Count me as a solid no. We used to let non-attorneys represent clients and it was a disaster. They would bring anything to arbitration and it would cost firms a fortune. If you let non-attorneys represent clients then you need to also amend arbitration so it is handled fairly:

1) All parties pay the same going in
2) Arbitrators cannot be trained not to award firms and brokers forum fees and attorney fees
3) Forums are held where specified in the client agreement. If clients don't like it, they don't have to sign it, how simple is that?
4) Case can be moved for dismissal at anytime

The above are just some of the changes that need to be made to make arbitration fair for all sides.

Jed Bandes

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October 23, 2017

Martha E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: ***Regulatory Notice 17-34, Non-Attorney Representatives in Arbitration***

Dear Ms. Asquith

I am an attorney who has been practicing in the area of securities arbitration since 1991. This is my primary practice area. I write you today to comment on the efficacy of allowing compensated non-attorneys to represent parties in FINRA arbitration.

I have always thought that allowing non-attorney representatives to appear before FINRA on behalf of claimants is allowing and condoning the practice of law without a license. Representing parties in a FINRA arbitration today requires the same skills as representing clients in complex business litigation matters in court. Lawyers have been trained to understand the myriad of legal issues that are at play in a FINRA arbitration. Furthermore, lawyers have passed a bar examination, creating a floor for who can practice law. Bar associations and courts regulate attorneys, disciplining them if they fail to meet certain standards or violate ethical cannons. No such protections exist for the clients of non-attorney representatives.

Attorneys have numerous legal duties to their clients, including the duty of loyalty, the duty to do what is best for the client, and the duty of confidentiality. Again, the client of a non-attorney representative has no such protections. I am guessing that the clients of these non-attorney representatives often have no idea that there are such significant differences between retaining an attorney to represent them in FINRA arbitrations, and "retaining" a non-attorney representative.

It seems that when I review arbitration awards, the most likely result of a zero award comes when a claimant represents himself, but that is closely followed by when a claimant is represented by a non-attorney representative. While these are my own observations, I am sure it would not be difficult to review the arbitration award database to determine if my informal observations are accurate. If they are, this is a significant additional reason for barring non-attorney representatives in FINRA arbitration.

Those people who bring claims in the FINRA arbitration forum are typically victims of the financial services industry. By allowing non-attorney representation in FINRA arbitration, FINRA is potentially condemning these victims to being victimized once again by people who do not have the competence, duties or protections that come with an attorney representative.

Very truly yours,

Jeffrey A. Feldman

JAF/mh

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November 1, 2017

VIA EMAIL (pubcom@finra.org)
AND FIRST CLASS MAIL
Marcia E. Asquith
Office of the Corporate Secretary
FINRA 1735 K. Street NW
Washington, DC 20006 – 1506

Re: Non-Attorney Representatives in Arbitration Comment Letter

Dear Ms. Asquith:

On behalf of Gusrae Kaplan Nusbaum, PLLC, ("GKN") I submit this comment in response to FINRA Regulatory Notice 17-34, regarding the representation of claimants in FINRA arbitrations and mediations by non-attorneys. GKN has represented broker – dealers, public and private companies as well as, individuals in the securities industry since 1975.

Our Firm has interacted with compensated non-attorney representatives' ("NAR Firms") many times over the years. In our view NAR Firms[1] do not work in the best interest of the public and many NAR Firms take advantage of those naïve and unsophisticated individuals, promoting

[1] We do not hold the same opinion of law school arbitration clinics as the clinics are supervised by either law professors or practicing attorneys.

these people to pay a fee for reviews of records and thereafter representation of the individual in an arbitration against a member firm and registered individuals.

While FINRA Rules prohibits NAR Firms from representing clients in certain situations,[2] including but not limited to, "the (NAR) person is currently suspended or barred from the securities industry in any capacity," NAR Firms are controlled by and employ barred individuals. One firm is Cold Spring Advisory Group ("CSA") headquartered in New York. CSA is controlled by Louis Ottimo, a barred individual, CRD # 2606438, and CSA is supposedly owned by as a matter of record Ottimo's wife. Despite Ottimo's bar from representing clients pursuant to FINRA Rules, arbitrators have allowed CSA to represent public customers in arbitrations before FINRA Dispute Resolution.

