THE NEWSLETTER FOR FINRA NEUTRALS

Volume 3 – 2021

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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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Avoiding Confusion and Delays When Resolving Motions to Dismiss

By Matthew Kipnis, FINRA Extern

Motions to dismiss are strictly limited in FINRA arbitration. Specifically, FINRA Rule 12504/13504 of the Codes of Arbitration Procedure (Codes) sets forth three discreet grounds for the panel to act on a motion to dismiss. To grant a motion to dismiss, the panel must determine that:

1. the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release;
2. the moving party was not associated with the account(s), security(ies), or conduct at issue; or
3. the non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

In addition to these three grounds, motions to dismiss may be filed based on time limitations under Rule 12206/13206.[1] That's it. Arbitrators are not permitted to grant motions to dismiss beyond these four grounds. Lastly, if the panel grants a motion to dismiss under Rule 12504/13504 or Rule 12206/13206, the decision must be unanimous.

When evaluating a motion to dismiss, panels may be tempted to consider standards for a motion to dismiss used in a court proceeding. However, applying standards outside of those enumerated under Rule 12504/13504 or 12206/13206 is not permitted under the Codes. And considering additional, non-permissible grounds can cause unnecessary delays to the arbitration proceeding and confusion for all parties involved.

In a traditional court proceeding, there are several substantive grounds for which motions to dismiss can be granted. This allows parties to argue the substantive bases for their cases prior to the case-in-chief, whereas FINRA believes that parties have the right to a hearing in arbitration to argue their cases. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and should be granted only under limited circumstances laid out in Rules 12504/13504 or 12206/13206.

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For example, in a court proceeding, a party may file a motion to dismiss for failure to state a claim upon which relief can be granted, which requires the judge to evaluate the legal sufficiency of a claim for relief. However, a panel will not be able to review this type of motion to dismiss in FINRA arbitration because it lies outside the four permissible grounds outlined in Rules 12504/13504 and 12206/13206.

Best Practices

To avoid delays and confusion, arbitrators should treat the three grounds under Rule 12504/13504 as "yes" or "no" questions. Doing so helps panels efficiently resolve motions to dismiss and proceed with the arbitration.

Rules 12504/13504 and 12206/13206 also make it clear that parties could face significant consequences for filing meritless motions to dismiss:

- If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.
- If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.
- If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.
- The panel also may issue other sanctions under Rule 12212/13212 if it determines that a party filed a motion under this rule in bad faith.

Conclusion

Avoiding delays wherever possible is in the best interest of parties and arbitrators. Thus, efficiently navigating a motion to dismiss under FINRA Rule 12504/13504 or Rule 12206/13206 is imperative.

Endnote

1. Under Rule 12206/13206, no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.

   The panel determines whether a claim meets the six-year eligibility requirement by reviewing the submissions, pleadings and arguments of the parties and giving the parties an opportunity to conduct discovery if requested. If the arbitrators have additional questions about the eligibility of the claim, they should ask the parties to brief the issue. The arbitrators may find that there is a continuing occurrence or event giving rise to the dispute. For example, although a customer purchased stock 10 years ago, there are allegations of ongoing fraud starting with the purchase but continuing to a date within six years of the date the claim was filed.

Bits, Bytes and E-Discovery Fights: Part III

*By Lisa Miller, FINRA Arbitrator**

This article is the third in a multi-part educational series on e-discovery and motion practice for FINRA arbitrators. In this article, Ms. Miller explores how arbitrators can handle parties' misconduct in the context of e-discovery.

E-Discovery Abuse

A broad framework for e-discovery processes is outlined in the *Zubulake* line of cases.[1] These cases set out standards nationwide for courts dealing with e-discovery. Although they are not directly focused on arbitration, the concepts may be useful for arbitrators managing e-discovery issues. *Zubulake* established steps to preserve and produce electronic data and analyzed factors related to e-discovery costs, including:

- The extent to which the request is tailored to discover relevant information.
- The availability of such information from other sources.
- The total cost of production versus the amount in controversy.
- The total cost of production, compared to the resources available to the parties.
- The relative ability of the parties to control costs (and their incentive to do so).
- The importance of the issues at stake in the litigation.
- The relative benefits to the parties of obtaining the information.

