumstances that would require the arbitrator's temporary or permanent removal from the roster.

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To Recap (continued)

Failures to make timely and full disclosures are very disruptive to the process and unfair to the parties.

As stated previously, an arbitrator's job is not to determine the significance of a disclosure or to determine whether the disclosure may be perceived to be a conflict. The arbitrator's job is to disclose to the best of the arbitrator's ability. Failure to disclose is a violation of the Code of Ethics, and can subject the arbitrator to permanent removal from the roster for "misstatement or failure to disclose material information" as outlined in the Disqualification Criteria.

Recall again that the Code of Ethics states that "not every disclosure gives rise to a challenge for cause. However, prompt, complete disclosure might permit a party to make a more informed decision." Often it is not the disclosure itself that results in an arbitrator's removal from a case or from the roster: it is the arbitrator's **failure to disclose** that causes the greatest concern.

Code of Ethics
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525

Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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Test Yourself

Question 1

Which of the following is NOT one of the arbitrator's primary responsibilities?

- To mediate the dispute.
- To be neutral in fact and appearance.
- To conduct fair hearings.
- To make final and binding decisions.

Question Feedback:

To mediate the dispute.

Mediation is not one of the arbitrator's duties. If the parties wish to attempt mediation, FINRA's mediation department is available to help the parties find a qualified mediator. The arbitrator should not attempt to mediate the arbitration proceeding to which he/she has been assigned. The arbitrator's duties are to be neutral both in fact and appearance, to conduct fair hearings and to make final, binding decisions.

Question 2

Are you required to make ALL of the following disclosures?

- Direct or indirect financial or personal interest in the outcome of the case.
- Existing or past financial, business, professional, family, social or other relationships with any party or related entity, representative or potential witness.
- Existing or past relationships with any other selected arbitrator, including prior arbitrator service together.
- Existing or past service as a mediator for any of the parties in the case.
- Circumstances that would require the arbitrator's temporary or permanent removal from the roster, in accordance with the Disqualification Criteria.
- Opinions, beliefs or positions regarding any of the parties, counsel or subject matter of the arbitration.
- Facts or circumstances that may affect an arbitrator's classification—either public or non-public—on the roster.
    - Yes
    - No

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Question Feedback

Yes.

Arbitrators are required to disclose—but are not limited to—the above information.

Question 3

Your stepdaughter recently accepted a job with a brokerage firm. She is 35 years old and lives on her own. You do not support her financially and cannot claim her as a dependent. Do you need to disclose this information?

- Yes
- No

Question Feedback

Yes.

Even though your stepdaughter does not live with you and is not financially dependent on you, you must disclose the fact that your stepdaughter—an immediate family member under the definition of a public arbitrator—is currently employed in the securities industry. Even if she is employed with a company that is not engaged in the securities business, as long as the company is affiliated with an entity that is engaged in the securities business, you must disclose this information.

Question 4

You share your thoughts about investments, finance and the economy on your Internet blog. Do you need to disclose the existence of your blog on your Disclosure Report?

- Yes
- No

Question Feedback

Yes.

You should disclose the fact that you maintain an investment/financial-related blog on your Disclosure Report.

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Section 2: Disclosure Milestones

There is not a single, identifiable “right time” in a proceeding to make a disclosure: disclosures should be made as soon as you become aware of them—whether at the beginning, middle or end of a proceeding.

However, at various times during service as a FINRA arbitrator, FINRA staff will ask specifically that the arbitrator make disclosures, if any. These milestones occur when:

1. completing the Arbitrator Application;
2. completing the Basic Arbitrator Training Program;
3. requested to serve in a specific case;
4. appointed to serve in a case; and
5. the arbitrator’s service begins.

What arbitrators need to remember is that disclosure is a continuing obligation and not limited only to those times—those “milestones”—when reminded by FINRA staff of this duty. For example, when an arbitrator or someone in the arbitrator’s immediate family starts a new job or opens a new account, it is the arbitrator’s duty to proactively update the Disclosure Report to disclose the new or amended information as soon as it comes to the arbitrator’s attention.

