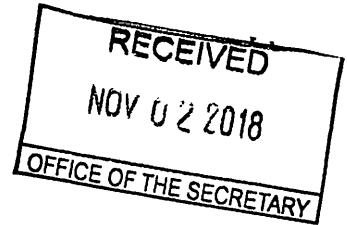


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**



3-18882

In the Matter of the Application

of John Boone Kincaid III

For Review of Action Taken by FINRA

APPLICATION FOR REVIEW OF FINRA ACTION

Applicant: John Boone Kincaid III
450 Little Stout Rd.
Sedona, AZ 86336

Dochtor Kennedy, MBA, J.D.
President & Founder

Erica J. Harris, Esq.
Associate

AdvisorLaw, LLC
9737 Wadsworth Pkwy, Ste. 205
Westminster, CO 80021

Dated: October 31, 2018

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application

of John Boone Kincaid III

For Review of Action Taken by FINRA

APPLICATION FOR REVIEW OF FINRA ACTION

On January 22, 2018, Mr. John Boone Kincaid III (“Mr. Kincaid”) submitted a Statement of Claim to Financial Industry Regulatory Authority (“FINRA”) against Legacy Financial Services, Inc. (“Legacy”) and Cetera Advisors, LLC (“Cetera”) requesting arbitration with a telephonic expungement hearing regarding two customer disputes that are reported on his Central Registration Depository (“CRD”) and BrokerCheck. *Exhibit 1.* On January 25, 2018, Mr. Kincaid received notice that Legacy was a Terminated Member. *Exhibit 2.* On March 14, 2018, Cetera filed its Statement of Answer in which it took no position as to the request of expungement. *Exhibit 3.* On March 14, 2018, Mr. Kincaid and Cetera filed a Joint Stipulation. *Exhibit 4.* On June 1, 2018, Mr. Kincaid and Cetera filed a Revised Joint Stipulation. *Exhibit 5.* On July 5, 2018, an Initial Pre-Hearing Conference (“IPHC”) was held in the matter. The hearing was scheduled for October 15, 2018. On October 2, 2018, before the scheduled hearing, Mr. Kincaid received an Executed Award in which the arbitrator denied Mr. Kincaid’s request for expungement. *Exhibit 6.* On October 3, 2018, FINRA case representative, Michelle Vickerman, told Mr. Kincaid that the arbitrator “could rule on the papers.”

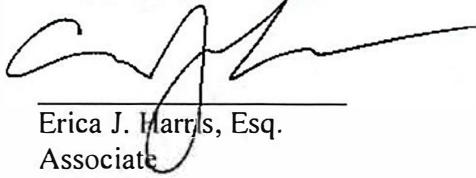
FINRA Rule 13200(a) requires arbitration of disputes between Members and Associated Persons. FINRA Rule 13600(a) states that hearings will be held unless the arbitration is administered under Rule 13800(c), Rule 13801, or Rule 13806(e)1; the parties agree otherwise in writing; or the arbitration has been settled, withdrawn, or dismissed. Rule 13600(b) also states that the panel will decide the time and date of the hearing at the IPHC. FINRA Rule 13800(c)(1) states that hearings will not be held for Simplified Arbitration *unless the claimant requests a hearing*. Rule 13800(c)(2) also states that if no hearing is requested, *no IPHC will be held* and the arbitrator will render an award based on the pleadings. FINRA Rule 13805 states that to grant expungement, the panel must hold a recorded hearing session. The FINRA Arbitration Manual states that “before ruling on requests to recommend expungement,” the panel must hold a recorded hearing session regarding the appropriateness of expungement. *Exhibit 7 at Page 74.*

The parties did not agree to forego a hearing in writing, nor was the proceeding dismissed. Mr. Kincaid requested a telephonic hearing for this Simplified Arbitration both in his Statement of Claim, and at the IPHC. An IPHC was held and the telephonic hearing was granted and scheduled. FINRA Rule 13805, coupled with the FINRA Arbitrator’s Guide, require that the panel hold a recorded hearing session before ruling on requests for expungement. The FINRA Award Information Sheet specifically requires the panel to indicate whether they conducted an in-person or telephonic hearing. There is no option for no hearing. *Exhibit 8 at Page 8.*

By reason of the foregoing, Mr. Kincaid submits this Application for Review to the Commission requesting that he be permitted to resubmit his request for expungement in a new proceeding with FINRA Dispute Resolution and be permitted to present his case in a recorded telephonic hearing before a neutral arbitrator.

Dated: October 31, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Erica J. Harris', written over a horizontal line.

Erica J. Harris, Esq.

Associate

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**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
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INDEX OF EXHIBITS

- Exhibit 1: John Boone Kincaid III Statement of Claim (Without Exhibits)
- Exhibit 2: Notice of Terminated Member
- Exhibit 3: Cetera Statement of Answer
- Exhibit 4: Joint Stipulation
- Exhibit 5: Revised Joint Stipulation
- Exhibit 6: Executed Award
- Exhibit 7: FINRA Arbitration Manual
- Exhibit 8: FINRA Award Information Sheet

EXHIBIT 1

FINANCIAL INDUSTRY REGULATION AUTHORITY DISPUTE RESOLUTION	CASE NO. _____
In the Matter of the Arbitration Between: Claimant: John Boone Kincaid III v. Respondents: Legacy Financial Services, Inc. and Cetera Advisors, LLC	
STATEMENT OF CLAIM	

As his Statement of Claim, Mr. John B. Kincaid (the "Claimant"), by the undersigned attorney, hereby requests arbitration with a telephonic expungement hearing before FINRA Dispute Resolution regarding the following allegations against Legacy Financial Services, Inc. and Cetera Advisors, LLC (the "respondents") pursuant to customer dispute occurrence numbers: 1369004 and 1408568 (together, the "Occurrences"):

THE PARTIES

1. The Claimant, John Kincaid (CRD #1250241), is a resident of Sedona, Arizona. He has been working in securities since April of 2000 and is currently a registered representative with Cetera Advisors LLC and Owner of Kincaid Financial Advisors in Sedona, Arizona. (*see*, Exhibit 1)

2. The respondent, Legacy Financial Services, Inc. ("Legacy Financial") (CRD #38697), is a previously registered brokerage firm that is not currently registered with FINRA. Between April of 2000 and July of 2007, Legacy Financial employed the Claimant as a registered representative in Sedona, Arizona. (*see*, Exhibit 1)

3. The respondent, Cetera Advisors, LLC (f/k/a Multi-Financial Securities Corporation) (“Cetera”) (CRD # 10299), is a registered brokerage firm that is currently registered with FINRA. Starting July of 2007 to present, Cetera has employed the Claimant as a registered representative in Sedona, Arizona. (*see*, Exhibit 1)

FACTUAL BACKGROUND

4. Each customer dispute is summarized below in chronological order by the date of the customer’s initial complaint.

Occurrence Number 1369004

5. In July of 2005, Mr. Michael Robertson (“Michael”) and Mrs. Theresa Robertson (“Theresa”) (together, the “Robertsons”) were referred to the Claimant by the Robertsons’ estate planning attorney while the Claimant was with Legacy Financial.

6. During the Claimant’s initial meeting with the Robertsons, they informed him that they were not happy with their investments in Fidelity Funds. Their current advisor, Ms. Barbara Benson (“Benson”), had not purchased the Fidelity Funds for the Robertsons. Rather, she had been put on as the representative of record, and the Robertsons were looking for a financial advisor, which search led them to the Claimant.

7. Michael was 50 years old. He was a dentist with over ten years of investment experience. His annual income was over \$120,000, and his net worth was over \$1 million. Theresa, 53 years old, had over 15 years of investment experience. She was retired. Through detailed discussions with the Robertsons, the Claimant and the Robertsons ascertained the Robertsons’ investment objective to be long-term growth with a moderate risk tolerance. (*see*, Exhibits 2, 3)

8. Following the Claimant’s discussion with the Robertsons about their investment objectives, the Claimant met with the Robertsons three times to discuss a potential investment. The Robertsons expressed an interest in real estate. Through their discussions with the Claimant,

and based on his recommendations, the Robertsons decided to open a new account with the Claimant for their Individual Retirement Accounts (“IRAs”), with Pershing as the custodian, and to transfer, liquidate, and reinvest their IRA funds into Dividend Capital Trust, Inc. (“Capital Trust”), a non-traded Real Estate Investment Trust (“REIT”) based in Englewood, Colorado. The Claimant explained the long-term nature of the investment to the Robertsons, who signed documentation acknowledging all details of the investment, including its long-term nature. The Claimant further explained the lack of liquidity in the first year and the limited liquidity in the following three years via the share redemption plan. The share redemption plan, if available, would be 92.5% of principal after the first year and would increase thereafter. All of the aforementioned information regarding the investment was stated in the prospectus which was provided to the Robertsons. (*see*, Exhibits 4, 5)

9. On August 5, 2005, the Robertsons opened their new Pershing account with the Claimant into which the funds from their IRAs were transferred. The funds transferred from Michael’s IRA amounted to \$57,746, and the funds transferred from Theresa’s IRA amounted to \$24,446, for a total of \$82,192. This total amount was less than ten percent of the Robertsons’ overall portfolio. (*see*, Exhibits 6, 7)

10. On September 8, 2005, once the transfer of the Robertsons’ IRA funds into their Pershing account was completed, the first of two purchases of Capital Trust shares took place. The first purchase was made with the funds from Michael’s IRA, for a Capital Trust account totaling \$57,746. (*see*, Exhibit 6)

11. On September 16, 2005, the second purchase of Capital Trust shares took place, made with the funds from Theresa’s IRA, for a Capital Trust account totaling \$24,415. (*see*, Exhibit 7)

12. Following the Robertsons' investment in Capital Trust, the Claimant spoke with the Robertsons three or four times.

13. In February of 2006, Benson informed the Claimant that the Robertsons had initiated liquidation instructions for their Capital Trust investment. Pershing was then to transfer the funds from the liquidation to American Funds through an American Funds request for liquidation and transfer form signed by the Robertsons with Benson as the registered representative. The Claimant did not place the order to sell/liquidate. The Claimant did not and could not place any sell order with Pershing or Capital Trust, as such an order could only be placed through a signed letter of instruction by the Robertsons.

14. The Claimant immediately contacted the Robertsons and told them that the Capital Trust shares would not be redeemed until the one-year holding period had elapsed. The Claimant further reminded the Robertsons of the reduction in capital that would occur when the funds were liquidated. The Robertsons and American Funds did not cancel or rescind their request to liquidate the Capital Trust shares.

15. In October of 2006, once the one-year holding period from the time of the Robertsons' initial purchases of Capital Trust had elapsed, the liquidation that had previously been requested by the Robertsons took place. The 92.5% principal redemption reduction resulted in a fee of \$4,389.48 for Michael's account and \$1,854.13 for Theresa's account. These fees were retained by Capital Trust and not by the Claimant, who received no compensation for this liquidation.

16. In November of 2006, the Claimant contacted the Robertsons and informed them that their funds from the liquidation of their Capital Trust accounts were now in their Pershing account.

17. Following the liquidation of their Capital Trust accounts, the Robertsons expressed concerns about this sale to the Claimant. The Claimant contacted Pershing and asked if there was any way to reinstate the position. Pershing informed him that they had acted on a valid transfer/liquidation form from another broker and therefore could not reinstate the position.

18. In July of 2007, the Claimant left Legacy Financial and began employment with Cetera.

19. On September 11, 2007, the Legacy Financial received a letter of complaint from the Robertsons. The Robertsons claimed that they were going to transfer funds from Capital Trust to their original broker and that an order was placed by American Funds to do so. However, once they learned they could not take their funds from their Capital Trust investment for one year's time, they had decided to hold on to their investment until Capital Trust went public in late 2006. The funds, they further claimed, were then sold on October 10, 2006, against their wishes. The Robertsons were informed of the sale in November of 2006 by the Claimant, to whom they alleged to have complained on several occasions between November of 2006 and March of 2007. The Robertsons claimed that neither they nor their American Funds broker authorized the Capital Trust sale through a letter of instruction. The Robertsons claimed that the Claimant tried to downplay the effect of the sale and that, because the Claimant sold the Capital Trust funds before the company went public, he cost the Robertsons \$20,208. (*see*, Exhibit 8)

20. On September 19, 2007, the Robertsons' letter was reported to the Claimant's Central Registration Depository ("CRD") and BrokerCheck as the Robertsons having alleged an "unauthorized transaction and transfer of account problem" and seeking compensatory damages of \$20,208. (*see*, Exhibit 1)

21. On July 23, 2009, the case was closed and no action was taken by Legacy Financial. (*see*, Exhibit 1)

22. The Robertsons' allegations of an "unauthorized transaction and transfer of account problem" are clearly erroneous, factually impossible, and false and, therefore, meet the FINRA Rule 2080(b)(1)(A) standard, the Rule 2080(b)(1)(B) standard, and the Rule 2080(b)(1)(C) standard for expungement. (*see*, Exhibit 1)

- a. The allegation of an unauthorized transaction is clearly erroneous, because the Robertsons, as they admit, authorized the transfer of money from their Capital Trust accounts through Benson and American Funds. Regardless of whether or not they decided at a later date not to transfer their funds, they did not in fact rescind their written authorization to do so. Therefore, the funds were transferred per their original written authorization. When the Claimant spoke with Pershing about the transfer, they informed him that they had acted on a valid transfer/liquidation order.
- b. The allegation of an unauthorized transaction is factually impossible, because the Robertsons did, in fact, authorize the very transaction that they later alleged that they had not authorized. Furthermore, the Claimant could not have placed any sell order with Pershing or Capital Trust, as such an order could only be placed through a signed letter of instruction by the Robertsons.
- c. The allegation of an unauthorized transaction is false, because the Robertsons claimed to have rescinded their decision to authorize the transfer. However, no letter or evidence of said rescinding was ever produced. In the absence of any evidence in support of the allegation, said allegation is unfounded and baseless. However, any person viewing the Claimant's CRD or BrokerCheck would reasonably infer that said allegation was truthful and that the Claimant made unauthorized transactions and created a problem with his clients' account

transfer. Therefore, the implication of said allegation on the Claimant's CRD and BrokerCheck is false.

- d. The allegation of a transfer of account problem, as reported to the Claimant's CRD and BrokerCheck is clearly erroneous, factually impossible, and false, because the Robertsons did not make any allegations in their complaint regarding a transfer of account problem.
- e. The Claimant was not involved in the alleged investment-related sales practice violation and, therefore, is entitled to relief pursuant to FINRA Rule 2080(b)(1)(B). The Claimant had no hand whatsoever in the transfer and/or liquidation of funds from the Robertsons' Capital Trust accounts. The Claimant placed no sell orders for the Robertsons, nor could he have. The transfer of funds from the Robertsons' Capital Trust accounts was made based on the valid transfer/liquidation order that they made through another broker, Benson. It was Benson and the Robertsons who requested of Pershing that the Robertsons' account be liquidated. The Claimant had no role in either the decision to liquidate or in the creation of the transfer/liquidation order. The Claimant was only told of the order by Benson after the fact.

23. Since the Claimant made no unauthorized transactions, since the Robertsons did not allege a transfer of account problem, and since the Claimant was not involved in the alleged investment-related sales practice violation, the public disclosure of the patently false allegations herein does not offer any public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing the Claimant's CRD record and will not provide valuable information for knowledgeable decision making.

Occurrence Number 1408568

24. In 2004 or 2005, the Claimant first met Mrs. Joanne Walsh (“Joanne”) at a social gathering in Sedona, Arizona, where they spoke briefly on the economy and the stock market. Joanne and her husband, Mr. William Walsh (“Bill”) (together, the “Walshes”) were friends and neighbors of a client of the Claimant.

25. In the spring of 2006, the Claimant met with the Walshes in their home and discussed their finances. Joanne was handling the financial decisions for herself and for Bill via power of attorney due to his medical condition. Joanne wanted a local financial advisor and was seeking more diversification in her and Bill’s portfolios.

26. Joanne was 64 at this time, and Bill was 83. The Walshes were retired. They had over 20 years of investment experience, their annual income was between approximately \$55,000 and \$60,000, and their net worth was over \$1 million. Through detailed discussions, the Claimant and Joanne ascertained the Walshes’ investment objective to be long-term growth with a moderate risk tolerance. Joanne allowed the Claimant to review copies of the Walshes’ most recent financial statements. (*see*, Exhibits 9, 10, 11) At the time, the Walshes were maintaining their investments in a Merrill Lynch brokerage account. (*see*, Exhibits 10, 11)

27. As of February 28, 2006, Bill’s IRA with Merrill Lynch had a balance of \$259,302.45, with 11% in fixed income and the rest in individual equities and cash. (*see*, Exhibits 12, 13, 14). Joanne told the Claimant that she and Bill withdrew only the Required Minimum Distribution (“RMD”) from Bill’s IRA each year, which was approximately \$14,000 to \$15,000. In discussing the Walshes’ investment objectives with the Claimant, Joanne said that they wanted their portfolio to have the growth potential of the market.

28. The Claimant recommended leaving the fixed income holdings and enough cash in the Merrill Lynch account to cover the next four years of RMDs and then allocating \$200,000 into

a Jackson National Perspective L Variable Annuity (“Jackson Annuity”) with a minimum guaranteed death benefit of \$200,000 payable to Joanne as the beneficiary. This minimum guaranteed death benefit was suitable for the Walshes, due to Bill’s advanced age and health issues. Even if the market value of the investment were to drop below \$200,000 (and assuming no withdrawals), Joanne would receive the full \$200,000 benefit upon Bill’s death. The Claimant explained to Joanne that the Jackson Annuity had a four-year surrender schedule and that it allowed penalty-free access to ten percent, or \$20,000, per year if needed. This liquidity feature, plus the \$55,000 to \$60,000 left in the Merrill Lynch brokerage account, would be more than enough to cover the next four years of RMDs.

29. The Claimant also proposed a much more diversified allocation in the equities via the sub accounts in the Jackson Annuity than the Walshes currently had in their Merrill Lynch brokerage account in order to meet the Walshes’ desire for greater diversification. Joanne liked the full plan as proposed by the Claimant, and she decided to proceed accordingly. Notably, the Claimant never told Joanne that he could guarantee improved performance and safety on the Walshes’ portfolio. (*see*, Exhibits 12, 13, 14)

30. On April 7, 2006, the Walshes made their \$200,000 investment in the Jackson Annuity. On this same date, Joanne signed disclosures indicating that she understood and agreed to the features of the Jackson Annuity. The Jackson Annuity provided the Walshes with diversification, as it was allocated into ten different subaccounts. (*see*, Exhibits 15, 16)

31. On August 4, 2006, the Claimant and Joanne met to discuss both the performance of the Walshes’ accounts and future strategies. The Claimant again interviewed Joanne regarding her current income needs and possible future expenditures. The Walshes wanted a much more diversified equity portfolio than the individual stocks in which they were then invested, and they wanted a tax-deferred investment. The Claimant discussed the benefits of investing non-qualified

funds in a tax deferred variable annuity such as the ING GoldenSelect Landmark Deferred Variable Annuity (“Landmark Annuity”). Joanne agreed to make such an investment.

32. On August 4, 2006, the Walshes invested in the Landmark Annuity, creating two accounts. From The William C. Walsh 1989 Trust, they invested \$50,000, and from The Joanne C. Walsh 1998 Revocable Trust they invested \$100,000. Both accounts had a four-year surrender schedule. The accounts were set up with a very diversified allocation of ten different subaccounts each, per the Claimant’s recommendation and Joanne’s approval. Joanne signed disclosures indicating that she understood and agreed to the features of the Landmark Annuity. (*see*, Exhibits 17, 18, 19, 20)

33. Between September of 2006 and September of 2007, the Walshes’ accounts performed very well. During this time, the Claimant met with Joanne on several occasions and spoke with her many times on the phone.

34. In July of 2007, the Claimant left Legacy Financial and began employment with Cetera. The Walshes transferred their accounts to Cetera with the Claimant. On September 24, 2007, the Claimant met with Joanne to go over the Walshes’ portfolio. (*see*, Exhibits 21, 22, 23). The Claimant presented Joanne with the Behringer Harvard Opportunity REIT 1 (“Harvard REIT”) as a potential long-term commercial real estate investment. Joanne suggested possibly selling her inherited shares of Pacific Gas & Electric (“PG&E”) stock to purchase shares in the Harvard REIT.

35. On September 26, 2007, Joanne directed the Claimant to sell her PG&E stock and authorized him to purchase \$50,000 worth of the Harvard REIT. The Claimant fully explained the long-term and illiquid nature of the Harvard REIT to the Walshes. (*see*, Exhibits 24, 25)

36. In total, the Walshes invested 20% of their portfolio in the Jackson Annuity, 15% in the Landmark Annuity, and 5% in the Harvard REIT (together, the “Disputed Investments”).

37. In December of 2007, the Claimant spoke with Joanne regarding Bill's RMD from his IRA and when they might get together socially with the Claimant's wife.

38. In 2008 and 2009, the markets suffered a highly documented and unprecedented market collapse and subsequent financial crisis. The global financial crisis of 2008 is considered by many economists to be the worst financial crisis since the Great Depression of the 1930s. It began in 2007 with a crisis in the subprime mortgage market in the United States and developed into a full-blown international banking crisis with the federal takeover of Fannie Mae and Freddie Mac and the collapse of a number of major investment banks, including the bankruptcy of Lehman Brothers on September 15, 2008. The crisis was followed by a global economic downturn known as the "Great Recession." (*see*, Exhibit 26)

39. On January 7, 2008, the Claimant received an email from Joanne expressing concerns about the Walshes' accounts. The Claimant called Joanne immediately and scheduled a meeting for the next day.

40. On January 8, 2008, the Claimant met Joanne in his office to discuss the Walshes' portfolios. The Claimant reiterated the long-term nature of investing in the stock market and the volatility that often comes with that. Joanne said that she expected no unforeseen expenses and that she would not require any additional withdrawals from her portfolio.

41. On January 17, 2008, the Claimant received an email from Joanne thanking him for their meeting on January 8th and asking some general questions.

42. On March 7, 2008, the Claimant received an email from Joanne regarding the economy and the stock market. The Claimant phoned her and again discussed the long-term nature of investing in the stock market and the volatility that often accompanies doing so.

43. On March 26, 2008, the Claimant received an email from Joanne regarding the cost basis for the PG&E stock sale. He responded with the information requested.

44. On April 16, 2008, the Claimant met with Joanne following her email request on April 11 that they do so. They discussed the drop in the Walshes' portfolio during the first quarter of 2008 and how the market had begun to move upward again. Again, the Claimant reiterated the long-term nature of investing and the volatility of the market.

45. At no time did the Claimant promise or make guarantees to the Walshes against possible losses in the stock market.

46. At no time did the withdrawals from Bill's IRA result in any type of penalty being assessed, as these funds came from the brokerage account and, if needed, could have been withdrawn from the Jackson Annuity without penalty.

47. On May 23, 2008, the Claimant received a call from Jackson National informing him that they had received an early surrender form from Joanne on Bill's IRA, despite there being only two years remaining on its four-year term. The Claimant immediately called Joanne. However, she was reluctant to talk, because she was driving in traffic. The Claimant then called ING and learned that Joanne had signed a surrender form for both her and Bill's Landmark Annuity accounts, as well as a request for funds to be sent directly to her address of record. The Claimant called Joanne numerous times over the following weekend. However, she did not answer. He sent her an email on Monday, May 26, 2008. (*see*, Exhibits 27, 28, 29)

48. On May 27, 2008, Joanne sent an email to the Claimant saying that she was upset and had switched financial advisors. This was the last the Claimant ever heard from Joanne.

49. The total value of the Jackson Annuity when Joanne withdrew it was \$210,561.12, a greater value than the Walshes' original investment of \$200,000. (*see*, Exhibit 29). However, Joanne willingly incurred surrender penalties of over \$21,000 in closing out all of the Disputed Investments.

50. On June 9, 2008, the Walshes filed a complaint alleging that the Claimant “was not forthright in selling the [Walshes] securities that were suitable for their ages, financial situation, investment objective and investment experience.” The Walshes sought \$50,000 in compensatory damages. (*see*, Exhibit 1)

51. In her complaint letter, Joanne alleged that she and Bill had lost \$50,000 and that the Claimant was responsible for their loss. She claimed that, in April of 2008, she met with an investment consultant at a Chase bank in Scottsdale, Arizona, who told her that the Walshes’ portfolio was approximately 95% “locked up.” The consultant also told her that a tax deferred investment should not be placed into an IRA and that there were penalties for early withdrawal during the ten-year locked time period. Joanne claimed that the Claimant was not honest, ethical, or forthright, and that he violated FINRA’s code of ethics by making unsuitable investments for the Walshes. (*see*, Exhibit 30).

52. On July 17, 2008, the Cetera, after completing a thorough investigation, denied the Walshes’ claims, having found no basis to their complaint. (*see*, Exhibits 1, 31)

53. On November 17, 2008, Behringer Harvard sent a letter to Joanne informing her that her redemption request for 100% of her shares in the Harvard REIT was approved and that a check for \$46,450.11 was included. (*see*, Exhibit 32)

54. The Walshes’ allegation that the Claimant “was not forthright in selling the [Walshes] securities that were suitable for their ages, financial situation, investment objective and investment experience” is clearly erroneous, factually impossible, and false and, therefore, meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement. (*see*, Exhibit 1)

- a. The allegation of unsuitability is clearly erroneous, because, pursuant to FINRA Rule 2111, the Claimant had a reasonable basis to believe that the Disputed

Investments were suitable for the Walshes based on the reasonable diligence of the Claimant, Joanne, and Cetera to ascertain the Walshes' stated goals of greater diversification and long-term growth with a moderate risk tolerance. In fact, the Disputed Investments performed well, even in the face of stock market volatility, such that, when Joanne closed the Jackson Annuity, she received more funds than she had originally invested. Despite claiming \$50,000 in losses, Joanne willingly incurred surrender penalties of over \$21,000 on the advice of her other financial consultant. Of their original \$200,000 investment, the Walshes lost nothing.

