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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.

## Anatomy of a Securities Mediation: What to Expect, How to Prepare and How to Win

*\*By Jeff Abrams, JD*



Mediation is designed to be used at strategic times to facilitate a negotiated solution to a dispute. Mediation allows parties to retain control of the outcome rather than relinquishing the decision to a panel of arbitrators. FINRA's mediation program encourages settlement of securities disputes with a panel of highly skilled and experienced mediators. The following is a summary of a caucus-based model of mediation, the method often used by FINRA mediators.

[FINRA Rule 14104\(b\)](#) of the Code of Mediation Procedure provides that if all parties agree, any matter eligible for arbitration under the Codes of Arbitration Procedure may be submitted for mediation. Some cases are relatively simple two-party matters. Others are multi-party disputes encompassing a myriad of complex issues. Most issues involve money, some involve pride and all involve a wide range of human emotions. Mediators need to be skilled in handling whatever comes up.

The role of the mediator is defined by [FINRA Rule 14109\(c\)](#): "The mediator shall act as a neutral, impartial, facilitator of the mediation process and shall not have the authority to determine issues, make decisions or otherwise resolve the matter." Despite the negations of power, the mediator wields a great deal of influence. The mediator "facilitate(s), through joint sessions, caucuses and/or other means, discussions between the parties, with the goal of assisting the parties in reaching their own resolution of the matter." ([FINRA Rule 14109\(d\)](#)). How can you be sure that the mediator is right for you? How can you best represent yourself or your client at a FINRA mediation?

### Pre-Mediation

Selecting a mediator with the right process skills is an important step. There are as many different styles of mediation as there are mediators. Some mediators are more facilitative, viewing their role as a facilitator of negotiations. Other mediators are more evaluative, preferring to direct the

### Year End Message

As we approach the end of 2019, we would like to extend a heartfelt thanks to our arbitrators and mediators. We value the expertise and skill you bring to the dispute resolution process and appreciate your dedicated service. Without you, we could not provide the excellent service that parties have come to expect at FINRA. As a forum, we continue to look for ways to enhance the dispute resolution experience for all participants. Whether it relates to technology, the case management process or honoraria, we welcome your suggestions for ways to improve the forum. We wish you a wonderful holiday season and look forward to working together in 2020.

negotiations with a view toward evaluating the claim for the parties. Most operate along a continuum, blending facilitative and evaluative approaches.

Find out about your mediator and his or her style. What kind of experience does he or she have? What kind of training has he or she received? How will the mediation be conducted? Will the mediator use joint meetings, private caucuses or a combination of both? Think about what you want in a mediator. Does the mediator have experience in resolving similar matters? Learn as much as you can about the environment and the mediator in advance of the mediation.

Have a private conversation with your mediator to explain the case from your client's perspective. Unlike arbitration where *ex parte* contact is prohibited, the essence of mediation (and what helps a mediator work their magic) is the ability to speak with one party outside the presence of the other. The mediator, as a shuttle diplomat, can help the parties barter both information and settlement offers. A conversation with the mediator before the formal session can be valuable in setting the stage for a successful mediation. Always be sure to confirm confidentiality of your communications at the beginning of the first conversation.

### Preparation Is Key

Spend time analyzing the case from different perspectives using the following suggested outline. A seasoned mediator will explore these areas during the mediation.

- Prepare a 10-minute summary of your case:
  - Facts—Undisputed and disputed
  - Law—Undisputed and disputed
  - Key witnesses and other proof
  - Damages
- Summarize your opponent's case as noted above. A good advocate can argue both sides!
- Describe the strengths **and** weaknesses of your case. Do not pull any punches.
- Describe the strengths **and** weaknesses of your opponent's case.