The Disclosure Process When Invited to Serve

Once you successfully complete the Basic Arbitrator Training Program, your name will start to appear on lists (generated on a random basis by our list selection system) and be sent to the parties during the list selection process, along with a copy of your Disclosure Report.

The parties review your Disclosure Report very carefully and complete their own due diligence and research. And, in some cases, parties will contact staff if they believe that additional disclosures are necessary. In turn, staff will contact you for more information.

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The Disclosure Process When Invited to Serve (continued)

The parties complete the list selection process by ranking and striking names and then returning their ranking forms. Staff enters each party's ranking form in FINRA's case management system. The parties' ranking forms are combined based on the parties' preferences and staff contacts the arbitrators chosen by the parties.

When FINRA contacts arbitrators regarding potential service on a case, arbitrators should ascertain whether any conflicts exist after the staff discloses the following information about the case:

- names of the parties;
- names of lawyers or agents representing the parties;
- names of any potential witnesses disclosed by the parties; and
- nature of the case.

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The Disclosure Process When Invited to Serve (continued)

When the parties select an arbitrator to serve on a case, and the arbitrator accepts the assignment, the Code requires the arbitrator to take the Oath of Arbitrator (Oath), which incorporates the duty to disclose under the Code. Arbitrators must review the Oath along with the following documents:

- the arbitrator's Disclosure Report;
- the Arbitrator Disclosure Checklist (Disclosure Checklist) found at the end of the Oath; and
- the Disqualification Criteria.

It is very helpful for arbitrators to keep a "conflicts folder," either manually or electronically, to track past case information including, case numbers, names of the parties, representatives, witnesses and other arbitrators who served on the panel, the outcome of the case and date of the award (if any). Arbitrators who maintain a conflicts folder should cross-check it each time they are called to serve on a case to help avoid any inadvertent nondisclosure.

Oath of Arbitrator
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf

Disclosure Checklist
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf

Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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The Disclosure Process When Invited to Serve (continued)

Arbitrators must review the Disclosure Checklist contained within the Oath, answer each question, sign and return it to FINRA. Arbitrators—particularly those who have served previously—may be tempted to perform this function quickly. Please do not! Take the time to read the materials **carefully.** Even if you do not believe that your circumstances have changed since you last served on a case, you must review each question carefully and provide an explanation for any affirmative responses.

Keep in mind that many of the Disclosure Checklist questions are case-specific. Accordingly, your answers can easily change from case to case. A question, to which you answered “no” in one case, could be a “yes” response in another case. The wise arbitrator completes the Disclosure Checklist on each new case as if seeing the document for the first time.

You must review your Disclosure Report and notify FINRA of any updates. This may include any updates to your employment, brokerage accounts, relationships, professional memberships, etc. Finally, you must also read the Disqualification Criteria before signing the Oath to be sure that recent events do not disqualify you temporarily or permanently from our arbitrator roster.

If a disclosure is required, immediately advise FINRA in writing by sending your completed Disclosure Checklist and any affirmative responses and explanations. Do not wait until the Initial Prehearing Conference or hearing to make your disclosure to the staff member assigned to the case.

Oath of Arbitrator and Checklist
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@neutrl/documents/arbmed/p009442.pdf

Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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Disclosure at Hearings

At the beginning of a hearing on the merits, arbitrators will be asked to repeat on the record any disclosures that they previously made to the parties. Repeating disclosures helps to ensure that all parties and representatives know and understand all prior disclosures. Additionally, arbitrators must make any new disclosures that they did not make previously. By continuing to make required disclosures, arbitrators comply with their ongoing duty to disclose under the Code.

As discussed earlier, FINRA Rule 12405 of the Code requires you to disclose **at any stage** of the arbitration any interests, relationships or circumstances, as they are recalled or discovered. Although it is best to make disclosures before the hearings, sometimes circumstances make this impossible. For example, upon entering the hearing room, you may recognize a face that you did not earlier identify with a name. Under those conditions, you have no choice other than to make the disclosure at that moment.

Prior to commencing either an IPHC or an evidentiary hearing, each arbitrator should repeat and re-affirm to the parties their classifications as either public or non-public and all prior disclosures.

Additional information: Canon II of the Code of Ethics states that the "(e)xistence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II."