- b. The allegation of unsuitability is factually impossible, because the Claimant and Joanne met regularly regarding her investments and discussed in detail the Walshes' investment goals and possible strategies for achieving them. The Claimant informed Joanne of every detail of the Disputed Investments, and Joanne signed paperwork acknowledging the details of the Disputed Investments. Joanne was aware that the Jackson Annuity and Landmark Annuity did not lock her out for ten years, as she claimed in her letter of complaint, but that they both had four-year surrender schedules and that the Jackson Annuity allowed for a penalty-free withdrawal of up to \$20,000 annually.
- c. The allegation of unsuitability is false, because the Disputed Investments matched exactly the stated investment goals of the Walshes. The Claimant did not withhold any information from Joanne regarding the Disputed Investments. Joanne was entirely satisfied with the Disputed Investments until another financial advisor told her, incorrectly, that she was locked out of 95% percent

of her portfolio for ten years and that it was not appropriate to place tax-deferred investments into an IRA. In fact, it is appropriate to place tax deferred investments into an IRA in certain cases, such as when, as in the case of the Walshes, there is also a desire for a minimum guaranteed death benefit. Said death benefit, given Bill's age and health condition, was entirely suitable and appropriate for the Walshes.

55. Since the Claimant made entirely suitable and appropriate recommendations, the public disclosure of the patently false allegations herein does not offer any public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing the Claimant's CRD record and will not provide valuable information for knowledgeable decision making.

RELIEF REQUESTED

56. The Claimant requests expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claim, allegation, or information is factually impossible or clearly erroneous.

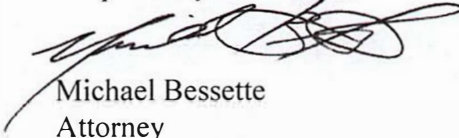
57. The Claimant requests expungement of occurrence number 1369004 from his CRD record pursuant to FINRA Rule 2080(b)(1)(B), as the Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

58. The Claimant requests expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(C), as the claim, allegation, or information is false.

59. The Claimant requests an award of damages in the amount of \$1.00 from the respondents.

60. The Claimant requests any and all other relief that the Arbitrator deems just and equitable.

Respectfully submitted,



Michael Bessette

Attorney

E: Mike@AdvisorLawyer.com

AdvisorLaw LLC
3400 Industrial Lane, Unit 10A
Broomfield, CO 80020

Date: January 22, 2018

Exhibit 1 – John B. Kincaid BrokerCheck Report and CRD Individual Snapshot Report, dated
January 22, 2018

Exhibit 2 – New Account Form for Michael R. Robertson, dated August 5, 2005

Exhibit 3 – New Account Form for Theresa K. Robertson, dated August 5, 2005

Exhibit 4 – Legacy Financial Services Real Estate Investment Trust (REIT) Disclosure
Document Publicly Available for Michael Robertson, dated July 12, 2005, signed
August 5, 2005

Exhibit 5 – Legacy Financial Services Real Estate Investment Trust (REIT) Disclosure
Document Publicly Available for Theresa Robertson, dated July 12, 2005, signed
August 5, 2005

Exhibit 6 – Dividend Capital Trust Subscription Agreement for Michael Robertson, dated
August 5, 2005

Exhibit 7 – Dividend Capital Trust Subscription Agreement for Theresa Robertson, dated August
5, 2005

Exhibit 8 – Legacy Financial Services Letter to John B. Kincaid Re: FINRA Complaint by Dr. Michael Robertson, dated September 11, 2007

Exhibit 9 – Durable Power of Attorney, signed by Joanne C. Walsh on March 2, 1989, copy of document dated April 18, 1996

Exhibit 10 –New Account Form for Joanne C. Walsh, dated March 23, 2006

Exhibit 11 –New Account Form for William C. Walsh, dated March 23, 2006

Exhibit 12 – Merrill Lynch IRA Report for William C. Walsh, dated February 1, 2006 to February 28, 2006

Exhibit 13 – Merrill Lynch Account Statement for William C. Walsh, dated February 1, 2006 to February 28, 2006

Exhibit 14 – Merrill Lynch Brokerage Statement for William C. Walsh, dated February 1, 2006 to February 28, 2006

Exhibit 15 – Legacy Financial Services Variable Annuity Disclosure Document for Jackson National Perspective L Variable Annuity, initialed and signed by Joanne Walsh on April 7, 2006, prospectus dated May 2, 2006

Exhibit 16 – Jackson National Life Insurance Company Perspective L Series Fixed and Variable Annuity Application, dated April 7, 2006

Exhibit 17 – ING GoldenSelect Deferred Variable Annuity Application for the William C. Walsh 1989 Trust, dated August 4, 2006

Exhibit 18 – ING GoldenSelect Deferred Variable Annuity Application for the Joanne C. Walsh 1998 Revocable Trust, dated August 4, 2006

Exhibit 19 – Legacy Financial Services Variable Annuity Disclosure Document for ING Landmark Variable Annuity, initialed and signed by Joanne C. Walsh for the William C. Walsh 1989 Trust on August 4, 2006, prospectus dated April 28, 2006

- Exhibit 20 – Legacy Financial Services Variable Annuity Disclosure Document for ING Landmark Variable Annuity, initialed and signed by Joanne C. Walsh on August 4, 2006, prospectus dated April 28, 2006**
- Exhibit 21 – Multi-Financial IRA Account Information, dated September 26, 2007**
- Exhibit 22 – Multi-Financial Trust Account Information, faxed on November 1, 2007, dated September 26, 2007**
- Exhibit 23 – Multi-Financial Trust Account Information, faxed on September 28, 2007, dated September 26, 2007**
- Exhibit 24 – Behringer Harvard Opportunity REIT I, Inc., Subscription Agreement, dated September 26, 2007**
- Exhibit 25 – Multi-Financial Illiquid Investment Letter for Behringer Harvard Opportunity REIT I investment, dated September 26, 2007**
- Exhibit 26 – “Financial Crisis of 2007-2008” Wikipedia article**
- Exhibit 27 – ING Confirmation Notice for ING GoldenSelect Landmark for the William C. Walsh 1989 Trust, dated May 23, 2008**
- Exhibit 28 – ING Confirmation Notice for ING GoldenSelect Landmark for the Joanne C. Walsh 1998 Revocable Living Trust, dated May 23, 2008**
- Exhibit 29 – Jackson National Life Perspective L Series Fixed & Variable Annuity Transaction Confirmation, dated June 9, 2008**
- Exhibit 30 – Joanne C. Walsh letter of complaint to Multi-Financial Securities Corp., dated June 9, 2008**
- Exhibit 31 – Multi-Financial letter to Joanne & William Walsh , dated July 17, 2008**
- Exhibit 32 – Behringer Harvard letter to Joanne C. Walsh re: the Behringer Harvard Opportunity REIT, dated November 17, 2008**

EXHIBIT 2



TO: Michael Besette, Esq.

CC: Christina Eaken, Cust
Kathleen Vannoy-Pineda, CCO

From: Michelle Vickerman
Case Administrator

Subject: FINRA Office of Dispute Resolution Arbitration Number 18-00248
John Boone Kincaid vs. Legacy Financial Services, Inc. and Cetera Advisors LLC

Date: January 25, 2018

The claimant in this case has filed a Statement of Claim against Legacy Financial Services, Inc.. FINRA's records show that Legacy Financial Services, Inc.'s FINRA membership is **terminated**. Due to Legacy Financial Services, Inc.'s membership status, the claimant *may, but is not required to*, arbitrate this claim in FINRA's forum, even if the claimant previously signed a predispute arbitration agreement with Legacy Financial Services, Inc. to arbitrate the claim here.

Customer Code Rule 12202 prohibits any FINRA member whose membership is terminated, suspended, canceled, or revoked; or that has been expelled from FINRA; or that is otherwise defunct from enforcing predispute arbitration agreements with its customers to arbitrate at FINRA, unless the customers agree in writing to do so after the claim has arisen. If the claimant chooses not to proceed with this claim in this forum, and has not agreed to arbitrate the claim in another forum, he or she may be able to bring this claim in court.

Based on the Submission Agreement, FINRA will assume that the claimant wants to proceed with the claim in this forum, **unless the claimant notifies us in writing that he or she does not want to arbitrate this claim in this forum**. For the claimant's convenience, we have enclosed a form that can be used to notify us if he or she does not want to proceed with the claim in this forum. If we receive such notification, we will refund the filing fee where appropriate.

If the claimant decides to proceed with this claim in this forum, he or she should be aware that arbitration awards against member firms whose FINRA membership status is terminated, suspended, canceled, revoked, expelled, or otherwise defunct, have a much higher incidence of non-payment than those against active members, and that FINRA has only limited disciplinary authority over inactive member firms that fail to satisfy arbitration awards.

If you have any questions, please do not hesitate to contact me at 213-229-2371 or by email at Michelle.Vickerman@finra.org.

MVV:rmr:LC36B
idr: 03/10/2010

RECIPIENTS:

Michael Bessette, Esq., AdvisorLaw LLC, 3400 Industrial Lane, Unit 10A, Broomfield, CO 80020
On Behalf Of: John Boone Kincaid

CC:

Christina Eaken, Cust, Legacy Financial Services, Inc., 2090 Marina Avenue, Petaluma, CA
94954

On Behalf Of: Legacy Financial Services, Inc.

Kathleen Vannoy-Pineda, CCO, Cetera Advisors LLC, 4600 South Syracuse Street, Suite 600,
Denver, CO 80237

On Behalf Of: Cetera Advisors LLC

FINRA Dispute Resolution Arbitration Number 18-00248
John Boone Kincaid vs. Legacy Financial Services, Inc. and Cetera Advisors LLC

Notice of Rescission of Submission Agreement

I have received FINRA Dispute Resolution's notice that Legacy Financial Services, Inc.'s membership status in FINRA is **<select one: terminated, suspended, canceled, revoked, or expelled>**. Pursuant to the Customer Code Rule 12202 or Industry Code Rule 13202, I do not want to proceed with my claim in the FINRA Dispute Resolution forum, and hereby rescind the Submission Agreement submitted in the above-referenced case only with respect to Legacy Financial Services, Inc..

The exemption from required arbitration in the above mentioned rules does not apply to claims against associated persons, regardless of their registration status, or to member firms whose membership is active. I understand that in order to proceed against any remaining respondents, I must submit a revised Submission Agreement and amended Statement of Claim identifying only the appropriate parties and the allegations and damages against each named party.

<Claimant's Name>

<Date>

<Claimant's Signature>

<Date>

<Claimant's Name>

<Date>

<Claimant's Signature>

<Date>

<Claimant's Name>

<Date>

<Claimant's Signature>

<Date>

EXHIBIT 3

1 Jeremy Carr, Esq.
2 Senior Counsel
3 Cetera Financial Group
4 200 N. Sepulveda Blvd., Suite 1200
5 El Segundo, CA 90245
6 Office Tel: 310.257.4829
7 jeremy.carr@cetera.com
8 *Attorney for Cetera Advisors LLC*

9 **FINRA DISPUTE RESOLUTION**

10 John Boone Kincaid III,

11 Claimant,

12 vs.

13 Legacy Financial Services, Inc. and Cetera
14 Advisors LLC.

15 Respondents.

CASE NO. 18-00248

**CETERA ADVISORS LLC'S
STATEMENT OF ANSWER IN
RESPONSE TO STATEMENT OF
CLAIM SEEKING ORDER
RECOMMENDING EXPUNGEMENT
PURSUANT TO FINRA RULE 2080**

16 **SUMMARY OF RESPONDENT'S POSITION**

17 Respondent Cetera Advisors LLC ("Cetera") submits this Answer to the Petitioner John
18 Boone Kincaid III's Statement of Claim seeking an order recommending expungement pursuant to
19 FINRA Rule 2080 ("SOC"). The SOC seeks expungement of occurrence numbers 1369004 and
20 1408568 (together, the "Occurrences"), reported on Claimant's Central Registration Depository
21 ("CRD") record.

22 Pursuant to FINRA rules, under certain circumstances, Respondent Cetera was obligated to
23 amend the U4 and U5 Forms of registered representatives currently or formerly associated with
24 the Firm when a customer of the Firm made a complaint. Throughout the period alleged in the
25 SOC, the Firm had established procedures to meet its regulatory reporting obligations. The Firm
26 acting in good faith and pursuant to its regulatory reporting requirements, reported customer

1 complaints on Claimant's U5, based upon information it had received.

2 Respondent denies any allegations of wrongdoing in the SOC. Claimant is currently
3 registered with Cetera and it appears that he has named Cetera as a Respondent solely on that
4 basis. In light of the foregoing, Respondent will defer to the Chair's findings in this matter with
5 respect to Claimant's request for expungement. Respondent otherwise requests that the appointed
6 Chair deny Claimant's request for \$1 in damages. Respondent further requests that in the event
7 that the appointed Chair holds a hearing in this matter, Respondent be given the opportunity to
8 attend the final hearing by telephone.
9

10 **PRAYER**

11 Cetera prays for an arbitration award containing the following:

- 12 1. A statement from the Arbitrator on the issue of whether to order recommending
13 that the customer complaint be expunged from Mr. Kincaid's CRD records in the
14 form required by FINRA Rule 2080;
- 15 2. Denial of Petitioner's request for \$1 in compensatory damages; and
- 16 3. An order that all forum costs are assessed against Petitioner.
17

18 Dated: March 13, 2018

19 Respectfully submitted,


20 By: 
21 Jeremy Carr, Esq.
22 Senior Counsel
23 Cetera Financial Group
24 200 N. Sepulveda Blvd., Suite 1200
25 El Segundo, CA 90245
26 Office Tel: 310.257.4829
27 jeremy.carr@cetera.com
28 *Attorney for Cetera Advisors LLC*

EXHIBIT 4

1 Jeremy Carr, Esq.
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5 El Segundo, CA 90245
6 Office Tel: 310.257.4829
7 jeremy.carr@cetera.com
8 *Attorney for Cetera Advisors LLC*

7 **FINRA DISPUTE RESOLUTION**

8 John Boone Kincaid III,
9 Claimant,
10 vs.
11 Legacy Financial Services, Inc. and
12 Cetera Advisors, LLC,
13 Respondents.

CASE NO. 18-00248

**JOINT STIPULATION AND
[PROPOSED] ORDER REGARDING
LIABILITY, DAMAGES, DISCOVERY,
AND HEARING PARTICIPATION BY
CETERA ADVISORS LLC**

14
15 **RECITALS**

16
17 Whereas, Claimant John Boone Kincaid III (“Claimant”) filed a statement of claim
18 (“SOC”) seeking expungement of occurrence numbers 1369004 and 1408568 reported on his
19 Central Registration Depository (“CRD”) records and \$1 in damages against Cetera Advisors LLC
20 (“Cetera” or “Respondent”);

21 Whereas, Claimant does not allege wrongdoing by Cetera and has named Cetera as a
22 “nominal” Respondent because FINRA’s Code of Arbitration rules do not allow for single party
23 expungement actions; and
24

25 Whereas, Cetera filed a statement of answer (“SOA”) in response to Claimant’s SOC,
26 requesting that the Chairperson deny Claimant’s request for \$1 in damages and confirming that
27 Cetera does not oppose Claimant’s requests for expungement.
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[CHAIRPERSON ORDER ON NEXT PAGE]

SO ORDERED: **FINRA ARBITRATION CHAIRPERSON**

Dated: _____ 2018 By: _____

Name _____

EXHIBIT 5

FINANCIAL INDUSTRY REGULATION AUTHORITY DISPUTE RESOLUTION	CASE NO. 18-00248
In the Matter of the Arbitration Between: Claimant: John Boone Kincaid, III v. Respondent: Legacy Financial Services, Inc. Cetera Advisors, LLC	
REVOCATION OF PREVIOUSLY FILED STIPULATION AGREEMENTS, AND AMENDED JOINT STIPULATION AND PROPOSED ORDER REGARDING LIABILITY, DAMAGES, DISCOVERY, AND HEARING PARTICIPATION BY LEGACY FINANCIAL SERVICES, INC. AND CETERA ADVISORS, LLC	

FACTS

1. Claimant John Boone Kincaid, III (Claimant) filed a statement of claim (“SOC”) seeking expungement of occurrence numbers 1369004 and 1408568 reported on his Central Registration Depository (“CRD”) records and \$1 in damages against Legacy Financial Services, Inc. (“Legacy”) and Cetera Advisors, LLC (“Cetera”).

2. Cetera filed a statement of answer (“SOA”) in response to Claimant’s SOC, requesting that the Chairperson deny Claimant’s request for \$1 in damages and confirming that Cetera does not oppose Claimant’s request for expungement.

3. On March 13, 2018, Legacy and the Claimant filed a Joint Stipulation Agreement.

4. On April 3, 2018, Cetera and the Claimant filed a Joint Stipulation Agreement.

RESPONDENTS LEGACY AND CETERA, AND CLAIMANT, HEREBY REVOKE SAID JOINT STIPULATION AGREEMENTS PREVIOUSLY FILED (ON MARCH 13, 2018 AND APRIL 3, 2018), AND HEREBY STIPULATE AND AGREE, BY

**AND THROUGH THEIR UNDERSIGNED ATTORNEYS, TO THE FOLLOWING,
SUBJECT TO THE CHAIRPERSON'S APPROVAL AND ORDER:**

1. Claimant will not assert new claims against Respondents Legacy or Cetera in FINRA Case No. 18-00248 (the "Action");
2. Claimant shall not seek reimbursement from Respondents Legacy or Cetera for any commissions or costs resulting from the underlying customer dispute occurrence numbers 1369004 and 1408568;
3. All forum fees and costs incurred in connection with the Action shall be assessed solely against Claimant (which does not include FINRA member fees, attorney's fees, travel expenses, or other ancillary costs associated with this case);
4. To the extent they exist, Respondent Cetera and Legacy shall produce a redacted copy of the customers' complaints, Respondents' responses to the customers' complaints, and any settlement agreements, relating to occurrence numbers 1369004 and 1408568, which can be located after a reasonable search;
5. Respondents shall not be required to provide any additional discovery in the Action;
6. Respondents shall not oppose Claimant's request for expungement of the matters identified in the Action;
7. Respondents shall not be required to appear or produce any witnesses in the Action;
and
8. At this time, Claimant shall maintain the request for \$1 money damages against Respondents Legacy and Cetera.

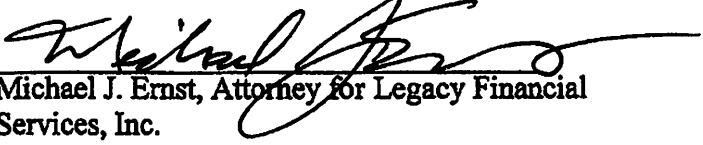
DATED: May 23, 2018

ADVISORLAW, LLC


Michael Bessette, Counsel for Claimant

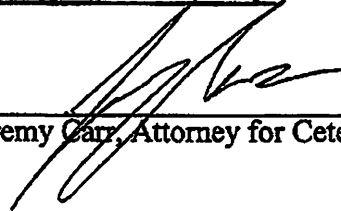
DATED: 6/1/18

STOKES CARMICHAEL & ERNST LLC.


Michael J. Ernst, Attorney for Legacy Financial Services, Inc.

DATED: 5/23/18

JEREMY CARR, ESQ.


Jeremy Carr, Attorney for Cetera

SO ORDERED:

FINRA ARBITRATION CHAIRPERSON

DATED:

BY: _____
Name:

EXHIBIT 6

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
John Boone Kincaid

Case Number: 18-00248

vs.

Respondents
Cetera Advisors LLC
Legacy Financial Services, Inc.

Hearing Site: Phoenix, Arizona

Nature of the Dispute: Associated Person vs. Members

REPRESENTATION OF PARTIES

For Claimant John Boone Kincaid ("Claimant"): Dochter Kennedy, MBA, J.D., and Michael Bessette, Esq., AdvisorLaw, LLC, Broomfield, Colorado.

For Respondent Cetera Advisors LLC ("Cetera"): Christina Vourakis, Esq., Cetera Financial Group, El Segundo, California.

For Respondent Legacy Financial Services, Inc. ("Legacy"): Michael J. Ernst, Esq., Stokes Carmichael & Ernst LLC, Atlanta, Georgia.

Hereinafter, Cetera and Legacy are collectively referred to as "Respondents."

CASE INFORMATION

Statement of Claim filed on or about: January 22, 2018.
Claimant signed the Submission Agreement: January 22, 2018.

Statement of Answer filed by Cetera on or about: March 13, 2018.
Cetera signed the Submission Agreement: February 26, 2018.

Legacy did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

Claimant asserted a claim seeking expungement of two customer complaints, occurrence numbers 1369004 and 1408568 ("Underlying Complaints") from his Central Registration Depository ("CRD") record.

In the Statement of Answer, Cetera advised that while it takes no position as to Claimant's request for expungement, it denies any allegations of wrongdoing in the Statement of Claim and objects to Claimant's request for compensatory damages.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

1. Expungement of the Underlying Complaints from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claim, allegation, or information is factually impossible or clearly erroneous;
2. Expungement of Occurrence Number 1369004 from his CRD record pursuant to FINRA Rule 2080(b)(1)(B) as Claimant was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds;
3. Expungement of the Underlying Complaints from his CRD record pursuant to FINRA Rule 2080(b)(1)(C) finding the claim, allegation or information false;
4. Damages in the amount of \$1.00 from Respondents; and
5. Any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer, Cetera requested:

1. A statement from the Arbitrator on the issue of whether to order recommending that the Underlying Complaints be expunged from Claimant's CRD records pursuant to FINRA Rule 2080;
2. Denial of Claimant's request for \$1.00 in compensatory damages; and
3. An order that all forum costs are assessed against Claimant.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that he has read the pleadings and other materials filed by the parties.

Legacy did not file with FINRA Office of Dispute Resolution a properly executed Submission Agreement but, having filed certain stipulations, is required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code").

On March 14, 2018, Claimant and Legacy filed a stipulation, in which Claimant agreed to, among other issues, not assert any claims against or seek damages from Legacy in this case. On April 3, 2018, Claimant and Cetera filed a stipulation, in which Claimant agreed to, among other issues, not assert any new claims, or seek damages from Cetera in this case. On April 20, 2018, the Arbitrator approved the March 14 and April 3 stipulations. Per Rule 13309(b) of the Code of Arbitration Procedure ("Code") they became part of the record.

On May 23, 2018, the parties filed a joint stipulation, which included, among other issues, an agreement that Claimant would "maintain the request for \$1.00 money damages against [Respondents]." On July 11, 2018, the Arbitrator approved the May 23 joint stipulation. Per Rule 13309(b) of the Code it became part of the record.

On June 12, 2018, the parties filed a joint stipulation to proceed with one arbitrator in this matter.

AWARD

After considering the pleadings and submissions, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's request for expungement of his CRD records is denied.
2. Claimant's request for \$1.00 in damages is denied.
3. Any and all claims for relief not specifically addressed herein are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 1,575.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute.

Accordingly, as a party, Cetera is assessed the following:

Member Surcharge = \$ 1,900.00
Member Process Fee = \$ 3,750.00

Accordingly, as a party, Legacy is assessed the following:

Member Surcharge = \$ 1,900.00
Member Process Fee = \$ 3,750.00

Hearing Session Fees and Assessments

The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator, including a pre-hearing conference with the arbitrator that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with a single arbitrator @ \$450.00/session = \$450.00
Pre-hearing conference: July 5, 2018 1 session

Total Hearing Session Fees	= \$450.00
----------------------------	------------

The Arbitrator has assessed \$450.00 of the hearing session fees to Claimant.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

ARBITRATOR

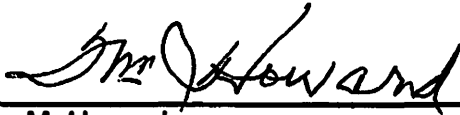
William M. Howard

-


Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature



William M. Howard
Sole Public Arbitrator



Signature Date

October 2, 2018
Date of Service (For FINRA Office of Dispute Resolution office use only)

EXHIBIT 7

FINRA Office of Dispute Resolution Arbitrator's Guide



This Guide contains important information about FINRA Office of Dispute Resolution services, policies and procedures. For additional information, please go to our website: www.finra.org or call one of our regional offices.

FINRA Office of Dispute Resolution attempts to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding concerning a rule in the Customer or Industry Code of Arbitration Procedure, the rule language prevails.

September 2018 Edition

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This Guide contains important information about FINRA Office of Dispute Resolution services, policies and procedures. For additional information, please go to our [website](#) or call one of our [regional offices](#).

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PART ONE: OVERVIEW

About the Arbitration Process

“Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.” —

Domke on Aristotle

Arbitration is a method of resolving a dispute between two or more parties. Parties agree in advance to abide by the decision of the arbitrators, who are impartial persons committed to rendering a fair and impartial decision after all parties have had an opportunity to present their cases.

