



Anatomy of a Zoom Videoconference Mediation

We published in SAA 2020-12 (Mar. 25) an article by Mediator Roger M. Deitz advocating that parties consider using telephone mediation as a way to cope with Coronavirus-related delays and disruptions to the dispute resolution process. This week we feature a squib by Mediator Scott Douglas, offering a real-life report on a mediation conducted via a popular videoconferencing platform. The words that follow are his.

As a result of recently imposed virus-related travel restrictions, as well as delays to court and arbitration proceedings, many are inquiring about conducting remote mediations using videoconferencing and other alternative forms of communication. The following is an example of how a recently conducted mediation unfolded from start to finish using [Zoom](#) videoconferencing, supplemented by email, text and telephone.

Mediation Day Minus 14

- Email to all counsel attaching Guidelines for using Zoom, with suggestions for preparing their clients, downloading the Zoom App, and pre-testing communications.
- Arrange time on day prior to mediation to hold test videoconference among counsel and any clients they wish to include. Obtain all email or text addresses for purposes of inviting participants to videoconference, and best phone number to reach counsel.
- Send out Zoom invitation to all participants for pre-mediation test videoconference.

Mediation Day Minus 1

- At pre-arranged time, all participants log on to videoconference using link from invite.

- Conduct short meeting to test communications and address any questions or concerns.
- Send out new Zoom invitation to all participants for mediation videoconference.

Mediation Day

9:00 a.m.: Initiate Zoom videoconference. Remind parties that the mediation is not being recorded. Conduct joint opening session. Use multiple split screen. Introduce all participants, explain process, opening comments.

9:05 a.m.: Drop all Respondents and defense counsel from group videoconference and conduct opening private caucus with Claimants and their counsel.

10:15 a.m.: Close session with Claimants and invite Respondents and their counsel to join Zoom conference via email. Conduct opening caucus with Respondents.

11:20 a.m.: Conduct brief telephone conference with counsel only before initiating new videoconference with counsel and clients. Provide feedback, evaluation, discuss making opening demand and any non-monetary issues. Sign off and allow time for Claimant group to determine opening demand.

11:45 a.m.: Obtain opening demand from Claimants' counsel via telephone. Confirm terms in email back to counsel.

11:50 a.m.: Phone call to Respondents' counsel to discuss opening demand from Claimants. Confirm terms in email to counsel.

Noon: Receive call back from Respondents' counsel to discuss counter offer and terms. Confirm in email to Respondents' counsel. Allow time for discussion between counsel and clients.

12:20 p.m.: Email from Respondents' counsel with formal counter offer and additional terms. Discuss on phone.

12:25 p.m.: Present opening offer via email to Claimants' counsel and follow up with phone

call to discuss. Allow time for private discussion between counsel and clients.

12:35 - 4:25 p.m.: Exchange numerous counter offers/demands by email and phone and clarify additional non-monetary issues and objectives raised by the parties. Utilize variety of negotiating tools to avoid impasse and keep negotiations moving forward.

4:25 p.m.: Reach agreement. Initiate new Zoom videoconference with counsel for both sides to confirm terms of settlement and preparation of written settlement agreement.

4:50 p.m.: Adjourn conference.

Commentary

Both sets of counsel expressed a great deal of satisfaction with the process. Claimants in this case were located in California, as was the Mediator and Respondents' counsel. Claimants' counsel and Respondents' insurance representative were in New York. All were able to remain at home while participating fully in the mediation. For cases of small to medium value, remote mediations may make a lot of sense even in normal times where travel is unrestricted. As we grow more accustomed to videoconference and effective alternatives to in-person mediations, we might just conclude that for many cases the expense and inconvenience of traveling to remote meeting sites is not justified and would be better spent settling the case.

*(ed: *Scott Douglas has been a full-time mediator since 1997, during which time he has successfully mediated more than 3000 cases. Prior to that, he was a partner with the law firm of Keesal, Young & Logan in Long Beach, CA. For more information on Mr. Douglas see his website at www.DouglasMediation.com. **The Alert thanks Mr. Douglas for his contribution. ***For another look at the migration to online ADR, see CPR Takes to the Web As ADR Continues in the Face of the Coronavirus Crisis, [published](#) April 2. ****Photo courtesy of www.CourtCall.com.)*



Coronavirus and the ADR Providers – What You Need to Know

We issue this “Extra” Alert with breaking news of importance to our readers concerning the Coronavirus pandemic and its impact on financial services dispute resolution, that we feel should not await our normal publication schedule. We thank these leaders for helping us keep our mutual constituents informed and up-to-date! The Alert is pleased to have facilitated this information exchange and dissemination, as we jointly move through this unprecedented crisis.

