

What's Inside

Dispute Resolution News	4
Question and Answer	7
Mediation Update	9
Arbitrator Training	11
Arbitrator Tip	12

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 serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

Arbitration Parties Are People Too— Help Them Feel That Way

By Andrew Gerber



When you preside in an arbitration hearing, you'll be confronting two different kinds of people: the disputing parties and the counsel who represent them. They're different from each other because the counsel will always understand what is going on in the room, and why things are being done the way they are. But that will often not be true of the parties.

You might expect that the counsel will have briefed their clients on what to expect. That assumption would be natural but could also be overly optimistic. Or you might focus your attention entirely on the counsel because they take the lead in the action, sitting closer to you and doing all the talking. That kind of focus would be natural too, but it could diminish your awareness of the parties, subtly and subconsciously, and could lessen your sensitivity to their need to understand the process going on around them. It could also make them feel ignored or abandoned and leave them, ultimately, with doubts and misgivings about the way their interests are being disposed of.

That result would represent a failure in the process. Here are a few things an arbitrator can do to help avoid it.

Before You Start: Explain That You're Not in Court, And What That Means

Parties may come to the hearing with misguided procedural expectations, based on prior experiences with court proceedings or from watching too much *Law & Order*. You can help them anticipate what is actually going to happen by explaining that an arbitration differs from a case in court: that the procedure is much less formal; that the rules of evidence are relaxed; and that the emphasis here is on making sure that each side is given a full opportunity to tell its story. This kind of briefing not only helps the parties understand the proceeding better, it also shows them that they are being recognized individually and taken into account—genuinely, not just technically.

Comments, Feedback and Suggestions

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Get Really Specific About the Ex Parte Rule

Parties who don't understand the ex parte rule can be offended and upset if you seem to snub them in ex parte encounters, in the hearing room or elsewhere.¹ You can avoid this risk by explaining the rule and its importance before the case begins. Alert them specifically that you won't remain in the room with any party or counsel without someone present from the other side (or all the other sides), and that you won't speak with them—even about the weather—if you cross paths with them separately outside the room. Explain that your avoidance of conversation won't be out of rudeness, but will actually be necessary to preclude violations of this bedrock principle of fair procedure.

During the Hearing: Help the Parties Understand What You're Doing

While the hearing is in progress, consider that a lay party might not understand what is happening, and consider the possibility that a brief explanation might defuse potential suspicion or alienation. For example: the lawyers may understand your ruling fully when you respond to an objection with a terse "sustained" or "overruled," but the parties may not. An occasional detour to explain your reason for a ruling could counteract a perception by the affected party that you are treating that party's case and counsel dismissively or unfairly.

Another example: if damage issues are addressed before liability has been determined, a lay party may interpret that as a signal that you have decided to find liability. You can allay that concern by assuring the parties that you have not, but that damages are being addressed provisionally at this point to avoid a need for a separate hearing on them.

These techniques are just examples. Others will suggest themselves if you think about the parties (remembering that they are the most important people in the room) and put yourself into their shoes. And, of course, the approach suggested here requires discretion: you may find yourself with parties whose sophistication makes it unnecessary and it could be overdone in any case. But a judicious measure of it in an appropriate case should not add significantly to the length of the hearing, and will more than compensate for its limited use of time by its contribution to the parties' satisfaction with the arbitration process they are paying for.

Arbitration Parties Are People Too— Help Them Feel That Way *continued*

This article was first published on the website of the Greater New York Chapter of the Association for Conflict Resolution. Mr. Gerber holds the copyright to the article and gave FINRA permission to republish it in The Neutral Corner.

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

Andrew J. Gerber graduated from the University of Vermont and Yale Law School. He was the ACLU's first legal intern, served in the U.S. Army JAG Corps and worked as a lawyer at the American Society of Composers, Authors and Publishers (ASCAP). After private law practice in New York City, he became an attorney for CBS, working mostly with its Records Group and its successor, Sony Music Entertainment. He became the first General Counsel of Columbia House and served there until 2001. He is now an arbitrator and mediator, including service for AAA, FINRA, the New York County Part 137, the Better Business Bureau and the mediation rosters of the New York Supreme Court Commercial Division and the U.S. District Court for the Eastern District of New York. He also works as a consultant to lawyers on entertainment and copyright matters.

He has lectured for PLI, the New York City Bar Association, the Federal Bar Association, the Copyright Society of the USA, the New Music Seminar and Brooklyn, Cardozo, Columbia, Fordham, Hofstra, NYU and Seton Hall law schools.

Endnote

- 1 See [Rule 12210](#) of the Code of Arbitration Procedure on ex parte communications.

Case Filings and Trends

Arbitration case filings from January through May 2011 reflect a 13 percent decrease compared to cases filed during the same five-month period in 2010 (from 2,455 cases in 2010 to 2,128 cases in 2011). Customer-initiated claims decreased by 19 percent through May 2011, as compared to the same five-month period in 2010.