Furthermore, on or around November 11, 2014, a FINRA member firm sued CSA and Ottimo, among others, in the Supreme Court of the State of New York, alleging that CSA and its agents, including Ottimo, improperly obtained confidential and proprietary information belonging to it and other broker-dealers and is utilizing such information to target, contact, induce, and encourage customers to initiate arbitrations against those same broker-dealers.[3]

CSA and other NAR Firms attempt to convince public customers to file claims regardless of the integrity of their allegations, knowing that most firms will settle these claims for ransom payments rather than litigate through hearing, as a full arbitration proceeding is an expensive endeavor. Many firms, especially small firms, cannot afford to litigate these claims. Another client had approximately five arbitrations filed by Stock Market Recovery at one time. Stock market Recovery is another NAR Firm based in Brooklyn, NY. One of the founders of SAR pled guilty

[2] Rule 12208 of the Code of Arbitration Procedure for Customer Disputes, Rule 13208 of the Code of Arbitration Procedure for Industry Disputes, and Rule 14106 of the Code of Mediation Procedure.

[3] This New York State action has been stayed since Ottimo filed for bankruptcy.

to insurance fraud in a seven figure scam. The claims filed by SAR were settled between $500 (in this claim it was cheaper for the firm to settle than to move to dismiss at hearing) and $15,000.

The course of conduct illustrated by the NAR firm conduct demonstrates that such conduct irreparably harms member firms and associated persons. The costs to the member firms are prohibitive and there is no recourse against NAR Firms for filing frivolous arbitrations.

Some NAR firms require a fifty percent (50%) contingency fee arrangement. These firms are not permitted to provide legal advice under various state laws, which certainly hinders the NAR firms functionality in representing clients in a legal setting. CSA employees, aside from Ottimo, are running boiler room operations where they cold-call customers based on purloined contact information and promise of recovery that is not legitimate. Public customers cannot receive proper representation under such circumstances, as all these NAR firms care about is extorting settlements and receiving fees from former brokerage firm customers.

NAR firms continue to skirt FINRA Rules, and as they are not member firms, or registered individuals. FINRA has no jurisdiction over any NAR firms' conduct. Member Firms, Associated Persons and unsuspecting members of the public continue to suffer financially and professionally at the hands of NAR firms. The only way to end such conduct is to bar NAR firms from representing investors.

Noteworthy, is that lawyers regardless of their licensing jurisdiction are subject to State Bar rules and Canons of Ethics. If a lawyer engages in fraudulent conduct or abuses a client there is recourse. There is no such recourse against NAR Firms.

Very truly yours,

Martin H. Kaplan

November 3, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 17-34
Non-Attorney Representation in Arbitration

To Whom It May Concern:

I have been involved with the securities industry since 1983. I have been a lawyer practicing in the securities arena since 1986. I handled my first securities arbitration prior to graduation from law school, albeit under a lawyer's supervision. I first experienced the representation of a compensated non-attorney in approximately 1990. I had several concerns then, and have those same concerns now.

First, a non-attorney is not subject to the ethics discipline of any entity. For instance, if a non-attorney makes a representation about the non-existence of a document, that non-attorney is not bound by any ethical obligation to be truthful. Given that some of the non-attorney representatives are former brokers with checkered pasts, this creates a scenario where each side is playing by a different set of rules. There was at least one compensated non-attorney who was a disbarred attorney.

Frankly, FINRA should not concern itself with a non-attorney's fee arrangements as this does not impact the fairness of the proceeding. However, failing to discharge one's duty of honesty in connection with the proceeding has a direct impact on the usefulness of arbitration.

Second, communications between a non-attorney and that non-attorney's customer are not covered by the attorney-client privilege. I have raised this issue with arbitrators and it has fallen on deaf ears, but it is a legal fact. There is no privilege and clients should be aware of this. FINRA needs to educate arbitrators on the application of the privilege and its unavailability to non-attorney representatives.

Third, non-attorneys under many states' laws are engaged in the unauthorized practice of law. Lawyers have an ethical obligation to report the unauthorized practice of law to their respective attorney regulatory body. The non-attorney could then argue to the arbitration panel that the lawyer and the lawyer's client are trying to gain an unfair advantage by removing the non-attorney, who was chosen by the customer.

I am aware that individuals representing themselves can be untruthful in a FINRA arbitration. Members and associated persons are permitted to represent themselves as well. The number of *pro se* claimants in large dollar cases is not a material figure, I'm sure. Members and associated persons are governed by FINRA rules which would require truthfulness and have a mechanism for regulation and punishment.