THE COVID-19 IMPACT ON ADR PROVIDERS: THE KEY INSTITUTIONS TELL US WHAT YOU NEED TO KNOW. *The Coronavirus pandemic has hit all Americans in so many ways, and the legal system and alternative dispute resolution serve as no exception. The Alert checked in recently with the major national ADR institutions to gather information on how they are coping.* Sharing information with the *Alert* were leaders from the American Arbitration Association-ICDR (“AAA” or “AAA-ICDR”); the International Institute for Conflict Prevention & Resolution, Inc. (“CPR”); FINRA Dispute Resolution Services (“FINRA”); and JAMS: AAA-ICDR – Christine L. Newhall, Senior Vice President; CPR – Helena Tavares Erickson, Esq., Senior Vice-President, Dispute Resolution Services & Corporate Secretary; FINRA – Rick Berry, Executive Vice President, FINRA Dispute Resolution Services; JAMS – Kristine Snyder, Senior Public Relations & Content Manager. We’ve organized the responses by subject.

Staff

Describe how the virus and precautions are impacting staff? Roughly what percentage of staff are telecommuting?

AAA: The AAA-ICDR is located in many cities and has 26 locations across the US and the globe. We are doing our part to help slow the spread and help keep our employees, neutrals and parties safe. We quickly implemented our telecommuting and business continuity plans which provide for some staff and critical office functions to operate from remote locations. New York City and cities in California were impacted the most at first, but no part of the country has been untouched by COVID-19. As a result of our telecommuting policy, approximately 75% of our commercial arbitration staff will soon be working remotely.

CPR: We are located in New York City, so 100% of staff are working from home.

FINRA: All but one of FINRA's Dispute Resolution staff is working remotely.

JAMS: Understanding the rapidly changing nature of this pandemic and the clear and present concerns it raises, JAMS made the decision to move the majority of our staff around the nation to a remote-work structure on March 17. Neutrals and staff have the technology to assist with cases through videoconferencing, which we have used in the past and has been effective in both mediations and arbitrations. In accordance with evolving federal, state, and local directives, JAMS has its entire workforce working remotely. Our physical offices will remain closed until we receive word from local authorities and the CDC that it is safe and appropriate to return.

Parties

Describe in general how case administration is being impacted.

AAA: The AAA-ICDR previously incorporated business continuity planning into our operations, and we have updated that planning on a continuing basis so that we can continue our work as seamlessly as possible under circumstances such as the spread of

COVID-19. That planning includes providing for backup servers and redundancies and security in our IT and finance capabilities, in addition to anticipating that employees in one or more locations would not be able to access AAA-ICDR offices. Many aspects of our business continuity plans have already been implemented, which will enable us to continue to administer arbitrations and mediations as seamlessly as possible

CPR: Cases are being administered by staff working from home. Most cases are non-administered, however, meaning relatively little staff participation after we assist the parties with neutral selection. Paper is no longer accepted, and documents must be filed online (we offer a secure, encrypted email option). Payments must be electronic.

FINRA: With the exception of the in-person hearings and pre-hearing conferences discussed below, our ability to process cases has not been impacted. Cases continue to be served, lists continue to be generated, panels continue to hold telephonic prehearing conferences, and awards continue to be issued. Because we moved to an all-electronic document platform about four years ago, and due to the Portal, our DR team members are able to keep the cases moving while working remotely.

JAMS: We have provided our neutrals and staff access to technology to allow cases to move forward through a variety of options. For example, JAMS offers several videoconferencing services, which have proven to be highly effective in both mediations and arbitrations. The feedback we've received from parties that have shifted their cases to our videoconferencing services due to the COVID-19 outbreak has been very positive, and we're confident in our ability to continue serving the legal and business community through this option.

Are in-person hearings still being held?

AAA: While the AAA-ICDR remains active and operational, no hearings will take place in AAA-ICDR hearing facilities after March 20 until at least April 17. In cities where governmental authorities have shut down activities, our physical offices will be closed immediately. Our case management staff will contact parties and arbitrators to discuss alternative arrangements, including the use of video, teleconferencing, or postponements.

