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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 FINRA’s forum by taking advantage of this valuable learning tool.

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Ten Best Practices for FINRA Chairpersons

By Professor Anthony Sabino, FINRA Arbitrator*



Chairing a FINRA arbitration is a solemn responsibility. While FINRA’s in-house training is without peer, there is no substitute for actual experience.

I was fortunate to be mentored during my first years as an arbitrator by some wonderful chairpersons (chairs)—highly skilled individuals who led by example and willingly shared their knowledge of FINRA’s arbitration forum.

As I near 20 years of service as a FINRA chair, I would like to repay my teachers’ generosity by sharing the lessons they imparted, to guide aspiring chairs and to provide value to those who already fill that role.

1. Due Process Emanates from Respect and Courtesy

Above all else, the most important responsibility of a chair is to see that due process is served. Obvious? Certainly. But what is not as apparent is that due process does not spring from legal axioms alone.

Its true fount is the fundamental principle of being respectful and courteous to all who come before FINRA Dispute Resolution Services (DRS). Due process is best served when you respect each party, attorney, witness, their claims and defenses and their testimony and exhibits. Due process naturally flows from that respectful and courteous treatment.

2. The Chair Takes Care of the Panel

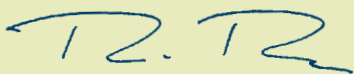
Unquestionably, the chair is the “first among equals.” But the chair cannot be heedless of the other two panelists. They are not only peers but, like the chair, were selected by the parties to hear the controversy.

To take care of the panel, you must be aware of your co-panelists’ circumstances. How far and long did they travel to the hearing? Are they tied to train schedules or do they have personal commitments later that day? Most importantly, be sensitive to signs of fatigue. The consideration you give your panel can only make them more focused on the matter at hand, and that alone advances due process.

Year End Message

As we approach the end of yet another unusual and remarkable year, we would like to extend a heartfelt thank you to our arbitrators and mediators. As we steadily move forward with in-person hearings, we appreciate your flexibility and ongoing commitment to providing a fair and safe way for parties to find resolution and finality. Despite these uncertain times, your expertise, skill and dedication have remained constant and serve as a reminder that the quality of our forum is shaped by the neutrals who serve to resolve the disputes. Thank you.

We wish you a joyous, safe and healthy holiday season and look forward to working together in 2022.



Rick Berry
Executive Vice President,
FINRA Dispute Resolution Services

3. Maintain an Orderly Hearing

A disorderly hearing is the enemy of due process. To be sure, parties should have latitude to make their case in their own way. But that precept does not grant either side unbridled discretion regarding their conduct.

The chair should not hesitate to step in when parties interrupt and talk over each other, argue rather than ask questions or fail to provide a response to proper examination. You do not diminish due process by maintaining order. To the contrary, by taking a firm and gentle hand, you enhance it.

4. Encourage Streamlining the Proceedings

Even in FINRA's non-judicial arbitration forum, due process demands that certain proprieties be observed. These include the formal admission of exhibits and qualifying of expert witnesses. However, these routine formalities can be time consuming and distracting.

To streamline the process, as chair, you can encourage the parties to stipulate (either before or during the hearings) to the admission of exhibits. A cursory review of the document production lists in [FINRA's Discovery Guide](#) reveals that each side is dependent on the other's documents. Given such mutuality, in most instances parties can readily stipulate to admissibility.

Similarly, the credentials of experts and any reports they generate are well known to each side before the hearings. Therefore, parties can often stipulate to an expert's qualifications and the admission of the expert's report. There is usually a tacit agreement from each side that "if you accept my expert, I will accept yours." Stipulating to the qualification of an expert and admitting the report does not detract from an incisive cross examination by the opposing party. Ultimately, the panel has the last word as to the weight and credibility of the expert and report.

Stipulations such as these enhance due process because they allow the panel to hear the substantive evidence sooner in the hearing.

5. Overbook Hearing Dates

One of the most practical lessons I learned was that it was "better to schedule too many hearing dates than too few." Parties often underestimate the time they will need to put on their case and how long it will take the opposition to cross examine.

