FINRA®

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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.

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Zoom Zooming into Mediations in COVID-Times

*By James Yellen**

As COVID-19 started hitting major US cities in March 2020, FINRA Dispute Resolution Services (DRS) had to adjust how it conducts hearings. While customer complaint filings for 2020 declined by 12 percent, employment and broker-dealer disputes increased by 31 percent and constituted almost half (47 percent) of all new arbitration filings. In his January 2021 NYSBA Journal article, "'Zoom & Greet!' 2021's Way To Meet, Network and Socialize at Annual Meeting and Beyond," author Michael Fox reported that the number one downloaded free app in 2020 according to Apple was Zoom.[1] One year earlier, in 2019, Zoom did not even grace the top 20.[2] There is no doubt that mediators contributed to that growth, as the advantages of Zoom mediation have become ever apparent since COVID-19 lockdowns began.[3] Based on my real-life experience as a mediator before and during the pandemic, I believe virtual mediation will remain a viable option long after the pandemic.

Virtual Arbitration vs. Mediation: Some Comparisons

Though less formal than court proceedings, FINRA arbitrations are, at their core, trials. Arbitration practitioners were initially slow to embrace remote arbitration.[4] Practitioners cited concerns about technical difficulties, privacy breaches, distractions and interruptions and missed opportunities to meaningfully connect with witnesses.[5] It is also more difficult for counsel to "read the room" in a Zoom arbitration.[6] In a live proceeding, the panel should not telegraph how a witness or an argument is landing, but sometimes an advocate picks up clues. A quick look towards the end of the conference room table can speak volumes.[7] Which arbitrator jotted something down during critical testimony? When did the panel members exchange glances? When did they pass notes to one another? These clues are more difficult to discern in a virtual arbitration. You *can* tell whether the panel members are staring at their screens. You *can't* tell whether they're looking at you, opposing counsel, a witness or a document.

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None of these arbitration-specific concerns, however, impact the effectiveness of Zoom mediations.[8] In some respects, Zoom mediations may prove to be both *more* convenient and effective in helping parties resolve disputes.[9] Considering the mediation process, it is perhaps unsurprising that in the past year, parties have mostly had positive experiences in Zoom mediation.[10]

Mediating By Zoom: A Real-life Account

Zoom mediations typically begin with the parties and counsel in a common virtual room.[11] This is almost, by definition, a joint session, even if all that occurs is the mediator explaining the schedule for the day and the ground rules for the mediation.[12] After the joint session, the mediator hosts follow-up "caucus" sessions held in private breakout rooms, which are almost identical to pre-Zoom mediations.[13] During these sessions, the parties and counsel meet privately with the mediator.[14] If the mediator senses an impasse and needs to connect with counsel alone and away from the clients, it can be done easily in another virtual breakout room.

Much like an in-person session, a Zoom mediation is both informal and interactive. The mediator works to get the parties to agree, and the parties "work the ref," so to speak. To unpack this, let's peek behind the curtain and look at the dynamics of an actual Zoom mediation I conducted recently.

I began the session with the parties and counsel on Zoom. The respondent's counsel wanted to make a brief initial statement. Historically, I have not been a fan of opening statements. In my experience, it is harder to reach an agreement when the parties begin the mediation by digging into their adversarial positions. However, it is also important to defer to counsel if they would like to say a few words, which is what I did. The respondent's counsel's words led to more (and louder) words by the claimant's counsel and still more (and still louder) words by the claimant, who took advantage of the joint session by unleashing two years of pent-up anger and emotion, at one point yelling "You are a loser and a liar!" at the respondent.

This invective allowed the claimant to vent directly at the respondent in a way that, in my view, was less likely to have occurred if the parties were face-to-face. That is not to say that in-person mediations cannot get heated. They can, and they do. But in a Zoom mediation, things escalate differently. Interpersonal tools that might otherwise suppress an emotional outburst (picture a lawyer extending an arm in front of a worked-up client to signal that it's time to stop talking) are unavailable. And raising one's voice at a screen may be less intimidating than raising one's voice at the person sitting

across the table. On the flip side, if the opposing party is being too loud and aggressive in a Zoom mediation session, they can *literally* "lower the volume" to quiet things down. This arguably allows one side to let off steam without scalding the other side too badly.