- Identify your client's **interests** expressed or, as more often the case, unexpressed (*i.e.*, what does the client need, what are motivating factors that underlie the dispute, why settle the case at all?)
- Identify the interests, expressed and unexpressed, of the other party.
- Review the alternatives to reaching an agreement (*i.e.*, assuming there is no settlement and the matter must go to arbitration). Ask yourself:
  - What is the likely outcome expressed as a range (assess some numerical probability)?
  - What are the expected fees and costs (and the value of lost opportunity time)?
  - How long must the parties wait until final disposition?
  - Is the client being realistic or do you need help in moderating expectations (“reality testing”)?
- Are there any unresolved procedural matters that would be dispositive of the case? If so, how does this impact your desire or willingness to settle?
- What is the relationship between the parties? Has there been any past or current business dealing? Is there a desire for a future relationship? Can anything be done to improve or preserve the relationship?
- What is the relationship between the advocates? Can anything be done to improve that relationship?
- What is the history of settlement negotiations? What obstacles to settlement have you observed?
- Does your client have authority to settle the dispute? Does the opposing party representative have similar authority? Are there other factors affecting the negotiations, such as a spouse or third party “leaning” on the client, the precedential value of the case, the publicity factor, etc.?
- What are some creative options for settlement? Do not be concerned with whether the other party would find them acceptable. This is brainstorming. Keep in mind that the resolution does not need to be confined to the sort of “relief” available in arbitration. Be creative and expansive.

- What external standards could be applied to the options to frame them as fair and legitimate in the eyes of all concerned parties? If the settlement is objectively fair, it is more likely to be acceptable.
- What proposals for settlement do you think **your client** would be willing to make? What proposals do you think the **other side** would be willing to make? How do you think the other side will react to your negotiating strategy?

At this point, you have organized your thoughts and can now focus on your presentation and strategy.

- Prepare a confidential mediation statement, (five to 15 pages) similar to a settlement brochure. Make copies for you, your client and the mediator, tabbed with sections to show:
  - Summary of case
  - Liability analysis
  - Summary of damages
  - Pleadings, pending dispositive motions and **most pertinent** case law, if applicable (highlighted for ease of reference)
  - Representative sample of key documents (highlighted) and other evidence
- You may want to send a separate settlement brochure (without confidential information) to the other party in advance of the mediation. If you do so, you are providing information and analysis, not drawing “lines in the sand” by making intractable and unyielding demands.
- Send materials for the mediator to review at least 10 days before the mediation.
- Be sure that your party or party representative will be present for the entire mediation (reserve the full day) and that the party has full authority to settle the case (not just a “bottom line”). Make certain that others who may influence the decision are available, even if by telephone, on the day of the mediation.

### How Will You Negotiate?

Plan a negotiating strategy with your client. Think about parameters for settlement and the kind of information you need to influence your decisions. A mediation session may uncover new information and reveal different perspectives. Therefore, come with an open mind and a willingness to be flexible. At the same time, it is good practice to think about your negotiating strategy.

The mediator is condensing weeks or months of negotiation into a single day (mediation is sometimes called “turbo-charged negotiation”). Do not set your negotiating plan in concrete. Avoid setting absolute “bottom lines” with your client or “saving face” later can be a real obstacle to settlement. It is helpful to consider an integrative or collaborative approach to the negotiation. Remain flexible with the process. Never let the mediator control your side of the negotiation. You and your client are in charge.

A good part of mediation training curriculum is negotiation theory and practice. Utilizing the paradigm of mediator as a “guest” at a negotiation, mediators must know about the process of negotiation to aid the parties.

We use an acronym, CAIROS, to demonstrate essential principles of interest-based negotiation.

- “C” stands for “Communication.” Good negotiators ask themselves “What do we want to learn from the other side?” and “What messages do we want to send to the other side?” Negotiators appreciate the importance of asking questions—both to obtain essential information, as well as to persuade the other side to “come about” in their thinking.
- “A” stands for “Alternatives.” Good negotiators always focus on the alternative to reaching an agreement, or the consequences of a failed negotiation. What are the risks of the arbitration? What might happen? Consider the whole array of possibilities and not just the “best case” scenario. What are the real and imagined costs?
- “I” stands for “Interests.” Good negotiators look at the interests and needs of all participants in a negotiation. Collaborative negotiators avoid the tendency to focus on positions, which are invariably at opposite ends of the spectrum. There is often a great deal of commonality between the interests of the parties, starting with a

common interest to negotiate a settlement and avoid the alternative. Negotiators build on common ground. Interest analysis leads to creative solutions.

To some degree, everyone acts out of a sense of self interest. Ask yourself, “How are the needs of the participants going to be satisfied?” To the extent that an agreement addresses such interests, it is more likely to be acceptable and honored in the long run.

- “R” stands for “Relationship.” Good working relationships are the key to productive interactions in negotiations, business, family and personal life. Negotiators ask themselves what can be done to improve the relationship. How can we create a positive working environment?
- “O” stands for “Options.” Options generation is a creative process. True brainstorming involves a suspension of judgment. It requires abandonment of positional thinking—the “either or” dilemma. We assume the pie is expandable, that we can create value.
- “S” stands for “Standards.” Good negotiators look for objective external standards as a formula or rationale for their proposals. On what basis shall we decide? A search for standards is attempting to apply objectivity and fairness to a proposal, making it more palatable to the other side.