Scheduling additional hearing dates is far more difficult than cancelling days you no longer need. Rather than watching the clock, parties can proceed with confidence, knowing that they have enough time to put their best case forward. Parties who feel rushed are more likely to believe they were denied due process. And they might be right. Avoid any such problem by scheduling one or two hearing days beyond what the parties request.

6. **Take Responsibility for Prehearing Matters**

Serving as chair starts with presiding over the Initial Prehearing Conference (IPHC) and ends with the issuance of the award. But sometimes there are certain tasks to be done, even before the first hearing. Chairs have sole authority over prehearing issues, such as resolving discovery disputes and issuing subpoenas. Never shy away from that responsibility. To the contrary, embrace it.

First, the chair has authority over these matters for a reason: it's just plain more efficient. Second, your fellow panelists are counting on you. You have an obligation to them to resolve these preliminary issues to the best of your ability. Third, you serve due process by firmly ruling with alacrity on these issues.

7. **Pay Attention to the Details**

Remember to ask counsel if they wish to re-direct or re-cross examine the witness. When they have concluded, be sure to ask your co-panelists if they have their own questions. This will be the best time to question a particular witness. As you reach the end of the case, ask each side if they wish to amend their pleadings based on the evidence (a small but important step that some participants neglect).

Before closing arguments, ask the claimant if they want to reserve time for rebuttal.

Depending on the complexity of the proceeding, consider suggesting to the parties that they take no more than "X" minutes to close (confer with your co-panelists and decide what "X" equates to in that specific case). Setting specific and fair timeframes helps parties focus on what is important to their case.

8. **Be Decisive**

The chair occupies the "center seat," so making decisions comes with the territory. Participants appreciate decisiveness handled with a gentle firmness.

Don't be afraid to be decisive when ruling on objections, admissibility of evidence and other matters that fall within the chair's purview. On close questions or if you need help, go into executive session and consult with your peers for their points of view. But the ultimate responsibility is yours, so make a decision, bring the parties back into the room and move forward. Everyone benefits from your forthrightness.

9. Let Your Panelists Speak First in Deliberations

While a chair should be decisive in making rulings both before and during a hearing, a more collaborative approach is advised for deliberations.

In deliberations, a good chair listens first and speaks last. A chair should not offer an opinion until each panel member's full and frank viewpoint is heard. Sometimes a panelist might feel intimidated and defer to the chair's perceived authority. Letting the panel members speak first helps solve that dilemma.

Each panel member arrived at the hearing by the same selection process and, therefore, deserves to be heard. For all these reasons, due process is best served when the chair listens first and speaks last in deliberations.

10. Lead the Way to Compromise

My closing point may be self-evident, but it does not hurt to state it outright. Your title may be "arbitrator," but you do not need to be "arbitrary," especially in reaching a final determination. Air out all the possibilities for a resolution of the case. Whether new or veteran, your peers bring their own particular skills and experience to the deliberations. Embrace that and benefit from their diverse viewpoints.

The paramount objective is to accord due process to the parties. Collaboration in deliberations and compromise in the final award best serve that objective.

And there you have it: one chair's notion of the top ten best practices for FINRA chairs. Please keep in mind that every arbitration is a unique opportunity to learn. Therefore, I hope you can make good use of my suggestions, and, indeed, add to them. Together, we can all work toward ensuring that FINRA's arbitration forum remains at the extraordinarily high level that it has always occupied.

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Bits, Bytes and E-Discovery Fights: Part IV

By Lisa Miller, FINRA Arbitrator*



This article is the fourth and final part in an educational series on e-discovery and motion practice for FINRA arbitrators. In this article, Ms. Miller explores emerging issues and ethics in the context of e-discovery.