The AAA-ICDR also provides guidance on hearings at www.adr.org/covid19.

CPR: Because of the non-administered nature of our cases and the fact that we do not routinely offer hearing space at our headquarters in Manhattan, we have not been made aware of any in-person hearings since the beginning of March.

FINRA: FINRA has administratively postponed all in-person arbitration and mediation proceedings scheduled [through May 31](#). Previously we had done so through May 1. We recognize that this decision may cause inconvenience and we do not make it lightly. We are taking this preventative action out of an abundance of caution, in the interest of public safety. The well-being of our FINRA employees, arbitrators, mediators, stakeholders and communities is of paramount importance.

JAMS: We are closely following the directives from local, state and national governments and the Centers for Disease Control and as such, are no longer conducting any ADR proceedings in person at this time.

Roughly what percentage of cases are being held by videoconference? Telephonic?

AAA: At this time staff are working with arbitrators and parties scheduling videoconference as well as telephonic hearings. The activity on cases is very high and continues to expand. The AAA-ICDR can assist with alternative hearing arrangements, including the use of video teleconferencing that will allow for remote participation in hearings. Online video, teleconferencing, internet communication, and means other than in-person can facilitate a full and equal opportunity for all parties to present evidence in a hearing.

CPR: We have been made aware of several hearings being planned for videoconferencing. There have also been a few postponements.

FINRA: A few cases that had been set for in person hearings switched to videoconferencing. Prehearing conferences are normally conducted telephonically and have not been impacted.

JAMS: We are unable to supply this data right now. JAMS is using several videoconferencing services and telephonic technology, which have proven to be highly effective in both mediations and arbitrations.

What's the best way to communicate with staff?

AAA: We are always accessible online at www.adr.org, by calling 800-778-7879, or contacting your case manager directly.

CPR: Email to CPRNeutrals@CPRADR.org.

FINRA: Staff can be reached by all the traditional methods – email, phone, and of course, for document submissions, we prefer the [Portal](#). Our work phone lines have been transferred (via Jabber) to our cell phones. Also, the general [regional office](#) phone numbers are rolling over to our staff, so there is no interruption there, either.

JAMS: Staff can be reached by calling the local office numbers found on the locations page on our website, <https://www.jamsadr.com/locations/>. Since employees are working remotely, voice messages will be retrieved frequently Monday through Friday from 8 AM to 5 PM and directed to a JAMS associate for response. In addition to calling the local offices, the following senior JAMS Associate contacts have been provided:

West Region, United States:

Gina Miller (Los Angeles)

Vice President. U.S. West Region

gmiller@jamsadr.com 213-620-1133

East and Central Region, United States:

Elizabeth Carter, Esq. (New York)

Vice President, U.S. East/Central Region

ecarter@jamsadr.com 212-751-2700

Global:

Matthew Rushton (London)

Director, Europe, Middle East & Africa

mrushton@jamsadr.com +44 207 583 9808

Neutrals

What message has been conveyed by your institution to arbitrators and mediators?

AAA: The AAA has been in contact with the AAA Arbitrator and Mediator Roster, outlining the AAA capabilities for handling teleconference and virtual meetings. The AAA case management staff are working directly with the arbitrators and mediators on their cases and handling all issues in real time. The AAA is also providing education to the arbitrators on cybersecurity at this critical time when there has been an uptick in opportunistic cyber-hacking.

CPR: We are here for you. Don't hesitate to reach out to us.

FINRA: The well-being of our arbitrators, mediators, stakeholders, FINRA employees and communities is of paramount importance. We also plan to shift neutral recruitment efforts from in-person recruitment to additional digital advertising.

JAMS: First and foremost, every decision JAMS is making at this time is with the health and safety of our staff, neutrals, and clients as our absolute priority. We are implementing policies, tools and technologies to enable our staff and neutrals to continue supporting our clients with minimal disruption, while closely following and adhering to the directives from government officials and the CDC to keep them safe and do our part to minimize the spread of COVID-19. We are committed to continuing to serve the businesses and firms that rely on our services. We will weather this storm together and look forward to returning to normal business operations as soon as we are confident that the health and safety of our associates and clients are no longer at risk.

General

What's the best Web address for current info?