Sanctions and Discipline

FINRA arbitrators may sanction parties who fail to produce e-discovery. Sanctions have been imposed in the context of intentional spoliation, grossly negligent preservation or destruction of data. FINRA's rules require cooperation of the parties in discovery (Rules 12505/13505) and specifically empower arbitrators to issue sanctions for lack of cooperation, failing to comply with the discovery rules or frivolously objecting to the production of documents or information (Rules 12511/13511).

Arbitrator Tip

Arbitrators may initiate disciplinary referrals against FINRA-registered entities or associated persons involved in e-discovery misconduct.

Arbitrators have wide latitude to sanction parties under Rule 12212/13212. The panel may sanction a party for failure to comply with any provision in the Codes or any arbitrator's order. Unless otherwise prohibited, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties.
- Precluding a party from presenting evidence.
- Making an adverse inference against a party.
- Assessing postponement and/or forum fees.
- Assessing attorneys' fees, costs and expenses.

However, no discovery requirement contained in FINRA's Discovery Guide supersedes any record retention requirement of any law or regulation or any rule of a self-regulatory organization.

Examples of Sanctions Ordered in FINRA Arbitrations

In *Litovich-Quintana and Torres v. Morgan Stanley Smith Barney d/b/a Morgan Stanley,* the claimant alleged violations of various obligations related to its sale of Puerto Rico bond investments.[2] During discovery, the respondent asserted privilege regarding certain personnel documents. The arbitrators twice ordered production of the personnel documents, but the respondent did not comply. The claimant moved for discovery sanctions for non-compliance with the panel's order.

The arbitrators found for the claimants and awarded approximately $250,000 in compensatory damages. The panel found the missing documents to be highly relevant to the dispute and ordered discovery sanctions of $3 million based on the prejudice the respondent's failure caused the claimant. The respondent moved to vacate. The district court denied the respondent's motion, and the appellate court affirmed the lower court's decision.[3]

In *Dean v. Wells Fargo Advisors*, the claimant asserted claims regarding an investment in a reverse convertible note.[4] The claimant ignored the first discovery order. The arbitrator issued a second order with three options, which the claimant also ignored:

- proceed with the hearings as scheduled, but, as a discovery sanction, the claimant would not be allowed to present evidence;

- postpone the hearing, so the claimant could adhere to the discovery requirements by a mutually agreed date, and the claimant must pay all postponement fees; or
- withdraw the claim, and forum fees would be split equally.

The arbitrator dismissed the claimant's case with prejudice and assessed motion and hearing fees against the claimant.

Confidentiality and Privilege

Confidentiality

If a party objects to document production on grounds of privacy or confidentiality, arbitrators or parties may suggest a stipulation between the parties that the documents will not be disclosed or used outside of the arbitration. Alternatively, arbitrators may issue confidentiality orders. When deciding contested requests, arbitrators should consider competing interests of the parties. The party asserting confidentiality must demonstrate that the documents require confidential treatment.

Arbitrators consider the facts of the case and additional factors, including:

- Whether the information has been published or produced without protective confidentiality limitations or is in the public domain.
- Whether the confidentiality order undermines the public interest or is otherwise antithetical to the interests of justice.
- Whether the confidentiality order implicates legal or ethical issues for the parties.
- Whether the disclosure is an unwarranted invasion of personal privacy (personal identifying information, embarrassing information not germane to the case, for example).
- Whether the disclosure of the information might cause harm.
- Whether the information contains proprietary business information (plans, procedures, trade secrets, customer lists).

Arbitrator Tips

Parties seeking review of private social media are not entitled to broad, uncontrolled access to them. Review may be limited solely to relevant issues.

Parties may take down social media posts. The substance of the posting should be preserved on an accessible computer.

Privileged Documents

Parties are not required to produce privileged documents, including attorney-client confidential material and attorney work product. Arbitrators are expected to be vigilant regarding these types of sensitive data. Arbitrators may not use a confidentiality agreement to require parties to produce privilege-protected documents (including attorney work product).