The arbitrators' award is final and binding, subject to court review only under limited circumstances. There is no appeal process within FINRA under the Code of Arbitration Procedure for Customer Disputes or the Code of Arbitration Procedure for Industry Disputes (collectively referred to as Codes or Code).¹ However, the parties may file a motion to vacate the arbitration award in a court of competent jurisdiction. In short, arbitration is a quick, fair, and relatively inexpensive alternative to litigation.

There has been a dramatic increase in the use of arbitration for all types of disputes since the late 1980s. A sharp increase in the number of securities arbitrations was influenced by a U.S. Supreme Court decision (*Shearson v. McMahon*, 1987) that helped establish arbitration as the predominant procedure for resolving securities disputes. Prior to this decision, the binding nature of the arbitration agreement and the broad scope of an arbitrator's authority in securities cases were less clear. Since arbitration is the primary means of resolving disputes in the securities industry, the public perception of its fairness is of paramount importance. Arbitrators appointed to resolve securities controversies must continue to meet the challenge of maintaining fair and orderly arbitration proceedings.

¹ Because many of the rules in the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) are identical, this Guide focuses primarily on the Customer Code (12000 series). Where there is a significant difference between the Customer Code and the Industry Code, the Guide will refer to the appropriate rule in the 13000 series of FINRA's Industry Code.

About FINRA

The Financial Industry Regulatory Authority (FINRA) is the largest independent regulator for all securities firms doing business in the United States. FINRA was created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. FINRA's mission is to protect America's investors by making sure the securities industry operates fairly and honestly.

FINRA touches virtually every aspect of the securities business—from registering and educating industry participants to examining securities firms; writing rules; enforcing those rules and the federal securities laws; informing and educating the investing public; providing trade reporting and other industry utilities; and administering the largest dispute resolution forum for investors and registered firms. FINRA also provides dispute resolution services for [exchanges](#) that do not operate their own dispute resolution program.

About FINRA Office of Dispute Resolution

FINRA Office of Dispute Resolution (FINRA) is the largest dispute resolution forum in the securities industry, handling most securities arbitrations and mediations in the United States. FINRA facilitates the efficient resolution of monetary, business and employment disputes among investors, securities firms and employees of securities firms.

FINRA is subject to Securities and Exchange Commission (SEC) oversight, and the SEC must approve FINRA's arbitration and mediation rules. In addition, the National Arbitration and Mediation Committee (NAMC) makes recommendations to FINRA regarding the conduct of arbitrations, mediations and other dispute resolution matters, including approving arbitrator and mediator candidates for the roster.²

FINRA's Administrative Staff

FINRA assigns a Case Administrator to every case. Case Administrators are responsible for managing individual cases and ensuring that each aspect of the case is administered properly. To make sure that telephone inquiries are handled quickly, Information Specialists are available to answer procedural and case-specific questions on any case. Information Specialists can provide:

² The NAMC is an advisory committee on arbitration matters and includes representatives from the public, the securities industry and arbitrators and mediators serving in FINRA's dispute resolution forum. The majority of the NAMC's members, including its Chair, are public representatives. Under the Codes of Arbitration Procedure, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. The NAMC shall also establish and maintain rosters of neutrals composed of persons from within and outside of the securities industry.

- dates and location of scheduled evidentiary hearings or telephonic hearings;
- contact information for Case Administrators or other staff;
- deadlines/due dates;
- the process for or status of scheduling, rescheduling and cancelling prehearing conferences; and
- clarification of correspondence received from FINRA.

FINRA also has a team of support staff to analyze and prepare claims for service; generate and send arbitrator lists to the parties and consolidate them when the parties return them; contact arbitrators to serve on cases; and schedule prehearing conferences and hearings.

Staff members are not advocates, nor do they conduct legal research or provide legal advice. Staff may only provide guidance on administrative procedures. When deciding a case, arbitrators should not seek or accept a staff member's opinion. Only the arbitrators may decide a case.

To contact any of our four [regional offices](#), please review the directory. Staff may also be reached by email by using `firstname.lastname@finra.org` (for example: `kelly.smith@finra.org`).

About FINRA Arbitrators

FINRA recruits, trains and manages a large roster of arbitrators and mediators. FINRA carefully selects arbitrators and mediators from a diverse cross-section of professionals. FINRA's neutrals are available to arbitrate and mediate cases in over 70 hearing locations in the United States, including at least one in each state, one in San Juan, Puerto Rico and one in London, UK. [Statistics](#) about arbitration and mediation, and information about arbitrators and mediators, are available on our website.

FINRA pledges to provide impartial, knowledgeable and courteous staff and highly trained arbitrators and mediators committed to delivering fair, expeditious and cost-effective dispute resolution services for investors, brokerage firms and their employees.

Finally, arbitrators are independent contractors, not employees of FINRA. Arbitrators are not eligible to receive any unemployment benefits or any FINRA employee benefits.

Arbitrator Honorarium

Pursuant to [FINRA Rule 12214](#), arbitrators are compensated at the rate of \$300 per hearing session, with an additional \$125 per day if acting as chairperson at a hearing on the merits. A hearing session is any meeting between the parties and arbitrators, including a prehearing conference with an arbitrator, that lasts four hours or less. In many instances, two hearing sessions will be held in a single day resulting in a \$600 (panel member) or \$725 (chairperson) honorarium. FINRA also provides arbitrators with

a \$200 honorarium for deciding discovery motions on the papers, submitted by the parties, and a \$250 honorarium for deciding a contested motion requesting the issuance of a subpoena without a hearing.

FINRA also provides that if one or more parties request a postponement or cancellation within 10 days before a scheduled hearing session and the arbitrators grant the request, the party or parties making the request will pay a late cancellation fee of \$600 per-arbitrator. This cancellation fee is effective for arbitration cases filed on or after July 6, 2015. For cases filed prior to July 6, 2015, an arbitrator will receive \$100 if a hearing is postponed or cancelled within three business days before a scheduled hearing session.

FINRA's Guidelines on Reimbursement for Expenses

FINRA has strict guidelines regarding reimbursement of arbitrators' expenses. Please carefully review the [Guidelines for Arbitrator Reimbursement](#) to comply with FINRA's expense reporting procedures. Please review the online training, [Completing Your Arbitrator Expense Report](#) for additional information.

For faster, more convenient reimbursement of expenses and payment of honoraria, arbitrators may register for [direct deposit](#) into a checking account.

PART TWO: ARBITRATOR TRAINING

Basic Arbitrator Training Program

After FINRA approves an arbitrator candidate's application, the candidate must successfully complete FINRA's Basic Arbitrator Training Program before becoming eligible to serve on arbitration cases.

FINRA's Basic Arbitrator Training Program consists of several parts: an Online Basic Arbitrator Training Course, an Online Expungement Training Course and a Live Video or Onsite Training Session.

A description of the program, details on how to register is available through the [Required Basic Arbitrator Training page](#) of our website.

Advanced Arbitrator Training

In addition to the mandatory, basic arbitrator training program, FINRA offers subject-specific online training modules. Arbitrators who successfully complete FINRA's training courses will have this noted on their arbitrator Disclosure Reports. A description of each module, together with details on how to register and applicable costs (if any), are available through the [Advanced Arbitrator Training page](#) of our website.

Continued, Mandatory Training

From time-to-time, FINRA creates subject-specific training on key issues in securities arbitration and requires every arbitrator on its roster to successfully complete the training. Arbitrators are given full notice of the training, and given sufficient time to fulfill the training requirement. Failure to complete a mandatory training requirement may result in removal from the roster.

PART THREE: THE ARBITRATOR'S ROLE—ETHICAL CONSIDERATIONS, DUTY TO DISCLOSE, CHALLENGES AND DISQUALIFICATION

The Arbitrator's Role: Ethical Considerations

FINRA encourages arbitrators to regularly review the [Code of Ethics for Arbitrators in Commercial Disputes](#) (Code of Ethics) to refresh themselves about their duties and ethical responsibilities. The information contained in this Guide is a brief reminder of the arbitrators' ethical duties; it is neither an exhaustive list nor a substitute for the Code of Ethics or the FINRA Codes. In addition to the Code of Ethics, arbitrators should also be mindful of any ethical considerations associated with their respective professions.

Neutrality

Arbitrators must be impartial and neutral throughout a proceeding. Impartiality extends to parties, counsel, agents, witnesses, co-panelists and even the type of case involved. Arbitrators must be impartial in both appearance and in fact. Arbitrators are viewed by parties in an arbitration case much as a judge would be viewed in a court of law. In some ways, arbitrators have greater power than a judge (*e.g.*, except for limited reasons, arbitration awards cannot be overturned). Therefore, it is particularly important in arbitration that the forum be fair and be perceived to be fair.

Avoiding Potential Conflicts

Upon accepting an appointment, arbitrators should avoid entering into any financial, business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias. For example, an arbitrator should not accept any engagement involving a party while an arbitration case is pending, nor do so for a reasonable period of time after the case concludes. Likewise, arbitrators should disclose previous cases for which they were retained that involved any party, counsel or witness in the current case.

Ethical Reasons Not to Accept Appointment as an Arbitrator

If an arbitrator has any doubt about whether he or she can be fair or impartial, the arbitrator should decline the appointment. For example, an arbitrator should refuse an appointment if the arbitrator has firmly held beliefs about the issue in dispute or about a named party to the dispute.

A major goal of arbitration is the prompt resolution of disputes. Thus, in accordance with [Canon I \(b\)\(4\) of the Code of Ethics](#), an arbitrator should accept appointment only if fully satisfied: "that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect."

Ethical Obligations Regarding Information Security

Documents and information in FINRA's arbitration case files are confidential. Arbitrators have an ethical duty to keep confidential all information obtained in connection with an arbitration or mediation. Information that needs to be safeguarded includes, but is not limited to:

- Social Security numbers;
- individual taxpayer identification numbers;
- driver's license numbers;
- party and arbitrator addresses;
- brokerage, bank or other financial account numbers;
- criminal history information;
- fingerprint cards;
- expunged records;
- attorney-client communications; and
- medical records.

Arbitrators must exercise caution when using, transporting, storing and ultimately disposing of case materials. These actions must be handled in a manner that preserves the confidentiality of the information. Arbitrators can protect confidential information by taking the following precautions:

- Do not leave case-related material out in the open where others can see it. Arbitrators should secure case material in a locked drawer when they are not being used.
- Do not leave case-related material unattended in a car for an extended period. If you anticipate that you will be away from your car for more than a short time, you should take the materials with you. However, you may want to leave materials in your car trunk—and lock the doors and windows—if you know you will be away from your car briefly.
- Be cautious when reviewing case materials in public. Do not allow third parties to read the materials over your shoulder.
- Be aware of your surroundings when participating in prehearings or hearings by conference call to ensure that others cannot eavesdrop. This is particularly important if you are participating by cell phone in a public area (*i.e.*, a train, a courthouse corridor, etc.)
- Exercise extra caution when serving on multiple cases to avoid sending information about one case to parties in another case.
- Verify that the correct order and enclosures are being sent to the intended recipients; arbitrators should confirm all email addresses and fax numbers before

hitting the send button. The case number and case name should be specified when transmitting orders and rulings, even when transmitting them to FINRA.

- Keep FINRA apprised of current contact information. For example, if an arbitrator provides an incorrect fax number or neglects to update contact information, FINRA may inadvertently send confidential information to an unauthorized person. Arbitrators may update their contact information quickly and easily through FINRA's [DR Portal](#);
- Do not use shared email accounts to receive or send case-related information. Only arbitrators assigned to the case should have access to case-related information. Individuals who are not involved with a particular matter are not authorized to view any correspondence or materials related to a FINRA arbitration case. Accordingly, no one other than the arbitrator should have access to the arbitrator's email account containing such information.
- Any time the hearing room is not occupied it should be locked and/or secured. Thus, hearing rooms should be locked or secured during a short term recess, lunch breaks and of course overnight.
- Do not dispose of case materials in a regular trash receptacle. Arbitrators should shred all case-related documents. If arbitrators are unable to shred documents in their possession, they may return them to FINRA for proper disposal.
- Consider leaving behind case materials at the conclusion of a hearing **only** if the hearing is held at a FINRA office or in a Regus meeting room. When leaving materials behind, clearly mark them to be shredded. For hearings that take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents remain in the room that are marked to be shredded. Regus will bill FINRA directly to shred the arbitrators' documents. Arbitrators should not expense these costs.
- Encourage the parties to take their respective materials with them for hearings in all other locations. Likewise, arbitrators should take their copies of the case materials with them when they leave and either shred them at home or return them to FINRA for proper disposal.

If arbitrators believe that the confidentiality of sensitive information has been compromised or have any questions about safeguarding case-related material, they should contact their case administrator immediately. For more information, listen to the [July 21, 2010 neutral workshop on Information Security](#).

The Arbitrator's Role: Duty to Disclose

Arbitrators must be impartial in both appearance and in fact. For this reason, arbitrators submit detailed biographical information at the time they submit an application to join FINRA's arbitrator roster. The information collected from the application is compiled to create an Arbitrator Disclosure Report (Disclosure Report). During the list selection process, the parties are given the opportunity to review the Disclosure Report of the arbitrators randomly listed for potential service. The Disclosure Report lists previous FINRA awards rendered by the arbitrator, and also lists the current cases to which the arbitrator is assigned. For your convenience, you may review a [Sample Disclosure Report](#).

In order to ensure that the arbitrators' Disclosure Reports are accurate and up-to-date, FINRA will send the arbitrators their Disclosure Report each time the arbitrator is appointed to a case. **It is extremely important that arbitrators update their Disclosure Reports frequently.**

Arbitrators are strongly encouraged to update their Disclosure Reports online using the FINRA DR Portal. If you have already registered with the portal, please go to the [DR Portal Web page](#) and log in to make updates to your profile. If you have not registered and would like to receive a registration invitation, please send an email to [Dispute Resolution Neutral Management](#) to request an invitation. Please include "request portal invitation" in the subject line. You must use your unique invitation to register with the portal.

Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Disclosure includes any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision. When making disclosures, arbitrators should consider all aspects of their professional and personal lives and disclose all ties between the arbitrator, the parties and the matter in dispute, no matter how remote they may seem. This includes, but is not limited to, lawsuits (even non-investment related lawsuits); any publications (even if they appear only online); professional memberships; service on boards of directors; etc. If you need to think about whether a disclosure is appropriate, then it is: **make the disclosure**. Failure to disclose may result in vacated awards which undermine the efficiency and finality of our process. Failure to disclose may also result in removal from the roster.

[FINRA Rule 12405](#) requires arbitrators to disclose any direct or indirect financial or personal interest in the outcome of the arbitration, as well as any existing or past, direct or indirect, financial, business, professional, family, social or other relationships with any of the parties, representatives, witnesses or co-panelists. **The duty to disclose is ongoing**. Therefore, arbitrators are also required to continually make reasonable efforts to inform themselves of relationships and interests including changes in their or their

immediate family member's³ employment, job functions or clients since these facts can result in a change to their classification as a public or non-public arbitrator.

Disclosures Upon Appointment to Serve

It is important that arbitrators ensure that they have no conflicts when they accept appointment to a case. Accordingly, when FINRA contacts arbitrators about possible case service, staff will disclose the following information about the case:

- names of the parties;
- names of current lawyers or agents representing the parties; and
- the nature of the case.

If an arbitrator determines that a potential conflict exists after learning the above information, the arbitrator must advise staff immediately. Arbitrators should disclose any circumstance that might hinder—or even appear to hinder—their ability to render an objective determination.

Disclosures After Appointment to Serve

Once an arbitrator accepts an appointment, FINRA provides the arbitrator the [Oath of Arbitrator](#) (Oath), which includes the Arbitrator Disclosure Checklist (Checklist). These documents are included in the case packet materials that contain the pleadings, arbitrator disclosures and the hearing scripts (for a [single arbitrator case](#) or a [three-member panel case](#)). Arbitrators should review carefully the pleadings, the witness lists, if included, and their co-panelists' disclosure reports followed by another thorough conflicts check. Only after completing these steps should the arbitrator sign the Oath and return it to FINRA. This process is repeated for every case to which the arbitrator is appointed. Arbitrators can easily complete and submit their Oaths and Checklists through the portal.

Disclosures at Hearings

Arbitrators must repeat their disclosures on the record at the start of the Initial Prehearing Conference, and at the beginning of the hearing on the merits. The parties should acknowledge the information and state whether they have an objection to proceeding with the appointed arbitrators.

Disclosures in General

Not every disclosure results in the arbitrator being removed from service on a case. When an arbitrator makes a disclosure, FINRA staff informs the parties of the facts disclosed by the arbitrator, and the parties decide whether to keep or replace the

³ The term "immediate family member" is defined as: (i) a person's parent, stepparent, child or stepchild; (ii) a member of a person's household; (iii) an individual to whom a person provides financial support of more than 50 percent of the individual's annual income; or, (iv) a person who is claimed as a dependent for federal income tax purposes.

arbitrator. As a rule, **when in doubt, always err in favor of making a disclosure.** Arbitrators are deciding issues of great importance to the parties involved. Therefore, it is important that the parties believe that the arbitrators rendered a fair decision.

The Arbitrator's Role: Challenges and Disqualification

Parties are permitted to challenge the appointment of an arbitrator to their case. Parties may challenge the arbitrator directly by filing a Motion to Recuse. Alternatively, a party's challenge may be made directly to FINRA in the form of a Challenge for Cause or by filing a Director's Authority to Remove request. Each method is addressed separately below.

Motions to Recuse

In the event that all parties ask an arbitrator to recuse (*i.e.*, "withdraw") from the panel, the arbitrator should honor the request and recuse. Recusal under these circumstances is required under the [Code of Ethics](#).

If fewer than all parties request that an arbitrator recuse him or herself from the panel, an arbitrator should do so unless, after carefully considering the matter, the arbitrator determines that the reason for the challenge is not substantial, and the arbitrator can nevertheless act and decide the case impartially and fairly. [FINRA Rule 12406](#) provides that requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.

Arbitrators should not feel offended if they are asked to recuse themselves from a case since such requests are generally not based on the ability or competence of an arbitrator.

In some instances, an arbitrator may voluntarily choose to withdraw from a case. When in doubt, arbitrators should consult with FINRA staff. Even if the case has already proceeded, it may be less expensive for the parties if an arbitrator steps down in the middle of the proceeding than for the parties to complete the proceeding and file a motion to vacate the award. However, whether arbitrators choose to step down should be balanced by the significance of the disclosure, the disclosed relationships and the prejudice to the parties.

Challenges for Cause Before the First Hearing Session Begins

In accordance with [FINRA Rule 12407\(a\)](#), a party may file a challenge for cause to remove an arbitrator from the case before the first hearing session begins. Once a party files a challenge for cause, all opposing parties are entitled to submit a response. FINRA staff, on behalf of the Director of Arbitration, will review the challenge for cause and responses filed, if any, to determine whether to remove the arbitrator.

The rule provides that a challenge for cause to remove an arbitrator will be granted where it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer will be resolved in favor of the customer.

The following list, though not exhaustive, shows examples of circumstances where a challenge for cause would likely be granted. Generally, absent good cause, a party's ability to challenge an arbitrator(s) may be deemed waived if the challenge is not timely filed after a new disclosure is discovered by a party.

Opinion and Bias

- Arbitrator has a firm opinion or belief as to the subject of a case for which he or she is an arbitrator.
- Arbitrator has a personal bias toward a party or party representative.

Personal Relationships

- Arbitrator is or was related by blood or marriage to a party, its attorneys or witnesses.
- Arbitrator is or was a party's guardian.

Business Relationships

- Arbitrator is or was a business partner, vendor, customer or client of a party.
- Arbitrator is a surety or guarantor of the obligations of a party.
- Arbitrator is currently a creditor or shareholder of any corporate party, or has any business relationship with a party.
- Arbitrator is or was a conservator or conservatee, employer or employee, principal or agent, or debtor or creditor of either a party or an officer of a corporation which is a party.
- Arbitrator is the parent, spouse or child of a person who is or was a conservator or conservatee, employer or employee, principal or agent, or debtor or creditor of either a party or an officer of a corporation which is a party.

Current Involvement

- Arbitrator is adverse to a party, its attorneys or witnesses.
- Arbitrator is a party to or the subject of a complaint, arbitration or litigation involving a securities investment.
- Arbitrator is currently an expert witness for a party.

Previous Involvement

- A party, its attorneys or witnesses previously accused an arbitrator of wrongdoing in a prior action.
- A party, its attorneys, or witnesses filed a motion to vacate challenging an award in a case in which the arbitrator had participated and signed the award.
- Arbitrator issued a complaint against a party, its attorneys or witnesses, in an action instituted or resolved during the past five (5) years.
- Arbitrator or any member, shareholder or associate of, or of counsel to his or her law firm, has had an attorney/client relationship with a party within three (3) years of the filing of the arbitration claim.
- Arbitrator or any member, shareholder or associate of, or of counsel to his or her law firm, has had an attorney/client relationship adverse to a party within three (3) years of the filing of the arbitration claim.

Financial Interest

- Arbitrator knows that he or she has, individually or as a fiduciary, a financial interest in the subject matter in controversy or in a party in the arbitration proceeding, or any other interest that could be substantially affected by the outcome of the arbitration proceeding.
- Arbitrator's immediate family member (as defined in Rule 12100) has a financial interest in the subject matter in controversy or in a party in the arbitration proceeding, or any other interest that could be substantially affected by the outcome of the arbitration proceeding.

Expert Witnesses

- An arbitrator in this matter testified as an expert witness against a party during the past (5) years.
- An arbitrator in this matter testified as an expert witness for a party during the past (5) years.
- An arbitrator in this matter was retained as an expert witness (but did not testify) in an action involving a party during the past three (3) years.
- An arbitrator in this matter was retained as an expert witness by a party's counsel, or his or her law firm, in an action during the past three (3) years (where no party in this matter was involved in the earlier action).

Director's Authority to Remove an Arbitrator After the First Hearing Session Begins

According to [FINRA Rule 12407\(b\)](#), after the first hearing session begins the Director may remove an arbitrator based only on information required to be disclosed that was not previously known by the parties. The limitation on disclosing information not previously known to the parties prevents parties from raising challenges late in the process that should have been raised at the outset.

Additional Resources

[Arbitrator Disqualification Criteria](#)

[Top 10 Ways to Be a Better Arbitrator](#)

[Neutral Workshop: FINRA's Information Security Policy](#)

[Notice to Parties: Help FINRA Protect Your Personal Confidential Information](#)

[Your Duty to Disclose online training](#)

[The Neutral Corner, Volume 4—2011](#)

PART FOUR: BEFORE THE PROCEEDINGS BEGIN

Determine Whether There Is a Senior or Seriously Ill Party Involved

FINRA recognizes that various state statutes provide for speedy trials in civil actions involving senior or seriously ill parties. FINRA appreciates the need for expedited hearings in arbitrations involving such parties. Since FINRA staff cannot shorten the time requirements set forth in the Codes, upon request, staff will expedite the administration of arbitration proceedings in matters involving senior or seriously ill parties.

Parties are eligible to participate in the program if they are at least 65 years old or have a serious health condition. In such situations, staff will begin the arbitrator selection process, schedule the Initial Prehearing Conference and serve the final award as quickly as possible. By mutual agreement, parties are also free to reduce the time requirements contained in the Codes. Staff will also determine promptly whether the parties are interested in mediation.

FINRA expects its arbitrators to be sensitive to the needs of senior or seriously ill parties when scheduling hearing dates, resolving discovery disputes and determining the reasonableness of postponements. At the Initial Prehearing Conference, counsel for a senior or seriously ill party should advise the arbitration panel of the party's desire for expedited hearings. When such a request is made, the arbitration panel is expected to schedule hearing dates and discovery deadlines that will expedite the process, yet still provide a fair amount of time for case preparation.

FINRA asks that arbitrators make every effort to expedite these cases particularly in the areas described below:

Discovery Deadlines

Arbitrators should take all steps within their authority to help expedite the exchange of documents and the identification of witnesses. During the IPHC, the panel should establish a discovery cut off as close to the IPHC date as possible. FINRA also recommends that the panel set the deadline for the filing of discovery motions no more than three months after the IPHC date.

Scheduling the Hearing

Arbitrators should schedule dates that will expedite the process but still provide a reasonable amount of time for case preparation. FINRA encourages parties and arbitrators to schedule the hearing within six months from the date of the IPHC. FINRA also recommends setting aside extra dates to avoid delay in the arbitration process.

Adjournments

When deciding adjournment requests, arbitrators should be mindful of the age and health of parties or key witnesses. In addition, arbitrators are expected to avoid causing postponements absent a genuine emergency.

Direct Communication

FINRA asks the parties and arbitrators to consider agreeing to direct communication in this matter if all parties are represented by counsel.

Decisions

Arbitrators should return orders and decisions to FINRA as soon as possible, preferably by email or through the portal (on DR Portal cases). To facilitate prompt return, arbitrators can sign orders and awards electronically.

FINRA intends for these measures to improve the arbitration process for disputes involving senior or seriously ill parties, while maintaining procedural balance and fairness for all involved parties.