FINRA Rule 12405
http://www.finra.org/finramanual/rules/r12405

Code of Ethics
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525

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Section 3: How to Make a Disclosure

How to Make a Disclosure

FINRA encourages arbitrators to routinely update their Disclosure Report by submitting updates electronically through the Arbitrator Information Update Form. Even if you are not currently serving on a case, you should take the necessary precautions to ensure that the biographical information provided to the parties is accurate before you are selected to serve. An updated Disclosure Report may increase the incidences of parties selecting you to serve.

If you have already been appointed to a case, speak with the assigned staff member if you have any questions or concerns about disclosure. When in doubt as to whether you should disclose something—regardless of the stage of the proceedings—always err in favor of disclosure. It is far better to make a disclosure that was not required, than to fail to make a disclosure when it counts.

Disclosing information immediately and fully allows the neutral process to work as designed—allowing the parties to object at the time the disclosure is made or risk waiving their right to object later.

Arbitrator Information Update Form
http://apps.finra.org/Mediation_&_Arbitration/ArbInfoUpdate.asp

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A Sample Disclosure

Consider the following scenario as an example of how a disclosure should be handled:

Mr. Johnson is a replacement arbitrator on a case scheduled for hearing in two months. His Disclosure Report indicates that an investor filed a claim against him in 2002 that was subsequently dismissed by the arbitration panel. Before signing his Oath, the arbitrator reviewed the pleadings, the Disclosure Checklist, his Disclosure Report and the Disqualification Criteria.

Mr. Johnson also carefully reviewed the Oath of Arbitrator. Before signing and dating his Oath, Mr. Johnson checked off the following statements:

> "Having been selected as an arbitrator to consider the matter in controversy between the above-captioned parties:
>
> I affirm my duty under the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes to keep confidential all matters relating to the above-referenced arbitration proceeding and decision, including but not limited to any information, documents, evidence, or testimony presented. My duty is continuous and does not cease at the conclusion of the arbitration or upon my withdrawal as an arbitrator.
>
> I affirm that I am not an employer of, employed by, or related by blood or marriage to any of the parties or witnesses whose names have been disclosed to me; that I have no direct or indirect interest in this matter; I know of no existing or past financial, business, professional, family or social relationship which would impair me from performing my duties; and that I will decide the controversy in a fair manner and render a just award.
>
> I have carefully read, reviewed, and considered FINRA Dispute Resolution's Temporary and Permanent Arbitrator Disqualification Criteria. I affirm that, based on the criteria, I am not temporarily or permanently disqualified from being a FINRA arbitrator.

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A Sample Disclosure (continued)

> I have reviewed and completed the Arbitrator Disclosure Checklist enclosed, and certify that (check one):
>
> __ I have nothing to disclose.
>
> **X** I made disclosures on the Arbitrator Disclosure Checklist.
>
> I have carefully read, reviewed, and considered my Arbitrator Disclosure Report and certify that (check one):
>
> __ I have nothing additional to disclose. My Arbitrator Disclosure Report is accurate, current, and up to date.
>
> **X** I have noted changes or corrections on the Report.
>
> I understand that I am an independent contractor, not an employee of FINRA. I am not eligible to receive any unemployment benefits or any FINRA employee benefits."

In addition to checking the two statements on the sample Oath shown, Mr. Johnson also answered "yes" to the question on the Disclosure Checklist that asked: "Have you ever been named as a party by an investor in any securities-related dispute?"

After answering affirmatively, Mr. Johnson elaborated on his answer by adding, "I was named as a Respondent in an arbitration in 2002. The arbitration panel dismissed all claims against me in the award."

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A Sample Disclosure (continued)

FINRA advised the parties in writing that Mr. Johnson affirmed on the Disclosure Checklist that he had been named as a party by an investor in a securities-related dispute. FINRA sent all affirmative responses and explanations with the entire Checklist to the parties.

The above is an example of an arbitrator properly fulfilling his disclosure obligation. Mr. Johnson made all of the required disclosures. He made sure that his Disclosure Report was accurate and up-to-date by disclosing his involvement in a prior arbitration proceeding.