Was the high-decibel joint session "unproductive"? In the short term, yes. Everyone's hackles were up, and it took some time in breakout rooms to calm things down. But for the claimant, it was also cathartic. The case settled hours later for less than the "bottom line" the claimant insisted on earlier. I suspect the name-calling and venting actually saved the respondent some cash at the end of the day.

Conclusion: Zoom Mediation Is Here to Stay

Nothing succeeds like success.[15] The vast majority of FINRA claims settle, and during the pandemic, Zoom mediation has been the most popular means of settling. The question then becomes what will happen in a post-pandemic world. Will the popularity of Zoom mediations continue as a means of settling employment or market-loss disputes among and between FINRA members?

Having no crystal ball, and armed with nothing more than 30-plus years of experience in the FINRA dispute resolution world, this mediator says the answer is a resounding "Yes." Zoom mediations are here to stay.

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Endnotes

1 Michael L. Fox, "Zoom & Greet!" 2021's Way To Meet, Network and Socialize at Annual Meeting and Beyond, *N.Y. State Bar Ass'n* (Dec. 10, 2020), https://nysba.org/zoom-greet-2020s-way-to-meet-network-and-socialize-at-annual-meeting-and-beyond/.

2 *See id.*

3 *See, e.g.,* R. Thomas Dunn, Virtual Mediations Are Zooming Forward . . . Jump on Board, *Nat'l L. Rev.* (Apr. 10, 2020), https://www.natlawreview.com/article/virtual-mediations-are-zooming-forward-jump-board (describing the "silver-linings" of Zoom mediations, such as more streamlined processes, greater control over parties, and newfound cost- and time-efficiencies).

4 *See, e.g.,* Stephen Douglas Bonney, Labor Arbitration in the Time of Coronavirus: Who's Ready for Video Hearings? *Arb. Info* (May 12, 2020), https://law.missouri.edu/arbitrationinfo/2020/05/12/labor-arbitration-in-the-time-of-coronavirus-whos-ready-for-video-hearings/.

5 *See id.*

6 *See id.*

7 *See id.*

8 "Once you become comfortable with the technology, Zoom mediation is very much like face to face mediation, but without a lunch buffet." Ken Shigley, A Dozen Tips for Zoom Mediations, *Miles Mediation & Arb.* (July 29, 2020), https://www.milesmediation.com/blog/a-dozen-tips-for-zoom-mediations/.

9 Diane M. Welsh, a JAMS mediator and arbitrator, now identifies as a Zoom "convert," reporting countless advantages for mediation sessions, such as increased participation, enhanced civility among parties, more efficient negotiations, and a better ability to de-escalate emotions. *See* Diane M. Welsh, Why Virtual Mediation Is Here to Stay, *The Legal Intelligencer* (Jan. 5, 2021), https://www.law.com/thelegalintelligencer/2021/01/05/why-virtual-mediation-is-here-to-stay/.

10 *See id.; see also* Donald L. Swanson, Practicalities of Mediating Via Zoom, *Bus. L. Today* (Dec. 10, 2020), https://businesslawtoday.org/2020/12/practicalities-mediating-via-zoom/; Mediation Sessions, *FINRA Dispute Resolution Services* https://www.finra.org/arbitration-mediation/mediation-sessions.

11 *See* Dunn, *supra* note 3.

12 A joint session typically marks the beginning of a mediation. The goal of the joint session is to allow the parties to speak to the other party's decision-maker directly, and without interruption. *See id*.

13 *See id*.

14 *See id*.

15 In 2020, there were 413 FINRA mediation cases in agreement, and the settlement rate was a robust 85 percent. Dispute Resolution Statistics, *FINRA Dispute Resolution Services,* https://www.finra.org/arbitration-mediation/dispute-resolution-statistics.

FINRA Virtual Mediations

By Narielle Robinson, FINRA Mediation Case Administrator

When FINRA DRS postponed all in-person proceedings, mediations were swiftly rescheduled. Where appropriate, parties were offered the option to proceed virtually via Zoom. Parties and mediators have been conducting telephonic mediations for years, which are still available. However, a pandemic "silver lining" was the opportunity for parties and arbitrators to transition to and embrace Zoom mediation.

What Should Mediation Parties Expect?

Once FINRA staff is notified of the date and time of a mediation, staff will send a Zoom invitation to the parties and the mediator.

When a party or mediator joins the Zoom meeting, staff will place them in the virtual waiting room until everyone is ready to be admitted to the main session. Staff will admit the mediator first to go over any questions about the mediation process over Zoom. Mediators should plan to join the mediation at least 15 minutes before the start of the session.