From January through May 2011, arbitration cases filed identified the following securities (listed in order of decreasing frequency): common stock, mutual funds, preferred stock, options, annuities, corporate bonds, variable annuities, limited partnerships, certificates of deposit, auction rate securities and derivative securities. The top two causes of action alleged are breach of fiduciary duty and negligence.

Dispute Resolution and FINRA News



California State Bar Rules for Arbitrators and Mediators

FINRA recently sent a letter to arbitrators and mediators who are available to hear cases in California, reminding them that if they are members of the California State Bar, they must be on active status to serve as an arbitrator or mediator in California cases. Rule 2.30 of the Rules and Regulations of the State Bar prohibits an inactive member from working as a private arbitrator, mediator or other dispute resolution provider, law clerk, paralegal, real estate broker or CPA. Specifically, Rule 2.30 states that “no member practicing law, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member.”

If you are an attorney admitted in California, and are on active status with the State Bar, you do not need to take action. If you are on inactive status with the State Bar, or if your current bar status is different from what is reflected on your Arbitrator and/or Mediator Disclosure Report, please notify Neutral Management at finradrnm@finra.org. Please include the title, “California Bar Requirement,” as the subject line of your email.

For further information about Rule 2.30, please contact the State Bar of California:

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Updated Statistics to Optional All Public Panel Rule

As previously reported, on January 31, 2011, the Securities and Exchange Commission (SEC) approved [SR-FINRA-2010-053](#), a rule change to provide all investors filing arbitration claims the option of having an all-public

Electronic Arbitration Orders

Electronic versions of the [Initial Prehearing Conference Scheduling Order](#) and [Order on Request for Direct Communication](#) are now available on our website. The electronic versions allow arbitrators to complete the forms online and email them to the appropriate regional office, providing a convenient and efficient way to transmit these orders and keep the case moving forward.

Online Arbitration Claim Filing Enhancement

FINRA updated the Online Arbitration Claim Filing form to allow customer claimants in cases that proceed with three arbitrators, the option to choose between two panel selection methods—the [new Optional All Public Panel rule](#) or the Majority Public Panel rule—at the time they file their claims. Please visit our website for more information about the enhanced [Online Arbitration Claim Filing](#) system.

panel, greatly increasing investor choice in the FINRA arbitration program. FINRA amended the Code of Arbitration Procedure for Customer Disputes (Customer Code) to give investors the option of choosing an arbitration panel that has two public arbitrators and one non-public arbitrator, as was previously the case, or choosing to have their case heard by an all-public panel.

As of June 1, 77 percent of customers (873 of 1,136 cases) have chosen to have their cases heard by a panel of all public arbitrators. Customers choosing the All-Public Panel Option have chosen to rank one or more non-public arbitrators on the list in 33 percent of the cases (123 of 372 cases) in which parties completed the ranking process. They have ranked four or more non-public arbitrators in 12 percent of the cases (43 of 372 cases).

Industry parties have returned the arbitrator ranking lists in 377 cases. Industry parties have ranked one or more non-public arbitrators in 99 percent of these cases (373 of 377 cases). In one percent of these cases (4 of 377), industry parties have struck all non-public arbitrators. In the 373 cases in which industry parties have ranked one or more non-public arbitrators, industry parties have collectively returned 430 lists. Industry parties in 92 percent (396 of 430 lists) have ranked four or more non-public arbitrators.

SEC Rule Filings

Update to the Proposed Rule Change Relating to Disciplinary Referrals Made During an Arbitration Proceeding

On July 12, 2010, FINRA filed the proposed rule change ([SR-FINRA-2010-036](#)) with the SEC. The proposal would amend Rule 12104 of the Customer Code and 13104 of the Code of Arbitration Procedure for Industry Disputes (Industry Code), to permit arbitrators to make a disciplinary referral during a pending arbitration when they have reason to believe that conduct poses a serious, ongoing, imminent threat to investors and requires immediate action. The SEC received 11 comments on the proposal. FINRA is reviewing the comments, and is considering whether to amend the proposal to address some of the issues raised. To that end, FINRA extended the time to July 11, 2011, for the SEC to act on the proposed rule change.

Please visit our website for more information about [SR-FINRA-2010-036](#).

SEC Rule Approvals

Amended Discovery Guide

On April 1, 2011, the SEC approved FINRA's proposed rules to amend the [Discovery Guide](#). The rules became effective on May 16, 2011, and apply to all cases filed on or after the effective date. For more information about the Discovery Guide, please review [Regulatory Notice 11-17](#). For additional training opportunities about the updated Discovery Guide, please listen to the [May 16 Neutral Workshop](#) and review the updated online [Discovery Training](#), both of which are described more fully in the Arbitrator Training section on page 11. These trainings are available **free** of charge.