Carefully reviewing and responding to the Disclosure Checklist gives arbitrators the opportunity to provide additional information about necessary disclosures.

Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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One Type of Disclosure: When an Arbitrator is Involved in a Pending Action

As stated earlier, arbitrators must disclose any circumstance that would require their temporary or permanent removal from the roster, in accordance with the Disqualification Criteria. For example, if an arbitrator, as a party (not as a party representative) names a broker-dealer or registered representative in a securities-related dispute, the arbitrator must disclose this event to FINRA.

When you are involved in a securities-related dispute as a party, you become temporarily disqualified for service on future cases while the action is pending. During this time, your name will not appear on lists for selection by parties. Therefore, it is important to inform FINRA as soon as the action is concluded and request to be re-activated to the roster.

If you become involved in a securities-related dispute after you have been appointed to serve on a case, you will need to file a written disclosure in each case assigned to you. When preparing your written disclosure, you should advise the parties that you will withdraw if any party is uncomfortable with your continued service.

If the Initial Prehearing Conference (IPHC) has not yet been held and a party requests your removal from the panel because you are a party to a securities-related dispute, the request will generally be granted by FINRA. In the event that the disclosure occurs after an IPHC or hearing, a party may ask you to recuse yourself, or seek your removal pursuant to FINRA Rule 12407 of the Code. Under these circumstances, the Director or President exercising his or her nondelegable power will generally grant the removal request. If a situation occurs where you believe your disclosure might cast doubt on your objectivity or impartiality, you may prefer to withdraw rather than become the subject of a removal request pursuant to the Code.

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One Type of Disclosure: When an Arbitrator is Involved in a Pending Action (continued)

A similar situation occurs when an arbitrator is the subject of a pending securities-related dispute initiated by a customer. Again, if you find yourself in this situation you must immediately communicate your disclosure to FINRA.

FINRA Rule 12407
http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4148

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Section 4: Party Responses to Disclosures

If a Party Files a Motion to Recuse

If all parties ask an arbitrator to recuse (*i.e.*, "withdraw") from the panel, the arbitrator should honor the request and withdraw. Recusal under these circumstances is required under Canon II G of the Code of Ethics.

If fewer than all parties request that an arbitrator recuse him or herself from the panel, an arbitrator should do so unless, after carefully considering the matter, the arbitrator determines that the reason for the challenge is not substantial, and the arbitrator can nevertheless act and decide the case impartially and fairly. FINRA Rule 12406 provides that requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.

Arbitrators should not feel offended if they are asked to recuse themselves from a case since such requests are generally not based on the ability or competence of an arbitrator.

In some instances, an arbitrator may voluntarily choose to withdraw from a case. When in doubt, arbitrators should consult with FINRA staff. Even if the case has already proceeded, it may be less expensive for the parties if an arbitrator steps down in the middle of the proceeding than for the parties to complete the proceeding and file a motion to vacate the award. However, whether arbitrators choose to withdraw from a case should be balanced by the significance of the disclosure, the disclosed relationships and the prejudice to the parties.

Code of Ethics
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525

FINRA Rule 12406
http://www.finra.org/finramanual/rules/r12406

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Challenges for Cause Before the First Hearing Session Begins

In accordance with FINRA Rule 12407 (a), a party may file a challenge for cause to remove an arbitrator from the case before the first hearing session begins. Once a party files a challenge for cause, all opposing parties are entitled to submit a response. FINRA staff, on behalf of the Director of Arbitration, will review the challenge for cause and responses filed, if any, to determine whether to remove the arbitrator.

The rule provides that a challenge for cause to remove an arbitrator will be granted where it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer will be resolved in favor of the customer.

FINRA Rule 12407
http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4148

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Director's Authority to Remove an Arbitrator After the First Hearing Session Begins

A party can file a challenge to remove an arbitrator based on nondisclosure while the case is ongoing. According to FINRA Rule 12407 (b), after the first hearing session begins the Director or President may remove an arbitrator based only on information required to be disclosed that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative.

The Director or President will exercise this nondelegable power only if the parties did not know the information underlying the motion for your withdrawal when you were selected to serve and the information constitutes a clear, substantial reason for your removal.

