

Ten Best Practices for FINRA Chairpersons

*By Professor Anthony Sabino, FINRA Arbitrator**



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

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

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

1. Due Process Emanates from Respect and Courtesy

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

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

2. The Chair Takes Care of the Panel

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

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

3. **Maintain an Orderly Hearing**

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

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

4. **Encourage Streamlining the Proceedings**

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

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

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

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

5. **Overbook Hearing Dates**

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

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

6. **Take Responsibility for Prehearing Matters**

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

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

7. **Pay Attention to the Details**

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

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

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

8. **Be Decisive**

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

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

9. Let Your Panelists Speak First in Deliberations

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

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

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

10. Lead the Way to Compromise

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

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

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

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