Consider Using the Direct Communication Rule

In order to expedite the arbitration proceedings, FINRA rules permit direct communication between the parties and the arbitrators. Specifically, [FINRA Rule 12211](#) permits parties and arbitrators to communicate directly, without FINRA staff intervening, provided certain requirements are met. According to the rules, only parties that are represented by counsel may use direct communication. If, during the proceeding, a party chooses to appear without counsel (pro se), the rule no longer applies. All arbitrators and all parties must agree to the use of direct communication. The arbitrators will determine the scope of direct communication and will memorialize the participants' agreement in an order. Parties may send the arbitrators only the types of items that are listed in the order. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

Materials must be sent at the same time and in the same manner to all parties, all arbitrators and FINRA staff, and staff must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators. The rule states that materials more than 15 pages long shall be sent to FINRA staff only by mail or courier. Arbitrators could include a similar provision as to themselves in the direct communication order.

Generally, the decision to use direct communication will be made at the Initial Prehearing Conference; however, parties and arbitrators also may agree to use direct communication later in the course of an arbitration proceeding, so long as the agreement is contained in a [written order](#) of the arbitrators. The rule provides that either

an arbitrator or a party may rescind his or her agreement to use direct communication at any time, with notice to all arbitrators and parties.

Additional Resource

[Direct Communication Rule online training](#)

PART FIVE: PREHEARING CONFERENCES

The Initial Prehearing Conference

To maximize the efficient administration of a case by the panel, FINRA will schedule an Initial Prehearing Conference (IPHC). The IPHC will generally be held by telephone. Pursuant to [FINRA Rule 12500\(b\)](#), FINRA will notify the parties and arbitrators of the date and time of the IPHC at least 20 days prior to the conference.

At the IPHC, the panel will schedule evidentiary hearing dates; set discovery, briefing, and motions deadlines; and, address other preliminary matters. Additionally, the panel should confirm that the respondents submitted signed Submission Agreements. The panel should advise the parties that if any respondents have not filed a signed Submission Agreement, or otherwise objected to jurisdiction, then they must do so within 30 days or they may be subject to sanctions.

Expedient resolution of disputes is one of the goals of arbitration. Therefore, the commencement of evidentiary hearings within nine months or less after the IPHC is the goal of FINRA and the arbitrators. There may be times when this is not feasible; however, the commencement of hearings more than nine months after this conference should be the exception.

Preparing for the Initial Prehearing Conference

Proper preparation requires that arbitrators review all filed claims, answers, specific motions and responsive papers prior to the IPHC. Arbitrators should also review the Codes of Arbitration Procedure and FINRA procedural guidelines, such as the FINRA [Discovery Guide](#) for customer cases, the [Initial Prehearing Conference Script](#) (IPHC Script), and the [IPHC Scheduling Order](#) before the IPHC. These documents are included in the case packet. If arbitrators do not receive the documents described here, they should immediately ask the assigned staff to provide them.

When preparing for the IPHC, arbitrators should:

- Remember to alert FINRA of any changes to their contact phone numbers at least 24 business hours before the scheduled IPHC.
- Understand that FINRA's telecommunications provider will call all arbitrators and party representatives for the conference call. Arbitrators should be available at least 5 minutes prior to the scheduled time for the conference call.
- Be aware that a FINRA staff member may or may not participate in the call. Arbitrators should contact FINRA **prior** to the commencement of the call if they have any questions about the call.

Conducting a Fair and Impartial Initial Prehearing Conference

FINRA designed the [IPHC Script](#) to facilitate a fair hearing process. Arbitrators should use the script to the greatest extent possible to ensure that all necessary procedures are followed. The chairperson should follow the [IPHC Script](#) and be sure to:

- identify the participants (parties, attorneys, other individuals listening to the call);
- ask the participants to identify themselves each time before they speak;
- read the case name and number;
- state that the panel is a body of neutral arbitrators who are not employees of FINRA; and
- ask the parties to confirm that they accept the panel.

At the conclusion of the IPHC, the chairperson should sign the [IPHC Scheduling Order](#) on behalf of the panel and submit it to the assigned FINRA staff member for distribution to the parties.

Opting Out of the Initial Prehearing Conference

In some cases, the parties may wish to opt out of the IPHC. [FINRA Rule 12500\(c\)](#) permits the parties to forgo the IPHC if they jointly provide the Director with the following information:

- a statement that the parties accept the panel;
- a statement concerning whether any other prehearing conferences will be held and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
- a minimum of four sets of mutually agreeable regular hearing dates;
- a discovery schedule;
- a list of all anticipated motions, with filing, response and reply due dates; and
- a determination of whether briefs will be submitted and if so, the due dates for the briefs and any reply briefs.

Other Prehearing Conferences

After the IPHC, the panel may need to convene additional telephonic prehearing conferences with the parties to resolve issues or disputes. These additional conferences may occur before the evidentiary hearings begin or even after the hearings have commenced.

Prior to a prehearing conference, FINRA will provide arbitrators with any written submissions pertaining to the issues or disputes to be addressed at the conference. Arbitrators should be familiar with all submissions before the prehearing conference begins. Arbitrators presiding at prehearing conferences should always give

consideration to the oral arguments set forth by parties, as well as the documentary information provided prior to the conference.

At the conference, the chairperson should follow these procedures:

Make Preliminary Introductions

- Identify the participants (parties, attorneys, other individuals listening to the call);
- Ask the participants to identify themselves each time before they speak;
- Read the case name and number; and
- State that the panel is a body of neutral arbitrators who are not employees of FINRA.

Address the Issues

- Ask the party requesting the prehearing conference to explain the issue;
- Ask for the positions of the other party or parties, giving the moving party an opportunity to respond;
- Ask questions—as necessary—to identify and clarify the issues; and
- Provide all parties with an opportunity to respond.

Make Rulings

- If the prehearing conference involves discovery issues, be specific and provide a reasonable timetable for compliance, including dates and places for the exchange of information or documents;
- Reread and confirm the panel's ruling with the parties (make sure all parties understand it fully);
- Be polite, but firm when delivering your order. Do not allow the parties to debate an issue once you have ruled.
- Document the panel's ruling in a prehearing order (the panel may request parties' counsel to submit a draft order for adoption or modification);
- Inform the parties of the maximum fee that the panel can assess for each prehearing session;
- Ask whether there are any other issues prior to concluding the prehearing; and
- If arbitrators want to confer privately—either during the conference or after the parties have finished their presentations—make sure all the parties are off the phone before discussing the issues. Verify with the conference operator that only the arbitrators are connected to the call.

Follow-Up

- Send a copy of the written order, preferably typed, to the assigned FINRA staff person by fax or email for distribution to the parties.

Additional Resource

[Understanding the Prehearing Conference Stage: Initial Prehearing Conference](#) online training

PART SIX: DISCOVERY

Though issues concerning discovery and motions can occur at any time during an arbitration proceeding, arbitrators most often face these challenges between the IPHC and the first evidentiary hearing. Given the important and often complicated nature of these issues, Parts Six and Seven of this Guide are devoted exclusively to addressing those issues.

Discovery

Discovery is the exchange of documents and information that the parties undertake to prepare for the hearing on the merits. FINRA requires parties to cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration. The Codes provide procedures for discovery requests and outline the arbitrators' authority in the discovery process.

Discovery Guide

For customer disputes only, FINRA provides the [Discovery Guide](#), which documents that the parties should exchange without arbitrator or staff intervention. The Discovery Guide contains two Document Production Lists (Lists) of presumptively discoverable documents: one for firms/associated persons to produce and one for customers to produce. Though the [Discovery Guide](#) is not intended for use in simplified arbitration proceedings under [FINRA Rule 12800](#), the arbitrators may, in their discretion, choose to use relevant portions of the [Discovery Guide](#) in a manner consistent with the expedited nature of simplified proceedings.

The [Discovery Guide](#), including the Lists, serves as a guide for the parties and the arbitrators. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided on the Lists; order that the parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules. Where additional documents are relevant in a particular case, parties can seek them in accordance with the time frames provided in the Code.

Nothing in the [Discovery Guide](#) precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the [Discovery Guide](#). FINRA encourages the parties to agree to the voluntary exchange of documents and to stipulate to various matters.

Responding to Document Requests

Under [Rule 12506](#) unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, parties must either produce, identify and explain the reason that specific documents on the Lists cannot be produced or object to production. For all other discovery requests under [Rule 12507](#), parties must respond within 60 days from the date a discovery request is received.

A party must use its best efforts to produce all documents required or agreed to be produced. If a party responds that there are no responsive documents in the party's possession, custody or control, the customer or the appropriate person in the brokerage firm who has knowledge, upon the request of the party seeking the documents, must: 1) state in writing that the party conducted a good faith search for the requested documents; 2) describe the extent of the search; and 3) state that, based on the search, there are no requested documents in the party's possession, custody or control.

Ruling on Discovery

Under [FINRA Rule 12508](#), a party may object to the production of any document or information. (If a party objects to discovery on the grounds of confidentiality, see the "Confidentiality and Discovery" section of this Guide.) If any party objects to the production of any document or information, and the parties cannot resolve this objection, the party may file an objection, which specifically identifies the document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. The matter will be sent to the chairperson who will make a ruling. The chairperson is authorized to act on behalf of the entire panel in issuing subpoenas, directing appearances, ordering the production of documents and information, setting deadlines and issuing any other order that may serve to expedite the process and permit any party to develop its case fully.

In making any rulings on objections, the chairperson may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce this information. Some chairpersons may prefer to make these decisions with the benefit of the expertise of their colleagues and request that the full panel be convened to decide the issue.

Arbitrators should, to the fullest extent possible, encourage parties to:

- enter into stipulations;
- agree to the joint submission of pre-marked exhibits; and
- narrow the issues in dispute.

In addition, arbitrators should consider whether briefs or legal memoranda on an issue are desirable and, if so, establish a schedule for their submission. Arbitrators should set

deadlines and issue orders that will expedite the discovery process and permit a party to develop its case fully.

Production Orders That May Require Subpoenas

[FINRA Rule 12512](#) provides that only arbitrators may issue subpoenas in FINRA's forum directing the appearance of a witness and/or the production of documents not covered in [FINRA Rule 12513](#).

Parties must submit to FINRA a written motion requesting a subpoena and a draft subpoena. All opposing parties have an opportunity to submit written objections to a subpoena request. [FINRA Rule 12512\(c\)](#) provides that if a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with FINRA staff, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. FINRA will send to the arbitrator the subpoena and any other relevant materials. Arbitrators should read all the materials supplied as well as the pleadings in the case before executing the subpoena.

Only after determining the relevancy of the documents requested, should arbitrators consider the parties' costs, and by whom such costs will be borne.

If an arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and on the subpoenaed party.

Production Orders That Do Not Require Subpoenas

[FINRA Rule 12513](#) provides that upon motion of a party, arbitrators may order the following without the use of subpoenas:

- the appearance of any employee or associated person of a firm; or
- the production of any documents in the possession or control of such persons or firms.

In most instances, arbitrators should issue orders, instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons.

Under [FINRA Rule 12513](#), unless arbitrators direct otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties shall pay the reasonable costs of the appearance and/or production.

Depositions and Information Requests

Depositions are strongly discouraged in arbitration, pursuant to [FINRA Rule 12510](#). However, under Rule 12510, upon motion of a party, arbitrators may permit depositions, but only under very limited circumstances, including:

- to preserve the testimony of ill or dying witnesses;
- to accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- to expedite large or complex cases; and
- if the panel determines that extraordinary circumstances exist.

Information requests are a form of interrogatory, but are more limited in scope, number and specificity. In general, requests for information assist the discovery process. Proper requests for information may include the following:

- Who was the branch manager?
- Was the current compliance manual in effect during the period in question?
- Who were the individuals that supervised the broker?

Questions that ask for opinions or conclusions, rather than seek information on facts or events, may be improper. For example, a question asked of a witness such as, "What is your understanding of this document?" should generally be left for the hearing. Limiting the scope of requests for documents and information to the facts of a case keeps the discovery process moving.

Confidentiality and Discovery

If a party objects to document production on grounds of privacy or confidentiality, arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. Arbitrators may also want to consider ordering the redaction (removal) of names or other information, or having the parties sign confidentiality agreements.

Ideally, the parties will agree on the form and content of a confidentiality order. In some instances, however, the parties will not agree on what is or is not confidential. When deciding contested requests for confidentiality orders, arbitrators should consider competing interests of the parties. The party asserting or requesting confidentiality has the burden of establishing that the documents or information in question are entitled to confidential treatment. Arbitrators should not automatically designate all documents as confidential.

When the party requesting confidentiality has met the burden of establishing the need for confidentiality of certain documents or information, arbitrators should strive to accomplish the confidentiality sought in the least restrictive manner possible. In considering questions about confidentiality, arbitrators may consider the following factors:

- Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
- Whether there is a threat of harm attendant to disclosure of the information.
- Whether the information contains proprietary confidential business plans and procedures or trade secrets.
- Whether the information has previously been published or produced without confidentiality or is already in the public domain.
- Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
- Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

Arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine.

Concerns about confidentiality and privilege might also be raised regarding subpoenas issued to non-parties. Pursuant to [Rule 12512](#), a non-party may file an objection to a subpoena served upon the non-party. The arbitrator may set up a conference call with a non-party and the parties to discuss the non-party's objection to the subpoena. Staff advises the non-party and the parties of the arbitrator's decision. Non-parties also may ask the arbitrators to resolve questions concerning who pays the costs incurred as a result of producing subpoenaed documents.

Product Cases

Product cases are cases in which one or more of the asserted claims center around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. For example, many investors who purchased bond funds heavily invested in subprime debt filed suitability claims after these funds declined greatly in value after the collapse of the subprime market in 2008-2009.

Product cases are different from other customer cases in several ways, such as:

1. The volume of documents tends to be much greater.
2. Multiple investor claimants may seek the same documents.
3. The documents are not client specific.

4. The product at issue is more likely to be the subject of a regulatory investigation.
5. The cases are more likely to involve a class action with documents subject to a mandatory hold.
6. The same documents may have been produced to multiple parties in other cases involving the same security or to regulators.
7. Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

Parties do not always agree on whether a claim centers around a product as defined above and may ask the arbitrators to make that determination. The arbitrators may ask the parties to explain their rationale for asserting that a claim is, or is not, a product case. In addition, since product cases are different from other customer cases, arbitrators may encounter certain discovery-related issues that differ from those they have seen in other arbitrations.

The [Discovery Guide's](#) Document Production Lists may not provide all of the documents parties usually request in a product case. In a product case, parties typically request documents relating to, among other things, a firm's: creation of a product; due diligence reviews of a product; training or marketing of a product; or post-approval review of a product. Parties may ask the arbitrators to resolve disputes concerning which additional documents they must produce and the scope of the additional documents. Pursuant to the Discovery Guide, parties are not limited to the documents enumerated in the Document Production Lists. Where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the [12500](#) series of rules in the Customer Code. It is possible that the producing party may object to the production on a variety of grounds.

For example, discovery in product cases is document intensive and therefore can become costly. Parties potentially may raise issues of cost and burden in this regard. If a party demonstrates that the cost or burden of production is disproportionate to the need for the documents, the Discovery Guide provides that the arbitrators should determine if the documents are relevant or likely to lead to relevant evidence. If the arbitrators determine that the documents are relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item, or determining whether another document or documents can provide the same information. The arbitrator can also refer any unresolved discovery issue to the full panel for a determination.

When considering discovery issues in product cases, it is possible that parties will make the arbitrators aware that other panels have considered and decided similar disputes. Arbitrators should be aware that prior arbitration decisions are not binding on other panels.

Parties sometimes argue that documents they are requesting were produced in another customer case or pursuant to a regulatory inquiry and, therefore, the arbitrators should

order their opponent to produce the documents in their case. In this situation, the panel should consider the context of production in the other case or inquiry when deciding whether to order production in the case currently before the panel. If the prior production was to a regulatory authority, parties preserve the right to make whatever objections they deem appropriate, for example, that documents produced to regulators contain customer information that is proprietary, confidential and/or subject to privacy rights. Arbitrators should balance any arguments about the burden of reviewing and removing confidential material with the customer's need for the documents. The arbitrators may ask the parties to brief them on the law relating to production issues.

If a party objects to document production on grounds of privacy or confidentiality, the arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require confidential treatment. In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

1. Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
2. Whether there is a threat of harm attendant to disclosure of the information.
3. Whether the information contains proprietary confidential business plans and procedures or trade secrets.
4. Whether the information has previously been published or produced without confidentiality or is already in the public domain.
5. Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
6. Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

In product cases, the issue of unequal production may arise. Due to the nature of these claims, broker-dealers will generally have significantly more potential documents to produce compared to customers. Again, when determining whether to order production, arbitrators should determine if the documents are relevant or likely to lead to relevant evidence as described above.

FINRA encourages the parties to agree to the voluntary exchange of documents and information and to stipulate to various matters. As product cases are typically document intensive cases, arbitrators should encourage parties to discuss a discovery plan early on in the arbitration. When addressing parties' disputes over discovery, arbitrators should focus on narrowing requests and objections.

Electronic Discovery

The Discovery Guide provides that electronic files, such as emails and word processed memoranda, are documents within the meaning of the Discovery Guide. This means that parties are required to produce electronic files if they are responsive to an item on the Document Production Lists. While the Codes of Arbitration Procedure require parties to cooperate with each other during the discovery phase of a case, discovery disputes, including electronic discovery (e-discovery) disputes, may arise. Some e-discovery disputes involve the form of document production. Other disputes concern the sources the parties will search, and the search terms the parties will use when conducting a search for electronic documents. The arbitrators must be prepared to resolve these disputes. When resolving a dispute relating to the format for documents that parties are required to produce, the arbitrators should consider the totality of the circumstances, and they should balance any arguments about the burden of locating, reviewing, and producing e-discovery materials with the requesting parties' ability to use the documents.

Format of E-Discovery

FINRA encourages parties to discuss the form in which they intend to produce a document and to agree on the form whenever possible. There are several formats for producing electronic files. "Native format" is the form in which the electronic file was created. For example, if a party creates a document in Microsoft Word® (Word), then production in a Word document file format would be production in native format.

Parties may have reasons to convert a native document into another format—for example, to facilitate document review or to allow redactions. The most common ways to convert electronic documents are printing native documents and producing them in hard copy instead of electronically, and scanning or electronically converting native documents into a "static format," such as a "TIFF" or "PDF" format. When a party converts a native document into another format, the change may affect the document in several ways:

- Appearance
- Searchability
- Availability of metadata
- Maneuverability

Appearance: In many cases, converting a native file (such as a Word document) to a hard copy or static format document will not affect the appearance of the document—for example, if you print a Word document and produce it in hard copy, it will look the same. But that is not always the case. For example, some native files may be configured to print only certain portions of the document. A user can set the "Print Area" in a Microsoft Excel® (Excel) spreadsheet that will cause only certain rows or columns to be printed. A hard copy print-out of such an Excel spreadsheet will therefore contain less information

than the native file. Similarly, a hard copy print-out of a PowerPoint presentation may not contain speaker's notes that appear in the electronic file.

Searchability: At other times, converting a native file may affect the searchability of the document. The best example is printing out a Word document and producing it in hard copy form. In its native form, the contents of a Word document can be searched electronically for key words or information. In hard copy form, the document is not electronically searchable. Static electronic formats may or may not be searchable, depending on how they are converted. A PDF or TIFF file is essentially an electronic picture of a document and may not be searchable. But such a file will be searchable if the document image is accompanied by a data file that provides the text of the document in searchable form. This is sometimes referred to as "OCR" data, which stands for "optical character recognition." When parties refer to "OCR'ing" a document, they are referring to processing it in a specific way that will result in an "OCR" data file that accompanies an image file and renders the file searchable.

Availability of Metadata: Converting a native file may also affect the availability of metadata. Metadata describes how, when, and by whom electronically stored information (ESI) was collected, created, accessed, or modified, and how it is formatted. For example, an email contains many pieces of metadata, such as the date and time it was sent, who sent it, and who received it. Other native files also contain metadata such as the network location of the electronic document, the author of the document, and the last time the document was modified. It is possible to convert a native file to a static format and keep all the metadata attached—for example, a producing party can convert emails to TIFF and produce the metadata in an associated file. It is also possible to produce some, but not all, metadata associated with a native file. In the case of a conversion, parties should confer on whether metadata is required and what metadata, specifically, should be included in a production.

Maneuverability: Finally, converting a native file may affect the maneuverability of a document—the user's ability to manipulate data using the native application. A good example is an Excel spreadsheet. In its native format, a user can sort and filter data and examine embedded formulas and references in an Excel spreadsheet. If the Excel spreadsheet is printed or converted to TIFF or PDF, that ability is lost.

Certain of these definitions were adapted from a glossary of terms developed by the Sedona Conference Working Group on E-Discovery. The Sedona Conference's website explains that the Sedona Conference is a non-profit research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. You may access the [glossary on the Sedona Conference's website](#). The Conference publishes the glossary "as a tool to assist in the understanding and discussion of electronic discovery and electronic information management issues..."

Reasonably Usable Document Production

During discovery, parties may ask the arbitrators to resolve disputes about the format for document production. A term that parties may use concerning document format is “reasonably usable.” Parties must produce electronic documents in a reasonably usable format. Generally, a document that is produced in the format in which it is ordinarily maintained, or in a converted format that does not make it more difficult or burdensome for the requesting party to use in connection with the arbitration, is considered to be reasonably usable.

The reasonable usability of a document may depend on the specific needs of the parties. For example, imagine a case where the key factual issue is when an individual learned certain information. There, metadata may be very important for determining when that individual created relevant documents, and any format that does not include available metadata would not be reasonably usable. In other cases involving straightforward documents such as account statements and new account forms, metadata may not be relevant and hard copy production, without metadata, may be reasonably usable.

Reasonable usability may also depend on the relative resources of the parties. For example, customers of limited means might demonstrate that they would have difficulty producing documents in any format other than hard copy. Similarly, if reviewing documents in a certain format requires the requesting party to use specific technology, that format may not be reasonably usable if the technology is expensive or otherwise burdensome given the size of the claim, or the resources of the requesting party. If issues arise concerning e-discovery, you may ask the parties to brief the issue. It is the arbitrators’ responsibility to determine the format for document production, and to memorialize their decision in a written order of production.

The language relating to e-discovery is technical. Ask the parties to explain the terms they are using so you can fully evaluate whether the parties are producing documents in a reasonably usable format. The SEC gives guidance about e-discovery to Commission staff in its [Division of Enforcement Manual](#).

Examples of Reasonably Usable Document Production

Conversion to Hard Copy: An email in its native format is reasonably usable because a party can search it electronically. However, if a party converts the email into a hard copy document that a party cannot search electronically, then the document may not be reasonably usable. FINRA expects arbitrators to use their judgment when deciding issues relating to how parties should produce documents. If, for example, the volume of emails a party is producing is very small, the arbitrators could decide to allow a party to produce the emails in hard copy. Arbitrators may also conclude that more than one format is appropriate. For example, a native email cannot be produced with redactions. Therefore it may be appropriate to require native production for non-redacted emails, and static format production for the small subset of redacted emails.

Courts have begun addressing the issue of what is reasonably usable production. In one court case, when a defendant printed out 35,000 pages of emails to produce them in paper format rather than native format, the court ordered the party to produce the emails in native format.

Conversion to PDF: Courts have held that parties cannot convert electronic documents into a PDF format that diminishes their usefulness. In one case, when a party took documents ordinarily maintained on a server, printed them off the server, and then scanned them back into a digital format as PDF files lacking metadata and searchable text, the court ruled that the production was not acceptable. The court ordered the party to produce the documents in a reasonably usable format. In that case, if the producing party had produced PDF files with accompanying data files that provided the metadata and searchable text, the court may have reached a different conclusion.

Excel Files: One specific issue that has arisen in the FINRA forum relates to Excel spreadsheets produced in PDF format rather than in native format. When an Excel spreadsheet is produced in its native format, it can be sorted and filtered to find data. In a PDF format, this functionality is lost.

Emails: Another issue that has arisen in the FINRA forum relates to conversion of multiple page emails into separate PDF documents, diminishing the efficiency of review of those documents. Generally, in these situations, the converted documents should be determined not to be reasonably usable. In general, if an email production does not clearly identify and group together emails and their corresponding attachments, it is not likely to be reasonably usable.

The examples noted above that pertain to fact specific cases are intended to provide guidance. Arbitrators should be aware that these demonstrative examples of court decisions are not binding on arbitration panels and panels may consider relevant case law presented to them by the parties. Arbitrators must decide what is reasonably usable, including determining whether metadata is necessary in a particular case given the nature of the documents sought and whether a discovery request is reasonable in scope.

Arbitrators should balance any arguments about the burden of locating, reviewing and producing e-discovery materials with the parties' need for the documents. The arbitrators may ask the parties to brief them on the law relating to production issues.

Factors to Consider When Resolving E-Discovery Disputes

Based on the above discussion, when resolving disputes about the format for producing electronic documents, arbitrators should consider the totality of the circumstances including, among other matters, the following factors in determining whether the electronic files are in a reasonably usable format:

- For documents in a party's possession or custody, whether the chosen form of production is different from the form in which a document is ordinarily maintained.
- For documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it.
- For documents converted from their original format, a party's reason(s) for choosing a particular form of production; how the documents may be affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by a change in the documents' appearance, searchability, metadata, or maneuverability.

The bottom line, however, is that the documents must be reasonably usable. The arbitrators should not condone production of documents in a format where they are not reasonably usable.