Of course not all elements of interest-based negotiation are present in every engagement. Experience has shown that a successful integrative solution is more likely to be achieved when these six factors are present.

### **At the Mediation Session: Joint Session**

The mediator’s opening statement is designed to set a specific tone and is likely to include the following:

- Introductions by the persons present
- Summary of the mediator’s background and experience
- Discussion of the mediator’s role as distinguished from an arbitrator, neutral case evaluator or fact finder
- Presentation on the voluntary and confidential nature of the process
- Outline of how the day is likely to proceed and a summary of the ground rules

- Solicitation of the participants to negotiate in good faith and the signing of the Mediation Agreement
- Opportunity for opening statements

### Giving Your Opening Statement

In recent years, mediators and counsel have moved away from joint session presentations. Some fear that they cause more polarization and that a wrong word or sideways glance might torpedo the talks. In those situations, we dispense with a joint session presentation and allow the mediator to do the communicating. However, a well-stated presentation can move the other side to reconsider their position. Another plus is that you get to speak directly to the other decision maker. The following applies to situations where both sides and the mediator feel it worthwhile to make and hear presentations in joint session.

In mediation, the ultimate target of persuasion is not the mediator. The one who must find your arguments convincing is the party who must compromise their claim (or defense). It makes sense to address your remarks to the other party. Politely demonstrate that you mean business, that you will take this “all the way” if you must, but let them know that you are here in good faith to negotiate a fair settlement. This is not the place for grandstanding, but it is an opportunity to communicate. Keep your objective in mind—to negotiate in a manner that will ultimately lead to both parties agreeing upon a resolution. Be direct, concise and clear.

When the opposing party or counsel has completed his or her presentation, ask non-argumentative questions to clarify any matters. Communicate to the other side that you understand their interests. There is a difference between understanding and agreeing. If you can articulate their perspective (and do so in their presence), you are closer to achieving a meaningful settlement.

- Cover only key points—do not be distracted by subsidiary issues that, in all likelihood, will never be resolved. The whole is greater than the sum of its parts.
- Be courteous and persuasive.
- Practice active listening skills (an excellent beginning is to restate what the other said to show you fully understand—although not necessarily agree—with the other’s point of view).

Consider allowing your party to speak on his or her own behalf, if it will move the other side.

- Showcase the ability of the party to tell their story.
- It is a cathartic experience to relate your story to the other side—without filters or interruptions.
- Involve the party in the mediation process and create “ownership” of the dispute and ultimate resolution.

### First Caucus: Private Session

- This is primarily an “information-gathering” session by the mediator, and the parties will have the opportunity to “vent,” if needed, in this private setting.
- Confirm that the mediator will maintain confidences.
- Be candid and honest with the mediator.
- Be prepared for a thorough analysis of case—from your perspective as well as the perspective of the other party.
- Be ready to analyze the alternative, the consequences of failing to reach agreement. Estimate costs and expenses, likelihood of recovery, range of probable outcomes and other aspects associated with continued conflict.
- Brainstorm settlement options.
- Begin the negotiation process. It is helpful to start the negotiations with a meaningful proposal. (Note: some mediators do not request demands/offers until the second caucus.)
- Opening demands/offers are just that—an opening, a beginning. A good proposal is supported by objective criteria or legitimate standards. It can be explained with reference to a rational basis or formula (not just a feeling). With every offer, it is helpful to consider what response you believe the proposal will elicit in the other party, and whether it will further the negotiation.
- **OPTIONS—“Only Proposals That Include Others’ Needs Succeed.”** Can you articulate a benefit to the other side?



### Second (and Later) Caucuses

The mediator will use these sessions to create momentum toward settlement by refocusing the parties on previous areas of agreement, their underlying interests, the underlying interests of the other party, option analysis, risk analysis and transmittal of reasonable proposals.

- Be willing to listen to different points of view.
- Consider the information transmitted from the other side.
- If appropriate, allow new information to influence your risk analysis/settlement parameters.
- Use the mediator as a sounding board for “reality testing” and to “float” settlement proposals.
- Be willing to explore creative solutions.