FINRA raises the issue of whether non-attorney representatives represent a more economical alternative. There does not appear to be any evidence that non-attorney representatives are cheaper than attorneys. Furthermore, a lower contingency fee rate may be met with proportionately lower competence or dedication. In other words, one gets what one pays for.

Finally, assuming that a non-attorney representative is successful in gaining some compensation for a client, who should get paid? In a traditional attorney contingency fee structure, the attorney deposits the settlement or award proceeds in a trust account, governed by a regulatory authority, and disburses according to ethical rules. A non-attorney has no such ethical oversight and could do whatever he/she sees fit with respect to the settlement proceeds. If the non-attorney absconds with some or all of the proceeds, might the customer accuse the member firm of "knowing" that the non-attorney was not subject to ethical rules, ignored that fact and paid the funds to the non-attorney anyway.

The lack of a regulatory and ethics structure is the strongest argument against compensated non-attorney representation. In particular, if the compensated non-attorney's compensation is contingent on the outcome, the non-attorney has every incentive to cheat and no disincentive due to the lack of any disciplinary oversight or regulation.

Very truly yours,

Marc S. Dobin

Marcia E. Asquith:

Please accept this email communication as my comments in connection with the above matter. First, allow me to preface my comments with the recognition that I have not practiced law in several years and therefore presently have "no skin in the game." I have been an ADR professional for nearly 20 years, having provided arbitration, mediation and other types of ADR services in numerous forums. I have been a FINRA arbitrator since 1999 and have served on AAA, JAMS and FMCS panels for almost as long.

With regard to my mediation work, I have reached the personal conclusion that one does not have to hold a law degree or law license in order to perform well as a mediator. In connection with my labor arbitration work through FMCS, I have handled several cases as an arbitrator where one of the parties was represented by a non-lawyer (usually a union representative).[1] It is quite obvious to me (anecdotally) that neither a legal education nor a law license is necessary to provide competent representation in a labor arbitration forum. (Conversely, holding a law license does not guaranty competent representation.)

I do not wish to denigrate any of the comments, previously posted, that present "horror stories" (again, anecdotally) or valid concerns about allowing non-lawyers to represent customers in the FINRA forum. However, as the Regulatory Notice clearly points out, there are definite "down-sides" to disallowing continued representation by non-lawyers. I would strenuously argue that the best remedy is not to disallow all non-lawyer representation, but rather to put into place adequate safeguards to better inform the public as to the risks of engaging a non-lawyer in the FINRA forum.

One suggestion

I would advance is
to put in place a rule that requires all non-lawyers who wish to appear in the FINRA forum to present a "disclosure notice" to the customer. The disclosure notice must be approved in advance by FINRA and must be in clear English. The notice should disclose, among other things, the lack of a legal education, applicable bar or ethical rules, and malpractice coverage of the individual/entity offering to provide representation. While this remedy may not cure all of the objections voiced previously, it would at least put prospective clients on notice of the risks involved and better allow them to determine if they wish to proceed with the non-lawyer, represent themselves or employ an attorney.

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[1] I have seen non-lawyers engage in advocacy work in Florida, Georgia and Alabama. I have no knowledge of the legal prohibitions any or all of those state have against the practice; I just know that it is done on a regular basis.

KENNETH STARR
ADR PROFESSIONAL

WWW.STARRADR.COM[starradr.com]

Regarding allowing non-lawyers to represent clients in FINRA cases, as an arbitrator who has handled many cases, starting in 1996, I want to suggest that this is not good policy. I have actually been assigned only one case where claimant was represented by a lay person, and it was a disaster. Fortunately, the non-lawyer assigned the case to an attorney and the matter proceeded to conclusion.

I do wonder if a non-lawyer who is approved by FINRA is subject to state laws prohibiting the unlicensed practice of law.

I have handled many cases where a party is pro-se, and the misunderstandings about evidence, procedure, etc. are a problem, and in all fairness FINRA cannot prohibit pro-se representation. But where the claimant hires a lay person, a mess is likely to follow and that can be avoided.

I have seen arbitration grow more complex over the years, with motion practice, usually involving discovery, quite active. This growing complexity especially makes the lay person a poor representative of a claimant.

Thank you.

