THE NEWSLETTER FOR FINRA NEUTRALS

Financial Industry Regulatory Authority

Volume 1 – 2015

The Neutral Corner

What's Inside

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.

Dispute Resolution and FINRA News

Case Filings and Trends

Arbitration case filings from January through February 2015 reflect a 29 percent decrease compared to cases filed during the same two-month period in 2014 (from 672 cases in 2014 to 476 cases in 2015). Customer initiated claims decreased by 28 percent through February 2015, as compared to the same time period in 2014.

FINRA Dispute Resolution Task Force

The Dispute Resolution Task Force held its second in-person meeting on January 22, 2015. It reviewed the progress of the subcommittees and agreed that they would continue to work through their topics and share their findings with the task force. Please review the Dispute Resolution Task Force webpage for more information about the task force and its work.

Updated Expungement Guidance

FINRA recently updated its expungement guidance for cases in which expungement is the only relief requested. In these cases, a broker may file an arbitration against the brokerage firm without naming the customer or customers in the underlying dispute as a respondent. To ensure that customers are aware of the expungement request, arbitrators should order the broker to provide a copy of the statement of claim to the customer(s) in the underlying arbitration. Notifying the customer(s) gives them the opportunity to advise the arbitrators and parties of their position on the expungement request, which may assist arbitrators in making an appropriate finding under Rule 2080. Please review the updated guidance on our website. We also encourage arbitrators to review the expungement training available on FINRA's learning management system or as a PDF on the Written Materials page, especially before a hearing that may involve expungement issues.

Administrative Frequently Asked Questions (FAQ)

FINRA Dispute Resolution has updated the Administrative Frequently Asked Questions (FAQ) to clarify guidance on confidentiality of arbitration proceedings. Please review the FAQ in preparation for arbitration hearings.

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Comments, Feedback and Suggestions

Please send your suggestions and comments to:

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You may also email Jisook at *Jisook.Lee@finra.org*.

Arbitrator Reimbursement Guidelines

FINRA recently updated its reimbursement guidelines to increase the mileage reimbursement rate to $.575 per mile (per IRS Regulation). FINRA has also revised its policy to allow a greater number of arbitrators to be reimbursed for transportation and lodging under the reimbursement guidelines. Arbitrators who live or work more than 75 miles (decreased from 120 miles) of their primary hearing location are now eligible. Please review the updated guidelines on the Forms and Tools webpage.

Dispute Resolution Outreach

In January 2015, Kenneth Andrichik, Senior Vice President, Chief Counsel and Director of Mediation and Strategy, presented at the ADR Symposium hosted by the New York Law School. The program informed students, young lawyers and other professionals about arbitration, mediation and employment opportunities at FINRA.

In February, Mr. Andrichik served as a role-play coach in a basic mediation training sponsored by the New York City Bar Association.

FINRA Annual Conference: May 27 – 29, 2015

FINRA's Annual Conference will be held on May 27 – 29, 2015, in Washington, DC. This year's Annual Conference builds upon important regulatory updates to provide compliance officers, legal professionals, branch managers and others with the tools to develop and maintain an effective compliance framework. Please visit the 2015 Annual Conference webpage for more information about this year's program and how to attend the conference.

DR Portal

As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

- viewing and updating your profile information;
- viewing and printing your disclosure report;
- accessing information about your cases, including upcoming hearings and payment information;
- scheduling hearings;
- viewing case documents; and
- filing case documents.

Registration with the DR Portal is particularly important for cases that FINRA administers through the portal. FINRA is actively reaching out to arbitrators serving on portal cases to encourage them to register. Portal registration will be noted on the arbitrator disclosure report that parties review during arbitrator selection.

If you have not registered with the DR Portal, please send an email to Dispute Resolution Neutral Management to request an invitation. Please include "request portal invitation" in the subject line.

DR Portal Update

Expiration Dates

Arbitrators and mediators should be aware that DR Portal accounts expire after 17 months of inactivity. To avoid having to re-register in the portal, be sure to log in within 17 months. You can check on the status of cases and make updates to your profile. Also, note that passwords expire after 120 days and must be changed to access the portal.

Updating Email Addresses in the Portal

Neutrals, who need to update their email addresses and have already registered in the portal, must make this change on their own through the portal. FINRA staff cannot make any changes to neutrals' email addresses after they have registered in the portal. You can update your email address by first logging into the portal. From the homepage, select the "manage my account" link from the left-hand navigation panel. After you update your email address, press the "save" button and confirm that your data has been saved. Before logging out, you must navigate back to the Dispute Resolution Portal to effect this change in your profile. Please contact the Neutral Management department by email or by telephone at (855) 209-1620 if you have any questions. You may also review the User Guide for any help with the portal.