AAA: www.adr.org/covid19

CPR: <https://blog.cpradr.org/2020/03/13/cpr-covid-19-update/>

FINRA: <https://www.finra.org/rules-guidance/key-topics/covid-19>

JAMS: All information will be posted here:

[https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors)

Is there anything else you would like our readers to know?

AAA: Having worked with parties through disasters natural and manmade for 94 years, we, as always, are prepared to move cases efficiently through the dispute resolution process. No other ADR provider can match our size, scope, and technology infrastructure. We strongly encourage all parties and their representatives to proceed in filing their arbitration and mediation cases - but to file them online to reduce the amount of paper necessary for handling and to help facilitate the recommended social distancing.

CPR: We are conducting a free Webinar, [*ADR in the Time of COVID-19: How Neutrals & Advocates Can Use Zoom for Mediations & Arbitrations*](#), March 30 from noon - 1:30 pm Eastern.

FINRA: We are well-positioned to maintain the high level of customer service the parties have come to expect. FINRA Dispute Resolution team members have made a number of innovative changes in the past few years to continually improve our efficiency, such as all-electronic files and the Portal. In addition, our team members' ability to work from home productively and without impact to the parties or arbitrators follows several years of testing and technology enhancements.

JAMS: JAMS appreciates the support of the law firms, businesses, and individuals that use our services as we continue to navigate this dynamic and unprecedented environment. We

are committed to continue delivering the service our clients have come to expect from JAMS. We encourage anyone with questions to reach out to the contacts listed on our website

[https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors).



Today's Challenges Require a Serious Look at Telephonic Mediation: Here's How and Why to Do It

*by Roger M. Deitz**

The health crisis has seeded a financial crisis in many respects far worse than anything anyone alive today has ever experienced. A good part of the nation is under self-quarantine. Millions are without work. Houses of worship, stores, and factories are shuttered. At the same time, business and household expenses need to be paid. Except for emergency applications, the courts are closed. FINRA unilaterally postponed all in-person arbitrations and mediations until May 1, and recently [extended](#) this to May 31.

Consider Telephonic Mediation

Some claimants will not want to wait a year or more until mediations and arbitrations are rescheduled. Some financial institutions may see a benefit in mediating cases now rather than when restrictions are lifted. Although in-person hearings have been postponed other

deadlines continue to apply. Litigation expenses continue unabated. Telephonic mediation is perfectly suited to the current environment where social distancing is the norm, travel is discouraged or even prohibited, and many work from home. Telephonic mediation has been shown to be as effective as in-person mediation in arriving at resolution. Here are some suggestions for successful outcomes in telephonic mediation:

Before the Mediation

- Confer with the mediator before the mediation, jointly and separately. Everyone – counsel, the parties, experts, and the mediator – must be fully informed of all aspects of the dispute and the mediation process before the mediation begins.
- Agree on what is being mediated. What is the amount in issue? Are there any non-economic considerations? What are the legal issues? What are the facts in dispute? It is not necessary to have pre-mediation agreement on all items; it is necessary to understand what the arbitrators will be asked to conclude, both legally and factually. Pre-mediation agreement on the amount in dispute frees time to consider other issues.
- Do not mediate without a pre-mediation request from the claimant. This should be made well before the mediation begins. Surprise is the enemy of resolution.
- All participants must sign the Mediation Agreement before the mediation begins. The rules of mediation are critical, particularly confidentiality and that the mediator cannot be called as a witness and her or his notes may not be subpoenaed. There is much litigation about these issues which will be avoided with an executed mediation agreement.
- Preparation is key. Pre-mediation document exchange between counsel and the mediator is essential. Parties need to have possession of all important documents before the mediation begins.

At the mediation

After an all hands welcome by the mediator expect the mediation to continue by caucus. That doesn't mean joint discussions, especially between the mediator and counsel, may not take place.

- Opening presentations have by and large been abandoned in in-person mediation. I would

definitely discourage them in telephonic mediation. The parties need to be fully informed of each other's positions before the mediation begins. One effective way to accomplish this is to have two-part pre-mediation submissions. Part A is exchanged between counsel and with the mediator. Part B, containing confidential information and negotiation objectives, is sent privately to the mediator only. There needs to be a commitment from counsel to share the other side's Part A brief with the client.