Depending on the mediator's preference, staff may stay on to admit the parties, assist with roll call and to create breakout rooms or leave the meeting before the parties join the session. If the mediator opts to host the mediation, the mediator will be responsible for creating the breakout rooms and admitting participants to the main meeting room. Even if staff does not stay in the Zoom session, they will remain available if the mediator needs assistance.

Zoom breakout rooms work the same way that separate conference rooms do during in-person mediations. Parties caucus in different Zoom breakout rooms. The mediator can move between the rooms to hold discussions privately with the respective parties and counsel and can also bring all participants back together in a joint session.

For additional help, mediators and parties can schedule a tutorial (even if they have not yet scheduled their virtual mediation) by reaching out to National Mediation Administrators, Narielle Robinson or Mara Weinstein. Participants can also review the Guide for Using Breakout Rooms in Mediation.

Bits, Bytes and E-Discovery Fights: Part II

*By Lisa Miller, FINRA Arbitrator**

This article is the second in a multi-part educational series on e-discovery and motion practice for FINRA arbitrators. In this article, Ms. Miller discusses the costs and burdens of electronic discovery conflicts.

Costs and Burdens

Electronic discovery (e-discovery) has prompted broader discovery demands, which has ramped up opposition. The Discovery Guide (Guide) provides guidance on how to evaluate the costs and other burdens of e-discovery when ruling on discovery disputes.

A party may object to the production of the items on the Document Production Lists (Lists) in the Guide, citing the cost or other burden of production. If the objecting party shows that the cost or other burden of production is disproportionate to its probative value, arbitrators should first consider whether the document is relevant or likely to lead to relevant evidence. If arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider if there are alternative means for production, which would mitigate the cost or other burden of production, including:

- narrowing the time-frame;
- narrowing the scope;
- identifying other documents that can provide the requested information; or
- ordering a different form of production.

Absent a written objection or party agreement, parties must exchange documents on the Lists pursuant to the relevant time frames under FINRA's Codes of Arbitration Procedure (Codes).

Format of Production

Parties should produce electronic documents in a manner that is generally more convenient and less expensive for all parties, while providing the information that is relevant to the claims and defenses at issue. Arbitrators

decide disputes that arise concerning the form in which a document will be produced. Whether the e-discovery produced is in a reasonably usable format is a frequent source of motion practice.

Proportionality

No matter the size and complexity of a FINRA arbitration, e-discovery can be its most expensive aspect. The burdens and costs of preserving potentially relevant information is weighed against the potential value and uniqueness of the information. This refers to the types of documents secured through litigation hold and the methods of searching for and producing them. E-discovery and its costs should be reasonably proportional to the amount at stake.

Because FINRA arbitration is intended to be efficient, proportionality is particularly important. Parties often object to producing e-discovery because of the alleged disproportionate cost or burden of production compared to the documents' use in proving or disproving a point in contention. If an objecting party demonstrates disproportionality between the burden of producing the e-discovery and the reasonable need for it, arbitrators must first determine whether the document is relevant or likely to lead to relevant evidence. If so, the subsequent inquiry can encompass:

- the importance of the issues at stake in the action;
- the amount in controversy;
- the parties' relative access to relevant information;
- the resources of the parties;
- the importance of the discovery to resolution of an issue in the case; and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

A popular defense in e-discovery motion practice is that the data is not in the responding party's possession. In this case, an arbitrator's subpoena to a third party might be necessary, triggering a relevance and proportionality analysis.

Arbitrator Tip

To avoid unnecessary e-discovery motion practice, arbitrators should carefully examine the moving papers that are filed with the requested subpoenas *duces tecum* to ensure the subpoenas include specifics, addressing form, format, programs, version, etc. To accomplish this, counsel might have to meet and confer. If this process is unsuccessful, the arbitrator can order production in a specific format and in a particular form (*e.g.*, native, raw, PDF or some other option that makes sense when weighing burdens versus benefits).

Subpoenas and Orders of Production

Arbitrators can, in certain circumstances, issue subpoenas to compel individuals and entities to appear. Subpoenas *duces tecum* compel production of documents to the requesting party at a particular time and place. This process is essentially identical in e-discovery, although most e-discovery is forwarded electronically and is not brought to the proceedings. Parties should agree in advance of the hearing how the party will bring the responsive documents.

