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Volume 1 – 2022

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

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Pilot Programs: Prehearing Conferences by Zoom

By Shannon Bond, Associate Director, FINRA Case Administration

Zoom Task Force



At the end of 2021, FINRA Dispute Resolution Services (DRS) Zoom Task Force (ZTF) surveyed arbitrators and participants about their experiences with Zoom hearings. The ZTF sought feedback about their overall satisfaction

with Zoom hearings as well as their support for conducting prehearing conferences by Zoom. We invited arbitrators and participants, who had at least one Zoom hearing from March 2020 through August 2021, to complete the survey and received responses from 492 arbitrators and 117 participants. The responses were overwhelmingly positive. Below are highlights from the survey:

Overall Zoom Hearing Experience	Exceptional or Good	Satisfactory	Unsatisfactory
Arbitrators	91%	9%	<1%
Participants	74%	15%	12%

Satisfaction With DRS Staff Support	Very Satisfied	Satisfied	Indifferent	Not Satisfied
Arbitrators	85%	15%	<1%	<1%
Participants	63%	24%	11%	2%

Support for Zoom Prehearings	Initial	Discovery	Other
Arbitrators	75%	80%	85%
Participants	77%	83%	86%

Pilot Programs: Prehearing Conferences by Zoom continued

Prehearing Conferences by Zoom

Based on positive feedback about Zoom hearings and support for **prehearing conferences** by Zoom, in February, FINRA DRS began two pilot programs to hold prehearing conferences by Zoom:

- 1. Cases Administered by the Boca Raton, Chicago and New York Regional Offices
 - All discovery and motions to dismiss prehearing conferences will be conducted on Zoom with video.
 - All other prehearing conferences will be on Zoom with audio only.
- 2. Cases Administered by the Los Angeles Regional Office
 - All prehearing conferences will be conducted on Zoom with video.

Upon successful conclusion of the two pilot programs, all regional offices will make Zoom video the default method of conducting all prehearing conferences.

Questions and Answers

As these pilot programs get underway, arbitrators may have some questions. Below are common questions and answers that address what to expect with Zoom prehearing conferences.

What is the difference between an Initial Prehearing Conference (IPHC) and other prehearing conferences?

Once a panel is appointed, FINRA schedules an IPHC. The IPHC is the first time that arbitrators and parties meet to set the schedule for the case. During this conference, arbitrators and parties will schedule evidentiary hearing dates, establish discovery deadlines, set briefing and motion deadlines, determine whether mediation is desirable and address other preliminary matters.

After the IPHC, arbitrators may need to convene additional prehearing conferences with the parties to resolve issues or disputes, *e.g.*, discovery motions.

Pilot Programs: Prehearing Conferences by Zoom continued

How will I know if my prehearing conference is on Zoom?*

In the <u>DR Portal</u>, you will see your prehearing conference listed under "Arbitration Hearings." The prehearing conference will be on Zoom if you see "Zoom Meeting" in the "Location" field.

*Please note that your prehearing conference on Zoom may either be audio only or with video.

How do I know if my Zoom prehearing conference is audio only?

The prehearing conference will be audio only if, in the DR Portal, the "Hearing Format" is "Telephonic." Please refrain from turning on your camera to appear on video if the conference is audio only.

How do I know if my Zoom prehearing conference is on video?

The prehearing conference will be on video if, in the DR Portal, the Hearing Format is "Video." Please turn on your camera to appear on video.

Can I add the Zoom meeting to my calendar?

Yes. In the DR Portal, click on "Add to Calendar" to download a calendar file.

How do I join a prehearing conference on Zoom?

You have three options:

- 1. In the DR Portal, click on "Go to Zoom Meeting" to join on your device.
- You may dial into the Zoom meeting. In the DR Portal, click on the "+" next to "Zoom Meeting" to see the meeting details. Dial the phone number and enter the Meeting ID and Password when prompted.
- 3. If you added the Zoom meeting invite to your calendar, use the link provided there to join the prehearing conference.