- Expect telephonic mediation to take more time than in-person mediation.
- Block the entire day.
- Be accessible to the mediator.
- Many in person mediations are not completed in one day. Due to the asynchronous nature of how telephonic mediation is conducted, there may be need for additional time to achieve a fully deliberative resolution. I am not suggesting time limits for telephonic mediation. I am suggesting that with full and complete pre-mediation preparation the prospect of resolution the day of the mediation will be enhanced.
- Before the mediation begins discuss how documents will be exchanged among counsel, the parties, and the mediator.
- Do not increase the amount of the claim at the mediation. Do not advance a new theory of the case while the mediation is underway. This often happens in face to face mediations. It is fatal in telephonic mediation.
- The usual communication cues will either be totally absent or harder to find. Participants, especially the mediator, will have to employ all possible active listening skills. When numbers are exchanged, the tone and tenor of the delivery, pauses, inflections, and other signs - often not intended - but always telling must be spotted and incorporated in evaluating the offer or demand.

After the mediation

- There must be a writing at the conclusion of the mediation. All material terms of the settlement, especially non-economic terms must be discussed. This is especially important in employment disputes. Sharing a draft settlement agreement before the mediation can be a great help.

Not A Panacea

I am not suggesting telephonic mediation is the equivalent of in-person. It is not. There are two essential distinguishing characteristics: the inability of participants to fully communicate and diminished momentum. Do not insist on video conferencing. Even if video is employed, the best conference facilities will not capture all body signals and sounds. Many individuals will be unfamiliar or uncomfortable with video conferencing or lack high speed internet access; everyone knows how to use a telephone. Momentum fuels in-person resolution. The pace picks up as the day goes on; parties are drawn to resolution and away from conflict. Momentum in telephonic mediation is restrained by the time it takes to establish contact and shift from party to party. Despite these differences, telephone mediation works.

Conclusion

These are only a few suggestions for success in telephonic mediation. Speak with your adversary. Talk with a mediator with telephonic mediation experience. FINRA has an active and informed mediation program staffed by committed highly trained individuals with decades of experience. FINRA's mediation administrators are an extraordinary resource and are available to all participants and their counsel: Leon.DeLeon@finra.org; Narielle.Robinson@finra.org; Terri.Crombie@finra.org; Manly.Ray@finra.org. Today, as always, FINRA's Office of Dispute Resolution maintains full case services including telephonic conferencing using Verizon and video conferencing through Zoom. Finally, FINRA Mediation is committed to continuous development, and welcomes any suggestions you feel would benefit your mediation.

**Roger M. Deitz is a member of the SAC editorial board. He is a FINRA mediator and has participated in numerous telephonic mediations. Mr. Deitz was the chair of the NAMC mediation subcommittee when FINRA's mediation program was established. The author wishes to thank Terri Crombie, Leon DeLeon, and Narielle Robinson, as well as Manly Ray,*

for their valuable contributions.



Coronavirus News on SCOTUS & Arbitration

We issue this “Extra” Alert with breaking news of importance to our readers concerning the Coronavirus pandemic, that we feel should not await our normal publication schedule.

FINRA POSTPONES ARBITRATION HEARINGS UNTIL MAY 1. *As we predicted in our March 2 [blog post](#), FINRA has administratively postponed arbitration and mediation hearings through May 1. The March 16 [notice](#), *Postponement of In-Person Arbitration & Mediation Hearings*, posted on FINRA’s Website and sent to the Office of Dispute Resolution’s constituents says: “In response to the evolving coronavirus disease 2019 (COVID-19), FINRA has decided to administratively postpone all in-person arbitration and mediation proceedings scheduled through May 1, 2020. If you have an in-person hearing or mediation session that is postponed as a result of this decision, you will be contacted by FINRA staff to reschedule or discuss remote scheduling options. Please note that this decision does not affect other case deadlines. All case deadlines will continue to apply and must be timely met unless the parties jointly agree otherwise.” Our blog post said: “Absent an effective vaccination or treatment, we expect that as time goes by there will be growing resistance from arbitration participants to physically assemble for a hearing. ADR providers may also have similar qualms. To us this portends increasing interest in and usage of online ADR. It’s not a huge leap to envision FINRA reacting to growing contagion by temporarily*

halting cases and requiring hearings to be conducted by teleconference or video.”