SEC Rule Approval

Revisions to Arbitrator Definitions

On February 26, 2015, the Securities and Exchange Commission (SEC) approved a proposed rule change to amend Rules 12100 and 13100 of the Customer and Industry Codes to refine and reorganize the definitions of "non-public" arbitrator and "public" arbitrator. The amendments, among other matters, provide that persons who worked in the financial industry for any duration during their careers would always be classified as non-public arbitrators. Additionally, persons who represent investors or the financial industry as a significant part of their business will be classified as non-public, but, unlike persons who worked in the industry, they can become public arbitrators after a cooling-off period. The amendments also reorganize the definitions to make it easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.

In its approval order, the SEC states that the proposed rule change will address forum users' perceptions of neutrality in the forum, and will help FINRA to maintain the integrity of the forum.

On March 12, 2015, FINRA emailed a survey to all public arbitrators to determine which arbitrators to reclassify, based on the new definitions. We encourage arbitrators to carefully review the questions and return the survey if they have not already done so. Arbitrators may contact the Neutral Management department by email or by telephone at (855) 209-1620 with any questions about the new arbitrator definitions.

Please visit our website for more information about SR-FINRA-2014-028.

SEC Rule Filing

Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Cancelling or Postponing a Hearing

On February 5, 2015, FINRA filed with the SEC a proposed amendment to Rules 12214 and 12601 of the Customer Code and Rules 13214 and 13601 of the Industry Code to require that parties give more advance notice before cancelling or postponing a hearing, or be assessed a higher late cancellation fee to be paid to the arbitrators. The comment period closed on March 17, 2015. FINRA extended the time for the SEC to act on the proposal until May 25, 2015.

Please visit our website for more information about SR-FINRA-2015-003.

As a reminder, arbitrators should review their disclosure reports regularly to make sure that all information is accurate and current. Even if arbitrators are not currently assigned to cases, their disclosure reports are continually sent to parties in their hearing locations during arbitrator selection. Parties deserve to have the most current information to make an informed decision when they select arbitrators.

Mock Arbitrations

FINRA has recently received questions from arbitrators asking whether they can participate in private mock arbitrations coordinated by litigation preparation companies and frequent users of FINRA's forum.

FINRA cautions arbitrators that participating in mock arbitrations may cause complications when serving as an arbitrator for FINRA. However, FINRA arbitrators may participate in mock arbitrations, provided that they disclose this information immediately and thoroughly. Thus, arbitrators must disclose this activity completely in their arbitrator disclosure report, so potential parties are aware of this activity during list selection.

Arbitrators should disclose as much information as possible about the mock arbitration, including but not limited to:

- the names of the firms involved;
- the causes of action raised;
- any procedural and substantive issues considered; and
- any products involved.

If arbitrators are appointed to an arbitration case involving similar issues addressed in the mock arbitration, they should restate the details of the mock arbitration to the parties during the initial prehearing conference.

Mediation Update

Mediation Statistics

From January to February 2015, parties initiated 72 mediation cases. FINRA closed 80 cases during this time. Approximately 85 percent of these cases concluded with successful settlements, and the average case turnaround time was 86 days.

Mediation Program for Small Arbitration Claims Starting its Third Year

FINRA's Mediation Program for Small Arbitration Claims reached its two-year anniversary in January 2015, and continues to receive positive feedback from parties and mediators. Cases eligible for the program must have an active FINRA arbitration case with initial claims of $50,000 or less. Claims of $25,000 or less are eligible for mediation at no cost, while claims over $25,000 through $50,000 are eligible for mediation at a reduced fee of $50 per hour (divided by the parties). FINRA collects no mediation filing fees for these cases. To date, more than 90 percent of the cases that mediate through this program have reached a settlement. The settlement rate is higher than in mediations conducted through our regular program and emphasizes that successful mediations can be conducted telephonically.

Telephonic mediation provides parties who may find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute. The program also offers seniors or those with difficulty traveling, the option to participate in a mediation without traveling to a meeting site.

We look forward to another successful year offering parties in small cases an affordable option with the convenience and scheduling flexibility of telephonic mediation.

Question and Answer

Arbitrator Selection Process

Question How are arbitrators selected to hear cases?

Answer FINRA staff plays no part in selecting arbitrators to serve on cases. Instead, FINRA uses its computer system, the Neutral List Selection System (NLSS), to appoint a panel. NLSS generates, on a random basis, lists of proposed arbitrators from FINRA's rosters of arbitrators (*i.e.,* public, non-public and chairperson rosters) for each arbitration case.