The mediator may give you assignments to work on between caucuses. You may be asked to explore the risk analysis in further detail and generate additional options for settlement that have not yet been proposed to the other side. As the caucus sessions continue, the mediator will build the momentum and assist in clarifying common ground. Sometimes, the mediator will recommend a joint session to hammer out details.

### Closure (Post Agreement)

The mediator may recall the parties to the joint session format if they have been in caucus to summarize essential terms of the agreement. Each participant will be asked if the mediator’s summary was accurate and whether they agree that the matter has been settled.

Ask yourself:

- Have all bases been covered—are there any loose ends? Do you have a binding and enforceable settlement?
- Who will prepare the final documents—when and how will they be transmitted?
- What will happen if something breaks down in the post-mediation phase?
- How and under what circumstances should the mediator be brought into the discussions?

In order to avoid problems that are occasionally created by “settlement remorse,” it is good mediator practice to have the parties sign a memorandum of essential terms. Even better, some advocates come prepared with final settlement documents to be executed at the conclusion of the mediation. Let the mediator stay involved until completion. FINRA is notified about the settlement (not the terms of settlement) and the matter is closed.

Mediation is here to stay. Lawyers and parties recognize the special role that a mediator can play to bridge differences and bring about solutions. As confidante to both sides, the mediator stands in a unique position to assess the likelihood of settlement. And as facilitator of negotiations, the mediator can do more than the parties may be comfortable doing by themselves. Mediation works! Effective advocates make the process their own.

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*Jeff is a pioneer in the mediation field. He served on the legislative task force that drafted the landmark Texas ADR law. In 1990, he worked closely with FINRA (then NASD) to design its national mediation program. He has provided mediation training for FINRA in New York City and across the country, for the U.S. Bankruptcy Court for the Southern District of New York and for state and federal courts, state and local bar associations and private institutions.*

*Before becoming a mediator, Jeff worked as a trial lawyer handling complex business litigation. He is a member of the Texas Bar and a former member of the Florida and Oregon Bars. He is a current member of the National Academy of Distinguished Neutrals, an invitation-only professional organization.*

*Jeff lives in Dallas and travels nationwide on mediation assignments.*

## Introducing Previously Undisclosed Documents or Witnesses Under FINRA Rule 12514

*\*By Danielle Williams and Steeve Encaoua*



[FINRA Rule 12514\(a\)](#) of the Code of Arbitration Procedure for Customer Disputes (Customer Code) instructs parties to provide “copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced.” This rule is commonly referred to as the “20-Day Exchange” and is intended to prevent surprises at the hearing and to allow parties adequate time to prepare their cases.

What happens when a party tries to introduce previously undisclosed documents or witnesses at a hearing? Arbitrators will need to determine whether to admit these new documents or witnesses. FINRA Rule 12514(c) states that, “parties may not present any documents or other materials not produced and/or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness.” But, what constitutes “good cause”? As explained in FINRA Rule 12514(c), “good cause” includes the “need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing.” Therefore, a new document may only be introduced into evidence, or a new witness called to testify, to prove a statement made at the hearing is not true (rebuttal) or to attack the integrity or validity of testimony (impeachment).

In determining whether to admit previously undisclosed documents or new witnesses, arbitrators should focus on the last sentence of FINRA Rule 12514(c), specifically, the phrase “...based on developments during the hearing.” In other words, it may be appropriate to allow new documents or witnesses if an **unexpected** development transpires during the hearing. Or, perhaps a party needs to introduce evidence to prove that a witness is not telling the truth. For example, a claimant testifies that he or she never traded options. The respondent may be permitted to present account statements from another firm showing options trades even if the statements were not part of the 20-Day Exchange. However, arbitrators should deny a request for late submission of evidence if the documents are merely in further defense of a claim. FINRA Rule 12514(c) clearly conditions

that “Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties” at the time of the 20-Day Exchange. Please contact your case administrator with any questions about FINRA Rule 12514.