Emerging Issues in E-Discovery: Looking Ahead

Deepfakes

Advanced software tools allow bad actors to create reliable looking (but fabricated) content called “deepfakes.” With just a computer and an internet connection, they can invent photos and videos of people saying and doing things these individuals never said or did. They can also create locations that look real but are synthetic. Artificial intelligence and deep learning create confusion when viewing real versus fake media. And the problem is growing. The number of deepfake videos online almost doubled in the first seven months of 2019, from 7,964 to 14,678.¹

Using deepfakes, criminals may pose as someone else, create synthetic identities and fraudulently authorize financial and other actions. Deepfake technology is embedded in the financial system with documented cases of fraud and extortion. In a survey of 105 cyber security experts in the financial sector, released in January 2020, 77 percent of the chief security officers were concerned about deepfakes but only 28 percent had implemented safeguards.²

When and how deepfakes may be the subject of discovery have not been clearly defined by the courts. Applying existing FINRA approaches, arbitrators generally allow e-discovery regarding non-privileged matters that are both relevant to a claim or defense and proportional to the overall case. Arbitrators must first determine whether deepfakes are admissible, then resolve the question of fact whether the image, video or audio is synthetic.

To establish a defense in FINRA arbitration by asserting that evidence is synthetic, a party may offer testimony about the underlying technology. If the technology behind the alleged deepfake, or the technology the witness used to identify the deepfake, is proprietary, arbitrators might need to issue protective orders to ensure confidentiality and security.

Arbitrator Tip

Admissibility of alleged deepfake evidence would likely be contested. In a FINRA arbitration, conflicts regarding admissibility of a deepfake in the proceeding should be reasonably easy to resolve, considering the flexible manner in which evidence rulings are rendered. The challenge for arbitrators is how best to gauge reliability of deepfakes when deciding the case.

A practical approach to assess alleged deepfakes and credibility may include asking the following:

- Is the deepfake reasonably relevant?
- Has the deepfake been fairly and thoroughly authenticated?
- Does the deepfake constitute hearsay that is outside of the administrative hearsay rule?³
- Is the deepfake an “original”?
- Would admitting the deepfake into evidence be unduly prejudicial?

Authentication is often a hurdle when establishing the admissibility of photographic and video evidence. Due to deepfake technology, an elaborate foundation may be required in arbitration. The party challenging the authenticity of photographic and video evidence likely will request e-discovery under [FINRA’s Discovery Guide](#) related to the technologies used to create the evidence.⁴

Arbitrators presiding over cases with allegations of synthetic digital media might hear testimony about technology that is supposed to identify the likelihood of electronic manipulation. Popular programs offer a percentage chance, or confidence score, that the digital media has been secretly manipulated. For video evidence, these tools provide real-time scoring on each frame as video evidence plays.

Cross-Border Conflicts of Laws

The expanding global economy can create third-party e-discovery issues in FINRA arbitrations. With the popularity of cloud computing, the physical location of stored or sent data (*e.g.*, emails, text messages) is not clear. Even FINRA member firms housing e-data in foreign countries can face difficulties producing e-discovery if the country in which the data resides has an aggressive blocking statute in place. Sometimes, domestic rules of foreign sovereigns create conflicting legal obligations in cross-border e-discovery, especially regarding data protection. The complexity of cross border e-discovery increases costs, informing the e-discovery proportionality analysis for FINRA arbitrators.

Parties in FINRA arbitrations might seek extraterritorial documents, videos, digital images, emails, recordings, text messages, voicemails, database data, electronic calendars, vehicle black-box data and other e-evidence.

Arbitrator Tip

Smaller e-discovery productions will likely be less problematic for foreign jurisdictions. FINRA arbitrators can nudge the process along by suggesting the following approaches for smaller volumes:

- Explaining the relevance of the personal data being sought.
- Explaining to the subject(s) of the production the consequences of production.
- Exploring the possibility of redaction.
- Securing satisfactory consent of each individual whose data is being sought.
- Offering protective orders and security procedures.
- Employing culling and filtering protocols, including de-duplication.
- Producing materials in more accessible formats.
- Producing other, more readily available material that provides somewhat similar information.
- Allowing an offer of proof in the arbitration.