Phil Glick, Arb. No. A-13657

Re: Regulatory Notice 17-34: *Non-Attorney Representatives in Arbitration*

Dear Secretary Asquith:

I'm writing primarily to bring to FINRA's attention an article that is directly on point with the issues on which the Authority is seeking comment through the publication of RN 17-34. The article, which is an attachment to this email, was published earlier this year in my company's newsletter, *Securities Arbitration Commentator*. It was written by two attorneys with significant experience in the field of securities arbitration and caught our attention, because of its scholarly and comprehensive approach to the question of non-attorney representation.

Besides the logic of the authors' arguments, there are the authorities discussed and cited. The FINRA Regulatory Notice did not even mention the Report compiled and published by the Public Members of the Securities Industry Conference on Arbitration (SICA) in the mid-1990s on the issue. Non-attorney representation is not a new phenomenon in securities arbitration and any solution that FINRA proposes ought to be informed, not merely by a few horror stories that commenters will surely submit, but by a full appreciation of the attention and concern, the information-gathering, and the critical analysis that others have applied in confronting this issue.

Authors Aegis Frumento and Stephanie Korenman provide recommendations at the end of their article, which I also commend to the Authority. I find particularly incisive the law-of-the-shop and the law-of-the-land distinction the authors draw. I think, too, it will be essential to distinguish specifically the non-attorneys from the Securities Arbitration Clinics in any rulemaking on this subject:

Respectfully submitted,

Richard P. Ryder, President/Editor-in-Chief

Securities Arbitration Commentator, Inc.

www.sacarbitration.com[sacarbitration.com]

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Rethinking Non-Lawyer Advocacy in FINRA Customer Arbitrations

By Aegis J. Frumento and Stephanie Korenman*

Introduction

In the past six months, both FINRA and the SEC have issued warnings to investors against dealing with so-called asset recovery companies—firms that are not law firms or lawyers, but that sell services to recover investment losses, including through FINRA arbitration. FINRA warned bluntly, "In addition to the original money you lost, you now may lose more money at the hands of professional con artists."[1] The SEC urged investors to "think carefully before paying money for asset recovery services that may be fruitless."[2]

This is not a new thing. Twenty years ago, the Securities Industry Conference on Arbitration ("SICA") noted with alarm the proliferation of such asset recovery companies.[3] SICA concluded that asset recovery firms were engaged in the unauthorized practice of law and urged FINRA (then the NASD) to pass a rule permitting them access to the arbitration forum only if permitted by the state where the arbitration took place.[4] That recommendation eventually found its way into FINRA Rule 12208 as it currently stands.

SICA's recommendation and the current FINRA Rule were, we argue, missteps. The result has been that today, whether non-lawyer advocates are permitted to appear in FINRA arbitrations depends entirely on where the hearing is. To illustrate the problem, New York and Florida, the two most popular venues for FINRA arbitrations, between them hosting a third of all FINRA hearings,[5] have reached directly opposite conclusions.[6]

Even worse than divergent state rules, only a handful of states have ruled on the question at all. This, too, is of FINRA's making. Rule 12208(c) permits non-lawyers to appear unless "state law prohibits" it. Rule 12208(d) restricts challenges to the qualifications of representatives to "an appropriate court or other regulatory agency," and prohibits stays of arbitration pending any such challenge except by a court order. So, unless one of the other parties starts a court action to challenge a non-lawyer advocate under state law, that non-lawyer remains able to act.

Rule 12208 thereby establishes non-lawyer advocacy as the *status quo*, and because it takes time, energy and money to change a *status quo*, no party, so far as we can tell, has, since Rule 12208's adoption, challenged the qualifications of a non-lawyer advocate in a FINRA arbitration in any court anywhere in the country.[7] The consequence is that non-lawyers may appear as advocates for parties in FINRA arbitrations in most states by default—even though they may be engaged in the unauthorized practice of law by doing so, and even though they perpetuate a practice that SICA, FINRA and the SEC all view skeptically as not being in the best interests of investors.

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* ***Aegis J. Frumento*** *and* ***Stephanie Korenman*** *co-head the Financial Markets Practice Group of Stern Tannenbaum & Bell, LLP in New York City. Communications should go to afrumento@sterntannenbaum.com.*

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This is too fundamental a question to remain unsettled. Parties to FINRA arbitrations should by now know whether or not their paid advocates must be lawyers, and the answer should not vary by location. FINRA's rules control securities arbitration. It holds arbitrations in 70 cities in all fifty states, the District of Columbia and Puerto Rico. FINRA operates by grace of the federal securities laws and is a virtual subaltern of the SEC. Its arbitrations are mandatory upon industry participants—including especially customers—who are forced to forfeit access to the courts as the price of admission to the securities markets.