COVID-19 and Reality

Considering the large and growing number of arbitrations that have been postponed and rescheduled or that have moved online because of COVID-19, it is in the best interest of all parties to address e-discovery issues as early in the discovery process as possible. Arbitrators can guide the advocates' understanding of the challenges inherent in distance arbitration practice or issue orders, as needed.

In FINRA proceedings, only arbitrators may issue subpoenas to parties (usually directed at case-specific items not included on the Lists) and non-parties. If a party wants non-party subpoenas for e-discovery, the party must submit a written request. The arbitrator decides whether to issue the subpoena and the terms of the e-discovery production.

E-Discovery from Non-FINRA Member and Non-Party

FINRA's rules for arbitration include two mechanisms for seeking e-discovery under the Codes. For parties and non-parties who are not FINRA members, FINRA Rule 12512/13512 authorizes arbitrators to issue subpoenas for production of e-discovery. For non-party, FINRA members, FINRA Rule 12513/13513 authorizes arbitrators to issue arbitration orders (not subpoenas) for production of e-discovery.

Non-parties to FINRA arbitration must respond to e-discovery requests from arbitration panels within 15 calendar days of receipt of the order or subpoena. If a non-party fails to respond timely, the non-party is deemed to have waived objections.

As an alternative to a subpoena, an arbitrator's order for production for e-discovery can compel cooperation from a FINRA member who is not a party to the arbitration. Arbitrators have the authority to order production of e-discovery in the possession or control of FINRA-member entities. If a FINRA member that is not a party to the arbitration possesses necessary e-discovery, the arbitrator may order production (or a witness's appearance) on a party's motion, without using subpoenas. Generally, requesting parties pay the costs of production of e-discovery (and any witness appearance).

Sanctions

Sometimes, an arbitrator's subpoenas and orders of production are not entirely successful in getting the custodian's attention. In this situation, arbitrators may consider imposing sanctions against a party for failing to comply with the discovery provisions under the Codes or for frivolously objecting to the production of requested documents or information under FINRA Rule 12511. Arbitrators may also dismiss a claim, defense or proceeding with prejudice under FINRA Rule 12212 for intentional and material failure to comply with a discovery order if prior warnings or sanctions have been ineffective.

**Lisa Miller is a FINRA public arbitrator and administrative hearing officer in California. She wrote the American Bar Association's practice guide* Art of Advocacy in Administrative Law and Practice. *She consults on administrative law, cryptocurrency and third-party litigation funding. She welcomes your inquiries and can be reached at ProTem@LMillerConsulting.com.*

Is That Your Final Decision?

By Shannon Bond, Associate Regional Director, FINRA Midwest Regional Office

FINRA encourages arbitrators to inform parties of their final decision on the merits of a claim in the form of a written award, rather than announcing their final decision on the record at a hearing, issuing an order or otherwise indicating to the parties how they will rule.

A party with advance knowledge of the ruling may try to prevent the panel from issuing an award in a few ways. A party may request that the record be reopened pursuant to FINRA Rule 12609/13609. Seeking to change the final decision, parties file such motions to introduce new evidence or to reargue their case. A party may request arbitrator removal (FINRA Rule 12407/13410) or arbitrator recusal (FINRA Rule 12406/13406). Parties generally allege that an arbitrator's conduct was biased in favor of one party. But sometimes, they may also allege that an arbitrator has not made all required disclosures. Such motions are filed in the hopes that a new arbitrator will cause a different ruling to be made. If parties are unable to prevent the ruling from being rendered in a written award, they may challenge the award in court by filing a motion to vacate, citing "evident partiality" by arbitrators.

Even if the record is not reopened, arbitrators may change their minds about the final decision before an award is rendered. Such a change is within arbitrators' discretion. However, parties may be concerned about the accuracy of an award if they were led to believe that a different ruling would be made. In this situation, parties might file closed case submissions pursuant to FINRA Rule 12905/13905.

Arbitrators should avoid informing parties of their decision or their inclination before the award is served. The case is not over until the written award is published. When arbitrators share their viewpoints or decisions regarding the evidence and testimony with the parties, parties may perceive the conduct as indicative of bias. The result may be costly and time-consuming motion practice and post-award litigation.