In the final analysis, if you are not comfortable continuing to serve on the case, please withdraw from service.

FINRA Rule 12407
http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4148

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Test Yourself

Question 1

You have been selected to serve on an arbitration panel. Based on the pleadings, you realize that a good friend of yours invested in some of the same securities involved in the arbitration. Should you disclose this information?

- Yes
- No

Question Feedback

Yes.

The parties have a right to know this information and the pertinent circumstances. They are also entitled to know whether you have formed any opinions in regard to these or the other investments involved in the arbitration.

Question 2

You are a certified public accountant, presently classified as a public arbitrator, and you have been selected to serve on an employment discrimination case. Should you disclose to FINRA that you are changing employment in a month, at which time you will be employed by a securities firm? (Your new employer is not involved in the pending arbitration.)

- Yes
- No

Question Feedback

Yes.

Your new employment will change your arbitrator classification. You will no longer be classified as a public arbitrator. This is very important because the arbitration involves a discrimination claim, and the parties are entitled to a panel composed of all public arbitrator(s) under the Code.

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Question 3

Even if you are not currently serving on a case, you nevertheless have a continuing duty to disclose changes to your biographical information. What is the quickest way to update your Disclosure Report?

- Completing and submitting the Arbitrator Information Update Form on FINRA's website.
- Waiting until you are called to serve, and then making your disclosure to the parties on the morning of the hearings.
- Contacting a FINRA staff person.

Question Feedback

Completing and submitting the Arbitrator Information Update Form on FINRA's website.

The quickest and most accurate way to update your Disclosure Report is to complete and submit the Arbitrator Information Update Form on FINRA's website. At the same time, you can electronically request a copy of your narrative background for your review and update. Remember, parties select arbitrators based on the information provided in your Disclosure Report, so you have an ethical obligation to keep the information current and accurate.

Arbitrator Information Update Form
https://apps.finra.org/ArbitrationMediation/ArbInfoUpdate/

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Question 4

You were recently appointed to a case in which the claimant alleged that the broker breached his fiduciary duty and made unsuitable investments. Ten years earlier, you sued your business partner for a failed restaurant venture. The venture didn't involve securities, but it involved allegations of breach of fiduciary duty and the mismanagement of funds. Is this something that you should disclose?

- Yes
- No

Question Feedback

Yes.

You should make the disclosure. Although the lawsuit did not involve securities, the allegations involved in both cases are similar enough to warrant disclosure. If arbitrators are uncertain whether they should disclose this type of information, they should contact FINRA and discuss the issue with their case administrator. It is better to be over-inclusive and provide the parties with more information rather than too little information.

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Question 5

You are a non-public arbitrator and were recently the subject of a customer complaint. One of your customers complained about your management of his investment portfolio. You have never had a customer complaint and are certain that the issue will be resolved quickly and your record cleared. The amount of damages that the customer claimed is $10,000. Do you need to disclose this complaint to FINRA?

- Yes
- No

Question Feedback

Yes.

You should notify FINRA immediately of any pending action. Arbitrators are under a continuing obligation to inform FINRA of any pending actions—customer complaints, arbitrations, law suits, criminal action, administrative proceedings, etc. Depending on the nature of the disclosure, the arbitrator's availability status as an arbitrator may be affected. Arbitrators should review FINRA's Disqualification Criteria for more information.

Disqualification Criteria
http://www.finra.org/ArbitrationMediation/Neutrals/ArbitrationProcess/ArbitrationCaseGuidanceResources/P009512

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Question 6

FINRA recently contacted you to serve on a case in which a customer brought a claim against a broker-dealer involving a structured product. You served as an arbitrator in a mock arbitration set up by the same broker-dealer, using a similar fact pattern as the claim brought by the claimant in the arbitration case. Should you accept the case?

- Yes
- No

Question Feedback

No.

Arbitrators must exercise discretion in accepting appointments. Arbitrators should thoroughly review and consider all aspects of the case—parties, counsel, products, claims, etc.—before accepting a case and affirming that they can be objective and impartial. You may be tempted to accept a case in your zeal to serve the forum; however, you must exercise judgment, discretion and common sense when evaluating whether you should accept a case. Arbitration proceedings and awards must be free of all taint or even a perception of taint, and you can do your part by not only making timely and proper disclosures, but also by exercising good judgment before accepting, or not accepting, appointments.