FINRA customer cases all arise out of a common, national understanding of the rights of the parties, largely rooted in common law principles, and in federal and state securities laws and regulations. Common sense argues for uniformity based on the FINRA forum itself, rather than disparity based on where the hearings just happen to take place. FINRA alone can set a uniform rule to govern who may appear as advocates in FINRA arbitrations.

I. The "Law of the Shop" or the "Law of the Land"?

Parties had been arbitrating cases for hundreds of years before FINRA came along. The practice apparently arose during the late Middle Ages, when merchants in France, England and Germany did most of their business at traveling trade fairs. Whenever disputes arose, they needed to be resolved quickly, for the very practical reason that the disputants needed to travel on. Arbitration tribunals arose and resolved disputes by the quick application of the customs and usages of merchants rather than the technical law. By the early 17th century, the arbitration of disputes among merchants had become commonplace. Merchant arbitration was thereafter brought over to the American colonies and here it flourished.[8]

Most arbitration participants in commercial and labor arbitrations were "repeat players," involved in arbitrations as an ongoing part of their businesses. Speedy and inexpensive resolution of disputes was more important than legally pristine outcomes. What mattered for decision-making was knowledge of the norms and customs of the industry of which all the parties were common denizens, not of the law writ large. Not surprisingly, then, neither arbitrators nor advocates were typically lawyers and few arbitration issues reached the courts.

The general legal consensus was that arbitrators were expected to apply the "law of the shop" and not the "law of the land."[9] Moreover, for repeat players, the outcome of any one arbitration was not likely to put much at stake. Over the course of a lifetime of arbitrations, imperfect results in individual cases would eventually regress to an acceptable mean—win some, lose some, but come out even over time.

Over the past 40 years, however, a new kind of arbitration arose and FINRA customer arbitration is among them. Modern customer securities arbitrations are very different from the traditional

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MANAGING EDITOR ..... **Richard P. Ryder**

SECURITIES ARBITRATION COMMENTATOR

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Non-Lawyer Advocacy *cont'd from page 2*

ones between merchants. *First*, customers and brokers are not participants in the same industry, so there is no "law of the shop" to apply. Rather, customer rights are rooted in agency, negligence, contract, fraud, and federal and state securities statutes — very much the "law of the land."

Second, customers are not "repeat players." Most customers will only see one securities arbitration in their lives, so that, unless a claim is very small, the customer will have a lot at stake and no prospect of having an unfair decision made up for in later cases. As a result, customer arbitration has lost much of its informality and become increasingly "lawyerfied," so that today it is nearly as procedural, protracted — and expensive — as real litigation. So, although it is still called "arbitration," it has lost much of the look and feel of traditional arbitration and taken on much of the look and feel of litigation — and of legal practice.

Faced with these new forms of arbitration practice, the courts have generally adopted one of two models. One can be called the "rule-of-venue" model. This starts from the premise that lawyers *only* practice in courts of law; arbitrations are not courts of law; therefore, advocacy in arbitration is not "practicing law." This is the model in New York. The alternative can be called the "rule-of-conduct" model, and it places primacy on how you conduct yourself. Basically, if you plead, analyze, and argue like a lawyer, then you are practicing law regardless of the setting. This is the model in Florida, Illinois, California and Arkansas.[10]

New York's rule-of-venue solution appears to be well-established, but it rests on shaky foundations. Only a few federal court cases have dealt with the issue, and only in connection with out-of-state *lawyers* acting in New York.[11] Only one state court has even considered the status of a non-lawyer advocate, and only in the context of deciding that his status as a non-lawyer did not render his statements any less privileged than those of any of the other participants in the arbitration.[12]

Curiously, the seminal case — Judge Weinfeld's widely followed decision in *Williamson, P.A. v. John D. Quinn Constr. Corp.* — does not rely on any New York State cases, but on a 1975 New York City Bar Association Committee Report that concluded "representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law. Even if it is held to be the practice of law, there are sound and overriding policy reasons for permitting such non-lawyer representation in the labor arbitration field."[13]

There are two main problems with the New York line of cases. *First*, they ignore the seminal New York case on out-of-state lawyering, where the Court of Appeals held that a California lawyer could not collect a fee for attending client meetings and giving advice to a client in New York because he was engaged in the unauthorized practice of law in New York — a case that reads for all the world like a "rule-of-conduct" decision.[14]

Second, the 1975 Bar Association Report on which the *Williamson* court relied dealt specifically with *labor* arbitrations, and indeed rested on an assertion that labor was a unique substantive area. Historically, labor arbitration is just the sort that adjudicated the "law of the shop" for repeat players.[15] As pointed out above, that traditional model of arbitration is very different from modern FINRA customer cases.[16]

The alternative "rule-of-conduct" model at least has the virtue of being substantively more coherent. That what one does should be more important than where one does it is intuitively appealing, so we should not be surprised that this model is in the ascendency.