But in many countries, blocking statutes prohibit disclosure of economic, commercial, industrial, financial or technical documents or information to be used as evidence in legal proceedings outside of that particular nation. Violations of blocking statutes in some nations are criminal acts, punishable with fines and imprisonment. Although many nations observe the Hague Convention (Hague) or other international protocols, which manage e-discovery processes otherwise locked by these statutes, these protocols generally do not apply to FINRA arbitrations. Therefore, domestic e-discovery processes depend heavily on negotiated resolutions.

In general, smaller e-discovery productions, which seem less intrusive and less of a scattershot approach, will be more palatable in foreign countries with protective data privacy statutes in place. As a result, narrowing the scope of the production can ease the process. This is an opportunity for FINRA arbitrators to craft thoughtful orders in e-discovery disputes. As always, assuring due process is the touchstone.

Because FINRA arbitrations are designed to provide swift dispute resolution, initiating litigation to access Hague or other international discovery processes is counter to the goals of FINRA's arbitration forum.

Ethics and E-Discovery

State ethics rules regulate advocates' conduct, including conducting e-discovery in arbitrations. These rules generally reflect the [ABA Model Rules](#). Ethics requirements can apply to e-discovery in subtle ways. When arbitrators issue orders or rule on e-discovery issues, they should know that the advocates before them are under ethics obligations.

ABA Rule 1.1: Competence

Arbitration counsel must provide competent representation, which includes a duty to stay "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." (Cmt. 8). This includes litigation review platforms for e-discovery and e-document review. Counsel must understand clients' communications channels and network set-ups to accurately design identification, preservation and collection protocols. Counsel's understanding of the burdens on clients in connection with document production affects e-discovery practice before FINRA arbitrators. Proportionality objections could be unwittingly waived.

Applying this rule to FINRA’s e-discovery process, advocates must be competent in e-evidence sources, approximate volume of data, burdens of collection, review processes, data production, crafting search terms and formats of production.

ABA Rule 1.5: Fees

Under Rule 1.5, “a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” The volume of e-data increases significantly every year. In this context, counsel must use e-discovery practices that are technically competent and avoid unnecessary costs. To be respectful of client e-discovery budgets, legal teams should start the e-discovery processes early in each case. Early data workflow analysis will allow irrelevant and non-responsive data to be sifted out before processing and review costs are assessed.

ABA Rule 1.6: Confidentiality of Information

Lawyers must guard against inadvertent disclosure of privileged information and documents during e-discovery. Confidentiality obligations extend to implementing data-security measures to protect clients’ privileged material from data leakage. Arbitration is private but not necessarily or automatically confidential. Absent confidentiality stipulations, arbitrators, but not parties, may be bound by confidentiality. Attorneys can shore up privilege protections through negotiated protective orders, clawback agreements or non-waiver stipulations.

FINRA arbitrators are sometimes asked to issue or interpret these types of orders or may choose to suggest them to facilitate efficient, cooperative e-discovery by the parties.

ABA Rule 3.3: Candor Toward the Tribunal

E-discovery preservation and collection processes raise ethical issues related to this duty of candor. Counsel must be able to reliably and accurately represent, to opposing counsel and the arbitrator, the:

- client’s ability to locate and produce electronic evidence in an agreed-on format;
- thoroughness of the searches and reviews the client has performed; and
- contents of the client’s production of e-discovery.

ABA Rule 3.4: Fairness to Opposing Party and Counsel

Under this fairness requirement, counsel shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal material having potential evidentiary value. Rule 3.4 mandates that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal (except for an open refusal based on an assertion that no valid obligation exists). To avoid spoliation claims and to adhere to Model Rule 3.4, attorneys must understand their client's technology to be able to competently identify, preserve, and collect e-discovery, issue sufficient litigation hold communications and follow up with data custodians.