Document Sources and Search Terms

The parties should discuss the electronic sources they will search, and the search terms they will use, and come to agreement on both whenever possible. The sources will vary depending on the party conducting the search. For example, an investor may have, among other sources, a personal computer, an email provider, a smart phone, and a back-up service or external hard drive. A firm may have, among other sources, email servers, email archives, file servers, and databases along with the personal computers and smart phones of its employees. If a dispute arises about the sources to be searched, arbitrators should ask the party requesting a search to explain why the party believes that a particular source is likely to lead to relevant evidence. The arbitrators should consider whether the requested source is duplicative or cumulative of other sources. The parties should also agree on search terms. If they fail to come to agreement on search terms, the arbitrators should ask them to explain why they selected the particular terms in dispute. It is the arbitrators' responsibility to determine the sources and search terms for document production, and to memorialize their decision in a written order of production.

Modifications to Electronic Files

Sometimes parties modify electronic files they receive during discovery. For example, parties might modify an Excel spreadsheet to isolate a particular column of data that they want the arbitrators to focus on, or they may add a calculation to the spreadsheet based on the existing data. [Rules 12514](#) and [13514](#) provide that at least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. Pursuant to Rules 12514 and 13514, if a party intends to use at the hearing an electronic file that the party modified, the party must produce the modified document to all other parties.

Discovery Sanctions

Failure to comply with the discovery rules hinders the efficient and cost-effective resolution of disputes and undermines the integrity and fairness of FINRA's forum. On occasion, parties may use the discovery process to harass and burden their opponent. Arbitrators should take this into consideration when considering discovery issues.

Arbitrators have several tools available for addressing failures to comply with discovery rules. [FINRA Rule 12511](#) provides that a party's failure to cooperate in the exchange of documents and information as required under the rules may result in sanctions. The panel may issue sanctions against any party for:

- failing to comply with the discovery provisions of the rules, unless the panel determines that there is substantial justification for the failure to comply; or
- frivolously objecting to the production of requested documents or information.

Further, under [FINRA Rule 12212](#), the panel may dismiss a claim, defense or arbitration with prejudice as a sanction for the material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Additional Resources

Please see the sections of this Guide on Motions to Compel Discovery and Issuing Sanctions for additional information.

[Discovery, Abuses and Sanctions online training](#)
[Managing Discovery of Electronic Information: A Pocket Guide for Judges](#)
[The Neutral Corner, Volume 1—2008](#)

PART SEVEN: MOTIONS

Though issues concerning discovery and motions can occur at any time during an arbitration proceeding, arbitrators most often face these challenges between the IPHC and the first evidentiary hearing. Given the important and often complicated nature of these issues, Parts Six and Seven of this Guide are devoted exclusively to addressing those issues.

Panel's Authority to Rule on Motions

Under [FINRA Rule 12409](#), the panel has the authority to interpret and determine the applicability of all provisions of the rules. The panel's interpretations are final and binding upon all the parties. All rulings and determinations of the panel must, however, be made by a majority of the arbitrators, unless the parties agree, or the rules or applicable law provides otherwise pursuant to [FINRA Rule 12410](#).

Types of Motions

Although arbitration is an informal process, a variety of matters may be subject to motion practice. The following is a non-exhaustive list of common motions filed in arbitration, each of which will be addressed individually in this Guide.

- Motion to Amend a Claim
- Motion to Consolidate Claims
- Motion to Sever Claims
- Motion to Change the Hearing Location
- Motion to Bar Defenses Due to Untimely or Incomplete Answers
- Motion to Compel Discovery
- Motion to Postpone a Hearing
- Motion to Dismiss
- Motion in Limine

Motion to Amend a Claim

[FINRA Rule 12309](#) provides that parties may amend their pleadings, including adjustments to their damage requests, up until the time FINRA staff appoints a panel. Once a panel is appointed, parties may only amend their pleadings if the panel grants a motion to amend the pleading. However, once the ranked arbitrator lists are due to FINRA, no party may amend a pleading to add a new party to the arbitration until a panel has been appointed and the panel grants a motion to add the party.

Motion to Consolidate Claims

[FINRA Rule 12312](#) provides that one or more claimants may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

- the claims assert any right to relief jointly and severally; or
- the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

[FINRA Rule 12313](#) provides that one or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

- the claims are asserted against the respondents jointly and severally; or
- the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

Before the panel's appointment, staff may consider a party's motion to consolidate claims. After its appointment, the panel may reconsider the decision to consolidate the claims based on a party's motion.

Motion to Sever Claims

Under [FINRA Rules 12312](#) and [12313](#), parties may request that a claim be heard separately from another claim. Arbitrators should refer to the standards outlined in the Motion to Consolidate Claims section of this Guide to determine whether the claims were appropriately consolidated.

Motion to Change the Hearing Location

In accordance with [FINRA Rule 12213](#), FINRA will generally select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute, unless the hearing location closest to the customer's residence is in a different state. In that case, the customer may request a hearing location in the state where the customer resided at the time of the events giving rise to the dispute, even though it may be further from the nearest out-of-state hearing location.

In cases involving firms only, or more than one associated person, under [FINRA Rule 13213](#) FINRA will consider several factors when selecting the hearing location, including:

- the parties' signed agreement to arbitrate, if any;
- which party initiated the transaction or business in issue; and
- the location of essential witnesses and documents.

Parties may request that the case be heard at another location. After the panel is appointed, the panel will address a motion to change the hearing location.

Motion to Bar Defenses Due to Untimely or Incomplete Answers

[FINRA Rule 12308](#) provides that the panel may, upon motion by a party, bar a party from presenting any defenses or facts at the hearing if the party did not file a timely answer. In addition, if a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.

Motion to Compel Discovery

[FINRA Rule 12509](#) provides that a party may make a motion asking the panel to order another party to produce documents or information if the other party has failed to respond to discovery requests, or objects to the production of documents or information under the rules. The rules require that these motions must include the disputed document request or list item, a copy of any objection thereto and a description of the efforts of the moving party to resolve the issue before making the motion.

Before ruling on a request, arbitrators must determine that a document is relevant or likely to lead to relevant evidence. Only after determining relevancy, should the arbitrators consider the cost or burden of production. If a party has demonstrated that the cost or burden of production is disproportionate to the need for the documents, arbitrators should see whether there are alternatives that can lessen the impact, such as narrowing the relevant time frame or scope of the request, or whether the other documents can provide the same information.

For issues involving privacy or confidentiality, arbitrators may want to consider ordering the redaction (removal) of names or other information, or having the parties sign confidentiality agreements. If a party claims a document is confidential, the burden is on that party to establish its confidentiality.

Please see the sections of this Guide on Discovery for additional information.

Motion to Postpone a Hearing

[FINRA Rule 12601](#) provides that arbitrators may postpone any hearing(s) either on their own initiative or at the request of any party to the arbitration. A party may request that the arbitrators postpone a hearing for a variety of reasons, such as the sudden inability of a necessary party, counsel or material witness to appear.

Consensual Postponement

A hearing will be automatically postponed if all parties agree to postpone the hearing. However, if all parties jointly request or agree to more than two postponements, the panel may dismiss the arbitration without prejudice.

Contested Motion to Postpone

When parties request a postponement without the agreement of all parties, the panel may not grant a postponement request made within 10 days of a scheduled hearing session, unless the panel determines that good cause exists. In deciding whether to grant a contested postponement request, the arbitrators should consider the following factors:

- fairness to the parties;
- the objection of the opposing party;
- the merits of the request;
- previous postponements; and
- the ability to conduct a productive hearing.

Arbitrators should be aware that certain statutes permit parties to move to vacate arbitration awards by alleging that arbitrators exceeded their authority by refusing to grant a reasonable postponement request.

Pursuant to [FINRA Rule 12601\(b\)](#):

- Except as otherwise provided, a postponement fee will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. The fee will equal the applicable hearing session fee under [FINRA Rule 12902](#). The panel may allocate the fee among the party or parties that agreed to or requested the postponement. The panel may also assess part or all of any postponement fees against a party that did not request the postponement, if the panel determines that the non-requesting party caused or contributed to the need for the postponement. The panel may waive the fees.
- If a postponement request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional

fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

- No postponement fee will be charged if a hearing is postponed:
 - Because the parties agree to submit the matter to mediation administered through FINRA, except that the parties shall pay the additional fees described in [FINRA Rule 12601\(b\)\(2\)](#) for late postponement requests;
 - By the panel in its own discretion; or
 - By the Director in extraordinary circumstances.

While the rules do not limit the number of times the arbitrators may postpone a hearing, arbitrators should be mindful that one of the goals of arbitration is to provide a speedy method for resolving disputes. The arbitrators' role is to bring the parties' disputes to a fair and expeditious conclusion so arbitrators should refrain from postponing hearings on their own accord whenever possible.

Motions to Dismiss

A motion to dismiss is a request made to the panel by a party—prior to or after the conclusion of the case-in-chief—to eliminate some or all claims raised by the party filing a claim. Under the Code, there are three types of motions to dismiss, each of which will be addressed separately in this Guide:

- [FINRA Rule 12206\(b\)](#) Eligibility Motions: Motions to dismiss based on eligibility grounds. These motions are usually made before a party has concluded its case-in-chief.
- [FINRA Rule 12504\(a\)](#) Motions: Motions to dismiss filed before a hearing on the merits (*i.e.*, prehearing motions) or motions filed during the hearing on the merits but before a party has concluded its case-in-chief.
- [FINRA Rule 12504\(b\)](#) Motions: Motions to dismiss made after a party has concluded its case-in-chief.

[FINRA Rule 12206\(b\)](#) Eligibility Motions

A respondent may file a motion to dismiss a case because of eligibility under [FINRA Rule 12206](#), which states that no claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.

In addition to stating that the full panel will resolve any questions regarding eligibility of a claim, [FINRA Rule 12206](#) also contains the following procedural requirements:

- A party must file an eligibility motion in writing, separately from the answer, and only after filing the answer.
- A party must file the motion at least 90 days before a hearing, and the other parties have 30 days to respond. Any reply must be made within five days of receipt of a response.
- FINRA staff will forward the eligibility motion and all response papers to the full panel for review.
- If a party files a motion to dismiss on multiple grounds, including eligibility, the panel must decide eligibility first.
- Before granting a motion under this rule, the panel must hold a hearing on the record.
- If the panel grants an eligibility motion, the decision must be unanimous, and must be accompanied by a written explanation.
- If the panel determines that a claim was filed after the six-year eligibility cut-off and grants the eligibility motion, it cannot rule on any other grounds for dismissal.

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

If the panel dismisses a claim on the grounds of eligibility, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all claims, including the dismissed claim, in court. Before dismissing a claim, however, the arbitrators should carefully consider each party's positions in their moving, response and reply papers and oral arguments, and must hold a hearing on the record. If the panel reaches a unanimous decision to grant the eligibility motion, it should inform FINRA of its ruling promptly and provide a written decision.

Fees, Costs and Sanctions

If the panel denies an eligibility motion, the panel must assess forum fees associated with any hearings on the motion against the moving party. If the panel deems that an eligibility motion was frivolous, the panel must award reasonable

costs and attorneys' fees to any party that opposed the motion. If the panel determines that a party filed an eligibility motion in bad faith, it may issue sanctions under [FINRA Rule 12212](#). Please see the section of this Guide on Issuing Sanctions for additional information.

[FINRA Rule 12504\(a\)](#) Motions to Dismiss Before a Party Concludes its Case-in-Chief

FINRA believes that parties have the right to a hearing in arbitration. Therefore, motions to dismiss filed prior to the conclusion of a party's case-in-chief are discouraged and granted only under limited circumstances. According to [FINRA Rule 12504\(a\)](#), the panel cannot act upon a motion to dismiss a party or claim, unless the panel determines that:

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

If a party files a motion to dismiss on multiple grounds, including eligibility, the panel must decide eligibility first, pursuant to [FINRA Rule 12206](#). If the panel grants the motion to dismiss on eligibility, it must not rule on any other grounds for the motion.

If filing a [FINRA Rule 12504\(a\)](#) motion, the party must do so in writing, separately from the answer, and only after filing the answer. Such motions must be filed at least 60 days in advance of the hearing, and the other parties will have 45 days to respond. Any reply must be made within five days of receipt of a response. FINRA staff will forward motions and responses to the full panel for review. The panel should ask the parties to provide briefs if it needs additional information to decide a [FINRA Rule 12504\(a\)](#) motion to dismiss.

Not only do [FINRA Rule 12504\(a\)](#) motions require the input of the entire panel, but the panel must also hold a hearing before it grants such a motion, unless the parties waive the hearing requirement. If the panel grants the motion, the decision must be unanimous and accompanied by a written explanation. If the panel denies the motion to dismiss, a party may not re-file it, unless specifically permitted by panel order.

Fees, Costs and Sanctions

If the panel denies a [FINRA Rule 12504\(a\)](#) motion, the panel must assess forum fees against the party who filed the motion. If the panel deems the motion frivolous, it must also award reasonable costs and attorneys' fees to the party who opposed the motion. If the panel determines that a party filed a motion to dismiss in bad faith, it may issue sanctions under [FINRA Rule 12212](#). Please see the section of this Guide on Issuing Sanctions for additional information.

[FINRA Rule 12504\(b\)](#) Motions to Dismiss After a Party Concludes its Case-in-Chief

The restrictions set forth in [FINRA Rule 12504\(a\)](#) do not apply to [FINRA Rule 12504\(b\)](#) motions to dismiss after a party concludes its case-in-chief. After the claimant has presented its case—including all documentary evidence and testimony—the respondent may ask the panel to dismiss the claim on the grounds that the claimant failed to prove the allegations in the statement of claim or failed to prove a right to recovery. Generally, these motions are made orally at the hearing after the claimant's presentation.

When ruling on motions to dismiss after a claimant has concluded its case-in-chief, arbitrators should view the evidence in the light most favorable to the claimant. If the claimant has presented credible evidence to support a recovery, the panel should deny the motion. However, if the testimony and documents do not support any possible recovery, the panel may grant the motion to dismiss the claim.

Both sides have invested a lot of time and effort in the arbitration. Arbitrators should be sure that all parties had a full opportunity to argue the motion to dismiss. Consider the following issues before granting a motion to dismiss:

- Did the claimant have the chance to call all witnesses? Why or why not?
- Did the claimant meet its burden of proof? When determining this, remember to look at all evidence presented in the light most favorable to the claimant.
- Does the claimant have any further witnesses, evidence or testimony to offer?

The panel may direct the respondent to present its case, even if the claimant's case is weak and the respondent's motion has some validity.

If the panel grants a [FINRA Rule 12504\(b\)](#) motion and dismisses all of the claimant's claims after the presentation of the claimant's case, the panel must still complete the following tasks:

- render a written award under [FINRA Rule 12904](#); and
- consider how to allocate forum fees and costs among the parties.

If the panel grants a [FINRA Rule 12504\(b\)](#) motion to dismiss on some but not all of the claimant's claims, the hearing would proceed as to the surviving claims. At the conclusion of the hearing, the panel would issue an award that disposes of each claim.

Fees, Costs and Sanctions

Note that [FINRA Rule 12504\(b\)](#) does not preclude a panel from issuing an explanation or awarding costs or fees in connection with the motion. It also does not prevent a panel from issuing sanctions under [FINRA Rule 12212](#) if it determines that a party filed a motion to dismiss in bad faith. Please see the section of this Guide on Issuing Sanctions for additional information.

Motion in Limine

A motion in limine is a request for the arbitrators to rule on the admissibility of evidence in advance of the hearing. Parties may try to include other issues for ruling when filing motions in limine, including requests to dismiss one or more of the alleged claims. Arbitrators should treat any requests for dismissal of claims as motions to dismiss and respond to them in accordance with FINRA's motion to dismiss rules. As with all motion practice, arbitrators should be alert to the possible misuse of motions as tactics to delay the hearing.

Additional Resources

[Motion to Dismiss and Eligibility Rules Frequently Asked Questions](#)
[Regulatory Notice 09-07](#)
[Motions to Dismiss online training](#)

PART EIGHT: BEFORE THE EVIDENTIARY HEARING

Preparing for the Evidentiary Hearing

Proper preparation for a hearing requires that arbitrators review all filed claims, answers, and specific motions and responsive papers in advance. Arbitrators should also review the Codes of Arbitration Procedure and FINRA procedural guidelines, such as the FINRA [Discovery Guide](#) for customer cases and the [Hearing Script](#). These documents are included in the case packet sent by FINRA staff at the time of the arbitrator's appointment. If arbitrators do not receive the documents described here, they should immediately ask the assigned staff to provide them.

[FINRA Rule 12514](#) requires parties, at least 20 calendar days prior to the first scheduled hearing date, to serve on each other copies of documents in their possession that they intend to present at the hearing and to identify witnesses they intend to call. Parties may shorten or lengthen the exchange deadlines by agreement. The witness lists will also be sent to the arbitrators by FINRA staff for review prior to a hearing. If arbitrators do not receive the witness lists, they should immediately ask the assigned staff to provide them.

While reviewing the pleadings, arbitrators should AGAIN look for any potential conflicts, as this is an ongoing duty. For example, a party may retain attorneys shortly before a hearing commences, which may require arbitrators not only to repeat previously disclosed information but also to make additional disclosures. Similarly, arbitrators should look for any potential conflicts when reviewing witness lists.

The arbitrator should immediately notify FINRA staff of any additional disclosures or conflicts that might prevent an impartial determination or create an appearance of bias. Arbitrators should consider any circumstance that relates to the subject matter in dispute, as well as to existing or past, direct or indirect, financial, business, professional, family, social or other relationships with any of the parties, counsel or witnesses. As indicated earlier, the duty to disclose requires arbitrators to make a reasonable effort to become aware of these relationships or interests.

Offsite Hearing Locations Guidance

Arbitrators should review the document entitled "[Information for Hearings Not Held at FINRA Dispute Resolution Offices](#)" to ensure that they follow FINRA's offsite hearing location procedures.

PART NINE: DURING THE EVIDENTIARY HEARING

Before the Hearing Starts

Arbitrators should arrive early and confirm the room number for their hearing because there may be multiple hearings conducted in the building on the same day. The arbitrators should not allow the parties to enter the room until all the parties have arrived. To maintain the appearance of neutrality, arbitrators should keep a formal demeanor and avoid engaging in small talk with the parties and their representatives.

At the hearing, the panel's first duty is to identify the people in attendance, though arbitrators should refrain from addressing the parties or their representatives by their first names. Identifying those present sets the right tone for the proceedings, and helps to maintain the confidentiality of the process by ensuring that only involved individuals are present.

Parties

[FINRA Rule 12602](#) states that all parties are entitled to attend all hearings. A corporation is also entitled to have a corporate representative in the room.

[FINRA Rule 12208\(a\)](#) provides that parties may represent themselves in any arbitration held in a United States hearing location. A member of a partnership may represent the partnership. A bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. In addition, a non-attorney may represent a party, unless state law prohibits such representation, the person is currently suspended or barred from the securities industry in any capacity or the person is currently suspended from the practice of law or disbarred. Please see the section of this Guide on Parties' Presentations for additional information about pro se parties.

Non-Appearing Parties

[FINRA Rule 12603](#) states that if a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing go forward, and render an award as though all parties had been present. The panel should indicate on the record the attempts FINRA staff made to notify the non-appearing party of the hearing. If the panel is satisfied that the party received adequate notice of the hearing from FINRA, the panel may proceed in that party's absence.

Counsel

[FINRA Rule 12208\(b\)](#) provides that at any stage of an arbitration proceeding held in a United States hearing location all parties have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United

States or the highest court of any state of the United States, the District of Columbia or any commonwealth, territory or possession of the United States, unless state law prohibits such representation.

Special Rules for Out-of-State Counsel

In some jurisdictions, out-of-state counsel cannot represent a client in arbitration. In these jurisdictions, it is considered the unauthorized practice of law to provide such legal representation without being admitted to the appropriate Bar. Specifically, California, Florida, Illinois, Michigan, New Jersey, New York and Oregon each have specific rules concerning requirements that out-of-state counsel must comply with when representing a party to an arbitration proceeding in one of these states.

Witnesses

Generally there are two types of witnesses present during an arbitration hearing: fact witnesses and expert witnesses:

- Fact witnesses testify on the material facts of the case. Unless all parties agree otherwise, the panel will usually sequester fact witnesses.
- Expert witnesses express views, give interpretations and apply their standards of expertise to facts others have provided. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.

Pursuant to [FINRA Rule 12602](#), a non-party witness may be represented by an attorney at an arbitration hearing while the witness is testifying. Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination. The panel will determine the extent to which the attorney may participate.

Parties may request that the arbitrators direct reimbursement for expenses of a witness. In some instances, the panel may wait until the conclusion of the hearing to assess the fees. For example, if a witness is located a significant distance from the hearing site, the panel might decide to assess the cost of the witness' travel after the parties have presented their cases. Please see the section of this Guide on Witness and Production Fees for additional information.

Starting the Hearing

Hearings are generally held either at a FINRA office, a Regus Conference Center, or in a local hotel or meeting facility. All logistics for the hearing are handled by FINRA staff and communicated to the parties and the arbitrators.

Hearing Decorum

Arbitrators must set the right tone for the hearing from its very outset. Arbitrators should maintain decorum at all times. Shouting, profanity or gratuitous remarks should be stopped. If a hearing becomes heated, arbitrators should intervene or, if necessary, call a recess.

Party Representative Behavior

Some counsel become attuned to the system and try to use the informality to take an unfair advantage by responding to arguments, making gratuitous statements, or by asking leading questions of their own witnesses. (A leading question is a question in which the wording of the question suggests what the expected answer should be.) While leading questions might be appropriate to expedite the hearing and to cover non-controversial matters, it is ordinarily inappropriate for counsel to ask leading questions of their own witnesses on important matters and, in effect, testify for the witness. If the arbitrators determine that a question is leading, the arbitrators should explain to counsel that the panel would appreciate hearing the witness' testimony, as it is the witness' testimony—not counsel's—that is evidence.

On the other hand, it is not inappropriate for counsel to ask leading questions of witnesses who are not their own. For example, under federal rules of evidence, leading questions are permitted only during cross-examination and if a party calls a hostile witness, adverse party or a witness identified with an adverse party.

Whenever the arbitrators believe that counsel is using the informality of the proceedings to their advantage, the arbitrators should intervene and bring the offending practice to a halt even if the opposing party does not object.

Arbitrator Behavior

Arbitrators should avoid comments or body language that indicates a preference for either side. Care should be exercised, particularly when questioning a witness, so that the arbitrator does not indicate disbelief. Grimaces, frowns or hand signals should be avoided. The arbitrators should strive to conduct themselves appropriately. All parties should be given a fair opportunity to present their cases.

Avoiding Ex Parte Communications

Unless operating under the Direct Communication Rule, [FINRA Rule 12211](#) provides that no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present. Communications include an exchange about the arbitration case, as well as an exchange of pleasantries or casual comments. Arbitrators should avoid being in the hearing room when fewer than all of the parties are

present (e.g., when a hearing adjourns, ask all the parties to leave at one time). While a case is ongoing, you must avoid social contacts with parties or their representatives except as part of a large group (e.g., a Bar Association dinner, etc.).

While arbitrators should avoid ex parte communications, they may proceed with a hearing in the absence of a party if the party has been given a reasonable opportunity to appear. Please see the section of this Guide on Parties for additional information on non-appearing parties.

Using the Hearing Script

FINRA staff will provide the arbitrators with a [Hearing Script](#) to use during the hearing. The script outlines how the hearing is conducted and what is expected of the parties. The arbitrators should keep in mind that they may modify the procedures outlined in the [Hearing Script](#) to accommodate special circumstances that arise during a hearing.

The chairperson will read a statement into the record that acknowledges that the arbitrators have read all of the pleadings submitted by the parties. The statement also outlines the manner in which the hearing should proceed, including the order in which the parties may make opening and closing statements and present evidence. Further, the script requires arbitrators to repeat their earlier disclosures on the record because it ensures that:

- there is a record of the disclosure;
- all parties and their representatives received the disclosure statement;
- new representatives who had not appeared previously know of the disclosure; and
- the parties are given the chance to ask further questions about the disclosure.

Record of the Hearing

Arbitrators must be sure that there is a complete record of the hearing. Therefore, arbitrators should use: the [Attendance List](#) to track the attendance of the parties, representatives and witnesses; and the Exhibit List ([Claimant's Exhibits](#) and [Respondent's Exhibits](#)) to track the parties' exhibits.

All hearings are digitally recorded, and the digital recording is the official record of the proceeding, even if it is transcribed pursuant to [FINRA Rule 12606](#). The panel member in charge of recording the proceedings should:

- identify the recording with the case name and number, the hearing date and the recording number;
- clearly identify each individual hearing date on the record;
- ensure that the recording device is functioning properly;
- be certain that the recording device is turned off during all executive sessions;
- remember to restart the recording device after lunch, breaks and executive

- sessions; and
- return all recordings to FINRA at the end of the hearing. Please see the section of this Guide on Ethical Considerations Regarding Information Security.

The digital recording or stenographic record will be the official record of the hearing, and parties and counsel should refrain from making audio or video recordings or transmissions of the proceedings unless otherwise agreed by all parties and arbitrators.

Any party may make a stenographic record of the hearing. However, even if a stenographic record is made, the digital recording will be the official record of the proceedings, unless the panel determines otherwise. If the stenographic record is determined by the panel to be the official record of the proceeding, a copy of the stenographic record must be provided to the Director, each arbitrator and all parties. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel determines otherwise. For more information on using the digital recorder, view our [training course](#) available online.