The American Bar Association's Model Rules of Professional Conduct gave impetus to this trend by enshrining in Rule 5.5 on multi-jurisdictional practice of law the express permission for out-of-state attorneys to provide legal services on a temporary basis in connection with an arbitration, thereby affirming that arbitration practice was indeed the "practice of law." The ABA Model Rules have been adopted, in one form or another, by most states.[17] While the Model Rules do not specifically speak to the activities of non-lawyers, a few jurisdictions have relied on Rule 5.5 to declare that non-lawyer arbitration advocates would be practicing law illegally.

Yet there are exceptions to both the "rule-of-venue" and the "rule-of-conduct" approaches rooted in a very practical concern — that the amount at stake matters. In New York and elsewhere, non-lawyers are routinely permitted to act as advocates in small claims courts, even though they are still courts.[18]

Likewise, even in a "rule-of-conduct" jurisdiction like Illinois, non-lawyer advocates routinely assist clients in obtaining unemployment benefits, despite the lawyerly tasks involved, because of "the informal nature of the proceedings, the minimal amount involved and the long history of participation by non-lawyer representatives. . . ."[19] And, as mentioned above, non-lawyer advocacy in union grievance proceedings is commonly accepted, no matter how much it looks and feels like practicing law.

It seems clear, therefore, that traditional arbitration, in which advocates need not have been lawyers, shared these two essential attributes: *First*, they dealt primarily with the norms and customs of participants in a common business — the "law of the shop;" and *second*, the stakes in individual cases were small.

Even today, when both those attributes are present, all states make exceptions, from whatever their stated positions on who is "practicing law," to permit non-lawyers to represent parties — regardless of the formal nature of the forum as a court, or of the substantive

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Non-Lawyer Advocacy *cont'd from page 3*

nature of the task as fundamentally lawyer-like.

We think, therefore, that the proper way to address non-lawyer advocacy in FINRA customer cases is to look to those precedents rather than to a somewhat artificial and overly rigid "rule-of-venue" or "rule-of-conduct." In FINRA customer arbitrations, the "law of the land" predominates over the "law of the shop;" therefore, non-lawyer advocates should be excluded unless the amount at stake is small.

II. FINRA Rule 12208 Does Not Help

The stock exchanges and the NASD historically treated arbitrations in the same way all merchants did—exclusively as a way of quickly resolving disputes between their members. The New York Stock Exchange first began offering arbitration services in 1817, but did not even permit customer access to them until 1872.[20] Thus, securities arbitrations were from inception typical of those where the "law of the shop" was applied to repeat players.

And, also typically, non-lawyer advocacy was expected and certainly permitted. The old NASD Code of Arbitration Procedure (Rule 10316) simply provided that all parties had the right to representation by counsel, but it made no distinction between lawyers and non-lawyers. In practice, securities arbitration was a "businessman's forum" in which lawyers were more likely seen as a hindrance than a help.[21]

That changed dramatically when the Supreme Court ruled that customer arbitration agreements were fully enforceable, even to the extent of hearing federal securities law claims that had once been the exclusive province of the federal courts.[22] Today, there are almost twice as many FINRA customer cases as there are industry disputes. Clearly the "law of the shop" model that supported non-lawyer advocacy in the past—and that may still for industry cases—no longer holds for the vast majority of modern FINRA customer disputes.