ABA Rule 4.4: Respect for Rights of Third Persons

"A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender." Inadvertently produced information protections, clawback agreements and privilege logs are hot topics in e-discovery. Parties sometimes implement agreements that require the return of privileged documents inadvertently produced during discovery without waiving attorney-client or work product privilege.

FINRA arbitrators can suggest these types of agreements to mitigate the expense of document-by-document privilege review under a proportionality analysis and speed the process along.

Ethics and Social Media

Social media users may have some expectation of privacy in their posts, depending on their privacy settings. Counsel may advise clients to use the highest level of privacy/security settings available, which will prevent opposing counsel from directly accessing the client's social media. Opposing counsel can request access through e-discovery practice.

**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 Toews, R. (2020, May 20). Deepfakes Are Going to Wreak Havoc on Society. We Are Not Prepared. Forbes. <https://www.forbes.com/sites/robtoews/2020/05/25/deepfakes-are-going-to-wreak-havoc-on-society-we-are-not-prepared/?sh=6ed853ab7494>
- 2 iProov. (2020, January 29). *Deepfakes: The Threat to Financial Services*. <https://www.iproov.com/blog/deepfakes-the-threat-to-financial-services>
- 3 In administrative proceedings, evidence may not be excluded solely because it is hearsay. While such evidence may support a finding if it is corroborated by competent evidence in the record, a finding of fact based solely on hearsay will not stand. US Legal. (n.d.). *Admissibility of Hearsay*. Retrieved December 14, 2021, from <https://administrativelaw.uslegal.com/administrative-agency-adjudications/admissibility-of-hearsay/>
- 4 See John P. LaMonaca, *A Break from Reality: Modernizing Authentication Standards for Digital Evidence in the Era of Deepfakes*, 69 Am. U. L. Rev. 1945, 1977 (2020).

The Importance of Arbitrator Disclosure

By: Victoria Bonadies, Contractor Analyst, FINRA Neutral Management and Stephen Fletcher, Associate Principal Analyst, FINRA Neutral Management

Arbitrator Disclosure



[Arbitrator disclosure](#) is a foundational element of the FINRA's arbitration forum. FINRA Rules [12405/13408](#) of the Codes of Arbitration Procedure set forth the general disclosure requirements for FINRA arbitrators. Under these rules, arbitrators must make reasonable efforts to learn of, and must disclose, any circumstances that may prevent them from rendering an objective and impartial determination.

Disclosure may include experiences, relationships, background information or any other circumstance that either affects, or *appears to affect*, an arbitrator's ability to be impartial during the proceeding. Common examples of disclosable information that may potentially affect an arbitrator's ability to serve impartially or create an appearance of bias include lawsuits (both investment and non-investment related), service on boards of directors, publications and professional memberships, among many others.¹

The obligation to disclose is continuous, meaning all arbitrators appointed to serve in an arbitration must update their disclosures immediately as they are discovered or recalled.² Although disclosures can be made at any stage of the proceeding, ensuring that the Arbitrator Disclosure Report (ADR) contains complete, accurate and up-to-date information is imperative to maintain neutrality and transparency.³ FINRA provides an ADR for each arbitrator on the proposed lists to parties to help them make informed decisions when selecting arbitrators.

Failure to Disclose: Impact on Awards and Availability

Arbitrator disclosure impacts the integrity of FINRA's arbitration forum. Lack of full disclosure may result in vacated arbitration awards, removal from the roster or both. Vacated awards undermine the efficiency and finality of the arbitration process, resulting in further proceedings, re-administration of the dispute and additional time and costs.

Moreover, technology has enhanced and changed many standards of practice in the financial and legal industries. In the past, public records were usually locked in filing cabinets and accessing records, such as local court actions, required significant due diligence—physically going to the location, submitting request forms and paying fees. Now, many of those same publicly available documents are reviewable with little more than a guest login to a local jurisdiction’s website.