Like other objections under FINRA Rule 12508/13508, objections based on privilege are subject to the same requirements. The objecting party must specifically identify which document or requested information it is objecting to and the basis for the objection. Objections must be timely, in writing and must be served on all other parties. Parties may not simply fail to respond to discovery on the grounds that a document is privileged. If a party challenges another party's claim of privilege, the arbitrators must determine whether a privilege exists based on the facts and circumstances of the case. Upon request of a party, arbitrators may request that a party asserting the privilege provide information that, without revealing the information itself, would be sufficient for the other parties to assess the privilege claim.

Social Media

Social media may contain material inconsistent with a party's stated position in the arbitration and might be effective for impeachment. Counsel generally seek e-discovery from social media platforms, smartphone apps and messaging programs. Because social media data is easy to modify or destroy, extra caution is generally required to ensure that the data is properly preserved for arbitration.

If there is a dispute, the analysis will focus on whether the party seeking the information has laid a sufficient foundation to show that impeachment material likely exists, weighed against the opposing party's privacy interests. If an arbitrator finds that social media's probative value outweighs its prejudicial effect, private content on password-protected social media must be turned over as e-discovery.

Under state and federal law, parties may not destroy social media to keep them out of a pending or reasonably foreseeable proceeding, even if the party has not received a specific request for them. The duty to preserve potential evidence exists even in advance of e-discovery requests.

**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.*

Endnotes

1. *Zubulake v. UBS Warburg,* 217 F.R.D. 309 (Zubulake I); *Zubulake v. UBS Warburg,* 216 F.R.D. 280 (S.D.N.Y. 2003) (Zubulake III); *Zubulake v. UBS Warburg,* 220 F.R.D. 212 (S.D.N.Y. 2003) (Zubulake IV); *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (Zubulake V).

   In the *Zubulake v. UBS Warburg* line of cases, the courts held that parties' e-discovery obligations include the implementation of a litigation hold, once a party reasonably anticipates litigation. The litigation hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, create a mechanism for collecting the preserved records so they might be searched by someone other than the employee, describe the e-evidence at issue with as much particularity as possible, direct that routine destruction policies cease (e-mail auto-delete functions, for example) and describe the consequences for failure to preserve the data.

2. FINRA Arbitration Award 17-01908.

3. *Torres v. Morgan Stanley Smith Barney,* Case No. 20-11535 (11th Cir. 2020) and *Torres v. Morgan Stanley Smith Barney,* Case No. 19-22977 (SDFL 2020) at DE30.

4. FINRA Arbitration Award 11-03911.

Using the Arbitration Hearing Scripts

By Narielle Robinson, Senior Case Administrator, FINRA Mediation

Experienced FINRA arbitrators are probably very familiar with the Initial Prehearing Conference (IPHC) and regular hearing scripts. They may even seem repetitive. However, adherence to the scripts is vitally important because they provide a roadmap for the proceeding. Participants who do not regularly appear at FINRA, such as pro se parties, may not be familiar with FINRA's procedures, and using the scripts provides reminders and sets expectations. If all participants are well-versed on the contents of the scripts and understand the arbitration process scenario, parties and arbitrators may agree to deviate from the scripts. In most cases, it is in the best interest of all participants to follow the scripts.

Maintaining the integrity of the forum requires transparency, which is what FINRA's scripts aim to provide. By examining some of the questions and language in the script, the following questions and answers illustrate why adherence to these scripts is so important.

Why is it important to obtain the parties' acceptance of the panel?

When parties accept the composition of the panel, they are confirming their understanding that the arbitrators do not have conflicts of interest that would affect their ability to be fair and impartial. This is vital because conflicts of interest are one of the few bases for a court to vacate an award.[2] Prior to confirming the parties' acceptance of the panel, the chairperson should ask each arbitrator to confirm that they have submitted their Oath of Arbitrator and Arbitrator Disclosure Checklist, and to make any additional disclosures they have prior to the hearing. If a party has concerns about an arbitrator's disclosures, that party may either move to recuse the arbitrator, which only that arbitrator will decide, or assert a challenge to the arbitrator's continued participation in the matter pursuant to Rule 12407/13410. Given its significance, FINRA encourages arbitrators to "*Disclose! Disclose! Disclose!*" If you are unsure whether something should be disclosed, it is best to err on the side of caution and make the disclosure and let the parties weigh its relevance.

