



IN DEFENSE OF USING A CLAIMANT'S ATTORNEY IN FINRA ARBITRATIONS

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In addition to prosecuting claims for clients and in the process, ideally making them whole, plaintiffs attorneys should, in theory, serve a gatekeeper role for culling out claims that are frivolous. When a prospective client approaches a plaintiff's attorney, a business decision has to be made by that attorney. It would be irrational for a plaintiff's attorney to take on cases that cannot be won at trial or settled for less than the cost of prosecuting the lawsuit.

Experienced plaintiffs attorneys know which cases are potentially lucrative and which are not. In the process they prevent utterly baseless claims from being pursued.

If no attorney will take the case, a plaintiff can note that there is a very strong chance the case is frivolous. However, the Financial Industry Regulatory Authority (FINRA) rules permit a party to an arbitration to be represented by a non-lawyer. This allowance seems to promote litigation that never should have been filed. This article discusses one recent example of how this practice can be harmful to both respondents as well as claimants.

Certain organizations staffed by non-lawyers, such as Stock Market Recovery Consultants Inc., advertise for and represent claimants in FINRA arbitrations in

some jurisdictions already. At other times a non-lawyer will take a flier on representing claimants in a FINRA arbitration. In the FINRA context, this person is often an accountant or another financial representative acting as a non-lawyer representative of claimants in front of FINRA.

Take, as an example, a recent case involving a married couple who filed a claim against a financial advisor they became unhappy with. In this matter, the claimants had a 10-year relationship with the respondent financial advisor. They invested \$450,000 with two of the respondents and invested an additional \$300,000 with them

over that 10-year period. In the 10-year period, which spanned the recession of 2002 and the great recession of 2008, financial advisors grew the claimants' account by \$168,000. In 2010, the claimants moved their money to another financial advisor.

In 2011, one of the claimants attended a lecture at a local community college involving financial investing. After the lecture, the claimant spoke with the lecturer and explained to her that he was confused by some investments that had been made by two of the respondents who had been his financial advisors over the last decade. This conversation eventually led to the lecturer recommending that the claimants file a FINRA complaint against their two financial advisors, the advisors' supervisor, another respondent who only met with the claimants once to answer certain questions about their accounts and the broker dealer in September 2011. The lecturer would later become the claimants' expert witness, (herein referred to as "Expert Witness").

During the discovery phase of the FINRA case, Expert Witness appeared telephonically with the claimants and spoke on their behalf. At that point, the respondents all believed that Expert Witness was representing the claimants in the proceedings. Several times during the discovery process, which occurred over a one and a half year period, the respondents approached Expert Witness and asked if she and the claimants would agree to attend mediation with a FINRA mediator. The respondents' attorneys explained to Expert Witness that they would pay the mediation expenses and that the claimants were not obligated to resolve their claim at mediation. The respondents, their counsel and insurance carrier knew that the claimants were not properly analyzing damages and felt strongly that if a mediator became involved, he/she could explain to the claimants the mistakes they were making in calculating damages and end the wasteful litigation costs of defending this frivolous action. It never happened. Each time she was approached, Expert Witness stated that the claimants were not interested in mediation or attempts to settle. It was clear to the respondents that Expert Witness did not properly understand the legal process as there was no downside for the claimants to proceed to a mediation where the respondents would pay the expenses. After the arbitration award in favor of the respondents, it was learned from the claimants that Expert Witness had even recommended against mediation to them.

At the arbitration hearing, Expert Witness explained to the arbitrators that she was not representing the claimants and was

not being paid, but that she was only speaking on their behalf because the claimants were not capable of presenting their side without assistance.

The presentation of evidence at an arbitration is uniquely a skill reserved for an attorney and...constitutes the practice of law. In this matter, the fault does lay with FINRA alone. The easiest way to end the practice of non-attorneys representing clients in FINRA would clearly be for FINRA to amend its rules.

The arbitrators entered an award in favor of the respondents and found "the evidence admitted at hearing demonstrated that respondents did not violate any statute, rule or duty owed to claimants, and claimants knew that their claims were completely without merit in that they suffered no economic loss attributable to the behavior of respondents in managing their accounts, but in fact realized substantial gains in their accounts during the time period covered by their claims." The arbitrators awarded \$75,000 in attorney fees to be paid by the claimants as well as all of the arbitration costs.

The claimants never consulted with an attorney but instead relied on the advice of Expert Witness. After the award, one of the claimants stated that if anyone ever thinks about proceeding to a FINRA arbitration without consulting an attorney that her name and contact information should be given to that person so that she could communicate what a poor decision that would be.

The presentation of evidence at an arbitration is uniquely a skill reserved for an attorney and in the minds of the authors constitutes the practice of law. In this matter, the fault does lay with FINRA alone. The easiest way to end the practice of non-attorneys representing clients in FINRA would clearly be for FINRA to amend its rules. Representing claimants in FINRA arbitrations requires a lawyer that has experience in litigation. At a time when FINRA is embarking on new reforms in other areas, this is an area that should also be addressed. An attorney familiar with litigation would have concluded that the claimants did not sustain damages even if they could have somehow proven liability. The claimants would have saved \$75,000 plus the cost of the arbitration hearing in addition to the anxiety of going through the arbitration hearing. We can only speculate on what motivated Expert Witness in this matter, but people like Expert Witness, who have no legal training or litigation skills should not be allowed to lead financial investors into a forum that could become very costly to them. Similarly, the respondents who, with their insurance carriers, collectively spent hundreds of thousands of dollars defending these meritless claims, and who had to proceed to post-arbitration court proceedings to have these claims expunged from their CRD, would be spared and time and FINRA resources would be saved.



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