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## \*Maintaining Arbitrator Confidentiality

\*\*By Terri L. Reicher



Arbitrators often hear that they should not discuss cases with anyone but their co-panelists, either during the case or after it concludes. Confidentiality protects the parties, the arbitrators' award and the integrity of the arbitration process. Canon VI(B) of the [Code of Ethics for Arbitrators in Commercial Disputes](#) (Code of Ethics) states that:

Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

### How Can an Arbitrator Breach Confidentiality?

Arbitrators can knowingly breach confidentiality in obvious ways, like discussing a case with a party or party's counsel, or with any other person, even a family member. An arbitrator can *unknowingly* breach confidentiality, as well. Here are some examples:

- Discussing a case with a co-panelist at a social or professional event, a sporting event, a mall, an airport—any place within hearing distance of a third party.
- Discussing the facts of a case, even if you do not mention names. In the area of securities arbitration, the community of legal professionals and arbitrators is small; those present at a social or professional event may know the discussed case and the parties involved.
- Responding to a request from an attorney to evaluate his or her performance in the arbitration (this may come up in an attorney malpractice case), or to evaluate the credibility of a particular witness. Disclosing these opinions necessarily discloses the arbitrator's views of the case.

### Why Is Confidentiality So Important?

Confidentiality is the obligation that the law imposes on arbitrators in return for immunizing them from questioning after an award is issued. Arbitrators enjoy some of the same privileges and immunities accorded to

judges because they perform a similar function. Like judges, arbitrators cannot be questioned about the basis of their decisions. Without this immunity, every losing party in an arbitration would be able to attack the award by compelling the arbitrator into court for cross-examination about his or her reasoning.

### What Are the Dangers of Breaching Confidentiality?

The arbitrator's immunity from post-award questioning can be waived when an arbitrator has voluntarily discussed the case and disclosed his or her reasoning, or disclosed communications with other panel members, to someone outside of the panel. Breaching confidentiality not only waives the protection for that arbitrator, but it may also waive protection for the other panel members, even if they did not breach confidentiality.

Breaching confidentiality also undermines the validity of the award by giving a dissatisfied party a possible basis to seek judicial review of the award. The law allows for vacatur of awards for arbitrator bias, evident partiality or other misconduct. A court could deem an arbitrator's breach of confidentiality as evidence of bias, evident partiality or misconduct.

### How Can You Protect Yourself and Your Co-Panelists?

- Do not discuss a case with anyone except your co-panelists or FINRA staff. Do not volunteer the fact that you are sitting on or have sat on an arbitration case. If you must disclose the case for professional purposes, your disclosure should be limited to the existence of the case, the parties (if necessary for conflict-of-interest checks) and the case schedule, if relevant. Despite this limitation, an arbitrator must fulfill his or her disclosure obligation under the Codes of Arbitration Procedure.<sup>1</sup>
- Avoid any contact, even incidental, with parties or their counsel outside of hearings or conferences. If any contact occurs, the arbitrator who engaged in the ex parte contact should disclose to the chairperson or case administrator that the contact took place and the nature of the contact. The arbitrator should reduce the disclosure to writing and place the disclosure on the record.
- After the case is over, avoid all contact with the parties and their counsel. If you are contacted by any of the participants, advise the person that you cannot speak and refer the caller to the regional

office that administered your case. Next, immediately contact FINRA and advise the case administrator that a case participant contacted you. Do not call your fellow arbitrators to ask if they have been contacted.<sup>2</sup>

- If you receive a subpoena for documents or testimony in a motion to vacate or confirm an award, immediately contact the regional office that administered your case. Do not discuss the subpoena with anyone else. Arbitrator depositions rarely occur, but the first question will be, “Have you discussed this matter with anyone?” A “yes” answer makes it likely that the other person also will be subpoenaed.

While problems concerning arbitrator confidentiality seldom arise, should such a problem occur, FINRA provides legal representation to arbitrators who are sued or subpoenaed for actions that arise from their service on an arbitration case.

*\*We are republishing this article with some revisions. This article was originally published in [The Neutral Corner \(April 2007\)](#).*

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### Endnotes

1. See [FINRA Rules 12405](#) and [13408](#) on Disclosures Required of Arbitrators.
2. See the related Question and Answer on “Post-hearing Inquiries” in this issue.

## Office of Dispute Resolution (ODR) and FINRA News

### Arbitration Case Filings and Trends



Arbitration case filings from January through November 2019 reflect a 12 percent decrease compared to cases filed during the same 11-month period in 2018 (from 3,937 cases in 2018 to 3,454 cases in 2019). Customer-initiated claims decreased by 13 percent through November 2019, as compared to the same time period in 2018.