Why does the script remind parties and arbitrators not to communicate with one another outside of the hearing room?

When a party and arbitrator communicate without anyone else present, the communication is referred to as *ex parte* communication. *Ex parte* communications are problematic because they imply that information may have been provided to the arbitrator that compromises the arbitrator's impartiality, no matter how innocuous the communication may have been. Therefore, if a party and an arbitrator communicate outside of the hearing room without the other parties, that arbitrator must disclose the conversation on the record as soon as the hearing resumes. This includes accidental run-ins in a restroom, elevator or restaurant.

What are some of the things the script reminds the chairperson to do before closing an evidentiary hearing?

1. Ask the parties if there are any issues remaining that were not previously raised. By answering this question, the parties are stating on the record that they had an opportunity to be heard. No matter the outcome, confirming that the parties are satisfied with the process is essential to maintaining the integrity of the forum.
2. Direct the parties to take all their documents out of the hearing room. This is integral in maintaining the confidentiality of the proceeding and protecting the participants' privacy.
3. Remind the parties to submit evaluations of the arbitrators and FINRA staff after the hearing. Parties' feedback helps FINRA to continually improve the process for all participants. For example, evaluations may reveal that additional arbitrator training is necessary on certain topics. Arbitrators are not FINRA employees, but they work with FINRA to make the process more transparent, efficient and fair. FINRA may also learn that the hearing rooms in a certain facility are not conducive for a large hearing. Comments, big or small, contribute to the improvement of the forum.

Endnote

1. *See* 9 USC § 10.

Vaccination Requirement for In-Person Participants

Effective **October 4, 2021 through July 1, 2022**[1], all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses, and others, must be fully vaccinated[2] to attend FINRA Dispute Resolution Services arbitration hearings or mediation sessions (hearing).

- From October 4, 2021 through November 19, 2021, in-person attendees may, in lieu of being fully vaccinated, provide proof of a negative PCR test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing.
- After November 19, 2021, in-person participants who attest that there are circumstances that prevent them from being vaccinated can provide proof of a negative PCR test within 72 hours of the start of the hearing, and every 72 hours during the course of the hearing. All costs associated with COVID testing are the responsibility of the parties or individuals that incurred them.

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FINRA Dispute Resolution Services and FINRA News

COVID-19 Impact on Arbitration and Mediation Hearings

Effective **August 2, 2021**, all FINRA DRS hearing locations are 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 hearings will be sent to parties and arbitrators in advance of scheduled hearing dates. These protocols *may* 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;
- Plexiglas dividers and face shields provided in the event that testifying witnesses must remove their masks; and
- best practice information for in-person participants when traveling to and attending the hearing.

Virtual Arbitration Hearing Statistics

Since the postponement of in-person hearings through August 31, 2021, 463 arbitration cases have conducted one or more hearings via Zoom (176 customer cases and 287 industry cases).

Through August 31, 2021, FINRA DRS received 841 motions for Zoom hearings:

- 476 contested motions
  - 342 customer contested motions
    - 202 granted
    - 134 denied
    - 6 open

Testing Requirement for In-Person Participants

(Florida Hearing Locations Only)

Effective **October 4, 2021 through July 1, 2022**[3], for cases with in-person arbitration hearings or mediation sessions (hearing) in Florida, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses, and others, must provide proof of a negative PCR test within 72 hours of the start of the hearing and every 72 hours during the course of the hearing. In the alternative, in-person participants in Florida may attest that they are fully vaccinated[3]. All costs associated with COVID testing are the responsibility of the parties or individuals that incurred them.

Endnotes

1. This date is subject to change as health and safety conditions warrant.
2. Counsel or *pro se* parties will file an attestation with their FINRA case administrator that they and all of their parties, paralegals, witnesses, etc. are fully vaccinated or have complied with the COVID-19 testing requirements. Arbitrators and mediators will also be required to file the attestation.
3. Ibid.