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Section 5: Consequences of Nondisclosure

One of the most serious consequences of an arbitrator's failure to disclose is that the award is vacated.

One of the primary benefits of arbitration is a final and binding award, subject to court review only under limited circumstances. However, one of the grounds under which a party may file a motion to vacate the arbitration award in a court of competent jurisdiction is evident partiality based on an arbitrator's failure to disclose conflicts of interest and other information that could give the appearance of bias. And, as discussed below, courts have granted such motions to vacate.

It is in everyone's best interest for arbitrators to make all disclosures. Failing to do so could result in a considerable waste of time and money for all involved. Please bear in mind that failing to disclose information may result in your disqualification from FINRA's arbitrator roster.

Motions to Vacate

FINRA does not have an appeals process to vacate an award, but parties may file in court a motion to vacate an arbitration award within the statutory time period. In doing so, parties must state at least one of the limited ground(s) set forth in Section 10(a) of the Federal Arbitration Act on which they are requesting the court to set aside the award. The four grounds are:

1. Where the award was procured by corruption, fraud, or undue means;
2. Where there was evident partiality or corruption in the arbitrators, or either of them;
3. Where the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced; and
4. Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made.

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Motions to Vacate (continued)

Successful motions to vacate are rare. One of the limited grounds is evident partiality based on the arbitrator's failure to disclose conflicts of interest and other information that could give the appearance of bias.

Federal Arbitration Act

http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t09t12+3+2++(the)%20%20A

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Examples of Successful Motions to Vacate for an Arbitrator's Failure to Disclose

The following is a summary of cases in which courts have vacated arbitration awards on the ground of evident partiality resulting from an arbitrator's failure to disclose.

> *Commonwealth Coatings Corp. v. Continental Casualty Corp.,* 393 U.S. 145, 89 S. Ct. 337 (1968), *reh. den.* 393 U.S. 1112, 89 S. Ct. 848 (1969)
>
> Commonwealth Coatings is the seminal United States Supreme Court case dealing with arbitrator disclosure. In the underlying arbitration, the panel chair failed to disclose that one of his regular customers was a party to this case. There had been no business dealings in about a year; in fact the court described them as sporadic. And the amounts involved were relatively minor. However, the court vacated the underlying arbitration award, which had been confirmed by the U.S. District Court and the Court of Appeals, holding that the failure of the arbitrator to make a disclosure created "an inference of bias." In other words, the court was not so much concerned about the nature of the business relationship between the arbitrator and the party as it was by the arbitrator's failure to make a disclosure about the relationship. Arbitrators, the court found, "must disclose to the parties any dealings that might create an impression of possible bias."

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Examples of Successful Motions to Vacate for an Arbitrator's Failure to Disclose (continued)

Larry Hagman et al. v. Citigroup Global Markets, Inc., No. BS128800, 2011 WL 975535 (Cal.Superior Feb. 9, 2011) (Trial Order).

A California superior court vacated a FINRA arbitration award because the arbitrator failed to disclose that he had been involved in a dispute two years earlier, involving what the court believed was the same subject matter as the assigned case. In 2007, the arbitrator was a plaintiff in a bankruptcy action in which the arbitrator and his wife sued an investment partner, alleging breach of fiduciary duty. The arbitrator's claim alleged that the investment partner caused investment losses, which substantially damaged the arbitrator's retirement funds. The assigned arbitration case involved the respondent's alleged mismanagement of the claimants' accounts.

At the time of the case, FINRA's Disclosure Checklist contained the following question:

Have you, any member of your immediate family, close social or business associate, been involved in the last five years in a dispute involving the same subject matter as contained in the case to which you are assigned?

The arbitrator answered "no." On appeal the court held that, although the arbitrator's bankruptcy suit involved a real estate limited partnership and not securities, the similarities between the arbitrator's suit and the arbitration claim with regard to breach of fiduciary duty and mismanagement of an investment resulting in a loss of retirement funds, were sufficient to vacate the award. The decision vacating the award was appealed, but the parties settled before the matter was decided.