FINRA Dispute Resolution Services and FINRA News

COVID-19 Impact on Arbitration and Mediation Hearings

Beginning **July 5, 2021**, FINRA DRS will reopen all of its hearing locations for in-person arbitration and mediation proceedings except for the following: Augusta, Boca Raton, Buffalo, Detroit, Philadelphia, Providence and Wilmington. FINRA DRS has postponed all in-person proceedings in these seven locations through July 30, 2021. Beginning **August 2, 2021**, all FINRA DRS hearing locations will be open for in-person proceedings.

Safety Protocols for In-Person Hearings

FINRA DRS is committed to taking measures to ensure each hearing is safe for the hearing participants. FINRA DRS is reviewing the Centers for Disease Control and Prevention (CDC) guidance and consulting with public health experts to determine the appropriate safety protocols at each hearing venue. Details on the exact safety protocols that will be in place for July hearings will be sent to parties and arbitrators with July hearings. These protocols will include:

- hearings held in venues large enough to allow social distancing;
- hand sanitizer provided in each room;
- masks for all in-person participants and arrangements made to provide masks to participants who do not have them;
- best practice information for in-person participants when traveling to and attending the hearing; and
- a requirement for all participants to fill out a daily health certification.

Virtual Arbitration Hearing Statistics

Since the postponement of in-person hearings through May 31, 2021, 337 arbitration cases have conducted one or more hearings via Zoom (123 customer cases and 214 industry cases).

Through May 31, 2021, FINRA DRS received 733 motions for Zoom hearings:

- 435 contested motions
  - 321 customer contested motions
    - 189 granted
    - 117 denied
    - 15 open
  - 114 intra-industry contested motions
    - 78 granted
    - 29 denied
    - 7 open
- 298 joint motions (107 in customer cases and 191 in industry cases).

The virtual arbitration hearing statistics are now available on the Dispute Resolution Statistics page.

Arbitration Case Filings and Trends

Arbitration case filings from January through May 2021 reflect a 19 percent decrease compared to cases filed during the same five-month period in 2020 (from 1,547 cases in 2020 to 1,258 cases in 2021). Customer-initiated claims also decreased by two percent through May 2021, as compared to the same time period in 2020.

FINRA Dispute Resolution Services Headquarters and Northeast Regional Office Have Moved

FINRA DRS's Headquarters and Northeast Regional Office have moved to a new location in lower Manhattan. The new offices (11th floor) and hearing rooms (10th floor) are at Brookfield Place located at 200 Liberty Street, New York, NY 10281. Effective immediately, any in-person hearings scheduled to be heard in New York, NY will be held at Brookfield Place. The new space provides upgraded hearing rooms and is convenient to many nearby dining and hotel options. Please contact the Northeast Regional Office with any questions about our new offices at Brookfield Place.

New Feature: DR Portal Automated Reminders

The DR Portal now sends automated reminders for upcoming events on your cases. For example, reminders let you know that you have an Oath of Arbitrator due or that a scheduled hearing is coming up or that a case payment has been posted. You can adjust how you receive reminders using the **Manage My Portal Preferences** quick access link on the left-hand menu. While you cannot disable the reminders completely, you can choose to receive these reminders by portal message only, so they do not fill up your email inbox.

These portal reminders will be automatically moved to your archived messages after 30 days.

Register for the DR 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 of Arbitrator and Checklist, the Initial Prehearing Conference Scheduling Order, general, dismissal and postponement orders, the Award Information Sheet and the Arbitrator Experience Survey;
- 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 often 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 forms in the portal, the portal 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.

American Bar Association 2021 Dispute Resolution Tech Expo Virtual Conference: July 12 – 16, 2021

The Tech Expo will feature presentations, collaboration sessions and exhibitions of innovative technologies and software designed specifically for use by dispute resolution practitioners. The program will address evolving trends in dispute resolution and how new and emerging technologies can be utilized to maximize efficiencies and productivity. FINRA is a cooperating organization for this event. Please visit the ABA website for more information about the program and how you can register. Please be sure to use this discount code at checkout: TECOOP21.

Regulatory Notices

Regulatory Notice 21-17: FINRA Seeks Comment on Supporting Diversity and Inclusion in the Broker-Dealer Industry

FINRA seeks comment on any aspects of our rules, operations and administrative processes that may create unintended barriers to greater diversity and inclusion in the broker-dealer industry or that might have unintended disparate impacts on those within the industry. The comment period expired June 28, 2021.

Please review Regulatory Notice 21-17 for more information.