SCOTUS POSTPONES MARCH ORAL HEARINGS. *The Supreme Court on March 16 issued a Press Release postponing oral hearings through April 1.* Says the [Press Release](#): “In keeping with public health precautions recommended in response to COVID-19, the Supreme Court is postponing the oral arguments currently scheduled for the March session (March 23-25 and March 30-April 1). The Court will examine the options for rescheduling those cases in due course in light of the developing circumstances.” The Justices will conduct their regularly scheduled conference on March 20, but some may participate remotely. The Release observes that oral arguments have not been postponed since the Spanish Flu pandemic of 1918. The Release adds that this move is not unprecedented: “The Court also shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks.”

*(ed: *These are unprecedented times, indeed. **FINRA in September 2017 posted on its Website, Hurricane Maria Update: Accommodations for Hearings Scheduled in Puerto Rico, temporarily postponing hearings in the Commonwealth. NASD Dispute Resolution took a similar approach to New York-area cases in the wake of 9-11. In that instance, the agency temporarily postponed and stayed hearings in that region.)*



FINRA Stats, 12/19: Another Slow Year at FINRA-ODR, in Terms of New Filings

Take the final tally of 3,757 new case submissions that FINRA Office of Dispute Resolution recorded during the past year, deduct the reported total of some 500 cases for the month of August, when a pile of new Puerto Rico Bond cases was filed, and the monthly averages for the rest of the year come in slightly under 300.

That's just about the way the real monthly tallies occurred, all in a fairly tight group around 300 with a single month's surge. The 303 new filings in December only punctuate that regularity. The yearly total represents a drop of 13% from 2018's 4,325 cases, but 2018 was a relative outlier; one has to look back to 2011, when 4,729 cases were filed to find a higher outcome.

"Market Bottom"? Viewing 2020

So, one can view this range of case filings, which, from 2013 to 2017, has run in a steady range from about 3,400 to 3,800, as a sort of "market bottom," possibly an indicator of the probable caseload in 2020, but consider this: 1) those results from 2013-2017 were comprised in part of some 4,000 Puerto Rico bond cases. That source peaked in 2018, judging from FINRA's Municipal Bond and Municipal Bond Fund figures of 971 and 959, respectively, for that year. The comparable figures for 2019 were 717 and 702, respectively, and that surge in August, because it was related to a six-year eligibility issue, was likely an exclamation point at the end of a long sentence. 2) On the intra-industry side, which contributed 1,394 cases to the 3,757 total for 2019 (-14%), the Controversy Types section of FINRA-ODR's [December report](#) tells us that expungement claims have peaked. For the past few years, we have reported an upsurge in sole expungement proceedings by brokers, driven by an impending deadline on their ability to pursue expungement of aged CRD items. A small legal niche has grown up around this excited demand, but, again, the trend has, based on the statistical evidence, suggests it waned in 2019. Expungement is not a category that appears in FINRA's Controversy Type Chart, but nominee names, such as fiduciary

duty, suitability, negligence, and (perhaps) misrepresentation, for those proceedings, we believe, reflect sharp declines in case numbers in 2019 (ex: suitability, 17 cases vs. 63 in 2018). Assuming no stock market correction in the first half of 2020 — and a continued downdraft in the two case sources above — 2020 could be a very slow year. That's not a prediction, just an observation.

A Definite Arbitration Trend

While we're tossing around case statistics, let's return to a matter we touched upon in our November 2019 report (SAA 2020-01 (Jan. 8)): the “disappearing” Award. According to the overall close-out statistics in FINRA's 2019 year-end report, 84% of the concluded matters closed without an arbitrator's ruling. At least 70% of those cases were settlements, probably more, and, in the customer column alone, the total was 87% — i.e., only 13% of customer-initiated claims were tried to an Award. That's not much different than litigation in the courts and, when one considers that many of the closed cases in litigation were lost by plaintiffs in motion practice — probably a single-digit percentage outcome in FINRA arbitration — one appreciates the robust settlement structure that supports case processing at FINRA-ODR.

Settlement Observations

We have two observations about this “disappearing Award” phenomenon — anomalies, really, because we see this high settlement rate as somewhat anomalous in an arbitration regime: 1) the FINRA report for December indicates that 57% of the cases were settled via direct negotiation by the parties and 13% of the whole were settled via mediation. We credit the overall settlement sum of 70%, but reports from the “field” that we hear — and statements by arbitration counsel at seminars — suggest that mediation plays a much large role in the settlement process. We recall at 2019's PLI seminar — which is mainly about FINRA arbitration — senior inside counsel saying that she could not remember the last time a case had settled without mediation — that Claimant's counsel wanted mediation even where the case could have been settled by direct negotiation. 2) it also seems inconsistent to see such a high settlement rate for customer claims that, when tried at FINRA-ODR, are

winning at an increasing clip. The overall “win” rate for customer claims in 2019 was 45%, up from 40% in 2018. Small claims cases (paper only) had a stunning year, with a 48% “win” rate (versus 35% in 2018) and the larger cases with all-public panels registered a 53% “win” rate (vs. 42% in 2018).