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Examples of Successful Motions to Vacate for an Arbitrator's Failure to Disclose (continued)

Benjamin, Weill & Mazer v. Nancy Hurwitz-Kors, 195 Cal. App. 4th 40 (Cal. App. 1st Dist. 2011).

In a non-FINRA case involving a dispute over attorneys' fees, a California court of appeals vacated an arbitration award because it found that the arbitrator failed to disclose relevant information about his personal law practice. The court found that the arbitrator should have disclosed that he regularly represents law firms in fee disputes, which might have led the defendant to "reasonably entertain a doubt" that the arbitrator would be able to arbitrate the dispute impartially.

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Examples of Successful Motions to Vacate for an Arbitrator's Failure to Disclose (continued)

Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Vesanayi, 492 F.3d 132 (2d Cir. 2007).

The Court of Appeals for the Second Circuit affirmed the district court's ruling vacating the non-FINRA arbitration award. Before the hearings started, the arbitrators were advised that Applied Industrial Materials was being sold to Oxbow Industries. The arbitrator, who was the CEO of Seacor Holdings, later disclosed to the parties that SCF, the barge division of Seacor, was engaged in contract negotiations with Oxbow. He stated that he was not involved in the contract negotiations or the day-to-day operations of SCF and that he did not plan to become involved in discussions between SCF and Oxbow. After the liability phase of the hearing, Ovalar conducted an investigation and discovered that SCF and Oxbow had a preexisting relationship. SCF earned approximately $275,000 from this relationship. Ovalar requested that the arbitrator withdraw. In denying the request, the arbitrator disclosed that he had asked SCF's president to withhold from him all information regarding SCF's discussions with Oxbow. The court agreed with the district court's finding that once the arbitrator knew of a potential conflict, he failed to either investigate the potential relationship between his corporation and one of the parties or disclose that he walled himself off from learning more, which was indicative of evident partiality.

Although it may seem obvious when an arbitrator should disclose information during a case, it is not always as easy in practice. To avoid post-award litigation and to maintain the integrity of the arbitration process and the finality of the award, arbitrators should always disclose any information that may be relevant to the assigned case.

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What to Do if Named in a Motion to Vacate an Award

In motions to vacate alleging arbitrator partiality or misconduct, a party may ask you to provide testimony about your or another arbitrator's conduct in arbitration, or about an alleged conflict of interest.

If you are contacted by a party to discuss a case, or if you receive a request or subpoena to testify in a deposition or court hearing, do not discuss the case with the party, even if the party assures you that your discussion is "off the record." Instead, you should notify FINRA staff immediately.

FINRA will represent you in the matter and the case administrator or FINRA's office of General Counsel will contact you to coordinate a response. Discussions with parties are never "off the record," and you may waive not only your own privilege against testifying, but that of your fellow panelists.

It is also important to note that the privilege protecting arbitrators from testifying in post-award proceedings does not apply to disclosure/conflict issues. That said you should not discuss the case with the parties, but if a party presents clear evidence of a disclosure issue, he or she may be able to depose you on this issue, as long as it does not include arbitral deliberations.

Remember that the lack of neutrality by one panel member affects the entire panel, and jeopardizes the finality of the award. While disclosures do not always constitute the basis for a valid challenge for cause, the failure to make required disclosures reflects negatively on this forum's reputation for fairness—an invaluable asset that is not easily restored once it is diminished.

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Test Yourself

Question 1

You have been selected to serve on an arbitration case. When you review your Oath (together with your Disclosure Report, the Disclosure Checklist, and the Disqualification Criteria), you realize that you have not disclosed your recent membership with the Securities Industry and Financial Markets Association or SIFMA. Are you obligated to disclose this membership?

- Yes
- No

Question Feedback

Yes.
You are obligated to disclose this information. You must check "yes" to the question on the Disclosure Checklist that asks whether you are a member of a securities-related organization and provide a written explanation.

Question 2

You currently have checking and savings accounts with a commercial bank that happens to own a brokerage firm. Your relationship with the bank is limited to these accounts, and you have no securities account with the brokerage they own. You were recently called to serve on a case in which the brokerage arm of the bank is a named respondent. Do you need to disclose the fact that you have bank accounts with the bank?