The Parties' Presentations

While the arbitrators should maintain control of the presentations made during the hearing, they must also be sure that all parties have a full opportunity to present their case. To do this, the panel will (1) explain the procedures and ground rules to be followed; (2) ensure that the parties have an opportunity to make an opening statement; (3) listen to the parties' presentations; (4) ask questions to clarify and elicit important facts; (5) rule on the admissibility of evidence; (6) facilitate testimony by telephone or affidavit; and (7) rule on motions.

Pro Se Parties

As indicated earlier in this part of the Guide, a party on occasion will appear at the hearing without counsel (pro se party), and arbitrators should be sensitive to the fact that the pro se party is most likely inexperienced in either litigation or the arbitration process. Pro se parties may need some guidance from the panel, and the panel needs to use its judgment to determine how much guidance to provide. In some cases, the panel must take a more active role. However, at all times the panel must be careful to maintain its neutrality. The chairperson may explain the following points to pro se parties:

- Arbitration is not mediation. The arbitrator's role is therefore not to reach a compromise decision, but to make a final decision on the facts, determine whether liability exists and, if so, the amount of the damages, if any.
- The chairperson will explain the arbitration procedure—including the Code and the sequence of testimony and questions—to a pro se party. However, as arbitrators, the panel cannot present a party's case.
- The purpose of the opening statement is to allow the parties to explain what they intend to prove—not to present evidence.

- While the hearing must be orderly, arbitrators are not bound by formal rules of evidence.
- A pro se party may present testimony in a narrative statement.
- When questioning witnesses, parties may not argue with them.
- Parties must address any motions or objections to the panel, not to the other parties.
- If a party feels a question from the other party is irrelevant or inappropriate, the party may object.
- Parties must give copies of each document to the opposing parties—who may object to the document—before the panel decides whether to admit it as evidence.
- All parties have the right to be represented by a lawyer at any time in the proceeding.

All efforts to assist a party should be balanced against the need to remain impartial. If an issue arises with respect to a pro se party, the arbitrators should contact a FINRA staff member for assistance.

Admissibility of Evidence During the Party’s Presentation

[FINRA Rule 12604](#) provides that the panel will decide what evidence to admit. The rule also provides that the panel is not required to follow state or federal rules of evidence.

The rules of evidence applied in a court of law are not usually used in arbitration because arbitration is less formal than judicial proceedings, and allows for more liberal introduction of evidence than would be permitted in court. This does not mean that the arbitrators should accept everything presented to them. In fact, the opposing party will probably object to at least some of the evidence introduced. The evidence should relate to the case. The parties should be given an opportunity to object or comment on anything that is presented to the panel. The key consideration is fairness.

Exclusion of Evidence During the Party’s Presentation

[FINRA Rule 12514\(c\)](#) provides that—at a party’s request—arbitrators may exclude from the hearing any **documents not exchanged**. When considering such requests, the panel should determine:

- whether the document should have been produced;
 - was the document covered by a document request?
 - if so, why wasn’t it produced at that time or produced as part of the 20 day identification of documents and witnesses?
 - was the document request objected to?
 - was the document request narrowed such that production was not required?
- when the document should have been produced;
- the significance of the document to be produced;

- if the document sought for rebuttal or impeachment purposes; and
- whether the panel has previously allowed both sides to submit documents that had not previously been produced.

If the submitting party has no valid reason why the document was not provided previously, the panel should consider excluding the document. Withholding documents is contrary to FINRA rules, wastes the time of the parties and the panel and causes undue surprise and prejudice to the affected party.

[FINRA Rule 12514\(c\)](#) also provides that—at a party’s request—arbitrators may exclude from the hearing **witnesses not identified**. When considering the appearance of a witness, the panel should determine:

- whether the witness should have been identified;
- the significance of the testimony of the witness;
- if the witness testimony is sought for rebuttal or impeachment purposes; and
- whether the panel has previously allowed the testimony of witnesses not previously identified.

If the party has no valid reason why the witness was not identified previously, the panel should consider excluding the witness’ testimony. Failing to identify witnesses is contrary to FINRA rules, wastes the time of the parties and the panel and causes undue surprise and prejudice to the affected party.

If the panel decides not to exclude the document or testimony, it should take sufficient steps to reduce any prejudice to the affected party. Such steps may include:

- time to review the document;
- the opportunity to re-call witnesses whose testimony might be relevant; and
- sanctions against the party who did not timely produce the document or identify the witness.

Issuing Sanctions

[FINRA Rule 12212](#) provides arbitrators with wide discretion in addressing a party’s failure to comply with any provision of the rules, or any order of the panel or single arbitrator authorized to act on behalf of the panel. For example, arbitrators may assess monetary penalties payable to one or more parties; preclude a party from presenting evidence; make an adverse inference against a party; assess postponement and/or forum fees; and assess attorneys’ fees, costs, and expenses. The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

It is not appropriate to sanction a party’s attorney for conduct or noncompliance because FINRA does not have jurisdiction over attorneys. In addition, arbitrators should not make sanctions against parties payable to FINRA as FINRA is not a party to the

proceeding. Please see the section of this Guide on Awarding Sanctions, If Any for additional information.

Questions by Arbitrators and Factual Investigations

Each case must be judged solely on the written and testimonial evidence presented at the hearing. Each arbitrator has a right to question witnesses. Even though it is proper for an arbitrator to ask questions, every effort should be made to avoid taking over a hearing or becoming an advocate. Parties and their attorneys should be permitted to try their own cases. Generally, arbitrators should refrain from questioning a witness until all parties have finished their examination.

Arbitrators should not make independent factual investigations of a case. When arbitrators are in doubt about an issue, legal or otherwise, they should request briefs from the parties. If cases are cited in a party's motion or brief, and the arbitrators wish to read the full court opinions, the arbitrators should ask the parties to supply copies. Arbitrators generally should review only those materials presented by the parties.

Rulings Made During the Hearing

All arbitrators share an equal status. The chairperson should neither make, nor appear to make, unilateral rulings on key issues. It is incumbent on the other arbitrators to call any occurrence of this nature to the chairperson's attention during an executive session. The panel may, however, agree to have the chairperson make decisions on objections to evidence introduced during the hearing.

Executive Sessions

Executive sessions are privately held discussions among the arbitrators outside the presence of the parties and their representatives, witnesses and stenographers. An executive session may be requested by any arbitrator for any reason provided they facilitate a full and fair hearing. Arbitrators may call such sessions to discuss procedural or substantive motions or to discuss a question, concern or observation from any member of the panel, at any time during the hearing. All executive sessions are off the record. Before the hearing begins, the arbitrators should agree on how to call an executive session.

In an executive session, the arbitrators should try to reach a consensus. Not all panel decisions will be unanimous. In the event that the panel does not agree on a decision, all rulings and determinations should be made by the majority of the arbitrators. At some point during the hearing, an arbitrator may be in the minority and will have to accept a ruling with which the arbitrator disagrees. The arbitrator should avoid the appearance of dissension in the hearing room. While disagreements may occur, the appearance of cooperation and teamwork among arbitrators is key to a successful hearing. When the hearing reconvenes, the chairperson will announce the decision, if any, but does not need to state the rationale for the decision.

Concluding the Hearing: Ascertaining the Final Damage Requests

During the course of discovery or the evidentiary hearing, parties may change their initial damage requests. Therefore, prior to the close of the hearing, the arbitrators should request that the parties restate their respective claims. Parties requesting damages should also provide the arbitrators with a summary of their final request for damages, which may be presented as a range, as opposed to a specific monetary amount. If a party's final damage request amount is different from what the party requested in an earlier pleading, then these new final damage requests, as well as the parties' original requests as specified in their pleadings, will be reflected in the award. Arbitrators will note any updated damage requests in Section 10 of the [Award Information Sheet](#).

Since the panel also determines how to assess hearing session fees that have accrued in the case, the parties should include a statement recommending how the panel should assess these fees.

Exiting the Hearing Room

At the conclusion of a hearing, a pre-designated panel member should collect all accepted exhibits and return them to FINRA as the official record. If deliberations are not yet final, arbitrators should take their case-related materials at the conclusion of the hearing. Otherwise, arbitrators should follow the guidance below to properly dispose of their case-related materials.

Proper Disposal of Case-Related Materials

For Hearings Held at a FINRA Office or a Regus Conference Facility:

Case materials that are to be shredded may be left behind **only** if the hearing is held at a FINRA office or in a Regus meeting room. Such materials must clearly be marked for shredding.

For hearings take place at a Regus meeting room, arbitrators should alert the Regus onsite representative that documents marked to be shredded remain in the room. Arbitrators should not expense these costs; Regus will bill FINRA directly to shred the arbitrators' documents.

For Hearings Held Outside a FINRA Office or Regus Conference Facility

Arbitrators should encourage the parties to take their respective materials with them. Likewise, the arbitrators should take their copies of the case-related materials with them when they leave and either shred them at home or return them to FINRA for proper disposal. Please see the section of the Guide on Ethical Considerations Regarding Information Security.

Hints for the Chairperson

Although the chairperson casts one vote in all matters, the chairperson presides over the arbitration proceeding, and his or her approach will influence the panel's effectiveness.

The chairperson should make special efforts to:

- become familiar with all matters that may be presented;
- discuss with FINRA staff what motions will be presented;
- read into the record all agreed-upon dates and times for future sessions;
- ensure that all witnesses are sworn; and
- confirm that the record is complete.

The chairperson should be prepared to:

- tell counsel to avoid repetitive and irrelevant matters;
- maintain decorum;
- instruct a witness, when appropriate, to answer only the questions asked and not testify on matters unresponsive to questions;
- ask counsel to speed up a line of questioning when possible;
- advise counsel that they should have sufficient copies of all exhibits;
- encourage parties to agree on the introduction of documents as joint exhibits.

Additional Resources

[Civility in Arbitration online training](#)
[Chairperson online training](#)

PART TEN: AFTER THE EVIDENTIARY HEARING

Deliberations

Arbitrators have a duty to participate in making final and binding decisions with regard to all important procedural issues, properly submitted claims and costs.

Arbitrators should begin the deliberation process after the hearing closes. Arbitrators should not attempt to decide the final outcome of the dispute until all the evidence is received. The arbitrators may wish to review the hearing record, the pleadings and submissions and their notes before starting deliberations. Arbitrators may also request that the parties submit post-hearing briefs to help clarify issues.

After each panel member has reviewed the case information, the chairperson should begin the discussion by asking the panel members to express their individual views of the case. All arbitrators must take part in deliberating the facts and issues, and their observations and opinions should be heard, acknowledged and considered. The panel should proceed with the deliberation in the following order:

- determine the facts of the case by evaluating the credibility of the witnesses and the relevance of the testimony;
- determine the facts of the case by evaluating the relevance of the documents;
- apply the law to the facts; and
- reach a decision.

[FINRA Rule 12410](#) of the Code states that all rulings and determinations by the panel shall be by a majority of the arbitrators. A decision on liability, too, requires a majority vote. While a decision requires at least two panel members agree on liability, the reasons behind their determinations may differ. For example, a party may present several theories to support its argument on liability. As long as two panel members agree on liability, even if based on different theories, the panel may make a finding on the party's behalf. If the claimant's claim is separated into specific issues, the arbitrators will probably want to separate their analysis and decision by issue, too.

Arbitrators are not strictly bound by legal precedent or statutory law. However, it is important that arbitrators not manifestly disregard the law. By doing so, your award may be vacated. In other words, if the parties have provided the panel with the law, the law is clear, and it applies to the facts of the case, the arbitrators should not disregard it.

As mentioned in the previous section of this Guide, parties may have changed their initial damage requests during the course of discovery or the evidentiary hearing. If a party's final damage request amount is different from what the party requested in an earlier pleading, then these new final damage requests, as well as the parties' original requests as specified in their pleadings, should be considered during the panel's deliberations and reflected in the award.

Rendering the Award

Arbitrators must render an award as soon as possible. [FINRA Rule 12904](#) provides that arbitrators should endeavor to render an award within 30 business days from the date the record is closed. Pursuant to [FINRA Rule 12608](#), the panel will decide when the record is closed.

Form of the Award

[FINRA Rule 12904](#) also requires that all awards must be in writing and signed by a majority of the arbitrators. All awards rendered are final and are not subject to review or appeal within FINRA. FINRA staff provides the panel with an [Award Information Sheet](#) prior to a hearing. This document contains a number of questions about the hearing. By answering all of the questions on the [Award Information Sheet](#), the panel ensures that it has considered all necessary items to enter an award.

FINRA staff will prepare an award based on the information in the [Award Information Sheet](#). Arbitrators should review carefully the award to ensure that it is accurate, and that all issues have been clearly decided before signing it. All FINRA awards are publicly available in the FINRA [Arbitration Awards Online Database](#).

All awards must include the following:

- the names of the parties;
- the names of parties' representatives, if any;
- an acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;
- a summary of the issues, including the type(s) of any security or product, in controversy;
- the damages and other relief requested;
- the damages and other relief awarded;
- a statement of any other issues resolved;
- the allocation of forum fees and other fees allocable by the panel;
- the names of the arbitrators;
- the date the claim was filed and the award rendered;
- the number and dates of hearing sessions;
- the location of the hearings; and
- the signatures of the arbitrators.

Awards do not have to be unanimous. The rules provide that a majority of the panel must agree with the award and sign the final award document. An arbitrator who disagrees with the award may note the dissent.

Explained Decisions

[FINRA Rule 12904](#) provides that the parties may **require** the arbitrators to write an explained decision. If the parties submit a joint request for an explained decision at least 20 days before the first scheduled hearing date, the chairperson is required to draft an explained decision and will receive an additional honorarium of \$400. The explained decision is a fact-based award stating the general reason(s) for the panel's decision. Arbitrators are not required to include legal authorities and/or damage calculations in the decision.

Absent a joint request from the parties for an explained decision, arbitrators may still include a written decision to be published within the body of the award if they believe that an explanation for the award would benefit the parties. However, if the panel decides on its own to write an explained decision, or at the request of only one party, then no panel member will receive an honorarium for writing the decision.

Note that an award granting a motion to dismiss must be accompanied by a written explanation under [FINRA Rule 12504\(a\)](#), as must an award granting expungement of customer dispute information under [FINRA Rule 12805](#). For more information on writing an explained decision, view our [training course](#) available online.

Types of Remedies

Depending upon the relief parties request, there are several types of remedies arbitrators may consider. If the panel is satisfied by a preponderance of the evidence that the respondent is liable for the alleged loss, the panel should determine an appropriate remedy. Remedies may include:

Actual Damages and/or Statutory Damages

Actual damages, sometimes called compensatory damages, are a monetary sum required to compensate a party for their loss. These include:

Net Out-of-Pocket Losses

The calculation of a claimant's net out-of-pocket losses varies depending on whether the panel finds the wrongful conduct involves one or more specific trades or the management of an entire account. For specific trades, net out-of-pocket loss is the purchase price of the security plus commissions minus the total of the value of the security on the relevant date plus dividends or interest received. For wrongful conduct involving an entire account, net out-of-pocket losses are calculated by taking the beginning account value, plus money and securities deposited, minus money and securities withdrawn, less account value on the relevant date. Arbitrators should look to the parties for instructions on these issues.

In addition, some claimants may argue that to award "full compensatory damages" it is necessary to look beyond a claimant's net out-of-pocket loss. These "special" or consequential damages might include:

- lost profits in the form of dividends on stocks sold because of wrongdoing;
- taxes the claimant incurred because of the wrongdoing;
- loss of available funds in the claimant's business;
- loss of financing; and
- commissions paid.

Benefit of the Bargain

The benefit of the bargain measure seeks to give the claimant the expected value of the investment. For example, the claimant's measure of damages would be the amount the investment would have been worth if the respondent's misrepresentation had been true, less what the investment is actually worth. The difficulty with applying the benefit of the bargain measure of damages is determining, with some specificity, the profits that the claimant would have reasonably received.

Well-Managed Portfolio Account

This measure of damage allows the claimant to recover the difference between what the claimant's account made or lost versus what a well-managed account, given the investor's objectives, would have made during the same time period.

Statutory Damages

Sometimes, a claim will be based upon a statute that explains how damages should be calculated. If a claim is based upon such a statute, the panel should look to the parties for guidance on how the law requires damages to be calculated.

Other Remedies

Rescission

Rescission is designed to place the claimant in the same position occupied before the wrongful transaction. It may include the return of the securities at issue.

Disgorgement

The arbitration panel may require the respondent to disgorge profits or commissions. The goal of disgorgement is to make the wrongdoing unprofitable

and therefore deter the wrongdoing. Disgorgement might be available even where the claimant has not suffered net out-of-pocket losses.

Specific Performance

Specific performance requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. If the arbitrators determine that specific performance is an appropriate remedy for a case, the award should be specific and clear with respect to:

- the action to be taken;
- the individual who will take the action; and
- if appropriate, when the action will take place.

For example, a panel might determine that rescission of a transaction or agreement is the only way to place the parties back in the position they were before the wrongdoing. If the arbitrators award damages and the claimant has not yet sold the securities, the award should direct what happens to the securities—whether the claimant retains them, sells them, or returns them to the firm, and under what conditions.

Injunctive or Permanent Relief Available in Industry Cases

Temporary Injunctive Relief: Pursuant to [FINRA Rule 13804](#), parties who want a temporary injunction must file for such relief in court. The only related relief available in arbitration at FINRA is for a permanent injunction.

Permanent Relief: [FINRA Rule 13804](#) provides the legal standard an arbitration panel should apply when deciding a request for a permanent injunction. The panel should apply the choice of law as indicated in the parties' agreement, or the law of the state where the events occurred, if the parties do not have an agreement.

Under [FINRA Rule 13804](#), once the panel has heard all evidence on the request for a permanent injunction, it may prohibit the parties from seeking an extension of a court-issued temporary injunction. Arbitrators do not have the authority to modify or dissolve a court's order. However, arbitrators may order the parties to jointly move to modify or dissolve the temporary injunction. If a panel's order conflicts with a pending court order, the panel's order will become effective when the court's order expires.

Requests to Include Interest as Part of the Award

If a party requests the panel to include interest as part of the award, the panel should review the following issues:

- statutory or contractual basis that allows interest to be awarded;
- amount of or rate of interest;
- date interest begins; and
- date interest ends.

The interest rate can vary by jurisdiction and case. Some states specify the legal rate of interest that may be awarded in legal matters. Other jurisdictions use Internal Revenue Service rates or those on treasury bills. In some cases, panels select the rate of interest the broker applies to its own customers for outstanding debts. In general, when awarding interest a panel should apply a reasonable rate that is based on the facts of the case.

With respect to when interest begins to accrue, the arbitrators will generally apply interest from the date a contract was breached or the time the panel determines that a debt became due or payable.

Requests to Include Punitive Damages as Part of the Award

Upon a party's request, arbitrators may consider punitive damages as a remedy if a respondent has engaged in serious misconduct that meets the standards for such an award.

Punitive damages are not intended to right a wrong, but are intended to punish the wrongdoer and to deter future wrongdoing. The standards for awarding punitive damages vary from state to state. While most states permit punitive damages only for conduct that is malicious or intentional, some states permit punitive damages for reckless indifference to the rights of others or for gross negligence.

If punitive damages are awarded, the arbitrators should clearly specify what portion of the award is intended as punitive damages. In addition, arbitrators should include in the award the basis for awarding punitive damages. If the panel needs additional information to determine the basis for awarding punitive damages, it should ask the parties to brief the issue to help determine whether both factual and legal bases exist for such an award.

Awarding Sanctions, if Any

If the panel issues sanctions, pursuant to [FINRA Rule 12212](#), it must include this information in the award. Arbitrators should not make sanctions against parties payable to FINRA as FINRA is not a party to the proceeding. Awards containing monetary sanctions payable to FINRA are inappropriate. Please see the section of this Guide on Issuing Sanctions for additional information.

Awarding Fees and Costs

Arbitrations involve a number of fees and expenses, and the panel decides which party must pay these costs. The panel may ask FINRA staff to provide a summary of all fees that have been incurred as a result of the arbitration, as well as payments made by each party. This section addresses separately the following fees and costs: forum fees; attorneys' fees; witness and production fees; and other case-related costs.

Forum Fees

A party must remit a filing fee when it files a claim, counterclaim, third party claim or cross claim. The cost of the filing fee is based on the amount in dispute and the number of arbitrators assigned to hear a case. Schedules of fees can be found in [FINRA Rules 12900 through 12903](#), and [FINRA Rules 13900 through 13903](#). Also see the [Award Information Sheet](#) for guidance on allocating hearing session fees.

FINRA may temporarily waive fees if the party shows that it is unable to pay the filing fee and/or hearing session deposit. However, FINRA will also inform the party that the panel may still assess arbitration costs at the close of the case.

The total amount of forum fees the arbitrators may assess against the parties is based on the number of hearing sessions needed to complete the hearing. A hearing session includes any meeting between the parties and arbitrator(s) that lasts four hours or less. For example, if a hearing runs two days—eight hours each day—the parties are subject to an assessment of four hearing sessions.

The panel has the discretion to assess forum fees among the parties. In deciding how to allocate the forum fees, arbitrators may consider the following factors:

- temporary waivers of filing fees or hearing session deposits granted because of financial hardship;
- actions by any party that may have prolonged the length of the hearing;
- the legitimacy of arguments made or positions taken;
- disruptions or time delays caused during hearing sessions; and
- the ultimate merits of the case (*i.e.*, who prevailed or substantially prevailed).

Arbitrators should remind the parties periodically that they may be assessed forum fees at the conclusion of the hearing. Although liability may be considered when deciding how to assess fees, it is not the only factor when deciding to assess forum fees.

If the panel elects to assess a postponement fee in its award, it should consider the same factors used in assessing forum fees when assessing this fee. For example, if a party requested and was granted a postponement because another party failed to produce documents, the panel might consider assessing the fee against the non-producing party in the award.

Attorneys' Fees

You may award attorneys' fees when, for example: 1) the parties' contract includes a clause that provides for attorneys' fees; 2) the governing law provides for attorneys' fees when all of the parties request or agree to such fees; 3) the fees are required or permitted as part of a statutory claim; or 4) as otherwise provided by law. FINRA does not provide guidance on whether arbitrators may award attorneys' fees. The law may vary widely and may require interpretation that FINRA, as a neutral forum, will not provide. In addition, you should not conduct your own legal research.

If a party requests the recovery of attorneys' fees and you have questions regarding the panel's authority to award such fees, you should request briefs from the parties that identify the basis for awarding attorneys' fees.

If the panel determines that a party has a right to recovery, that party must prove the amount to the satisfaction of the panel. The panel may permit testimony or evidence to be submitted during the case-in-chief, or in post-hearing written submissions.

Witness and Production Fees

Occasionally, parties may request that the arbitrators direct reimbursement for expenses of a witness, and the costs associated with producing documents. When reviewing witness fees, arbitrators should follow the rule in the applicable jurisdiction. If necessary, the panel should ask the parties to brief the issue.

Usually, each party is responsible for producing and copying documents that they intend to use. According to [FINRA Rule 12513](#) the party requesting the production of documents shall bear all reasonable costs of production, unless the panel directs otherwise. On larger cases, a party might ask that the requesting party come to the location of the documents and copy what is needed.

If the parties cannot agree on who should bear such fees, the panel must find a reasonable solution. After reaching a decision, the panel should memorialize it in an order or the award.

Other Case-Related Costs

The parties may request that the arbitrators direct reimbursement for other expenses, such as:

- cost of transcribing the record;
- travel costs—when the parties have traveled to the hearing and a party has caused the case not to go forward (last-minute postponement request);
- expert fees; and
- teleconference fees.

FINRA may also alert the panel to outstanding administrative costs such as:

- photocopying charges;
- mailing charges;
- unpaid postponement fees; and
- unpaid administrative costs.

A panel may assess each of these fees and costs in its award applying equitable principles.

Member Surcharge and Process Fees

Although arbitrators generally have wide latitude in determining how to assess fees and costs against the parties, they do not have discretion in allocating member surcharges and process fees.

[Rules 12901](#) and [12903](#) require a brokerage firm to pay a surcharge and process fees when the firm: 1) files a claim; 2) is named as respondent in a claim, counterclaim, cross claim or third party claim; or 3) employed an associated person at the time of the dispute who is named as a respondent in a claim, counterclaim, cross claim or third party claim.

Arbitrators may not reallocate any of the member surcharge or process fees paid by a firm to another party.

Arbitration Award Offsets

Absent specification to the contrary in the award, when arbitrators order opposing parties to make payments to one another, the monetary awards shall offset, and the party assessed the larger amount shall pay the net difference.

Expungement of Customer Dispute Information

Central Registration Depository

The Central Registration Depository (CRD[®]) is an online registration and licensing system that contains administrative and disclosure information about registered securities firms and brokers. FINRA maintains and operates the CRD system pursuant to FINRA rules and an agreement between FINRA and the North American Securities Administrators Association (NASAA), an association whose members include state and other securities regulators in the United States, as well as other securities regulators in North America.

The CRD system is used by members of the securities industry, state and federal regulators and self-regulatory organizations (SROs). FINRA works with NASAA, the Securities and Exchange Commission (SEC), other members of the regulatory

community and brokerage firms to ensure that information in the CRD system is accurate and complete.

The CRD system has several important uses:

- Investors rely on CRD information, most of which is available to them through [FINRA BrokerCheck](#)⁴, when making decisions about whether to do business with a particular broker or brokerage firm.
- Regulators use CRD to fulfill their regulatory responsibilities.
- Regulators also use the CRD system as a regulatory tool (e.g., to help identify trends or potential threats to investor protection).
- Brokerage firms rely on CRD when making hiring decisions.