Panel Composition for Promissory Note Cases

On April 7, 2011, the SEC approved a proposed rule change ([SR-FINRA-2011-005](#)) to amend Rule 13806 of the Industry Code to provide that FINRA will appoint a chair-qualified public arbitrator to a panel resolving a promissory note dispute instead of appointing a chair-qualified public arbitrator who is also qualified to resolve a statutory discrimination claim. The amendment ensures that FINRA has a sufficient number of qualified arbitrators readily available to resolve promissory note cases.

The amendment to the Industry Code became effective on June 6, 2011, and applies to all promissory note proceedings in which FINRA has not sent lists of arbitrators to the parties. For more information on this amendment, please review [Regulatory Notice 11-22](#).

Replying to Responses to Motions

On April 7, 2011, the SEC approved a proposed rule change ([SR-FINRA-2011-006](#)) to amend FINRA Rules 12206, 12503 and 12504 of the Customer Code and Rules 13206, 13503 and 13504 of the Industry Code to provide moving parties with a five-day period to reply to responses to motions. The amendments provide parties with a full opportunity to brief the issues in dispute, and ensure that arbitrators have all of the motion papers before issuing a final decision on the motion.

The amendments became effective on June 6, 2011, and apply to motions in all cases. For more information on the amendments, please review [Regulatory Notice 11-23](#).



Question and Answer

Non-Responsive Respondents and the Use of Default Procedures

Question: I am appointed to a case in which the respondent has not filed an answer and has failed to otherwise appear at any of the scheduled prehearing conferences. The claimant has since filed a motion for default judgment. May I grant the claimant's motion, enter a default award and dispose of the case?

Answer: No. The panel may not enter a default award based solely on the non-responsive party's lack of participation or appearance. However, pursuant to [Rules 12801 and 13801](#) of the Codes of Arbitration Procedure, the claimant may request default proceedings against any respondent that fails to file an answer within the time provided by the Code and falls into one of the following categories:

- A member whose membership has been terminated, suspended, canceled or revoked;
- A member that has been expelled from FINRA;
- A member that is otherwise defunct; or
- An associated person whose registration is terminated, revoked or suspended.

To properly initiate default proceedings against a respondent that fails to file a timely answer, the claimant must notify FINRA in writing and send a copy of the notification to all other parties. If there is more than one claimant, all claimants must agree in writing to proceed under the default proceedings rule against a defaulting respondent before the rule may be used.

If FINRA determines, after receiving written notice from the claimant, that the requirements for proceeding under the default rule have been met, FINRA will notify all parties that the claim against the non-responsive respondent will proceed

under the default proceedings rule as a separate matter with a new case number. FINRA will appoint a single arbitrator in accordance with FINRA's arbitrator list selection system to review the case materials and render an award.

No hearing will be held. However, the claimant—through its statement of claim and other supporting documents—must still meet its burden to establish a sufficient basis for an award. The arbitrator may request additional information from the claimant before rendering an award.

If the defaulting respondent files an answer after FINRA notifies the parties that the claim against that respondent will proceed under the default proceedings rule, but before an award has been issued, the proceedings against that respondent under the default rule will be terminated. The claim against that respondent will then proceed under the regular provisions in the Code.

Mediation Case Statistics

From January through May 2011, parties initiated 290 [mediation cases](#). FINRA also closed 287 mediation cases during the same five months period. Approximately 85 percent of these cases concluded with successful settlements, and the average case turnaround time during this five-month period was 104 days.

Mediation Update



Annual Mediator Membership Fee Due September 1

FINRA mediators must submit their \$200 annual membership renewal fee by September 1 to remain active on the roster.

Payment instructions are available on our [website](#).

If your membership has lapsed and you want to renew it, please email [Marilyn Molena](#).

Membership Benefits

FINRA's mediator roster has gained a strong reputation with parties and their attorneys, partly because FINRA remains selective about the quality and experience of its mediators. FINRA screens mediators before sending them mediator applications, and the National Arbitration and Mediation Committee (NAMC) approves all mediator applicants before they are available to serve on the roster. FINRA sends mediator applications to approximately 10 percent of those who inquire about applying to the roster. In 2010, the NAMC approved 30 mediators who have the appropriate background and experience to serve in the forum.

Although FINRA cannot guarantee that all mediators on its roster will be selected by parties, it makes an effort to provide parties with a wide range of mediators—who meet the parties' specific qualifications—from whom to choose. By joining FINRA's mediator roster, mediators enjoy the following benefits:

- **FINRA Credential:** FINRA mediators have a competitive advantage in their mediation practice as a member of the leading securities mediation program.
- **Marketing Resources:** FINRA continually promotes the quality of its mediators, the benefits of mediation and the advantages of FINRA mediation to frequent users of our forum.
- **Access to FINRA Arbitration Cases:** FINRA reaches out to the parties in every arbitration case, encouraging them to explore mediation at FINRA. Staff also works to convert inquiries from disputing parties—that have not yet filed arbitration claims—to try FINRA mediation.