Regulatory Notice 21-16: FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts

FINRA reminds member firms about requirements when using predispute arbitration agreements for customer accounts. Where member firms use mandatory arbitration clauses in their customer agreements, FINRA rules establish minimum disclosure requirements regarding the use of such clauses and prohibit predispute arbitration agreements from including conditions that, among other things, limit or contradict FINRA rules. In addition, FINRA rules do not allow class action claims in FINRA arbitration. Accordingly, FINRA rules prohibit member firms from incorporating provisions that would prevent customers from bringing or participating in judicial class actions by adding waiver language into customer agreements (class action waivers) and prohibit member firms from enforcing arbitration agreements against members of a certified or putative class action.

Please review Regulatory Notice 21-16 for more information.

Regulatory Notice 21-04: FINRA Amends Arbitration Codes to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees

FINRA has amended its Codes to: (1) increase the additional hearing-day honorarium chairs receive for each hearing on the merits from $125 to $250 and (2) create a new $125 chair honorarium for each prehearing conference in which the chair participates. To fund the increase in payments to chairs, the amendments make minimal increases to certain arbitration fees. The amendments are effective for cases filed on or after April 19, 2021.

Please review Regulatory Notice 21-04 for more information.

SEC Rule Filing

Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests

On May 28, 2021, following discussions with SEC staff, FINRA temporarily withdrew from SEC consideration the rule filing establishing specialized arbitration panels for expungement requests so that FINRA can further consider whether modifications to the filing are appropriate. FINRA posted on its website a statement regarding the withdrawal, as well as an expungement webpage with data and key regulatory initiatives. FINRA continues to take meaningful steps to enhance controls on the existing expungement process in the near term. Please see SR-FINRA-2020-030 for more information.

Mediation Update

Expansion of FINRA's Mediation Program for Small Arbitration Claims

Effective November 1, 2020, FINRA expanded the Mediation Program for Small Arbitration Claims by increasing the maximum amount in controversy from $50,000 to $100,000 and making available all virtual platforms (telephonic and video) for these mediations. With these changes, the program is providing more parties the benefit of an expedient and cost-effective option for resolving small claims while also introducing parties to qualified, but underutilized diverse mediators on our roster. Since the expansion, there have been 11 requests to mediate under this program.

The program offers virtual mediation at these costs:

- no cost for arbitration claims of $25,000 or less;
- $50 per hour for cases with claims between $25,000 and $50,000 to cover reduced mediator fees. (FINRA collects this fee and divides it equally between the parties); and
- $100 per hour for cases with claims between $50,000 and $100,000 to cover reduced mediator fees. (FINRA collects this fee and divides it equally between the parties).

Virtual mediation offers parties who do not wish to travel the option to participate in a mediation from their own homes. It also provides mediators with additional opportunities to mediate in hearing locations across the country, regardless of the mediator's home base.

When parties mediate through this program, FINRA waives all mediation filing fees. Please contact FINRA's Mediation Department if you have any questions about this program.

Please note ALL mediation cases can proceed virtually at this time, whether or not a case is eligible to participate in the Mediation Program for Small Arbitration Claims. Please contact FINRA's Mediation Department with any questions.

Mediation Case Filings and Trends

From January through May 2021, parties initiated 164 mediation cases, a decrease of 16 percent from the same period in 2020. FINRA closed 204 cases during this time. Approximately 84 percent of these cases concluded with successful settlements.

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. References who can attest to your skill and mediation style help parties select the right mediator for their case. Please add references to your disclosure report, so parties may consider them during mediator selection. 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 on our website.

Become a FINRA Mediator

Do you have experience working as a mediator? Consider joining the FINRA mediator roster. Please email the Mediation Department for more information.

Questions and Answers

Scheduling Hearings

Question I'm assigned to a case where the counsel for both sides have agreed on hearing dates that are a year from now. The Initial Prehearing Conference Arbitrator's Script (IPHC script) instructs the parties that they should schedule hearings within nine months of the IPHC. Should I order the parties to choose dates within the next nine months?

Answer Due to a backlog of rescheduled arbitration hearings caused by COVID-19, arbitrators may find that party representatives are unavailable to attend evidentiary hearings within nine months of the IPHC. If the parties agree on hearing dates, the arbitrators should accept the parties' dates (even if the dates are more than nine months after the IPHC). The arbitration process belongs to the parties and the arbitrators should defer to the parties' agreement on scheduling.

