Latest Neutral Corner from FINRA's Office of Dispute Resolution Hits the Electronic Newsstand. Its Lead Article Discusses the NAMC, But It Also Features Tips on Scheduling Hearings

FINRA's Office of Dispute Resolution ("ODR") has once again posted the latest issue of its newsletter for arbitrators and mediators, The Neutral Corner *("TNC") and, as usual, it covers a number of different subjects, including the NAMC, the Portal, arbitrator training and disclosure, mediation, and tips on scheduling hearings.*

The feature article, "An Introduction to FINRA's National Arbitration and Mediation Committee," is co-authored by the two members of its Executive Committee, Public Chair Steven B. Caruso of Maddox Hargett & Caruso, P.C. and Industry Representative Darya Geetter of LPL Financial.

Inside the NAMC

The article discusses the composition, role and subcommittee structure of the Committee (or NAMC). "The NAMC," it explains, "is an advisory committee of leading practitioners that provides recommendations regarding the development and maintenance of an equitable and efficient system of dispute resolution, frequently proposing and considering new arbitration rules and procedures and "providing guidance to FINRA … for the recruitment, qualification, training and evaluation of arbitrators and mediators." FINRA prepares "a meeting agenda for the NAMC meeting and memos that analyze emerging issues." For their part, the co-authors assure us, "NAMC members … provide insight into the strengths and weaknesses" of rule proposals "and the impact the changes might have on the parties and the dispute resolution process…. The discussions are robust but cordial. Everyone's goal is to enhance the FINRA arbitration program and promote fairness to all participants. No constituent is favored."

How to Schedule Expeditious Hearings

The second largest amount of space in this 18-page issue of the *TNC* is devoted to explaining how arbitrators may schedule hearings within nine months of the initial prehearing conference (IPHC), as FINRA encourages them to do in order to expedite resolution of the claims. The first rule is that, if the parties agree on hearing dates, the arbitrators should accept them, even if they begin more than nine months later. However, when the parties disagree, arbitrators should push for hearings within nine months. Tips for achieving that end include: forcing parties or their counsel to specify when and why they have conflicting commitments; suggest that busy litigators ask colleagues to fill in for them; schedule hearings on non-consecutive days, evenings and weekends; and schedule backup dates for subsequent rescheduling.

Other Features

The issue also includes information on such subjects as case statistics, the demographic survey, upcoming events, rule filings, the recently released paper on "FINRA Perspectives on Customer Recovery," mediation news (including a decrease in new mediations, discontinuance of the mediator annual fee and a telephonic mediation program for small claims), how to enroll for direct deposit of arbitrator honoraria and expense reimbursement, arbitrator training resources, and the importance of completing the Oath of Arbitrator and Disclosure Checklist promptly and completely upon assignment to each case. The left-hand column of three consecutive pages is devoted to the online Portal. After listing its many uses, this section answers questions about how to know if a neutral is in the correct side of the Portal (look for a Profile Update tab at the far end of the top header; if it is not there, one is in the party side) and what to do if one cannot remember one's password (there is a procedure for resetting it).

(ed: As we have said many times before, the TNC *is a wonderful resource, not only for arbitrators and mediators, but for parties as well. Past issues may be found at http://www.finra.org/arbitration-and-mediation/previous-editions-neutral-corner.)* (SAC Ref. No. 2018-14-01)

Should FINRA Have an Automatic Mediation Process With the Option to Opt Out?

By Rick Ryder, SAC

Yes, in answer to the title's question, and the prospect for that to happen has been revived by a FINRA staff initiative, launched in July, to solicit public comment on the question through a special email message center: mediate@finra.org, and to actively inquire of interested participants just how they view the prospect. The FINRA Notification, announcing this initiative, also explained that automatic mediation, qualified by an opt-out privilege, was a key recommendation of the Dispute Resolution Task Force (DRTF or Task Force). For the reasons that follow, I support the Task Force's recommendation.

While a "lay-up" in the Task Force's view, the National Arbitration and Mediation Committee (NAMC) has, to date, reacted negatively or at least skeptically, to adoption of the DRTF proposal. I'm mystified by such inaction, first, because the proposal itself has great merit, but also because the proposal was central to the DRTF's seven measures for improving the FINRA mediation program.

The Task Force Recommendation

In addressing the question posed by FINRA, I'll start with the Task Force's position on the

automatic mediation concept. As the Task Force observed (see p. 34 of the Final DRTF Report) in making this recommendation, some parties are hesitant to request mediation, as the opposition may view it as "a sign of weakness." Making the process automatic assures that each FINRA arbitration proceeding will have the supplemental opportunity to consider mediation. At the same time, each party to a case may exercise an "opt-out" to decline the process for any reason whatsoever.

The Task Force evidently believed its proposal to have broad support, as it clearly vetted the concept before making this recommendation. Its Report indicates, for instance, that "[f]eedback from mediators, arbitrators and attorneys interviewed on the topic was uniformly positive." Observing that the ABA's Dispute Resolution Section had supported automatic mediation, with a party opt-out qualifier, and viewed the approach as "appropriate to encourage greater participation in the mediation process," the Report adds that an automatic program will also assure that "parties are informed of mediation early in the process when mediation may be most beneficial and cost effective."