### **Removal of Prehearing Conference Order From FINRA’s Website**

In April 2019, ODR added the Prehearing Conference Order (Order) to the [Dispute Resolution Portal](#) (portal). This allows arbitrators to complete the Order in the portal in fewer steps and without having to download a PDF. The Order provides additional ease by pre-populating case numbers, party names and arbitrator names. Arbitrators can find the Order under the “Drafts & Submissions” tab in the portal by selecting “Order” as the submission type. The system alerts arbitrators if required information is missing.

On December 2, 2019, FINRA removed the PDF version of the Order from its website. The PDF will remain available to arbitrators upon request. Since 2017, FINRA rules have required all parties, except customers representing themselves, to use the portal. ODR has integrated the Order and other important forms into the portal to encourage arbitrators to use the portal as the most efficient and secure way to communicate with parties and ODR. If you would like to register with the portal or need to reactivate a dormant account, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation.

If you have any questions about using the portal forms, please review the User Guide or contact a FINRA employee for assistance at (800) 700-7065.



## Register For the Portal Today

If you have not already done so, we strongly encourage arbitrators and mediators to register for the portal. The portal allows you to:

- file case documents including the electronic Oath and Checklist, the Initial Prehearing Conference (IPHC), general, dismissal and postponement orders, and the Award Information Sheet;
- access information about assigned cases, including case documents, upcoming hearings and arbitrator payment information;
- schedule hearings;
- update profile information;
- view and print the disclosure report;
- update the last affirmation date on the disclosure report; and
- review list selection statistics to see how often your name has appeared on arbitrator ranking lists sent to parties and how you have been ranked or struck on those lists.

Portal registration is reflected on the disclosure reports that parties review when selecting arbitrators and mediators.

## Portal How-to Videos

If you need assistance updating your profile or submitting the Oath of Arbitrator or other order forms in the portal, the how-to videos are here to help. These videos are quick tutorials for arbitrators on navigating to the Update Form and Oath of Arbitrator. They also include information on how to disable pop-up blockers in different Internet browsers.

## Updated Arbitrator Travel Policy

FINRA updated its guidelines for meal reimbursement. Please review the updated [FINRA Arbitrator Travel Policy](#) with this new information before your next hearing.

## Results of the Eleventh Annual Securities Dispute Resolution Triathlon

On October 19 – 20, 2019, FINRA and the St. John’s University Hugh L. Carey Center for Dispute Resolution held the Eleventh Annual Securities Dispute Resolution Triathlon in New York City. Twenty teams of law students from 18 law schools competed and demonstrated their advocacy skills in three critical forms of alternative dispute resolution: negotiation, mediation and arbitration.

Congratulations to the competitors!

- Overall Winner: South Texas College of Law
- Negotiation Round Winner: University of Houston Law Center
- Mediation Round Winner: South Texas College of Law
- Arbitration Round Winner: New York Law School
- Advocate’s Choice Winner\*: American University Washington College of Law

*\*Advocate’s Choice is based on votes by competitors for the team that demonstrated skill, competence and professionalism.*

## 2019 Demographic Survey Thank You

Thank you to those who participated in the 2019 demographic survey of the arbitrator and mediator rosters. As in previous years, the survey was administered by a third-party consulting firm and participation in the survey was voluntary.

FINRA is committed to diversity and has embarked on a campaign to recruit individuals from varied backgrounds to serve as arbitrators. The data received from this annual survey help 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 the arbitrators’ awards. All responses are anonymous and confidential. The results cannot affect your chances of being selected to serve on cases.

We look forward to publishing the 2019 results early next year. You may review the results of past demographic surveys on our [website](#).

## SEC Rule Filings

### *Proposed Rule Change to Amend FINRA Rule 12000 Series to Expand Options Available to Customers if a Firm or Associated Person is or Becomes Inactive*

FINRA filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend FINRA Rules [12100](#), [12202](#), [12214](#), [12309](#), [12400](#), [12601](#), [12702](#), [12801](#) and [12900](#) of the Customer Code to expand a customer's options to withdraw an arbitration claim if a member or an associated person becomes inactive before a claim is filed or during a pending arbitration. In addition, the proposed amendments would allow customers to amend pleadings, postpone hearings, request default proceedings and receive a refund of filing fees in these situations. The comment period expired on December 13, 2019. See [SR-FINRA-2019-0027](#) for more information.