With the influx of customer claims came complaints about non-lawyer advocates. Beginning in 1991, SICA received complaints about non-lawyer advocates filing frivolous claims and engaging in unethical practices, and ultimately concluded that non-lawyer advocacy "raised questions about the adequacy of the representation provided by [them], an issue vital to the integrity of the arbitration process."[23]

In light of that, SICA originally proposed, in 1993, a rule that would have prohibited non-lawyer advocates except for friends, relatives, fellow employees of a party; officers, partners or employees of a corporation or partnership that is a party; and "a business advisor not regularly in the business of representing parties in arbitrations."[24]

The proposed rule was published in the October 1993 issue of the *Securities Arbitration Commentator* and comments were received over the ensuing months. Non-lawyer advocates, as would be expected, unanimously opposed the new rule, arguing that arbitration was "an informal proceeding involving fact intensive issues which does not involve the practice of law."[25]

SICA pulled back from its original recommendation, but for practical rather than substantive reasons. As a result of its fact-finding, SICA concluded that non-lawyer advocates were probably engaged in the unauthorized practice of law, engaged in misleading advertising, did not generally charge less than attorneys, did not offer the protections of attorney-client privilege, malpractice insurance and professional ethical constraints, and were often persons barred from the securities industry or from practicing law. "SICA is concerned about the adequacy of such representation and the integrity of the SRO [arbitration] process. As a practical matter, however, because of the large number of arbitration cases filed with the SROs each year, the SROs are not equipped to police or review the quality of such representation." It therefore recommended a rule that permitted non-lawyer advocacy unless prohibited by state law, or if the non-lawyer was suspended or barred from the industry or from practicing law.[26]

That recommendation eventually became FINRA Rule 12208. In explaining why it opted to permit non-lawyers to continue representing parties in customer arbitrations, NASD (FINRA's predecessor) focused exclusively on affordability of representation for customers with small claims. "NASD understands that it may be difficult for investors with claims of less than $100,000 to retain an attorney on a contingency-fee basis . . . . In these circumstances, NASD believes that investors should be able to seek other assistance to resolve their . . . claims for a reasonable fee."

Among the non-lawyer advocates that NASD envisioned were expressly "a relative, friend or associate to represent or assist an elderly or disabled person . . . [and] . . . law school securities arbitration clinics. . . ."[27] But, of course, Rule 12208 does not provide for any such qualifications. So now, two decades after SICA first raised an alarm, non-lawyer advocates continue to ply their trade, and FINRA and the SEC continue to warn us about them.

III. A Modest Proposal for a Way Forward

What can we make of all this? It seems clear that the first thing we should do is abandon the "rule-of-venue" or "rule-of-conduct" approach. The better question asks neither what the advocate is doing nor where he or she is doing it, but rather *in what context is he or she doing it*. The context of the work yields a different set of questions, firmly rooted in traditional practice but also cognizant of what is really at stake: Is the context more concerned with the "law of the shop" or the "law of the land"? And, is the claim small enough to invoke a parallel with a small claims court? Answering those questions gets us to results that make a lot more sense in the real world. Here are some tentative conclusions:

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Non-Lawyer Advocacy *cont'd from page 4*

1. Non-lawyer advocates should be permitted in industry cases where "law of the shop" issues and repeat players predominate. Accordingly, FINRA Rule 13208 should stay as it is.

2. Non-lawyer advocates should be permitted in FINRA customer arbitrations that are to be determined by a single arbitrator under FINRA Rule 12401 and in Simplified Arbitration under FINRA Rule 12800. These cases have already been identified by FINRA as essentially "small claim" cases, so that the small claim court exception for non-attorney advocates is apt.

3. Non-lawyer advocates should not be permitted to appear in any other FINRA customer arbitrations, because all others involve a predominance of "law of the land" over "law of the shop," and the amounts at stake are sufficiently large so as to place one-time players like customers at considerable risk.[28]

In light of that, we propose that the first sentence of subsection (c) of Rule 12208 be amended to read as follows:
"Parties may not be represented in an arbitration by a person who is not an attorney or a law student enrolled in a clinical program at an accredited law school under the supervision of an attorney, except if the arbitration is to be decided by a single arbitrator under Rule 12401 or is a Simplified Arbitration under Rule 12800, unless:"

and that Rule 12208(d) be amended to read in its entirety as follows:
"Issues regarding the qualifications of an attorney or other ~~a~~ person to represent a party in arbitration are governed by this Rule and applicable law and may be determined by the arbitrators, an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues by a court or other regulatory agency.