(ed: We might return to these 2019 statistics for other readings that we see. We’d like to hear from readers with your observations — please email us at Help@SACArbitration.com with comments, whether anonymously or for publication.) (SAC Ref. No. 2020-04-01)

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Twice a week we present blog posts consisting of one write-up from each of our two flagship weekly online Alert services. Consider a subscription to these publications to receive the full array of coverage right on your desktop every week. Give it a try and sign up for a free trial to the [Securities Arbitration Alert](#) and the [Securities Litigation Alert](#).



The Neutral Corner 2-2019: FINRA-ODR Updates Arbitrators and Mediators on the Authority’s Latest Activities

[The Neutral Corner](#), the FINRA Office of Dispute Resolution’s newsletter for neutrals serving its dispute resolution forum, issues now on a quarterly basis; while the newsletter usually has a feature article, the latest edition is filled with short squibs on a variety of interesting topics. After covering the latest [case filing statistics](#) (down 22% YOY through May 2019), TNC approaches the Portal, FINRA-ODR’s Web-based claim filing and processing system, from several angles (changes, registration and video assistance). Staff

announce that the replacement of the IPHC Order, converting the form from a PDF to a fully integrated Portal document, has graduated to the next step: removal of the PDF from the Portal, absent a specific arbitrator request to use the old format. General dismissal and postponement orders can also be completed and submitted through the Portal.

Events, Rules & Recent Decisions

Next up, the staff previews the September 10, 2019 PLI-sponsored [“Securities Arbitration 2019,”](#) which typically features a team of staff members from FINRA-ODR. This program “will provide practical tips for litigating and arbitrating elder abuse claims and strategies for knowing when and which claims are ripe for mediation.” Ethical issues, diversity efforts, and future trends will fill the schedule. FINRA neutrals will receive a 25% discount over the modest \$1,850 registration fee. FINRA will, of course, report, as it does in *TNC*, on recent rule approvals. Amendments to Rules 12512/13513 ([RN 19-20](#), eff. 7/1/19) will assist third-parties who wish to oppose subpoenas or other arbitral orders (on the topic of third-party subpoenas, see the recent decision in [Next Level Planning v. Prudential Ins. Co.](#)).

Mediation in the Limelight

FINRA-ODR achieved a fantastic 89% success rate on the mediation front in the first five months of this year. New cases in agreement rose 6% during the YOY period. In the small claims area, in particular, where telephonic mediations have proven popular, FINRA has been running a 90% settlement rate. FINRA doesn't provide figures on how often this process is used, but its virtues extend beyond facilitating resolutions. FINRA indicates that the program serves mediator training objectives and aids seniors in particular. Mediator disclosures inform parties of frequency of service, success rates, and the types of cases mediated. Mediators are encouraged to keep their reports current and to provide references — an oft-requested item. The affirmation date is automatically updated when an arbitrator submits the Arbitrator Oath

Reminders, Advice & Counseling

Back to the Portal, FINRA-OacDR reminds arbitrators that they should regularly update their disclosure reports by logging on to the Portal and accessing their bios and case information. Parties look for updating information and FINRA, since 2017, discloses when reports were last revised or affirmed. Finally, the staff fields some questions from arbitrators about arbitrator classifications and awarding attorneys' fees. Consider this: a contract attorney who, otherwise qualifies as a Public Arbitrator becomes Non-Public for two years after working as a contract attorney for a law firm that meets the "\$50K or 10%" revenue test. As to attorneys' fees, FINRA-DR staff cannot advise on the law, but they do counsel not doing independent legal research on the subject.

(ed: Arbitrators want to do the "right thing," and some think that experienced staff should just go ahead and tell them what that is. TNC does an excellent job of straddling the line between informing and training its neutrals, while avoiding the trap of offering substantive advice on legal and procedural matters.) (SAC Ref. No. 2019-27-01)

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