Question One of the party representatives has advised that she is "booked" for the entire fall. How should I approach this?

Answer A blanket statement such as this is not acceptable. Ask the parties or their counsel to provide specific reasons why they are unavailable to schedule a hearing on specific days. During the IPHC, arbitrators can require the parties and their counsel to go through their calendars on a week-by-week or day-by-day basis and describe the prior commitments that make them unavailable to schedule additional arbitration hearings.

Question What other things can I do to help parties schedule a prompt hearing?

Answer A significant goal of arbitration is the quick resolution of disputes. During the IPHC, arbitrators should do everything within reason to schedule hearings promptly, and still provide parties a reasonable amount of time to prepare for the case. You may consider the following options to help parties find acceptable hearing dates:

- Suggest that the representative with the scheduling conflict consider asking a colleague in his or her firm to handle the conflicting event, which would allow the representative to schedule the case sooner.
- Consider scheduling non-consecutive hearing dates if doing so will prevent excessive delays.
- Determine if hearings can be scheduled in the evenings or on weekends.

Question Is there anything else I should think about?

Answer If you're having difficulty scheduling this set of hearing dates, imagine how difficult it will be to select more dates, should this set of dates be postponed for some unforeseen reason. Consider scheduling back-up dates in advance to help mitigate the risk of delays down the road.

Education and Training

Zoom Arbitration One Year Later: Lessons Learned, Tips for Practitioners and the Road Ahead

The pandemic forced the world to re-evaluate how it works in a number of ways—and FINRA DRS is no exception. To keep processes moving, FINRA DRS allowed hearings to proceed virtually. Now, a year later, we are looking at lessons learned, tips for practicing in a remote environment and plans for the future of arbitration and mediation.

On this episode of FINRA Unscripted, FINRA's Kaitlyn Kiernan is joined by Richard Berry, Executive Vice President of FINRA DRS, and two forum practitioners, Sam Edwards, a partner with the securities litigation and arbitration law firm Shepherd, Smith, Edwards and Kantas, and Beverly Jo Slaughter, senior managing counsel with Wells Fargo's Wealth Investment Management Litigation group. Tune in for an informative discussion about pandemic-related remote arbitration and mediation.

Fall 2020 Neutral Workshop: Tips for Virtual Hearings

In this neutral workshop, FINRA Principal Analyst, Stefanie Kendall, moderates a discussion on conducting virtual hearings with FINRA arbitrator, Tracy Allen, and forum practitioners, Beverly Jo Slaughter and Sam Edwards. They share best practices for effectively using exhibits and examining witnesses during a virtual hearing. The workshop also features a mock arbitration segment that demonstrates the hearing tips in practice and gives viewers a peek inside a virtual hearing, as guided by FINRA Case Administrator, Nora Sassounian.

Arbitrator Training Videos for Virtual Hearings

FINRA DRS is committed to providing training resources to arbitrators on how to use Zoom effectively when participating in virtual hearings. The first training video, "Zoom Basics for Arbitrators," provides an overview of the ways in which Zoom is secure, easy to use and helps to replicate the in-person experience.

Beyond the basics for using Zoom, there are training videos that address specific topics in depth, including: "How to Set Up Your Environment for Virtual Hearings," "Effective Zoom Practices for Arbitrators" and "Zoom Host Responsibilities for Arbitrators." Although arbitrators can host a Zoom hearing, FINRA staff will generally serve as the host and perform the Zoom tasks, such as starting and pausing the recording, admitting participants into the meeting and managing breakout rooms. All of these training videos are available now on FINRA.org.

FINRA Virtual Conference Panels: Practical Tips & What's New in Arbitration Procedures

FINRA's Virtual Conference Panels series provides a unique opportunity to hear the most up-to-date information directly from industry and regulatory experts. In this video, Richard Berry moderates a discussion on timely arbitration topics with FINRA arbitrator, Renee Gerstman, and forum practitioners, Beverly Jo Slaughter and Jeff Kaplan. They discuss the impact of COVID-19 on arbitration cases, offer tips and resources for conducting effective Zoom virtual arbitration hearings and share the latest in arbitration procedures. The videos are available for free on FINRA.org.

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. Giving parties the most current and complete information helps them make informed decisions when selecting their panel. Arbitrators should log in to the DR 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 do not have any 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 the Department of Neutral Management to request an invitation. Please include “request portal invitation” in the subject line.

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