Generally, the arbitrator selection process begins after the answer is due, regardless of whether the respondent answers the claim. After the answer is due, FINRA generates list(s) of arbitrators, using NLSS, and sends them to the parties with each arbitrator's disclosure report. Parties review the information, strike any arbitrators from the lists that they do not want on their panel and rank the remaining choices pursuant to Rules 12401 and 13401 or Rules 12403 and 13403. After parties have ranked their choices, they submit their ranked lists to FINRA. Using NLSS, FINRA combines the parties' ranked lists and appoints the highest ranked available arbitrator from each list to serve on the panel. Please also review the Arbitrator Selection webpage for more information.

Parties review closely the arbitrator disclosure reports during the arbitrator selection process and make their decisions based on the information in these reports. Arbitrators can do their part by regularly reviewing and updating their arbitrator disclosure reports.

Education and Training

FINRA Releases First Video Neutral Workshop: February 12, 2015—Rule Amendments; 2015 Vision; Expungement Refresher

The most recent Neutral Workshop features Rick Berry, Executive Vice President of FINRA Dispute Resolution, and key FINRA staff members, as they discuss recent rule amendments and the forum's initiatives for 2015. The video also includes an expungement refresher training in the form of a "Question and Answer" session with guest speaker Richard Pullano, Vice President and Chief Counsel of FINRA's Registration and Disclosure Department. Joining Mr. Berry and Mr. Pullano are Katherine Bayer, Regional Director of Dispute Resolution's Northeast office, and Barbara Brady, Vice President and Director of Neutral Management.

FINRA's Neutral Workshops provide practicing arbitrators and mediators with updates on developments within FINRA's dispute resolution program, such as the latest proposed rule changes, procedures and recent Regulatory Notices. The workshops are recorded by senior Dispute Resolution staff several times each year and posted for neutrals to access at any time.

Arbitrator Tips

Stay on Schedule

We remind arbitrators to stay on schedule during an arbitration hearing. A hearing session is a meeting with parties and arbitrators that is four hours or less. To be efficient and to avoid unnecessarily higher forum fees for parties, we encourage arbitrators to use the maximum time for each hearing session. Arbitrators are paid $300 for each four-hour hearing session,[1] and they should avoid reducing the allotted time by starting late or ending early. Unless agreed to by all parties, counsel and the panel, FINRA expects the hearings to start at 9 AM.

Arbitrators can also conserve hearing time by limiting discussion about schedules and future hearing dates. Arbitrators should ask counsel to consult and agree on future hearing dates and jointly propose agreed hearing dates to the panel. Arbitrators might also suggest that parties consult with each other in an effort to: (1) agree on the admission of hearing exhibits; (2) resolve possible issues about authentication of exhibits; and (3) schedule witnesses' testimony to avoid repetitive testimony on or examination of the same evidence. We also remind arbitrators that they have the authority to manage hearings to ensure they are conducted fairly and efficiently.

Turn the Recorder *Off* During Executive Sessions and Deliberations

FINRA cannot over-emphasize the importance of turning off the recorder during executive sessions and deliberations. Like the importance given to turning on the recorder to ensure that the proceedings are recorded pursuant to the Code of Arbitration Procedure, turning off the recorder during executive sessions and deliberations is equally important.

During these private conversations, arbitrators generally feel free to speak openly about the merits of the case with their co-panelists knowing that the parties are out of the room, and their conversations will not be recorded. This is exactly what should happen. Unfortunately, if arbitrators forget to turn the recorder off, their candid conversations will be recorded. Consequently, if parties request copies of the recordings to review the

testimony or prepare for a possible challenge to the award, they will not only receive the hearing record but also the arbitrators' private conversations. If the deliberation is recorded, parties may consider it as part of the record and use this information in support of their motions to vacate.

Recording these private sessions has the potential to weaken the finality of an arbitration award. Further, it reveals the workings of the deliberative process that should remain private, so that arbitrators can talk freely and exchange ideas. To avoid these unintended consequences, arbitrators should always make sure that the recorder is turned off before engaging in executive sessions, deliberations or any off-the-record conversations. Arbitrators should also consider leaving the hearing room to deliberate in a secure location outside the range of the recorder.

The recorder shows a red light when it is on and recording. Be sure to look for the red light and confirm that it is off before starting a private conversation during the hearing. For further guidance, please review the article, Properly Recording the Arbitration Hearing previously published in Volume 2, 2012 of The Neutral Corner.

Endnotes

1 Rule 12100 defines the term "hearing session" as any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

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