Greater access to information brings new challenges to arbitrator disclosure for arbitrators and parties. Arbitrators have a duty to check any public records which may require disclosure. Disclosures once thought to be unrelated to the securities industry or inconsequential to the process may now result in a vacated award if left undisclosed. During arbitrator selection, parties’ representatives review disclosure reports and will likely search public records for undisclosed matters that may potentially be grounds for vacatur.⁴

In recent years, multiple motions to vacate have been brought claiming that arbitrators failed to disclose pertinent and easily discoverable matters. Failure to disclose is one of the most common claims made in motions to vacate, but one that can be avoided. To file a motion to vacate, a party must make a claim that fits within a narrow set of grounds permitted by law.⁵ For failures to disclose, some parties have crafted arguments that fall within three of the four grounds available under the law: (1) “where the award was procured by corruption, fraud, or undue means”; (2) “where there was evident partiality of corruption in the arbitrators”; and (3) “where the arbitrators were guilty of misconduct...by which the rights of any party have been prejudiced.”⁶ These grounds have the most flexibility to support an argument that an arbitrator’s failure to disclose creates “the appearance of bias” or an “inference of bias” and therefore the award must be vacated.

Recent Examples of Failures to Disclose

Below are recent examples of avoidable failures to disclose that were referenced in motions to vacate:

- An arbitrator failed to disclose multiple small claims cases that were filed within the past 10 years. A party found the cases using a simple public online search of local court records. The party subsequently filed a motion to vacate.

The arbitrator did not think small claims cases needed to be disclosed since they did not relate to the securities industry. However, arbitrators have a duty to disclose **all cases**, regardless of subject matter, to which the arbitrator has been a party, regardless of the amount in dispute.

- An arbitrator failed to disclose they were previously a party in a matter with similar issues to the case the arbitrator was serving on. This resulted in a successful motion to vacate the arbitration award due to an “inference of bias.”

A party found the case on the Public Access to Court Electronic Records (PACER) database for federal cases. This database is publicly available to anyone and requires only a minimal fee for most documents. Attorneys for parties will likely search PACER and other court record databases, such as LexisNexis and Westlaw. If an arbitrator was a named party in any court action, they have a duty to disclose.

The duty to disclose is ongoing and applies to all circumstances during an arbitrator’s adult life, not just recent issues. As the examples illustrate, arbitrators should research their own histories using publicly available resources.

FINRA strives to support arbitrators in the disclosure process with regular internet searches and additional research of public records during the arbitrator selection process. However, these resources are limited in proportion to those of the parties. Regardless of how thorough FINRA staff may be, each arbitrator is better positioned to learn of pertinent disclosable matters, particularly those located in databases unavailable to staff.

Research and Disclosure Tips for Arbitrators

- Disclose **all** litigations to which you have been a party.
- Search local municipal and county records where you have lived and worked. Frequently, there are disclosable matters that an arbitrator may not have known resulted in public record filings. Examples include:
 - Tax disputes over a property assessment.
 - Late tax filings resulting in a warrant/lien.
 - Auto collisions where the insurance company handled the claim, yet the agreement resulted in a case filing and/or judgment.
 - Late payments to a landlord who filed a judgment per lease agreement which were released before service of process.

- Judgments filed by a creditor for non-payment of a medical bill, credit card or other obligation.
- Publicly filed judgments, foreclosure proceedings, bankruptcy filings and any other financial matters where a public record is created are disclosable, regardless of when they occurred.
- Unless a public record has been expunged and supporting documentation has been provided to FINRA, any judgment, satisfied or outstanding, must be disclosed.

Endnotes

- 1 See Top 10 Arbitrator Disclosure Tips, *The Neutral Corner, Volume 2 (2017)*.
- 2 See FINRA [Rule 12405\(b\)](#).
- 3 For additional discussion on transparency of the forum and the importance of timely completion of the Oath of Arbitrator and Disclosure Checklist, see *The Neutral Corner, Volume 4 (2016)*.
- 4 “The parties have the right, and arguably their advocates have the responsibility, to discover what they can about the arbitrators through publicly available information. Courts have rejected motions to vacate based upon parties’ post-award cries of failure to disclose, where the party could have discovered additional information about an arbitrator, but failed to do so.” Sandra D. Grannum, Arbitrator Disclosures and “The Importance of Being Earnest”: Former Name Disclosures, *The Neutral Corner, Volume 4 (2016)*.
- 5 See [9 U.S.C. § 10](#).
- 6 See *Id.*

FINRA Dispute Resolution Services and FINRA News



COVID-19 Impact on Arbitration and Mediation Hearings

[All FINRA DRS hearing locations are open](#) for in-person proceedings.