Reporting Requirements

In general, the information on the CRD system is submitted by registered securities firms and regulatory authorities in response to questions on the [uniform registration forms](#). These forms are designed to elicit and collect administrative and disclosure information that is relevant to regulators in connection with their licensing and enforcement activities. Securities firms and regulatory authorities may report a variety of disclosure events to the CRD system, including civil judicial actions, criminal matters, customer disputes (customer complaints, arbitrations and court actions), employment terminations, internal reviews (*i.e.*, a review of a broker's conduct by his or her former firm), investigations, financial matters and regulatory actions.

Brokers who seek to expunge disclosure events from their CRD records generally look to remove a customer dispute, employment termination or internal review. For example, when a broker is named as a respondent in, or is the subject of, a customer-initiated arbitration proceeding, that event must be reported on the broker's Form U4. Once the event is reported, it is recorded on the broker's CRD record. To protect the broker's reputation, brokers may seek to have any reference to the arbitration removed from their CRD record. The process of permanently removing this information is known as "expungement."

Role of Arbitrators in Expungement Cases

Expungement is an extraordinary remedy that arbitrators should recommend only under appropriate circumstances. Arbitrators should recommend expungement of customer dispute information only when it has no meaningful investor protection or regulatory value. Once information is expunged from the CRD system, it is permanently deleted

⁴ Although public investors cannot access the CRD system, most of the information submitted to CRD is made publicly available through [FINRA BrokerCheck](#). BrokerCheck is a free online tool that provides the public with information on the professional background, business practices and conduct of current and former FINRA registered securities firms and brokers.

and no longer available to the investing public, regulators or prospective broker-dealer employers.

Arbitrators have a unique, distinct role when deciding whether to recommend expungement of customer dispute information from a broker's CRD record. Customer dispute information includes allegations of misconduct made by customers against brokers in complaints, arbitrations and court actions. In making these determinations, arbitrators must consider the importance of maintaining the integrity of the information in the CRD system.

Given this significant role, arbitrators should ensure they have all the information necessary to make an informed and appropriate recommendation on expungement. Arbitrators should request any documentary or other evidence they believe is relevant to the expungement request. This is particularly important in cases that settle before an evidentiary hearing or in cases where only the party requesting expungement participates in the expungement hearing.

Expungement Rules

Rule 2080: Grounds for Expungement

FINRA rules provide a framework for arbitrators to follow when considering requests to expunge customer dispute information. The framework is intended to ensure that arbitrators recommend expungement only when the information is found to have no meaningful investor protection or regulatory value.

Rule 2080 establishes procedures to ensure that expungement occurs only when the arbitrators find and document one of its narrow grounds:

1. the claim, allegation or information is factually impossible or clearly erroneous;
2. the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
3. the claim, allegation or information is false.

The panel must indicate in the arbitration award which of the Rule 2080 grounds for expungement serves as the basis for expungement. If the award does not contain this information, parties must name FINRA as a party in any court proceeding seeking or confirming expungement relief. FINRA will expunge customer dispute information from CRD only by court order pursuant to Rule 2080(a). If the arbitrators recommend expungement based on the specific findings described in Rule 2080, FINRA may waive its right to be named as a party to the judicial expungement proceeding, thus waiving its right to oppose the request.

Rule 2081: Prohibited Conditions Relating to Expungement

Effective July 30, 2014, [FINRA Rule 2081](#) prohibits firms and registered representatives from conditioning settlement of a customer dispute on—or otherwise compensating a customer for—the customer’s agreement to consent to, or not to oppose, the firm’s or representative’s request to expunge such information from CRD. Arbitrators must be aware of the new rule when they conduct expungement hearings. Please see [Regulatory Notice 14-31](#).

Rule 12805: Expungement of Customer Dispute Information

[FINRA Rule 12805](#) provides enhanced safeguards designed to make sure that arbitrators have the opportunity to consider the facts that support or weigh against a decision to recommend expungement, and ensure that expungement occurs only when the arbitrators find and document one of the narrow grounds specified in [FINRA Rule 2080](#).

Before ruling on requests to recommend expungement of customer dispute information under Rule 2080, the panel must complete the following under Rule 12805:

1. Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This requirement also applies to cases administered under Rules 12800 and 13800 (Simplified Arbitration) even if a customer or claimant did not request a hearing on the merits.
2. In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement.
3. Indicate in the arbitration award which of the Rule 2080 grounds for expungement serves as the basis for recommending expungement and provide a brief written explanation of the reasons for the panel’s finding.
4. Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

Settled Cases

Settled cases involving expungement requests present unique challenges. Investors often stipulate to the expungement request or declare that they are not opposed to expungement and rarely attend the required expungement hearing. Typically, because the case has settled, there has been no hearing on the merits and, thus, no testimony or documentary evidence presented before the parties reach settlement. If a hearing on the merits has not been held, arbitrators must convene a hearing on the record to specifically address expungement. The broker or firm requesting expungement must demonstrate to the arbitrators that the facts provide a basis for expungement under one of the grounds in Rule 2080.

It is important to allow customers and their counsel to participate in the expungement hearing in settled cases if they wish to. Specifically, arbitrators should:

1. allow the customer and their counsel to appear at the expungement hearing;
2. allow the customer to testify at the expungement hearing;
3. allow counsel for the customer or a *pro se* customer to introduce documents and evidence at the expungement hearing;
4. allow counsel for the customer or a *pro se* customer to cross-examine the broker and other witnesses called by the party seeking expungement; and
5. allow counsel for the customer or a *pro se* customer to present opening and closing arguments if the panel allows any party to present such arguments.

When the investor does not attend the hearing, arbitrators will hear only the position of the party requesting expungement. Even if the opposing party does not appear at the expungement hearing, the party seeking expungement must still demonstrate to the arbitrators that expungement would be appropriate under one of the grounds in Rule 2080. The panel should not rely on the fact that the claimant did not appear at the expungement hearing as a factor weighing in favor of or against recommending expungement. In the absence of an opposing party, arbitrators should ask questions of the broker or firm and request any other evidence they believe is relevant to the expungement request.

Arbitrators must critically evaluate the settlement and determine whether it raises any concerns. Particularly, arbitrators should question whether expungement is appropriate in situations where the broker, or the firm, has agreed to pay a large monetary settlement—a settlement amount beyond a nuisance value. Arbitrators should evaluate whether a financial settlement raises questions about some culpability on the part of the broker or firm. If arbitrators nevertheless recommend expungement, they should explain in their written rationale why expungement is still appropriate despite a large settlement.

Arbitrators should also inquire and fully consider whether a party conditioned a settlement of arbitration upon agreement not to oppose the request for expungement. This is particularly important in cases where the investor does not participate in the expungement hearing or the requesting party indicates that the investor does not oppose the expungement request.

Effective July 30, 2014, Rule 2081 prohibits firms and registered representatives from conditioning settlement of a customer dispute on—or otherwise compensating a customer for—the customer's agreement to consent to, or not to oppose, the firm's or representative's request to expunge such information from CRD. This prohibition applies to written and oral agreements and to agreements entered into during the course of settlement negotiations, as well as to any agreement entered into, separate from such negotiations. The rule also precludes such agreements even if the customer offers not to oppose expungement as part of negotiating a settlement agreement, and applies to any settlements involving customer disputes, not only to those related to arbitration claims. In addition, Rule 2081 precludes the firm or broker, following

settlement of the underlying customer dispute, from compensating the customer in return for not opposing the expungement request.

A stipulated award that contains a prohibited condition casts doubt on the integrity of the process. Arbitrators should not accept a stipulated award that contains documentation of an offer that would violate Rule 2081. Arbitrators who learn of such prohibited conditions should review FINRA's information relating to [Disciplinary Referrals](#).

As with all requests seeking expungement of customer dispute information, arbitrators must affirmatively find and document one or more of the grounds under Rule 2080 and satisfy the procedural requirements under Rule 12805 before recommending expungement.

Expungement-Only Cases

In some instances, an associated person will file an arbitration claim against a member firm solely for the purpose of seeking expungement, without naming the customer in the underlying dispute as a respondent. To ensure that customers know about the expungement request, arbitrators should order the associated persons to provide a copy of their Statement of Claim to the customer(s) involved in the underlying arbitration.

It is particularly important to note that without this directive from the arbitrators, the customer(s) may not even be aware that an expungement claim is pending regarding their prior dispute. Additionally, notice provides the customer(s) with the opportunity to advise the arbitrators and parties of their position on the expungement request, which may assist arbitrators in making the appropriate finding under Rule 2080. The position of the customer(s) can be made known in writing or through participation in the expungement hearing.

BrokerCheck Report Review

Arbitrators should ask the broker seeking expungement (or the party seeking expungement on behalf of the broker) to provide a current copy of the broker's BrokerCheck report. Arbitrators should review the information on the report that the broker is seeking to expunge. Arbitrators should also pay attention to the "Disclosure Events" section when considering whether expungement is appropriate. This section shows the broker's additional disclosures, if any, that arbitrators should consider before recommending expungement. Specifically, this section shows all regulatory actions, civil judicial actions, investigation disclosures, customer complaints, criminal matters, financial matters and arbitrations and court actions in which a broker has been involved. For example, a disclosure event may include regulatory information that may be relevant to the matter that is the subject of the expungement request. In such cases, arbitrators should consider the regulatory information when determining whether an

expungement recommendation is appropriate. Reviewing the report allows arbitrators to consider the expungement request in the context of the broker's entire securities industry employment record. Additionally, arbitrators should ask whether the broker has other pending expungement requests. If a broker is requesting expungement in more than one case, arbitrators should consider the circumstances under which multiple requests are being made. This may be a factor in their decision to recommend expungement.

Awards and Expungements

If, after considering the required factors, a panel decides that expungement is appropriate in a customer dispute, the record will be expunged from the CRD system only if the panel clearly identifies and documents in the award one or more of the standards under Rule 2080, and the award is confirmed by a court of competent jurisdiction. Arbitrators must affirmatively find and document one or more of the grounds under Rule 2080; these findings cannot be implied in the award.

Rule 12805 requires arbitrators to indicate which of the Rule 2080 grounds for expungement serves as the basis for expungement and provide a brief written explanation of the reasons for recommending expungement under Rule 2080. The written explanation should be fact-based and should clearly connect the arbitrators' reasons for recommending expungement to the Rule 2080 expungement standard they cited. Inclusion of legal authorities and damage calculations is not required. The panel must assess forum fees for hearings sessions held solely for the purpose of considering expungement against the parties requesting expungement relief.

If a party requests expungement, arbitrators must provide their findings on expungement in the [Award Information Sheet](#) or the [Award Information Sheet – Sole Topic is Determination of Expungement of Customer Dispute Information](#) they complete at the end of the case. In some cases, FINRA staff may ask for additional information to satisfy the requirements under Rules 2080, 2081 and 12805. Arbitrators should be responsive to staff inquiries.

Expungement in Intra-Industry Disputes

Rules 2080, 2081 and 12805 do not apply to intra-industry disputes, unless the information to be expunged involves customer dispute information. For example, a broker might request expungement of the reason for termination (e.g., failure to meet production standards) reported on his or her CRD record by a former employer. Since this request does not involve customer dispute information, arbitrators may recommend expungement of this information from CRD without addressing the standards set forth in Rule 2080 or the procedural requirements under Rule 12805. FINRA will expunge the referenced information if the award is confirmed by a court of competent jurisdiction.

If the arbitrators recommend expungement of non-customer dispute information and also determine that the information is defamatory in nature, FINRA will expunge the information without a court order. When requesting expungement in these situations, parties should present evidence to the arbitrators that demonstrates that the information in the broker's CRD record is defamatory in nature, thereby portraying the broker in a negative light. If the arbitrators are satisfied that the information is defamatory in nature, they must clearly state in the award that they are recommending expungement based on the defamatory nature of the information in the CRD system. Arbitrators, however, are not required to find or to state explicitly in the award that all elements required to satisfy a claim in defamation under governing law have been met.

Parties Making Second Requests for Expungement

When an arbitration panel has issued an award denying a broker's expungement request, the broker may not request expungement in another arbitration case. Therefore, arbitrators should ask a party requesting expungement whether an arbitration panel previously denied expungement of the customer dispute information at issue. If there has been a prior denial, the arbitration panel must deny the expungement request and contact FINRA staff for assistance.

Additional Resources

[Expungement online training](#)

[The Neutral Corner, Volume 2—2010](#)

[The Neutral Corner, Volume 1—2012](#)

[Notice to Arbitrators and Parties on Expanded Expungement Guidance](#)

[The Neutral Corner, Volume 4—2013](#)

PART ELEVEN: AFTER THE CASE CLOSES

Avoiding Party Contact

Communications with the parties should be scrupulously avoided even after the proceedings are concluded. If a party contacts an arbitrator after the hearing closes, the arbitrator should notify FINRA staff immediately. A party should not directly contact arbitrators under any circumstances. Arbitrators should contact FINRA staff immediately if questioned about a case, asked to testify, asked to sign an affidavit, or threatened with a lawsuit by a party.

Party Submissions to Arbitrators After a Case Closes

[FINRA Rule 12905](#) provides that parties may not submit documents to arbitrators in cases that have been closed except under the following limited circumstances: 1) as ordered by a court; 2) at the request of any party within 10 days of service of an award or notice that a matter has been closed, for typographical or computational errors, or mistakes in the description of any person or property referred to in the award; or 3) if all parties agree and submit documents within 10 days of service of an award or notice that a matter has been closed. Any documents, if submitted, must be sent through FINRA.

Maintaining Confidentiality

Even after a decision is reached in the case, arbitrators have a continuing obligation to maintain confidentiality. Therefore, arbitrators should not discuss what occurred during the hearing with individuals outside the hearing room, including friends, family members and colleagues. All matters relating to the arbitration (including the pleadings, motions, evidence and panel deliberations) are confidential. Discussions held during executive sessions must also remain confidential. FINRA will distribute the award at the end of the case and will make it available on its website; this is not the responsibility of the arbitrators.

Arbitrators should keep the following in mind when observing confidentiality guidelines:

- Arbitrators generally enjoy quasi-judicial privilege for their deliberations and thought processes. However, discussing the basis for the panel's award with an outside person may waive this immunity for the arbitrators on the case.
- Always assume someone is listening. Discussions on elevators, in rest rooms and in restaurants can be overheard.

Maintaining confidentiality is extremely important. By discussing a case, a panel member may waive the right to arbitral immunity for him or herself as well as for the other panel members.

Arbitrator Immunity

Arbitrators have immunity from civil liability that may arise out of their conduct while serving as arbitrators. With respect to testimony, arbitrators generally have a quasi-judicial privilege from discussing the basis for their decisions. If arbitrators are named in an action or proceeding relating to their service on a case, FINRA will provide legal counsel and indemnify arbitrators. However, arbitrators are not immune from liability for misconduct that is punishable by law, such as fraud or corruption. Arbitrators can be liable for acts they commit while serving as an arbitrator that are not related to their role as arbitrators.

Another important aspect of maintaining confidentiality involves the disposal of materials and document retention. Arbitrators are not required to retain case-related documents after an evidentiary hearing is concluded or a case settles. However, FINRA recommends that arbitrators retain files for a short period after the conclusion of a case to address any motions filed after a case closes. If arbitrators do not wish to retain case-related documents, they should discard them in a manner that is consistent with preserving the confidentiality of the proceedings.

Evaluating Arbitrators

As part of FINRA's ongoing effort to improve the arbitration process, FINRA encourages arbitrators to complete the [Arbitrator Experience Survey](#) at the conclusion of every case. FINRA also asks parties to evaluate the arbitrators on their professionalism and conduct throughout the proceeding. FINRA staff evaluates arbitrators' performance at the end of the case.

Making Disciplinary Referrals

During the course of the hearing, arbitrators may hear evidence of serious wrongdoing that they believe warrants further investigation and possible disciplinary action. FINRA Office of Dispute Resolution relies on arbitration panels to refer appropriate matters for investigation. Arbitrators have sole discretion to make a disciplinary referral based on the evidence.

In general, arbitrators should refer matters that are of a regulatory interest. A disciplinary referral is not a recommendation that discipline be imposed, but a recommendation that FINRA conduct an investigation to determine whether disciplinary action is appropriate.

Post-Case Referral

Under [Rule 12104](#) at the conclusion of an arbitration, any arbitrator may refer to FINRA for investigation any matter or conduct that has come to the arbitrator's attention during

the arbitration, which the arbitrator has reason to believe may constitute a violation of the rules of FINRA, the federal securities laws or other applicable rules or laws.

Mid-Case Referral

Rule 12104 also allows an arbitrator to make disciplinary referrals during an ongoing arbitration in very limited circumstances. Any arbitrator may refer to the Director, any matter or conduct that has come to the arbitrator's attention during a hearing, which the arbitrator has reason to believe poses a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken. Examples of such a threat would include evidence of a Ponzi scheme or money laundering. You should not, however, make referrals during an arbitration based solely on allegations in the statement of claim, counterclaim, cross claim or third party claim. Dispute Resolution routinely provides copies of arbitration claims and other pleadings to other FINRA divisions to analyze for fraudulent securities activity or other possible rule violations. Thus, mid-case referrals based only on the pleadings are not necessary to apprise those divisions of possible wrongdoing. However, an arbitrator may make a mid-case referral based on evidence or testimony heard during the hearings.

If you believe that such a threat exists but the case is about to conclude, then you should wait until the case concludes to make a post-case referral as long as doing so would not materially compromise investor protection. For example, if during the third of four consecutively scheduled hearing days you learn of a serious threat that meets the criteria of the rule and anticipate that the remaining tasks to close the hearing will be completed shortly after the last hearing session on the fourth day, you could defer making the mid-case referral to avoid a significant delay to the conclusion of the case. In deciding whether to delay making the referral, you should weigh the potential harm a mid-case referral could have on the claimants (e.g., delay, additional expense) against the possible harm to non-party investors that a brief delay could cause.

Only the Director is authorized by Rule 12104 to evaluate the mid-case referral to determine whether it should be forwarded to other FINRA divisions to begin a regulatory investigation. Regardless of whether the mid-case referral is forwarded, FINRA will disclose to the parties that an arbitrator made a mid-case referral to the Director. After being notified of a referral, it is possible that a party may request that the referring arbitrator(s) recuse themselves. The rule requires that any such request be made no later than three days after FINRA notifies the parties of the referral or the party forfeits the right to request recusal of the referring arbitrator(s).

An arbitrator who is the subject of a recusal request because of a mid-case referral would not be required to grant the party's request. Consistent with any other recusal request, an arbitrator challenged because of a mid-case referral would be required to make the recusal decision in accordance with the Code and [Code of Ethics](#).

If the arbitration panel determines a referral is appropriate, it should complete the [Arbitrator Disciplinary Referral Form](#) and submit it online or forward it to the assigned staff person.

A single arbitrator may initiate a disciplinary action absent the consent of the panel. However, FINRA encourages arbitrators to discuss the matter with their co-panelists before initiating a referral.

Please see [Regulatory Notice 14-42](#) and FINRA's online [Basic Arbitrator Training](#) for more information about mid-case referrals.

Motions to Vacate an Award

Motions to vacate—if any—must be made through the courts. Typically, parties challenge awards on the grounds of arbitrator partiality. An award may also be challenged because of an arbitrator's conduct, such as failing to disclose relationships with the parties or counsel, exceeding authority, prejudicial conduct at the hearing, ambiguities or mistakes on the face of the award, corruption or fraud, unreasonable refusal to hear evidence or postpone a hearing and manifest disregard of the law.

In motions to vacate alleging arbitrator partiality or misconduct, arbitrators may be called to provide testimony about their conduct in an arbitration, or about an alleged conflict of interest. If an arbitrator is contacted in this context, the arbitrator should notify FINRA staff immediately and not discuss the matter with the party.

PART TWELVE: SIMPLIFIED CASES

Frequently Asked Questions for Simplified Cases

What is a simplified case?

Simplified cases involve claims of \$50,000 or less, not including interest and expenses. For customer cases under [Rule 12800](#), a single public arbitrator will be appointed to decide the case based on the pleadings and other materials submitted by the parties. If the case involves industry parties under [Rule 13800](#), a single, non-public arbitrator will be appointed to decide the case based on the pleadings and other materials submitted by the parties. Although a decision based on the pleadings is the default method, parties may request a hearing.

Can the parties request a hearing?

In a customer case under [Rule 12800](#), the customer may request a hearing. For industry cases under [Rule 13800](#), the claimant may request a hearing.

What kind of hearing options do parties have?

The customer or claimant may request a regular in-person hearing with a single arbitrator. The customer or claimant may also request a Special Proceeding.

What is a Special Proceeding?

A Special Proceeding is an intermediate form of adjudication that allows parties to argue their cases before a single arbitrator in a shorter, limited telephonic hearing. Special Proceedings are subject to the regular provisions of the Codes relating to prehearings and hearings, including fee provision, with several differences:

- A Special Proceeding is held by telephone unless the parties agree to another method of appearance.
- The claimants, collectively, are limited to two hours to present their case(s) and a half hour for any rebuttal and closing statement, exclusive of questions from the arbitrator and responses to such questions.
- The respondents, collectively, are limited to two hours to present their case and a half hour for any rebuttal and closing statement, exclusive of questions from the arbitrator and responses to such questions.
- The arbitrator has up to three hours to ask parties questions after the parties' presentations and may cede some of his or her allotted time to the parties.
- In no event can a Special Proceeding exceed two hearing sessions, exclusive of prehearing conferences.
- The parties are not permitted to question the opposing parties' witnesses.

- The customer cannot call the opposing party, a current or former associated person of a member party, or a current or former employee of a member party as a witness. Members and associated persons cannot call the customer of a member party as a witness.
- Members and associated persons cannot call an opposing party as a witness.

How are arbitrators appointed for simplified cases?

For simplified cases under [Rule 12800](#), one public arbitrator will be appointed to decide the case. The single arbitrator will be appointed from the FINRA chairperson roster using the Neutral List Selection System (NLSS), unless the parties agree in writing otherwise. For simplified cases under [Rule 13800](#), one non-public arbitrator from the chairperson roster will be appointed using NLSS.

Can the arbitrator request a hearing?

No, the arbitrator cannot request a hearing.

Can the arbitrator request additional information before deciding the case?

The arbitrator may ask the parties to submit additional information before deciding the case. The arbitrator may ask FINRA staff to request the information from the parties, and the parties will have 10 business days to respond to the arbitrator's request.

Can the parties request discovery?

The parties may request documents and other information from each other under [Rule 12800](#) or [Rule 13800](#). All requests for documents and other information must be served on all other parties, and filed with FINRA, within 30 days from the date that the last answer is due. Any response or objection to a discovery request must be served on all other parties and filed with FINRA within 10 days of the receipt of the requests. The arbitrator will resolve any discovery disputes.

If parties in simplified cases choose to conduct discovery, they should send a written communication advising the assigned FINRA staff person and all other parties that they are requesting that the assigned arbitrator allow time for the completion of discovery and the filing of additional submissions, if any.

Does the Discovery Guide apply to simplified cases?

For customer disputes only, the [Discovery Guide](#) outlines documents that the parties should exchange without arbitrator or staff intervention. The Discovery Guide is not intended for use in simplified arbitrations under [Rule 12800](#). However, the arbitrator may, in his or her discretion, choose to use relevant parts of the Discovery Guide in a manner consistent with the expedited nature of simplified proceedings.

What happens if a party increases the amount claimed to more than \$50,000?

The arbitration will no longer be administered under [Rule 12800](#) or [Rule 13800](#), and the regular provisions of the Codes will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under [Rule 12401](#), the remaining arbitrators will be appointed by the Director in accordance with [Rule 12403\(c\)](#) or [Rule 12403\(d\)](#). If no arbitrator has been appointed, the entire panel will be appointed in accordance with NLSS.

If a party files a counterclaim for unspecified attorneys' fees and costs, would the parties be precluded from proceeding under the simplified rules?

A counterclaim requesting only unspecified attorneys' fees and costs would be considered a request for expenses, and it would not be included in the total amount in dispute. Therefore, a counterclaim for attorneys' fees and costs would not raise the total amount in dispute beyond the \$50,000 limit, and the case would continue to proceed under the simplified rule.

What happens when an expungement request is made in a simplified case?

In simplified cases, a hearing is normally held only at the request of a customer or claimant. However, Rules 12805 and 13805, which outline procedures for the expungement of customer dispute information under Rule 2080, require arbitrators to hold a hearing session to determine the appropriateness of an expungement request. Therefore, the arbitrator in a simplified case must hold a hearing before deciding an expungement request, even if the customer or claimant did not request a hearing. The arbitrator will assess any forum fees for hearing sessions on a request for expungement against the parties making the request.

Are there special procedures for cases involving a promissory note?

If the respondent does not file an answer in a case involving a promissory note—regardless of the amount in controversy—FINRA will apply the simplified procedures in [Rule 13800\(d\)](#). Similar to simplified cases involving other types of disputes, the simplified discovery procedures outlined in [FINRA Rule 13800\(d\)](#) will apply, and the single arbitrator assigned to the case will decide the case based on the pleadings and other materials submitted by the parties. No hearing will be held.

The arbitrator may ask the parties to submit additional information before deciding the case. FINRA staff will request the information from the parties, and the parties will have 10 business days to respond to the arbitrator's request. When the arbitrator is ready to make a decision, the arbitrator should complete the [Promissory Note Case Checklist](#) (rather than the [Simplified Case Checklist](#)).