- 125 intra-industry contested motions
  - 88 granted
  - 31 denied
  - 6 open
- 374 joint motions (141 in customer cases and 233 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 August 2021 reflect a 22 percent decrease compared to cases filed during the same eight-month period in 2020 (from 2,660 cases in 2020 to 2,068 cases in 2021). Customer-initiated claims decreased by one percent through August 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.

Register for the DR Portal Today

If you have not already done so, we strongly encourage arbitrators and mediators to register for the Dr Portal. The DR 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.

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

DR Portal How-to Videos

If you need assistance updating your profile or submitting the Oath of Arbitrator or other forms in the DR Portal, the DR 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.

2021 Demographic Survey

In November, FINRA will once again conduct a demographic survey of FINRA's arbitrator and mediator rosters. As in previous years, the survey will be administered by a third-party consultant. This year, DataStar (surveystar.com) will conduct the survey. Participation in the survey is voluntary and all responses will be anonymous and confidential.

As part of its ongoing recruitment campaign, FINRA continues to seek individuals from varied backgrounds to serve as arbitrators. The data from this annual survey helps us track our progress toward enhancing the diversity of the roster and helps to determine future recruitment events.

The results of past demographic surveys are published on our website. Thank you to those who have previously participated in the survey. In 2020, 37 percent of the roster participated in the survey. With your help, we hope to surpass this participation rate this year.

Please look out for an email from DataStar (surveystar.com) in November with instructions to complete the 2021 survey.

Practising Law Institute Securities Arbitration 2021 (Webcast)

The Practising Law Institute's (PLI) Securities Arbitration 2021 program provided an opportunity to hear about the latest developments and topics directly from FINRA DRS leadership, arbitrators, noted academics and experienced attorneys who represent both customers and industry parties. PLI's distinguished faculty explored recent developments in FINRA arbitration and mediation, including how diversity and inclusion is being prioritized in FINRA arbitrations, ethical considerations for litigating elder abuse claims, advocacy tips in virtual arbitrations and mediations, examining and cross-examining experts in arbitrations and hot topics and future trends in securities arbitration.

The program was presented as a live webcast on September 9, 2021. A recorded version may be viewed on the PLI website. CLE credit is available. FINRA arbitrators and mediators will receive a 25 percent discount by using this registration link. Registrants can also register by phone (800-260-4754) using this discount code: **LMV1 SA921**.

American Bar Association 2021 Dispute Resolution Mediation Week: October 18 – 22

Mediation Week 2021 offers a festive week of mediation programming. The topics will range from advocacy to marketing and social media to peacebuilding and reconciliation and more. Registration is free to ABA Dispute Resolution Section Members and open to everyone. Interested FINRA arbitrators and mediators are invited to use the following discount code: **MWCE21**

American Bar Association 2021 Dispute Resolution Mediation & Advocacy Skills Institute: November 4 – 6

The theme for this year's program is "Mediation Beyond Boundaries: Competencies and Ethics in a Digital World." This three-day virtual program for mediators and advocates will explore new mediation frontiers in a post-pandemic world of technologies and innovations. FINRA arbitrators and mediators are invited to use the following discount code: **21MEDCE**

Regulatory Notices

FINRA Adopts Rules to Address Brokers With a Significant History of Misconduct

FINRA has amended its Membership Application Program (MAP) rules to address brokers with a significant history of misconduct and the brokers that employ them. The new rules require a member firm to submit a written request to FINRA's Department of Member Regulation, through the Membership Application Group, seeking a materiality consultation and approval of a continuing membership application, if required, when a natural person seeking to become an owner, control person, principal or registered person of the member firm has, in the prior five years, one or more "final criminal matters" or two or more specified risk events."

These changes, outlined in Regulatory Notice 21-09, became effective September 1, 2021.

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.