- **Lists and Disclosure Reports:** FINRA provides parties with a list of potential mediators who meet the necessary qualifications for a particular case and with a detailed disclosure report for each mediator.
- **Time Savings:** Mediation administrators work directly with parties to respond to questions and educate them about the mediation process. This helps parties come prepared for mediation and allows mediators to focus on resolving disputes.
- **Retain More Earnings:** FINRA deducts only a flat rate of \$150 from the mediator fees the parties submit at the conclusion of the mediation case.
- **Prompt Payment:** FINRA pays its mediators immediately after the mediation has concluded and the payment form has been submitted. FINRA mediators do not have to wait for the parties to submit payment. Mediators can also have payments deposited directly into their personal checking accounts by registering for [direct deposit](#).
- **No Collection Risk:** Mediators do not risk non-payment of fees and expenses because FINRA collects payments directly from the parties.
- **Indemnification:** FINRA provides its mediators with legal counsel if they are named in an action related to a FINRA mediation, and indemnifies them if they are held liable.
- **Administrative Assistance:** Staff provides administrative support, including scheduling mediation sessions at FINRA (with video conferencing options) or an offsite location and collecting mediator fees and expenses. Staff also ensures that all parties execute a Mediation Submission Agreement to establish the terms of the mediation in advance.

Mediation Outreach

On June 16, FINRA gave a presentation at the [Center for Alternative Dispute Resolution's](#) 2011 Annual Conference in Greenbelt, MD.

Updated Discovery Training

Neutrals can also benefit from the updated [Discovery, Abuses and Sanctions](#) training that contains the most updated information about FINRA's discovery procedures and reflects recent amendments to the [Discovery Guide](#). Neutrals may access the training—free of charge—by logging into [FINRA's Learning Management System](#). New users must first create an account under “Your Account” before searching for the [Discovery, Abuses and Sanctions \(2011\)](#) training and adding it to the Learning Plan.

Please contact [Jisook Lee](#) if you have any questions about accessing the course online.

Arbitrator Training



FINRA Discovery Guide Revisions

On April 1, 2011, the SEC approved FINRA's amendments to its [Discovery Guide](#). The amendments, which became effective on May 16 for all cases filed on or after that date, expand the guidance to parties and arbitrators on the discovery process and update the Document Production Lists.

Based on these revisions, FINRA is providing the following training opportunities to learn more about the updated Discovery Guide.

Neutral Workshop

This [neutral workshop](#) provides an overview of the revisions to the FINRA Discovery Guide. The Discovery Guide, created in 1999, provides direction on which documents parties should exchange without arbitrator or FINRA staff intervention. Workshop faculty Margo Hassan, Assistant Chief Counsel of FINRA Dispute Resolution, discusses:

- how the revised Guide gives parties and arbitrators more guidance on the discovery process; and
- how arbitrators should apply the Guide in arbitration cases.

Linda Fienberg, President of Dispute Resolution, gives an overview of the Optional All Public Panel Rule.

Links referenced during the workshop:

- [Discovery Guide](#)
- [Regulatory Notice 11-17](#)—Revised Discovery Guide and Document Production Lists for Customer Arbitration
- [Regulatory Notice 11-5](#)—Customer Option to Choose an All Public Arbitration Panel in All Cases
- [Public Arbitrator Pilot Program Summary Sheet](#)

Please send any questions or comments to FINRADRcall-inworkshop@finra.org.

Note: FINRA's neutral workshops are pre-recorded, which allows neutrals to listen at any time of their choosing and also permits them to pause and playback the audio file.

Arbitrator Tip: Arbitrator Conduct



FINRA arbitrators are expected to maintain a high standard of professional conduct at all times. In particular, arbitrators must be sensitive about making comments that could be perceived as disparaging, denigrating or demonstrating hostility or aversion toward any participant in the arbitration, including parties, counsel, witnesses and co-panelists. Examples of inappropriate comments include offensive jokes or language and the use of epithets, slurs or negative stereotyping based on race, gender, national origin, religion and sexual orientation.

Inappropriate comments and conduct by arbitrators may jeopardize the finality of an arbitration award, as well as negatively affect perceptions about the fairness of the FINRA arbitration forum. Arbitrators should immediately report any instances of inappropriate comments or conduct by one of their peers to the FINRA staff member assigned to their case. FINRA investigates all complaints of arbitrator misconduct as part of our internal arbitrator evaluation process and will take appropriate action, up to and including removal of the arbitrator from FINRA's roster.

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