Pilot Programs: Prehearing Conferences by Zoom continued

FINRA scheduled my prehearing conference on video. Can it be changed to audio only?

FINRA highly encourages the use of video for a more satisfying prehearing conference experience. However, the panel may order an audio-only prehearing conference, or the parties may jointly agree to an audio-only prehearing conference.

FINRA scheduled my prehearing conference with audio only. Can it be changed to video?

The panel may order a prehearing conference with video, or the parties may jointly agree to a prehearing conference with video.

I don't know what I need for a Zoom prehearing conference or what to expect. Is more information available?

FINRA has the following resource guides for virtual prehearings:

- <u>Party Resource Guide for Virtual Pre-Hearing Conferences</u>
- <u>Arbitrator Resource Guide for Virtual Pre-Hearing Conferences</u>

What if I need additional help with Zoom?

Arbitrators and parties may contact FINRA staff with questions or schedule a practice session before a prehearing conference.

News Release: FINRA Hires Firm to Conduct Independent Review of Arbitrator Selection Process



FINRA <u>announced</u> that it has hired the Lowenstein Sandler law firm to conduct an independent review of how FINRA DRS complied with its rules, policies and procedures for arbitrator selection in an arbitration proceeding whose

award was recently vacated by an Atlanta Superior Court judge.

COVID-19 Impact on Arbitration and Mediation Hearings <u>All FINRA DRS hearing locations are open</u> 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 mediations.

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 party with an in-person participant who has indicated that there are circumstances that prevent them from being vaccinated.

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

Through July 1, 2022, for cases with in-person arbitration hearings or mediations in <u>Florida</u>, 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;
- N95/KN95 or surgical masks required for all in-person participants (except for witnesses while testifying and for counsel or party representatives while delivering opening or closing arguments), regardless of vaccination status, and shall be provided to participants who do not have their own. (Please note that for hearings held in FINRA office buildings, the use of N95/KN95 masks are required and will be provided to case participants);
- 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 February 28, 2022, 717 arbitration cases have conducted one or more hearings via Zoom (306 customer cases and 411 industry cases).

Through February 28, 2022, FINRA DRS received 1,106 motions for Zoom hearings:

- 555 contested motions
 - 395 customer contested motions
 - 240 granted
 - 147 denied
 - 8 open
 - 160 intra-industry contested motions
 - 115 granted
 - 41 denied
 - 4 open
- 551 joint motions (231 in customer cases and 320 in industry cases).

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

Now Available: 2021 Arbitrator and Mediator Diversity Statistics

Since 2016, FINRA DRS has worked with a third-party consultant to survey annually—on an anonymous and voluntary basis—the demographics of newly added and existing neutrals and have made them available on **FINRA's website**. In sharing the findings, FINRA strives to provide transparency about the current makeup of our arbitrator and mediator rosters.

The Neutral Corner

FINRA Dispute Resolution Services and FINRA News continued

Accommodations for Arbitration Participants with Disabilities

FINRA DRS is dedicated to ensuring that individuals with disabilities have equal and full access to FINRA's dispute resolution forum. If an arbitrator, party, attorney or witness needs an accommodation to participate in an arbitration hearing (*e.g.*, closed captioning may be available for participants with a hearing impairment), they should contact FINRA DRS to make arrangements prior to the scheduled hearing. Our 2021 demographic survey of the roster demonstrates our best results ever. The 2021 survey showed that we outperformed versus 2020 in key demographic groups. Of the new arbitrators added in 2021:

- 45% were female (40% in 2020)
- 23% were Black or African-American (14% in 2020)
- 7% were Hispanic or Latino (3% in 2020)
- 6% were Multi-Racial (3% in 2020)
- 5% were LGBTQ (2% in 2020)
- 4% were Asian (same as in 2020)

While we are encouraged by these results, we recognize this is a long-term effort. There is more progress to make, and we remain fully committed toward achieving our diversity goals.