Rule Approval

FINRA Adopts Rules to Address Firms With a Significant History of Misconduct

On July 30, 2021, the Securities and Exchange Commission (SEC) approved FINRA's proposal to adopt FINRA Rule 4111 (Restricted Firm Obligations) to require member firms that are identified as "Restricted Firms" to deposit cash or qualified securities in a segregated account, adhere to specified conditions or restrictions, or comply with a combination of such obligations. The SEC also approved FINRA's proposal to adopt FINRA Rule 9561 (Procedures for Regulating Activities Under Rule 4111) and amend FINRA Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series), to create a new expedited proceeding to implement proposed Rule 4111.

Please see SR-FINRA-2020-041 for more information. FINRA will announce the effective date in a Regulatory Notice.

Mediation Update

October is FINRA Mediation Settlement Month

FINRA's Mediation Department is offering its annual reduced fee program during Mediation Settlement Month. The program aims to encourage parties to experience the benefits of mediation for the first time and reinforce its value and effectiveness for those who have mediated previously. Additionally, this program helps participating mediators get their names out to parties in the forum.

To participate in the program, parties must agree to mediate by October 31, 2021 and conduct the mediation by December 31, 2021.

The program offers virtual and in-person mediation at these costs:

Amount of claim	Length of Mediation	Mediation Session Fee
Up to $25,000	4 hours	$100/party
$25,000.01 – $100,000	4 hours	$200/party
Over $100,000	8 hours	$500/party

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

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

FINRA will also reduce the filing fees by half when parties participate in this program. Once parties have agreed to participate, they will receive a randomized list of mediators to review and rank, and the mediation session will be scheduled promptly.

We anticipate another successful Mediation Settlement Month. Please contact FINRA's Mediation Department with any questions.

Mediation Case Filings and Trends

From January through August 2021, parties initiated 330 mediation cases, an increase of 17 percent from the same period in 2020. FINRA closed 337 cases during this time. Approximately 85 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 the types of cases you have 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 DR 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

Disposing of Case Documents

Question The evidentiary hearing has concluded, and I am not sure what to do with the exhibits. Can we have the parties or the representatives at the hearing location take care of the exhibits?

Answer At the conclusion of the hearing, a pre-designated panel member must collect one official set of the accepted exhibits and return them to FINRA as the official record. All other case materials should be shredded.

For hearings held at a FINRA office, arbitrators can leave the extra copies of case materials that are to be shredded in the hearing room. The materials must be clearly marked for shredding. For hearings held at an offsite location, arbitrators should encourage the parties to take their respective materials with them. Likewise, the arbitrators should take their copies of case-related materials with them when they leave and shred them at home or return them to FINRA for secure disposal.

Calculating Hearing Sessions

Question How does FINRA calculate hearing sessions to determine arbitrator honoraria and the forum fees assessed to the parties?

Answer Pursuant to Rule 12100(p)/13100(p), a "hearing session" is a meeting between the parties and arbitrators of four hours or less, including a hearing or a prehearing conference. FINRA calculates the number of hearing sessions per day based on the total amount of time the parties and arbitrators meet.

For example, if the parties and arbitrators meet in the morning for two and one-half hours (2 ½), break for lunch for one hour (1) and return after lunch to meet for another one and one-half hours (1 ½), the parties will be assessed for one hearing session, and the arbitrators will be paid for one hearing session. FINRA does not calculate the one-hour lunch as part of the hearing session. Although the parties and

arbitrators met twice, once before and once after lunch, the total amount of time spent does not equal two hearing sessions pursuant to Rule 12100(p)/13100(p). The controlling factor in determining the number of hearing sessions is the total amount of time the parties and arbitrators met, which, in this example, equals four (4) hours or one hearing session.

Secondary Hearing Locations

Question I am interested in expanding my service area. Can I add a secondary hearing location and pay my own expenses?

Answer Several years ago, FINRA discontinued the practice of allowing arbitrators to volunteer, at their own expense, to serve outside of their primary hearing locations. Instead, if additional arbitrators of a particular classification (public chair, public, or non-public) are needed in a specific hearing location, all arbitrators of that classification from a nearby hearing location will be invited to travel at FINRA's expense. FINRA believes that uniformly inviting arbitrators in this manner eliminates the potential perception of bias and contributes to the transparency of the arbitrator selection process.

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.

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.

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, FINRA is 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 DR 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 DR Portal. If you would like to register in the DR 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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