If the associated person in a case involving a promissory note files an answer (but does not seek any additional relief or assert any counterclaims or third party claims), regular

discovery procedures will apply and, regardless of the amount in controversy, the single arbitrator will hold a hearing.

Arbitrators may review [Regulatory Notice 09-48](#) for further guidance on procedures for promissory note cases.

Can the parties request an explained decision in simplified cases?

Parties will not be able to require explained decisions in simplified arbitrations that are decided without a hearing. Explained decisions are not appropriate in simplified arbitrations because of the abbreviated nature of the proceedings.

How much time does an arbitrator have to render a decision?

An arbitrator should promptly endeavor to make a decision in a simplified case.

Are there special forms I need to complete at the end of the case?

When the arbitrator is ready to make a decision, the arbitrator must complete the [Simplified Case Checklist](#) and submit it FINRA. FINRA will then draft an award based on the arbitrator's findings and send it to the arbitrator for review and signature before serving the award to the parties.

For promissory note cases, arbitrators should complete the [Promissory Note Case Checklist](#).

What is the honorarium for serving on a simplified case?

FINRA will pay the arbitrator an honorarium of \$350 for deciding a simplified case under [Rule 12800](#) or [Rule 13800](#).

Additional Resources

[Regulatory Notice 09-48](#)

[Regulatory Notice 18-21](#)

[Video: Special Proceeding for Simplified Arbitration](#)

EXHIBIT 8

Updated October 1, 2018

Award Information Sheet

Case Number: _____

To promptly prepare the award, FINRA needs certain information from the panel. Please make every effort to send this form to your case administrator within 24 to 48 hours after the panel has decided the case. For example, within 24 to 48 hours of the last hearing session, the panel's deliberation session or the post-hearing submission due date.

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Please complete Parts I–III for ALL cases:	
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Part I: General

1. Who did counsel/representative for Claimant state that they want reflected on the Award as counsel/representative?

2. Who did counsel/representative for Respondent state that they want reflected on the Award as counsel/representative?

3. Change of party representation, if any?

4. Parties who did not appear, if any?

5. Did a party file a motion to dismiss during the evidentiary hearing?

Yes No (if No, please proceed to Question 6)

a) Which party filed the motion?

Claimant Respondent

If more than one Claimant or Respondent, please identify the moving party:

b) Was the motion to dismiss filed before or after the conclusion of the non-moving party's case-in-chief?

Before After

Briefly describe the basis for the motion and the opposition:

c) Was the motion granted or denied?

Granted* Denied

- *If granted, describe the basis for the panel's decision on the motion:

6. Hearing dates, with the time the evidentiary hearing started and concluded, excluding deliberation sessions:

Date:_____ Start time:_____ Lunch start:_____ Lunch end:_____ Stop time:_____

Date:_____ Start time:_____ Lunch start:_____ Lunch end:_____ Stop time:_____

Date:_____ Start time:_____ Lunch start:_____ Lunch end:_____ Stop time:_____

Date:_____ Start time:_____ Lunch start:_____ Lunch end:_____ Stop time:_____

Date:_____ Start time:_____ Lunch start:_____ Lunch end:_____ Stop time:_____

7. Was any party's final damage requests presented at the close of the evidentiary hearing different from what were requested in their pleading requesting damages? (See *Hearing Script, section T*)

Yes* No

- *If Yes, please identify the party and its final damage request below:_____
-
-
-

8. Did anything unusual occur at the evidentiary hearing that the panel wishes to include in the award? For example, motion for recusal; withdrawal of counsel; or a party's concern about fairness.

Yes* No

- *If Yes, please describe below and attach additional pages if necessary:
-
-
-
-

Next Step: Please complete Part II: Award

PART II: Award

Use The Following Pages To Ensure That The Panel Decided All Claims And Other Relief Requests.

Initial Claim *(Please refer to Part V for any Counterclaims/Cross-Claims/Third Party Claims)*

_____ shall

[Party/Parties]

pay to _____

[Party/Parties]

1. Compensatory damages, please state amount awarded or state denied:

2. Punitive or RICO damages awarded, if any? _____

- Authority for Punitive or RICO Damages (e.g., brief description of legal citation):

3. Interest awarded?

Yes No

- Specifically indicate the percentage of interest or daily rate awarded.

- Date interest on the award begins to accrue?

- Date interest on the award ceases to accrue?

4. Attorneys' fees awarded?

Yes No

- Amount awarded: _____

- Authority for attorneys' fees (e.g., specify statute, contract or other legal authority):

5. **Costs** awarded? (Please note: costs do not include FINRA forum fees. *Please refer to Part III: Forum Fees to assess FINRA forum fees*)

Yes No

Amount awarded: _____

**Please note that per Rule 12901/13901 and 12903/13903, the Member Surcharge and Member Process Fees paid by FINRA member firms may not be allocated to another party.*

6. **Other damages** awarded, if any? (e.g., witness fees):

7. **Specific performance** granted, if any? Please describe completely and attach additional pages if necessary:

8. Is the award **joint and several** against two or more parties? Yes* No

- *If Yes, the award is joint and several against the following respondents:

9. **Injunctive relief** granted, if any? *If yes, please complete Part VII: Injunctive Relief.*

Next Step: Please complete Part III: Forum Fees

Part III: Forum Fees

1. Provide below the specific parties against whom the evidentiary hearing forum fees are to be assessed. Please specify the percentage.

Claimant(s) _____ %
_____ %
Respondent(s) _____ %
_____ %

2. Please indicate whether forum fees are to be assessed **jointly and severally** against any of the parties.

Yes* No

- *If Yes, please state below the parties to be assessed **jointly and severally**.

3. Provide below the specific parties against whom the pre-hearing fees and motion fees are to be assessed. Please specify the percentage. (*You may indicate below if previous assessments should be used*)

Claimant(s) _____ %
_____ %
Respondent(s) _____ %
_____ %

4. Do you wish to maintain the preliminary fee assessments made in your pre-hearing conference order(s) and decisions for discovery related motions or contested subpoenas decided on the papers, if any, that differ from the above assessment?

Yes, please utilize assessments contained in prior orders

No, please use assessment above

Please note, hearing session fees for any motions to dismiss that were filed pursuant to Rules 12206 and/or 12504 will be assessed to the moving party if the panel denied the motion.

5. Please indicate whether you wish to have Respondent(s) reimburse Claimant(s) for the non-refundable portion of any claim-filing fee paid to FINRA Office of Dispute Resolution.

Yes No

Disciplinary Referral

6. Is the panel making a disciplinary referral? Yes* No

- *If Yes, please complete the [Arbitrator Disciplinary Referral Form](#).

Exhibits and Hearing Materials:

7. Has the panel returned one set of hearing exhibits to FINRA? Yes No

8. Has the panel returned the witness and exhibit lists to FINRA? Yes No

9. Has the panel returned extra copies of hearing materials to FINRA or shredded the documents? Yes No

Next Step: If applicable, please complete Part IV: Expungement; Part V: Counterclaim/Cross-Claim/Third Party Claim; and/or Part VI: Explained Decision.

Part IV: Expungement

Note: Expungement is an extraordinary remedy that should be recommended only under appropriate circumstances. Customer dispute information should be expunged only when it has no meaningful investor protection or regulatory value. Once information is expunged from the CRD system, it is permanently deleted and thus no longer available to the investing public, regulators or prospective broker-dealer employers.

1. Does a party (or unnamed party) seek expungement?

- Yes - state the name: _____
- No - please proceed to Part V: Counterclaim/Cross-Claim/Third Party Claim; and/or Part VI: Explained Decision (if applicable)

2. Was the expungement request made:

In a Pleading (i.e. Statement of Claim or Answer)?

In a Motion?

Other? _____

Part IV(A): Expungement Cases with Customer Dispute Information

3. If the case was filed by a customer or is an intra-industry case that requests expungement of customer dispute information, the panel must follow Rule 2080 and comply with Rule 12805 or Rule 13805. *For intra-industry cases expungement requests that DO NOT involve customer dispute information, please complete Part IV(B): Intra-industry Expungement Cases with No Customer Dispute Information on page 13.*

a) Is the panel recommending expungement?

Yes - please complete the remainder of Part IV: Expungement

No - please proceed to Part V: Counterclaim/Cross-Claim/Third Party Claim; and/or Part VI: Explained Decision (if applicable)

b) Did the panel conduct either a recorded in-person or a recorded telephonic hearing to determine the request for expungement?

In-person hearing

Telephonic hearing

Rule 2080 Grounds for Expungement

4. If expungement is recommended, the panel must identify which of the following Rule 2080 finding(s) it is making in order to grant the expungement request:

The claim, allegation, or information is factually impossible or clearly erroneous.

The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

- The claim, allegation, or information is false.

For the Award - Brief Written Explanation Recommending Expungement

5. The panel must provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement apply to the facts of the case. The panel's explanation should support its findings. Separate explanations may be used for different occurrence numbers and different parties. (Please review the *Expungement Order Examples* on page 25)

(Please provide additional pages, if necessary)

Documentary or Other Evidence

6. Did the party seeking expungement provide a current copy of the relevant BrokerCheck® report?

Yes

No - please issue an Order for production of the BrokerCheck® report

7. If a party is requesting expungement of multiple occurrences and you are recommending expungement, please provide the CRD Occurrence Number(s) for the disclosures covered by your expungement recommendation.

8. What specific documentary or other evidence did the panel rely upon in recommending the expungement? Please identify the documents or testimony that the panel relied upon.

(Please provide additional pages, if necessary):

Customer Notice and Participation

In some instances, an associated person will file an arbitration claim against a member firm solely for the purpose of seeking expungement, without naming the customer in the underlying dispute as a respondent. To ensure that customers know about the expungement request, arbitrators should order the associated persons to provide a copy of their Statement of Claim as well as notice of the expungement hearing to the customer(s) involved in the underlying dispute.

9. Did the party seeking expungement provide a copy of their Statement of Claim and notice of the expungement hearing to the customers in the underlying dispute?

Yes No*

- *If No, please provide a brief explanation of the reasons why expungement is still appropriate:

10. It is important to allow customers and their counsel to participate in the expungement hearing if they wish to. Participation includes testifying, presenting evidence and conducting cross-examination. Did the arbitrators allow the customers and their counsel to participate in the hearing?

Yes No* Not Applicable

- *If No, please provide a brief explanation of the reasons why expungement is still appropriate:

Parties Making Second Requests for Expungement

When an arbitration panel or a court has issued an award or decision granting or denying a broker's expungement request, the broker may not request expungement of the customer dispute information at issue in another arbitration case. Therefore, arbitrators should ask a party requesting expungement whether an arbitration panel or a court previously granted or denied expungement of the customer dispute information at issue. If there has been a prior ruling, the arbitration panel must deny the expungement request and contact FINRA staff for assistance.

11. Has a panel or court previously ruled on (granted or denied) expungement of the same disclosure in the Central Registration Depository (CRD)?

Yes* No

- *If Yes, please contact your Case Administrator immediately:

Settled Cases – Settlement Documents

12. Did the parties reach a settlement in this case or in the underlying customer dispute that is the subject of the expungement request?

- Yes
- No - please proceed to Question 13

a) Did the panel review the settlement documents in this case or any other underlying customer dispute that is the subject of the expungement request?

- Yes
- No - please issue an Order for production of the settlement documents

If settlement documents were not provided after being ordered, please provide a brief explanation of the reasons why expungement is still appropriate:

b) Did the party seeking expungement contribute to the settlement?

Yes* No

- *If Yes, please provide a brief explanation of the reasons why expungement is still appropriate:

c) Did the panel consider the amount of payments made to any party and consider any other terms and conditions of settlement?

Yes No*

- *If No, please provide a brief explanation of the reasons why expungement is still appropriate:

Settled Cases - Settlement Payments and Prohibited Conditions Relating to Expungement of Customer Dispute Information

Effective July 30, 2014 FINRA Rule 2081 prohibits firms and registered representatives from conditioning settlement of a customer dispute on—or otherwise compensating a customer for—the customer’s agreement to consent to, or not to oppose, the firm’s or representative’s request to expunge such information from CRD. Arbitrators who learn of such prohibited conditions should review FINRA’s information relating to **Disciplinary Referrals—FINRA**.

13. Did any party condition settlement of the arbitration upon an agreement not to oppose the request for expungement?

Yes* No

- If yes, please provide a brief explanation of the reasons why expungement is still appropriate:

Part IV(B): Intra-industry Expungement Cases with No Customer Dispute Information

1. Has the moving party provided the Panel with a copy of the Form U5?

Yes No*

- *If No - please issue an Order for production of the Form U5.

2. Is expungement of the Form U5 being granted?

Yes No

a. If Yes:

- Is the "Reason for Termination" being changed?

Yes No

- What is the new Reason for Termination? (You may choose only one):

Voluntary Deceased Permitted to Resign* Discharged* OR Other*

- o *If "Permitted to Resign," "Discharged," or "Other" is chosen, you must provide language for the "Termination Explanation" section:

- o If "Voluntary" or "Deceased" is chosen, would you like to entirely delete the "Termination Explanation"?

Yes No (If No, please provide replacement language below.)

3. Would you like to change any of the "Disclosure Questions" in Section 7 from a "Yes" checkbox to a "No" checkbox?

Yes* No

- a. *If Yes, please advise which sections(s) will be updated from a "Yes" checkbox to a "No" checkbox (example answer: 7F(1))

- *Please note: The accompanying “Disclosure Reporting Pages” corresponding to the Disclosure Question(s) noted above will be deleted in their entirety.*
- *Please note: Questions 7A, 7C, 7D and 7E pertain to “Disclosure Events That Cannot Be Expunged.” For further guidance, please see: [FINRA Expungement Training](#)*

Please review the *Information Sheet on Defamation Claims in Intra-Industry Disputes* on page 23.

If the claim is between a FINRA member firm and a current or former associated person, and the panel intends to recommend the expungement of information not related to a customer dispute from the Central Registration Depository (“CRD”), state whether the expungement recommendation is based on the defamatory nature of the information, and if so, clearly state in the award that the “expungement recommendation is based on the defamatory nature of the information in the CRD system.”

(Please provide additional pages, if necessary)

If the panel does not base its expungement recommendation on the defamatory nature of the information, FINRA will require the requesting party to obtain court confirmation of the award before executing the expungement recommendation.

Part V: Counterclaim/ Cross-Claim/ Third Party Claim

(Please check the box for the appropriate claim that was filed. Please include the panel's decision/ruling for each additional Counterclaim, Cross-Claim, and/or Third Party Claim that was filed).

_____ shall

[Party/Parties]

pay to _____

[Party/Parties]

1. Compensatory damages, please state amount awarded or state denied:

2. Punitive or RICO damages awarded, if any?

- Authority for Punitive or RICO Damages (e.g., brief description of legal citation):

3. Interest awarded?

Yes No

- Specifically indicate the percentage of interest awarded.

- Date interest on the award begins to accrue?

- Date interest on the award ceases to accrue?

4. Attorneys' fees awarded?

Yes No

- Authority for attorneys' fees (e.g., specify statute, contract or other legal authority):

5. **Costs** awarded? (Please note costs do not include FINRA forum fees. Forum fees are addressed in Part III: Forum Fees of this form)

Yes No

**Please note that per Rule 12901/13901 and 12903/13903, the Member Surcharge and Member Process Fees paid by FINRA member firms may not be reallocated to another party.*

6. **Other damages** awarded, if any? (e.g., witness fees):

7. **Specific performance** granted, if any? Please describe completely and attach additional pages if necessary:

8. Is the award **joint and several** against two or more parties? Yes* No

- *If Yes, the award is joint and several against the following respondents:

9. **Injunctive relief** granted, if any? *If yes, please complete Part VII: Injunctive Relief.*

Yes No

Part VII: Injunctive Relief

Injunctive relief granted? Please describe and attach additional pages if necessary:

Injunctive Relief Fees:

1. The Injunctive Relief Rule (Industry Code: Rule 13804) provides that the increased arbitrator honoraria for the hearing on the request for permanent injunction should be assessed equally against the parties but that the arbitrators may reallocate this additional amount among the parties in the award. Please indicate how these additional honoraria should be assessed:

Claimant(s)	_____	%
	_____	%
Respondent(s)	_____	%
	_____	%

2. The Injunctive Relief Rule also provides that the parties are jointly liable for the reasonable travel-related costs and expenses of an arbitrator who is required to travel to a hearing location other than the arbitrator's primary hearing location(s). The Rule further provides that the arbitrators may reallocate this expense. Please indicate how the expenses should be assessed.

Arbitrator _____, traveled outside his or her assigned hearing location and incurred \$ _____ in reasonable travel-related costs and expenses.

Arbitrator _____, traveled outside his or her assigned hearing location and incurred \$ _____ in reasonable travel-related costs and expenses.

Arbitrator _____, traveled outside his or her assigned hearing location and incurred \$ _____ in reasonable travel-related costs and expenses.

The parties are liable for those reasonable travel-related costs and expenses as follows (percentage):

Claimant(s)	_____	%
	_____	%
Respondent(s)	_____	%
	_____	%

Please return this Award Information Sheet to the Case Administrator assigned to the case (together with your Oath if you have not already provided it).

We thank you for your service in this matter. FINRA Office of Dispute Resolution looks forward to working with you again in the future.

APPENDIX

FINRA Codes of Arbitration Procedure for Customer and Industry Disputes, Rules 12104 and 13104 provide that, during an arbitration, an arbitrator may refer any matter to FINRA for disciplinary investigation that has come to the arbitrator's attention during and in connection with the arbitration. The matter may be either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of FINRA's rules, the federal securities laws or other applicable rules or laws.

Arbitrators must complete the Arbitrator Disciplinary Referral Form to refer potential disciplinary violations to FINRA Member Regulation for investigation. In this form, the Arbitrator should discuss only those facts and circumstances that underlie the decision to refer this case for disciplinary investigation. The Arbitrator should not describe the basis for the award in the arbitration case.

The Arbitrator should not discuss this matter with any person, including the parties or their counsel in the arbitration proceeding. If anyone contacts you to discuss this referral, please call Todd Saltzman at (212) 858-4273.

Please submit the form to Todd Saltzman, Vice President of Case Administration, Neutral Management and Operations, by email at todd.saltzman@finra.org or by fax at (301) 527-4840. Or, you may mail the referral form to:

FINRA
Office of Dispute Resolution
Attn: Todd Saltzman
One Liberty Plaza
165 Broadway, 27th Floor
New York, NY, 10006

If you wish to make a Disciplinary Referral, please complete this form:
[Arbitrator Disciplinary Referral Form](#)

Summary of Expungement Rules 12805 and 13805 (Including Rule 2080) for Customer Disputes

FINRA Codes of Arbitration Procedure for Customer and Industry Disputes, Rules 12805 and 13805 establish procedures that arbitrators must follow when considering requests for expungement relief of customer dispute information from the CRD System under Conduct Rule 2080.

These procedures are designed to: (1) make sure that arbitrators have the opportunity to consider the facts that support or oppose a decision to grant expungement; and (2) to ensure that expungement occurs only when the arbitrators find and document one of the narrow grounds specified in Rule 2080.

Pursuant to the rules, in order to grant expungement of customer dispute information under Rule 2080, the panel must:

- (a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 12800, the Simplified Arbitration procedures, even if a customer did not request a hearing on the merits.
- (b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.
- (c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case. Therefore, the arbitrators must make one of the following findings:
 - 1. The claim, allegation, or information is factually impossible or clearly erroneous; or
 - 2. The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or
 - 3. The claim, allegation, or information is false.
- (d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

Rule 2080 requires that all directives to expunge customer dispute information from the CRD system be confirmed by or ordered by a court of competent jurisdiction. It also requires that FINRA members or associated persons name FINRA as an additional party in any court proceeding in which they seek an order to expunge customer dispute information or request confirmation of an award.

FINRA will generally oppose confirmation of the expungement portion of the arbitration award in most cases where it participates in the judicial proceeding.

These rules do not affect FINRA's practice of permitting expungement, without judicial intervention, of information from the CRD system as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms based on the defamatory nature of the information ordered expunged.

For more information about expungement please review:

- FINRA Rules:
 - [FINRA Rule 12805](#)
 - [FINRA Rule 13805](#)
 - [FINRA Rule 2080](#)
 - [FINRA Rule 2081](#)
- [Regulatory Notice 08-79](#)
- [Regulatory Notice 14-31](#)

Please review:

[Notice to Arbitrators and Parties on Expanded Expungement Guidance](#)

Examples of Recommendations to Expunge Customer Dispute Information

This link provides examples of the relevant portions of written explanations in awards ordering expungement under each of the three standards in Rule 2080 (with the names of the parties redacted). Although each case is different, arbitrators may find it useful to see how previous panels have drafted expungement orders. Arbitrators should contact their case administrator if they have any questions about expungement orders.

Please review:
[Examples of Expungement Orders](#)

Information Sheet on Defamation Claims in Intra-Industry Disputes

Under existing CRD policy, FINRA will expunge information from the CRD system – without the need for judicial intervention – if the expungement directives contained in intra-industry awards that involve associated persons and firms are based on the defamatory nature of the information ordered expunged and do not involve any customer dispute information. Arbitrators must clearly state in the award that they are ordering expungement relief based on the defamatory nature of the information in the CRD system. Rule 2080 applies in intra-industry cases that request expungement of customer dispute information.

View Rule 2080 Frequently Asked Questions at the FINRA website at:

<http://www.finra.org/industry/crd/rule-2080-frequently-asked-questions>

CRD Disclosures Ineligible for Expungement in Arbitration

The following CRD disclosures are ineligible for expungement through FINRA arbitration:

Regulatory actions:

These generally involve proceedings by a federal or state regulatory authority, foreign financial regulatory authority, or self-regulatory organization (like FINRA). These events typically include actions where a regulator has made certain enumerated findings or imposed penalties against an associated person. The regulatory action disclosure category also encompasses instances where an associated person's authorization to act as an attorney, accountant, or federal contractor has been revoked or suspended.

Civil judicial actions:

These include court injunctions in connection with investment-related activity; court findings that an associated person was involved in a violation of any investment-related statutes or regulations; or investment-related civil actions brought by a regulator that are dismissed by a court following a settlement agreement.

Investigations:

This category includes investigations or proceedings by a domestic or foreign governmental body or self-regulatory organization with jurisdiction over investment-related businesses.

Criminal matters:

This includes charges or convictions for any felony and misdemeanors that have been reported to the CRD system, such as fraud, wrongful taking of property, or bribery.

Financial matters:

This includes compromises with creditors and bankruptcies occurring within the prior 10 years; a bonding company's denial, payment on, or revocation of a bond for an associated person; and any unsatisfied judgment or liens.

Expungement Order Examples for Intra-Industry Disputes

Expungement of Termination Comment: The Panel recommends the expungement of the Termination Comment in Section 3 of "BROKER" (CRD # xxxxxx) Form U5 filed by "FIRM" on "DATE" and maintained by the Central Registration Depository ("CRD"). The Termination Comment should be changed to "INSERT NEW COMMENT." The Reason for Termination shall remain the same.

In addition, the panel recommends that the Yes answer to Question 7F (1) of the foregoing Form U5 be expunged and changed to No and the accompanying Termination Disclosure Reporting page be deleted in its entirety.

----- --
Expungement of Termination Comment and Reason for Termination: The Panel recommends the expungement of the Reason for Termination and Termination Comment in Section 3 of "BROKER" (CRD # xxxxxx) Form U5 filed by "FIRM" on "DATE" and maintained by the Central Registration Depository ("CRD"). The Reason for Termination should be changed to "Voluntary". The Termination comment should be left blank.

In addition, the panel recommends that the Yes answer to Question 7F (1) of the foregoing Form U5 be expunged and changed to No and the accompanying Termination Disclosure Reporting page be deleted in its entirety.

----- --
Expungement Recommendation with Finding of Defamation: The Arbitrator recommends the expungement of the "Yes" answer to Question 7F (1) on the Form U5 filed by "FIRM" on "DATE" from the registration records for "BROKER" (CRD # xxxxxx) maintained by the Central Registration Depository ("CRD"). The Arbitrator recommends that the answer be changed to "No" and the accompanying Termination Disclosure Reporting page be deleted in its entirety. In addition, the Arbitrator recommends that the current Reason for Termination be expunged and changed to "Voluntary" and the Termination Explanation appear blank.

The above recommendations apply to all subsequent disclosures concerning this event, including but not limited to, the Amended Form U4 filed on "DATE" by "FIRM" (CRD # xxxxxxx).

The above recommendations are based on the defamatory nature of the information.

The registration records are not automatically amended to include the changes indicated above. "BROKER" must forward a copy of this Award to FINRA's Registration and Disclosure Department for review.

----- --
Expungement Recommendation with No Finding of Defamation: The Panel recommends that the current Termination Explanation on the Form U5 filed by "FIRM" on "DATE" be expunged and changed to "mutual parting of ways" on the registration records for "BROKER" (CRD # xxxxxxx) maintained by the Central Registration Depository ("CRD"). These recommendations are made with the understanding that, "BROKER" must obtain confirmation of this award from a court of competent jurisdiction before the CRD will execute the expungement directive. The Panel further recommends that the Reason for Termination shall remain the same. The Form U5 is not automatically amended to include the changes indicated above. "BROKER" must forward a copy of the Court Order to FINRA's Registration and Disclosure Department for review.