Update to Business Mileage Rate

The Internal Revenue Service announced that effective January 1, 2022, the business standard mileage rate will be \$.585 per mile, increasing \$.025 from \$.56 per mile in effect during 2021. Please review the **Expense Reimbursement** page for more information about FINRA's travel reimbursement policy.

American Bar Association 2022 Virtual Dispute Resolution Joint Spring Conference: April 25 – 29, 2022 (Virtual)

The American Bar Association (ABA) will hold its Dispute Resolution Spring Conference jointly with the Solo, Small Firm and GP Division virtually this year. The theme for this year's conference is "Where Do We Grow from Here? New Directions and Rejuvenation." Attendees will learn the latest in dispute resolution techniques and trends, exchange ideas with experts and strengthen their professional relationships. FINRA is proud to be a cooperating organization for this event. Visit the <u>ABA website</u> for more information about the program.

2022 FINRA Annual Conference: May 16 – 18, 2022 (In-Person)

FINRA is excited to announce that the 2022 FINRA Annual Conference will be held in person in Washington, DC. The Annual Conference provides an opportunity for practitioners, peers and regulators to exchange ideas on today's most timely compliance and regulatory topics. The conference offers industry professionals a variety of sessions related to current trends in technology, cybersecurity, risk management and much more. Visit <u>FINRA's</u> <u>website</u> for more information about the conference.

Dispute Resolution 15th Annual Arbitration Training Institute & Arbitration Practice Development Program: June 1 – 3, 2022 (In-Person)

The ABA will present its 15th Annual Arbitration Training Institute in person at Loyola University Chicago School of Law. This two-day comprehensive training in advanced arbitration skills covers every stage of the arbitration process. Attendees can learn alongside and collaborate with nationally recognized experts and colleagues. The program is preceded by a half-day arbitration practice development and networking event. FINRA is proud to be a cooperating organization for this unique program and encourages arbitrators to consider attending. Visit the <u>ABA website</u> for more information.

Arbitration Case Filings and Trends

2021 Year-End Statistics

Arbitration case filings in 2021 reflect a 26 percent decrease compared to cases filed in 2020 (from 3,902 cases in 2020 to 2,893 cases in 2021). Customer-initiated claims decreased by nine percent in 2021 compared to cases filed in 2020.

In 2021, the following securities were most commonly identified in customer arbitration cases (listed in order of decreasing frequency): common stock, real estate investment trusts, business development companies, private equities, mutual funds, options, limited partnerships, annuities, exchange-traded funds, variable annuities, municipal bond funds, corporate bonds, municipal bonds, 401(k) and hedge funds. The top two causes of action alleged were breach of fiduciary duty and negligence.

Statistics through February

<u>Arbitration case filings</u> from January through February 2022 reflect a 21 percent decrease compared to cases filed during the same two-month period in 2021 (from 484 cases in 2021 to 381 cases in 2022). Customer-initiated claims decreased by 31 percent through February 2022, as compared to the same time period in 2021.

Register for the DR Portal Today

If you have not already done so, we strongly encourage arbitrators and mediators to register for the <u>DR Portal</u>. 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.

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 <u>Regulatory Notice 21-09</u>, became effective between April 15 and September 1, 2021. Please see <u>SR-FINRA-2020-011</u> 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 <u>Regulatory Notice</u> <u>21-34</u>, became effective on January 1, 2022. Please see <u>SR-FINRA-2020-041</u> for more information.

Regulatory Notice 22-09: FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously III or Elderly Parties

FINRA seeks comment on a proposal to accelerate arbitration case processing when requested by parties who are seriously ill or are at least 75 years old. The proposal would help ensure that these parties are able to participate meaningfully in FINRA arbitration by shortening certain case processing deadlines for parties and arbitrators under the Codes.

Comments are requested by May 16, 2022. Please see <u>Regulatory</u> <u>Notice 22-09</u> for more information about the proposal.