Vaccination Requirement for In-Person Participants (Except in Florida Hearing Locations)

Effective through July 1, 2022, all in-person participants, including arbitrators, mediators, counsel, parties, paralegals, witnesses and others [must be fully vaccinated](#) to attend FINRA DRS arbitration hearings or mediation sessions (hearing).

In-person participants who attest that there are circumstances that prevent them from being vaccinated can attend the hearing virtually or 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 or virtual attendance are the responsibility of the parties or individuals that incurred them.

Testing Requirement for In-Person Participants (Florida Hearing Locations Only)

Effective through July 1, 2022, 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. All costs associated with COVID testing are the responsibility of the parties or individuals that incurred them.

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 required for all in-person participants and arrangements made to provide masks to participants who do not have them;
- Plexiglas dividers and face shields provided if 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 November 30, 2021, 589 arbitration cases have conducted one or more hearings via Zoom (243 customer cases and 346 industry cases).

Through November 30, 2021, FINRA DRS received 976 motions for Zoom hearings:

- 509 contested motions
 - 367 customer contested motions
 - 218 granted
 - 142 denied
 - 7 open
 - 142 intra-industry contested motions
 - 102 granted
 - 36 denied
 - 4 open
- 467 joint motions (192 in customer cases and 275 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 November 2021 reflect a 25 percent decrease compared to cases filed during the same 11-month period in 2020 (from 3,615 cases in 2020 to 2,712 cases in 2021). Customer-initiated claims decreased by one percent through November 2021, as compared to the same time period in 2020.

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 IPHC 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.

Update to Arbitrator Disqualification Criteria

FINRA recently updated its [Permanent Disqualification Criteria](#) to specifically include removal for hate speech and violence.

- FINRA may recommend removal of arbitrators from its roster for any conduct or written or verbal comments by arbitrators that disparages, denigrates or demonstrates hostility or aversion toward any person based upon any classification protected by law.
- Examples of conduct that warrants removal include, but are not limited to, hate speech against any protected class, sexual harassment and physical violence or threats of physical violence.

Results of the 12th Annual Securities Dispute Resolution Triathlon

On October 16 – 17, 2021, FINRA and St. John’s University Hugh L. Carey Center for Dispute Resolution held the 12th Annual Securities Dispute Resolution Triathlon. Thanks to the students, volunteer judges and staff, we were able to hold the competition virtually this year. Twelve teams of law students competed and demonstrated their advocacy skills in three critical forms of alternative dispute resolution: negotiation, mediation and arbitration.

Congratulations to the competitors!

- Overall Winner: Texas A & M University School of Law (Team D)
- Negotiation Round Winner: Texas A & M University School of Law (Team D)
- Mediation Round Winner: University of Pittsburgh School of Law (Team B)
- Arbitration Round Winner: Cardozo Law School (Team A)
- Advocate’s Choice* Winner: South Texas College of Law Houston (Team J)

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

2021 Demographic Survey Thank You

Thank you to those who participated in the 2021 demographic survey. As in previous years, the survey was administered by a third-party consulting firm and participation in the survey was voluntary.

As part of our 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.

We look forward to publishing the 2021 results early next year. You may review the results of past demographic surveys on our [website](#).

Regulatory Notices

[Regulatory Notice 21-09: 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 between **April 15 and September 1, 2021**. Please see [SR-FINRA-2020-011](#) for more information.