### *Proposed Rule Change to Amend the Membership Application Program (MAP) Rules to Help Further Address the Issue of Pending Arbitration Claims, as well as Arbitration Awards and Settlement Agreements Related to Arbitrations That Have Not Been Paid in Full in Accordance with Their Terms*

FINRA filed with the SEC a proposed rule change to amend the MAP rules to help further address the issue of pending arbitration claims, as well as arbitration awards and settlement agreements related to arbitrations that have not been paid in full in accordance with their terms. Specifically, the proposed rule change would: (1) amend [Rule 1014](#) (Department Decision) to: (a) create a rebuttable presumption that an application for new membership should be denied if the applicant or its associated persons are subject to a pending arbitration claim, and (b) permit an applicant to overcome a presumption of denial by demonstrating its ability to satisfy an unpaid arbitration award, other adjudicated customer award, unpaid arbitration settlement or pending arbitration claim; (2) adopt a new requirement for a member, that is not otherwise required to submit an application for continuing membership for a specified change in ownership, control or business operations, including business expansion, to seek a materiality consultation if the member or its associated persons have a defined "covered pending arbitration claim," unpaid arbitration award, or an unpaid arbitration settlement; (3) amend [Rule 1017](#) (Application for Approval of Change in Ownership, Control, or Business Operations) to

require a member to demonstrate its ability to satisfy an unpaid arbitration award or unpaid settlement related to an arbitration before effecting the proposed change thereunder; (4) amend [Rule 1013](#) (New Member Application and Interview) and [Rule 1017](#) to require an applicant to provide prompt written notification of any pending arbitration claim that is filed, awarded, settled or becomes unpaid before a decision on an application constituting final action on FINRA is served on the applicant; and (5) make other non-substantive and technical changes in the specified MAP rules due to the proposed amendments. Please see [FINRA-2019-030](#) for more information.

## Mediation Update

### Mediation Statistics



From January through November 2019, parties initiated 544 mediation cases, an increase of 14 percent for the same period in 2018. FINRA also closed 550 cases during this time.

Approximately 86 percent of these cases concluded with successful settlements.

### Mediation Program for Small Arbitration Claims

FINRA's [Telephonic Mediation Program for Small Arbitration Claims](#) continues to receive positive feedback from parties and mediators. Active FINRA arbitration cases with initial claims of \$50,000 or less are eligible for the program. Claims for \$25,000 or less are eligible for mediation at no cost. Claims for more than \$25,000 through \$50,000 are eligible for a reduced fee of \$50 per hour (divided by the parties). FINRA collects no mediation filing fees for these cases.

To date, more than 90 percent of the cases mediated through this program have reached a settlement. While conducting mediations, FINRA mediators emphasize the value of telephonic mediation and help parties understand the strengths and weaknesses of their cases and help them shape their own outcomes.

Telephonic mediation offers seniors, or those with difficulty traveling, the option to participate in a mediation from the comfort of their own homes. Telephonic mediation also offers mediators in areas of the country with fewer opportunities to mediate the ability to mediate with parties in any location.

We encourage parties and counsel in small cases to consider using the telephonic mediation program.

### Keep It Current

Keeping your mediator disclosure report up-to-date—including the number of times you have mediated cases, your success rate and types of cases mediated—matters to parties when selecting a mediator. Parties have also requested references from mediators who do not list them on their disclosure report. Please add references to your disclosure report, so parties

may consider them when selecting a mediator. Lastly, if you have a cancellation policy, please include it in your disclosure report. You can update your mediator profile anytime through the [portal](#).

### Mediator Training Opportunities

Occasionally, FINRA receives information about mediator training that we think would be of interest to our mediators. We will post information and links to these training opportunities on the [Resources for Mediators](#) page of our website.

### 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

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### Letters Closing FINRA Investigations Without Further Action

**Question** Recently at a hearing, a member firm tried to introduce evidence that after FINRA investigated the firm, FINRA issued a letter stating that it had determined to close the investigation with no further action at this time. Should I permit a member firm or associated person to introduce evidence during the hearing of FINRA’s decision not to take action?

**Answer** No. A determination by FINRA not to take action against a member firm or associated person has no evidentiary weight in any mediation, arbitration or judicial proceeding. Further, FINRA considers it to be inconsistent with just and equitable principles of trade under [FINRA Rule 2010](#) for a member firm or associated person to attempt to introduce such a determination into evidence in any mediation, arbitration, or judicial proceeding. FINRA’s decision to close an investigation without further action may result from many factors unrelated to the merits of a complaint, such as jurisdictional limitations or the existence of an ongoing or completed enforcement action by another law enforcement or regulatory agency.