- Yes
- No

Question Feedback

Yes.
Although you do not have a securities account with the brokerage firm named as a respondent in the case, you have a financial relationship with an affiliated company, which should be disclosed to FINRA and the parties in the assigned case.

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Question 3

During the evidentiary hearings, a party calls a rebuttal expert witness. You realize that you graduated from college with this individual more than 20 years ago. Since you never had any social, professional, business or other relationship with this witness, you are hesitant to disclose this fact. Do you have a duty to disclose?

- Yes
- No

Question Feedback

Yes.

Although the disclosure appears to be immaterial and more often than not will not result in your disqualification, the failure to disclose it, and to affirm your impartiality, may create an appearance of bias since parties may later wonder whether your nondisclosure involved something more serious. Remember: disclosing a minor or old relationship will not necessarily result in your disqualification from the case.

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Section 6: Conclusion

Summary

Having completed this course, you should now be able to:

- understand the forum's arbitrator disclosure requirements and their importance to the neutrality of the process;
- follow the steps for correctly making a disclosure; and
- continue to meet your disclosure obligations.

Next Steps

To test your understanding of the course material, please complete the attached Your Duty to Disclose Exam and mail or fax it to FINRA for grading. Thereafter, FINRA will update your Disclosure Report to reflect that you have completed this course. You must complete the exam to receive credit for the course.

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FINRA Dispute Resolution

Your Duty to Disclose Training

Exam

Name: _____ Arbitrator ID#: A_____

Return Fax Number: 646-625-6028

Directions:

After reviewing the course, you must complete and submit the following mastery test to demonstrate your understanding of the material. **There is no minimum score required for the test; however, you must submit it to receive credit for completing the course.** Upon completion of the course and test, FINRA will automatically update your disclosure profile to reflect that you completed the course.

CLEARLY mark your answer.

- Include your name and arbitrator ID# on EVERY page.
- When you have completed the test, please FAX your pages to FINRA – Neutral Management Department at 646-625-6028.

---

1. If you are in doubt as to whether you should make a disclosure, you should avoid doing so if you feel it will substantially slow down the arbitration process.

   TRUE FALSE

2. Disclosure of facts or circumstances that may affect your classification as a FINRA public or nonpublic arbitrator is important because parties are entitled to properly classified arbitrators.

   TRUE FALSE

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3. You are not required to make a reasonable effort to learn of and disclose any interests, relationships, or other circumstances that might preclude you from rendering an objective and impartial determination. You need only disclose those things that immediately come to mind.

TRUE FALSE

4. You are the subject of, or a party to, a securities-related dispute. You must disclose this information.

TRUE FALSE

5. After the first hearing begins, if all parties object to your continued service because of a disclosure, you may remain on the panel if you determine that the reason for the challenge is not substantial, and that you can act and decide the case impartially and fairly.

TRUE FALSE

6. Your failure to make required disclosures will not affect the neutrality of your co-panelists and the finality of the award.

TRUE FALSE

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7. You are an attorney serving as a public arbitrator in a case involving a customer and “XYZ Brokerage.” Sometime prior to rendering your award, you are approached by an investor seeking your representation in a suit against “XYZ Brokerage.” Under the circumstances, it would not be appropriate for you to represent this person.

TRUE FALSE

8. Three years ago, you were retained to assist a party as an expert witness in a proceeding. You must disclose this information.

TRUE FALSE

9. Your married son accepted a job with Acme Brokerage. Since he is not a dependent, you do not have to disclose your son’s affiliation with the industry.

TRUE FALSE

10. At the time of your acceptance to FINRA’s Roster of Arbitrators, you were employed as a Quality Assurance Manager with Sunnyside Bank, a regional bank without ties to the securities industry. You were given the classification of “public” arbitrator. Years later, Sunnyside Bank is acquired by MegaBank International, a huge international bank with many interests, including securities. Although your employer has technically changed, the business transacted by your local branch has not changed nor has your position. Accordingly, your classification as a public arbitrator would not change, and no disclosure is required.

TRUE FALSE

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