Phil Cottone, a preeminent arbitrator and mediator, served as head of the mediation subcommittee of the DRTF. This past Spring, Mr. Cottone spoke at a NYSBA Arbitration Seminar and advised the audience of the progress made by the NAMC in reviewing, rejecting or implementing the DRTF mediation recommendations. As to the automatic mediation proposal, Mr. Cottone viewed it as "a win-win, so why not?" He asked. "If parties don't want it, any of them can opt-out." It appears, however, that the NAMC view was different, he added, "with "counsel on both sides uneasy about seeming to require mediation."

Worth Another Look

I applaud the FINRA-ODR staff and the NAMC for doing this additional research on the DRTF proposal. Let me explain why I favor the proposal. I start with the proposition that the DRTF's hard-won and much-debated proposals deserve not only the NAMC's consideration and deliberation, but the Committee's respect and deference. The correct approach to the 51 recommendations of the Task Force, pieced together over the course of more than a

year's time, should be to ask, not "why" but "how"? Unlike the NAMC, the members of which are all litigators, the august membership of the Task Force was hand-selected by FINRA's Board and is quite diverse — experts, academics, consumer advocates, litigators, neutrals. It was organized with the implicit expectation that its reported recommendations would be adopted in good part, if not in whole — that its concepts would be honored, in full spirit, if not full implementation. That's exactly how it worked with the Ruder Task Force in 1996.

Why I support the Recommendation

Speaking to the specific proposal, I see great merit in the automatic mediation proposal. For dispute resolution to work at its best, parties should be introduced to a panoply of alternatives and techniques, so that they can select, through negotiation and discourse, the tools that most suitably aid in the resolution of their particular dispute. Mediation is a great tool for parties that are sincere in the belief they can resolve their dispute; those parties who sense good faith among their adversaries will benefit from the greater visibility the process would be accorded under the DRTF proposal:

- Heightened Visibility/Communication: Besides those parties or counsel who worry about displaying "weakness" in first requesting mediation, there are others who may be uninformed of mediation's availability, skeptical of its benefits, or misinformed of its workings. Placing a decision on mediation before such parties (i.e., should we opt out?) will encourage an in-depth review by counsel with his/her client about the virtues and potential drawbacks of mediation. It may also lead to discussions with opposing counsel about their view of mediation. Those most likely to benefit from mediation's enhanced visibility are often those who are most uninformed and least experienced; that frequently will be the public investor and, perhaps, the aggrieved employee. These are precisely the parties who stand to enjoy the greatest incremental benefit by employing this dispute resolution alternative.
- Institutional Endorsement – FINRA Benefits: Boasting an 80% success rate, there can be little doubt about the potential for mediation to provide a less costly, more immediate, and often more satisfying result for parties in dispute than can arbitration, so FINRA should

have no qualms about further promoting the process to all parties. From the forum's viewpoint, those who accept the mediation challenge and succeed will be more favorably impressed with the fairness and openness of the FINRA-ODR facility and FINRA itself will save money as earlier mediated resolutions supplant the costly hearing phase.

- Enhanced Choice: That some see automatic mediation, with an opt-out qualifier, as *restricting* choice is perplexing, as the practice would actually enlarge choice. The worry that an outlying few may not understand the opt-out choice, but will only understand that mediation is automatic, if at all valid, should not prevent the far greater majority from enjoying the benefits and choices available from a decision path that affirmatively offers mediation. The automatic mediation program can be outfitted with many protections to safeguard against such misimpressions and to assure informed choice at every step of the process. Should those protections fail, one needs then to ask whether that results in real or sustained injury.
- Remember that mediation itself is a consensual process, so that, if one belatedly discovers s/he is in the wrong room, one can exit at any time. Electing not to opt-out initially does not bar a later opt-out at any stage of the mediation process. The choice to stay and mediate should be the affirmative focus; that's where the value lies. The prospect that a party *could* feel momentarily "painted into a corner" should not prevent this very desirable renovation. FINRA will save money, the clients will save money, time and stress, and fairness ratings will rise as the forum enjoys more satisfied "customers."

Conclusion

Communication is the key to mediation's success and greater communication about mediation — among parties and between party and counsel — will be assured by adopting the DRTF's automatic mediation proposal. Finally, adopting this central proposal will also serve to realize or promote other objectives the DRTF intended for mediation. The addition of more mediation cases of all shapes and sizes to the FINRA docket will, for instance, create more opportunities for fledgling mediators to gain experience and exposure. It will promote diversity among mediators, as more mediators see opportunities to utilize their skills. Expanding the roster of mediators with experience and diversity will enhance competition and party choice, while allowing more suitable matches between mediators and their cases.

(Note: The author encourages those who read this posting to participate in the process by emailing their views to FINRA at mediate@finra.org.)