[Regulatory Notice 21-34: FINRA Adopts Rules to Address Firms With a Significant History of Misconduct](#)

FINRA has adopted new rules to address firms with a significant history of misconduct. New Rule 4111 (Restricted Firm Obligations) requires member firms that are identified as “Restricted Firms” to deposit cash or qualified securities in a segregated, restricted account; adhere to specified conditions or restrictions; or comply with a combination of such obligations. New Rule 9561 (Procedures for Regulating Activities Under Rule 4111) and amendments to Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series) establish a new expedited proceeding to implement Rule 4111.

The new rules and rule amendments, outlined in [Regulatory Notice 21-34](#), become effective on **January 1, 2022**. Please see [SR-FINRA-2020-041](#) for more information.

Mediation Update

FINRA Mediation Settlement Month



FINRA's Mediation Department offered its annual reduced fee program during [Mediation Settlement Month](#) in October. As a reminder, all participants under this program should endeavor to complete their mediations by December 31, 2021. Thanks to the participants who contributed to another successful Mediation Settlement Month Program.

Mediation Case Filings and Trends

From January through November 2021, parties initiated 562 [mediation cases](#), an increase of 49 percent from the same period in 2020. FINRA closed 521 cases during this time. Approximately 88 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 Survey: List Process and Disclosure Updates

FINRA DRS is planning to enhance its mediator list process by offering more bespoke lists based on location, expertise and diversity. This will give more mediators an opportunity to be selected for a case.

To successfully enhance the mediator list process, we will need your help. In early 2022 FINRA Mediation Staff will send all mediators on the roster a voluntary survey seeking information about your demographic and skills background to update your disclosure reports. The survey will also give you an opportunity to provide updated information about your rates and experience with virtual mediations. Details about the survey will be coming soon.

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

Etiquette for Virtual Arbitration and Mediation Hearings

Question What is acceptable attire when attending a Zoom hearing?

Answer Arbitrators and mediators should dress professionally when attending virtual hearings. You represent FINRA’s forum and should dress as you would for an in-person hearing. If you would not wear something to an in-person hearing, you should consider changing your attire.

Question What is proper on-camera etiquette for Zoom hearings?

Answer Arbitrators and mediators should always conduct themselves in a manner that instills confidence in them and the arbitration or mediation process. They should act appropriately and professionally as they would in an in-person hearing. Parties will be paying close attention to their conduct on camera. Therefore, you should be aware of your body language, facial expressions and how you appear on camera at all times. You should avoid multitasking, including checking your cell phone or emails or eating during the hearing. Despite being on videoconference, parties are still watching for your level of engagement.

Question Do I need to keep my video on?

Answer During a Zoom hearing, while the proceeding is on the record, arbitrators and mediators must keep their videos on and remain visible on camera to the Zoom participants. They should not walk around while on camera or do anything that can be distracting during the hearing.

If you plan to use multiple monitors during the hearing, you should inform the parties at the beginning of the hearing. Let the participants know that even if you are not looking at them during testimony or oral arguments, you are still focused on the case.

Question Does FINRA have special tips for backgrounds?

Answer Arbitrators and mediators should make sure their backgrounds are neutral and free of clutter. Any items that may be distracting should be removed (*e.g.*, wine bottles, items that suggest political affiliation). The parties and their presentations should be the focus of the hearing.

Before the hearing, arbitrators and mediators should check their background lighting to make sure there is enough light to be seen clearly by the participants. They may want to consider using a ring light or other lighting source if they need additional light. If an arbitrator or mediator has any questions concerning the appropriateness of their background, they should contact the case administrator for assistance.

Finally, we recommend that [arbitrators](#) and [mediators](#) review the resource guides available on our website.

Fall 2021 Neutral Workshop: Getting Back to In-Person Hearings and More

In this [workshop](#), FINRA Principal Analyst Carissa Laughlin moderates a discussion on getting back to in-person hearings with arbitrator Monica Salis and FINRA Senior Case Administrator Lisa Lasher. They discuss vaccination requirements and safety protocols. Additionally, they share best practices on navigating issues related to independent research and arbitrator disclosure.

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 about 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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