However, if another party to the arbitration makes a representation that is inconsistent with the closing letter—for example, stating that FINRA determined to take action against the member firm or associated person—it would be permissible for the member firm or associated person to introduce the letter, in unedited form, solely for the purpose of creating a complete factual record. Please see [Regulatory Notice 02-53](#) for more information.

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### Post-hearing Inquiries

**Question** I recently served on two cases involving the same claimant's attorney. One case settled after a few days of hearing, and the other went to award. Shortly afterwards, I received an email from the claimant's attorney who wanted to discuss the cases. He wanted to know how I would have ruled in the settled case and the panel's reasoning for the award. He also wanted to get my thoughts on his performance as counsel and of the testimony of certain witnesses. He said he routinely contacts arbitrators to discuss cases when they close and that FINRA does not prohibit such discussions. Can I discuss the cases with the attorney?

**Answer** No. All matters relating to the arbitration, including pleadings, motions, evidence, witnesses and panel deliberations, are confidential. Arbitrators have a continuing obligation to maintain confidentiality even after a case has concluded.<sup>1</sup>

Although some courts allow attorneys to speak with jurors after a case has concluded, this kind of communication is prohibited in FINRA arbitration. Therefore, arbitrators should not discuss what occurred during the hearing or during panel deliberations with individuals other than their co-panelists—this includes parties, parties' counsel, friends, family members, colleagues and members of the media. If you are contacted by anyone other than your co-panelists to discuss a case—or any matter involving your service as an arbitrator for FINRA—you should decline to discuss the matter. You should refer all questions to FINRA and immediately advise the case administrator of the inquiry.

For more tips, please see Terri Reicher's article on *Maintaining Arbitrator Confidentiality* in this issue.

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### Avoid Double-booking

**Question** At an IPHC, the parties proposed a limited number of evidentiary hearing dates due to their busy schedules. However, the proposed dates conflict with another FINRA hearing in which I am an arbitrator. In my experience, these cases often settle prior to hearing. Can I accept the parties' proposed dates even though they conflict with my other hearing?



**Answer** No, an arbitrator should not “double-book” hearings. Double-booking, by definition, creates a scheduling conflict and may delay the arbitration process if an arbitrator must ultimately withdraw from one case to accommodate another.

The [Code of Ethics](#) (Canon I, Paragraph H) states that, “Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.” FINRA does not consider nonemergency conflicts to be valid reasons for withdrawing from a case.

To avoid double-booking, FINRA encourages arbitrators to register with the [portal](#), in order to view their entire hearing calendar for all of their assigned cases. Please note that an arbitrator who intentionally double-books be referred to the National Arbitration and Mediation Committee (NAMC) for removal from FINRA’s roster.

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**Question** I inadvertently double-booked myself for hearings. Should I notify the parties or wait to see if one of my cases settles?

**Answer** Arbitrators have an obligation to the parties to commit to agreed-upon hearing dates.

However, if an arbitrator inadvertently double-books hearings, he or she should notify the assigned case administrator immediately. This gives parties time to decide how to proceed, given the scheduling conflict. Notifying parties also prevents an arbitrator’s late recusal prior to hearing.

In October 2016, staff began recording instances of arbitrator recusals within 45 calendar days of a scheduled hearing on the merits. FINRA monitors arbitrators’ late recusals to determine whether to refer any arbitrator to the NAMC for possible removal from FINRA’s roster.

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### Endnote

1. [Canon VI\(B\)](#) of the [Code of Ethics](#) states: “Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”

## 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 during the arbitrator selection process. Parties should have the most current and complete information about an arbitrator to make an informed decision when selecting arbitrators. Arbitrators should log in to the [portal](#) to update their disclosure reports.

## Last Affirmation Dates on Arbitrator Disclosure Reports

In 2017, 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 during the arbitrator selection process. Parties may consider the affirmation date when making decisions about ranking and striking arbitrators.

In order to provide parties with the most current arbitrator information, we are asking arbitrators to review their disclosure reports regularly and affirm the information in the disclosure report. Arbitrators can affirm their disclosures and refresh the affirmation date by submitting an update through the portal or by submitting an Oath of Arbitrator when assigned to a case. Even if you have no changes, you can update the affirmation date by affirming the information on your disclosure report and submitting an update form through the portal. If you would like to register in the portal or need to reactivate a dormant account, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation. Please include “request portal invitation” in the subject line.

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