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Mediation Update

Mediator List Process and Disclosure Updates

In early January 2022, FINRA DRS sent a survey to all mediators on the roster seeking information about their demographics and skills. The survey also asked for updated rate information and experience with Zoom

mediations. The survey responses will be used to update mediator disclosure reports and will inform the new list process that will allow parties to request more bespoke lists—whether they are based on mediator expertise, diversity characteristics and/or geographic location. FINRA DRS will also be able to filter the new lists by Zoom proficiency instead of geography, giving underutilized mediators in less populated locations more opportunities to serve.

Responses to the survey were due on February 28, 2022. Mediation staff will follow up with mediators who have not returned the survey to ensure their disclosure reports are current and that they wish to remain on the roster. Please contact the <u>Mediation</u> <u>Department</u> with any questions.

FINRA's Mediation Program for Small Arbitration Claims

FINRA expanded the <u>Mediation Program for Small Arbitration</u> <u>Claims</u> by increasing the maximum amount in controversy from \$50,000 to \$100,000 and making available all virtual platforms (telephonic and video) for these mediations. With these changes, the program is able to provide more parties the benefit of an expedient and cost-effective option for resolving small claims while also introducing parties to qualified, but underutilized diverse mediators on our roster.

The program offers virtual mediation at these costs:

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

Mediation Update continued

 \$100 per hour for cases with claims between \$50,000 and \$100,000 to cover reduced mediator fees. (FINRA collects this fee and divides it equally between the parties).

Virtual mediation offers parties the option to participate in a mediation from their own homes. It also provides mediators with additional opportunities to mediate in hearing locations across the country, regardless of the mediator's home base. To help facilitate efficient virtual mediations, FINRA developed the <u>Guide for Using</u><u>Breakout Rooms in Mediation</u>.

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

Mediation Case Filings and Trends

2021 Year-End Statistics

In 2021, parties initiated 617 <u>mediation cases</u>, an increase of 49 percent from 2020. FINRA also closed 616 cases during this time. Approximately 89 percent of these cases concluded with successful settlements.

Statistics through February

From January through February 2022, parties initiated 154 mediation cases, an increase of 105 percent from the same period in 2021. FINRA closed 100 cases during this time. Approximately 93 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**.

Mediation Update continued

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.



The health certification must be completed, prior to the start of each day of the hearing, by each individual participant who plans to appear in person. The health certification requires participants to affirm the healthrelated guestions in order to attend the hearing in person. Staff will email a link for the health certification to all in-person participants. Participants submit their health certifications electronically.

1. For in-person arbitration hearings or mediation sessions 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.

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Questions and Answers continued

Question	How can arbitrators prepare for the hearing to ensure that participants have completed the necessary health certifications and attestations prior to the start of each hearing day?
Answer	FINRA will provide the chairperson (or an arbitrator designated by the chairperson) daily reports of all in-person participants who have completed health certifications and attestations. Individuals may not participate in the hearing until they have filled out the health certification for that day and an attestation of their vaccination or testing status is received. FINRA will send all in-person participants, including arbitrators, an email each morning before the start of the hearing, reminding them to submit their certifications. Arbitrators, counsel and pro se parties are responsible for updating their attestations, as needed during the hearing, using the link previously provided by staff. If you have any questions, contact the case administrator assigned to the case.
Question	What can arbitrators do if any of the participants have not completed the attestation or health certification prior to the start of the hearing?
Answer	It is at the arbitrator's or panel's discretion as to how to proceed. You may consider the following options to get the hearing started:
	 Inquire why the in-person participant has not submitted the required attestation and/or health certification.
	 Ask the participant to complete the attestation and/or certification immediately on their mobile device or laptop.
	 Have the participant complete an oral certification on the record at the start of the hearing.
	• Prohibit the participant from entering the hearing room if they are unable or unwilling to make the necessary affirmations. This option may lead to a Zoom appearance, postponement or possible rescheduling of testimony if the participant is a witness.

Education and Training

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.

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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 <u>Neutral Management</u> to request an invitation. Please include "request portal invitation" in the subject line.

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The Neutral Corner

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