FINRA "Special Notice" on Organization-Wide Engagement and Transparency Initiative Pulls Almost 50 Comments

FINRA in late March issued a "Special Notice" soliciting public comments on a new enterprise-wide project examining transparency and engagement. Questions relating to the Office of Dispute Resolution ("ODR") were specifically part of the mix and we reviewed those letters after the comment deadline of June 19.

The comment letters are arranged by date received and posted on FINRA's Website for public viewing. About a third of the letters had something to say about FINRA-ODR. Almost all of the commenters addressed the committee system at FINRA and the transparency of the rulemaking process; we included comments only by those who spoke expressly about NAMC or ODR rulemaking *(ed: for more background on the Initiative itself, see our earlier reporting at SAA 2017-04, -10 and -14).*

Questions for ODR Participants

The Special Notice solicited comments about the ODR program in three major areas (*ed: listed* verbatim): 1) How helpful are the tools and resources currently available on FINRA's dispute resolution web page? What additional tools and resources regarding FINRA's arbitration and mediation processes would be helpful? 2) If you have accessed the Awards Online database, how user-friendly did you find the database? Should FINRA consider making any changes to the accessibility of the database, or the information available through the database? 3) How else might FINRA enhance its dispute resolution forum's

operational transparency? In addition, as we noted, commenters were invited to address ODR's National Arbitration and Mediation Committee, in terms of its composition and effectiveness. Some commenters addressed specific points, while others wrote long letters making numerous points. For brevity, we focus on the most salient of each commenter's remarks.

Comment Letter Summaries

FINRA posted the comment letters in three tranches. The first commenters, from March 25 to May 8, had nothing to say about the ODR program. From May 9 to June 8, there were several and the rest came in with the deadline flurry.

SIFMA: SIFMA submitted three comment letters in response to the Initiative. We covered its June 2 letter specifically speaking to the ODR program at SAA 2017-24. In an earlier (5/8) letter, FINRA protested the follow-up inquiries from FINRA that track "nearly every filing" of a Form U4/U5. "For example, arbitration disclosures are often met with inquiries before the facts have been gathered and hearings held. Seeking such information early in an arbitration interferes with the litigation process and puts the firm in an awkward position of having to explain to FINRA why an extension is required pending the litigation."

George Friedman: Mr. Friedman praises ODR's portion of the FINRA website and suggests as improvements: (1) archiving historical statistical data; (2) calculating recovery rates in the statistical reports; and (3) adding "search check boxes" to Arbitration Awards Online and making it easier to search for explained Awards. Awards themselves should have less detail about fee calculations. He suggests making public "high-level results" of NAMC meetings, publishing "aggregate arbitrator performance data and aggregate ODR forum performance data." Finally, he would change the Award Information Sheet to clarify, with "Yes/No" boxes, whether arbitrators are awarding things like pre-judgment interest or attorney's fees.

Jeffrey Kaplan: Mr. Kaplan states that he has previously served on the NAMC and would not want to change the way it operates. He does think the Committee should meet more

frequently and, perhaps, make its “general topics/agenda public.” He believes FINRA has done a good job in the past of assuring both the industry and public members represent diverse perspectives.

Bob Muh: “I would like to propose a significant change so that an ‘explained decision’ is the default option. If both parties do not want an ‘explained decision’ they would have to submit a joint request not to require an explained decision at least 20 days prior to the first scheduled hearing date. I would also suggest that an additional fee of $500 be assessed on each party if they do not waive the explained decision. This fee would be paid to the Chair who would have the responsibility for writing the opinion. As allowed today, the parties may limit the matters that are included in the explained opinion.”

Bill Singer: Mr. Singer conveyed extensive remarks in his letter, mostly having to do with Board and committee composition. He added, in closing, that “FINRA should establish an Anti-Fraud Fund whereby all defrauded public customers would obtain restitution for unpaid arbitration awards.” He also supports abolishing “mandatory arbitration for customers and associated persons.”

Peter Chepucavage: Mr. Chepucavage also had extensive remarks, which he organized into five recommendations. The first and the fifth have relevance to ODR. In the first, he decries the manner in which houses are “weaponizing” the Form U5 against departing employees. The Form “needs to be modified to include only regulatory violations and not employment disputes.” The fifth recommendation holds that the “arbitration program has become too expensive” to handle expungement claims and claims under $100,000. “FINRA can cure this by hiring independent hearing officers to hear these claims as is done in small claims courts across the U.S.”

Ryan Bakhtiari: NAMC plays “a vital role” in the ODR process. As a former member and Chair, Mr. Bakhtiari favors leaving much alone and would only add contact information about the members.

Steven Caruso: As NAMC’s current Chair, Mr. Caruso states that NAMC serves “a critical

and essential purpose." He likes the current selection method, which is based on experience and knowledge." He praises the tools and resources on the website, the mandatory DR Portal, and calls the Arbitration Awards Online "one of the greatest improvements" by ODR in a decade. He would like access to "interim arbitrator orders" and "denial of motion to dismiss" orders when they are in writing.

(ed: The remainder of the letters were all posted under the deadline date. We'll cover those letters in a "Part II" segment in SAA 2017-26.) (SAC Ref. No. 2017-25-01)

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