Yes, it really is that simple. SICA's concern from 20 years ago about FINRA's ability to police whether or not an advocate is a lawyer is outdated—indeed, it seems almost quaint given today's technology. FINRA already has several Rules on its books that require it to determine if a party is an attorney,[29] and FINRA Rule 12208(b) already provides the necessary "qualifications" of an attorney representative in FINRA arbitrations.[30] Moreover, as of April 3, 2017, all represented parties must use FINRA's online DR Portal, which already requires attorneys to provide their State and Bar identification numbers.[31] DR Portal could be programmed to reject filings by non-lawyers, but even without such a feature, a representative's status as a non-lawyer can be easily proved by adversary counsel in a motion to disqualify. FINRA would face no additional burdens like whatever concerned SICA back in 1995.

FINRA customer arbitration is a national enterprise enforcing nationally applicable laws, rules and regulations. Who should and should not be permitted to represent parties at FINRA arbitration hearings should not be subject to the vagaries of individual state interpretations of what it means to "practice law." Only FINRA can act to impose uniform practice norms with respect to its arbitration proceedings. This is one way to do it.

Endnotes

1 FINRA Investor Alert, *It Can Be Hard to Recover from "Recovery" Scams* (updated Sept. 19, 2016), available at http://www.finra.org/investors/alerts/it-can-be-hard-to-recover-from-recovery-scams.

2 SEC Investor Alert, *What You Should Know About Asset Recovery Companies* (Aug. 9, 2016), available at https://www.sec.gov/oiea/investor-alerts-bulletins/ia_assetreovery.html.

3 *See* Securities Industry Conference on Arbitration, *Report on Representation of Parties in Arbitration by Non-attorneys*, 22 FORDHAM URB. L.J. 507, 512 (1995) [the "SICA Report"].

4 *Id.* at 524.

5 Excluding the current number 1 venue—San Juan, Puerto Rico—as being the anomalous consequence of the recent massive defaults on Puerto Rico bond issues. *See* FINRA Arbitration statistics available at www.finra.org.

6 As to Florida, *see Fla. Bar Re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1997 Fla. LEXIS 970 (Fla. 1997); as to New York, *see infra*.

7 The chairperson of a FINRA arbitration panel in Illinois did request, and he received, a Professional Conduct Advisory Opinion from the Illinois State Bar Association that non-lawyers who represent parties are engaged in the unauthorized practice of law. ISBA Opinion 13-03 (January 2013).

8 *See, generally,* Sara Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* 48 U.C. DAVIS L. REV. 921, 939-40 (2015).

9 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

10 *See, e.g.*, ISBA Opinion 13-03 at p. 6; "The character of the act done, not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law," *quoting People ex rel Chicago Bar Ass'n v. Goodman,* 366 Ill. 346, 8 N.E.2d 991 (1937).

11 *See, e.g., Prudential Equity Group, LLC v. Ajamie,* 538 F. Supp. 2d 605 (S.D.N.Y. 2008); *Williamson, P.A. v. John D. Quinn Const. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982).

12 *Depalo v. Lapin,* 2009 N.Y. Misc. LEXIS 5963 (Sup. Ct. N.Y. County, July 2, 2009 (unpublished opinion). It is interesting that the court's first cited reason was "that FINRA regulations specifically permit parties to be represented by someone who is not an attorney . . . ." *Id.* at *6. Thus, the court held that non-lawyer advocates were not practicing law in FINRA arbitrations because FINRA Rule 12208 expressly permits them to practice there—a circular argument.

13 Committee on Labor and Social Security Legislation, *Labor Arbitration and the Unauthorized Practice of Law,* 30 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 416, 422 (1975) [THE "1975 ABCNY REPORT"].

14 *Spivak v. Sachs,* 16 N.Y.2d 163, 211 N.E.2d 329 (1965).

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Non-Lawyer Advocacy *cont'd from page 5*

[15] *See generally, In re Town of Little Compton,* 37 A.3d 85, 2012 R.I. LEXIS 16, 192 L.R.R.M. 3186 (R.I. 2012).

[16] The Association of the Bar of the City of New York reaffirmed the conclusion of the 1975 Committee Report as recently as 2008. Committee on Arbitration, *Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York,* 63 The Record of the Association of the Bar of the City of New York 700 (2008) [the "2008 ABCNY Report"]. It did so even while acknowledging that the 1975 ABCNY Report referred only to labor arbitrations, and voicing concerns that since then arbitration has expanded to become "a big business" and "litigation by another name." *Id*. at 746. One has the sense that the newer Committee did not want to disturb a conclusion that had been so prominently enshrined in judicial opinions.

[17] *See* American Bar Association CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct, Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law* (as of Feb. 10, 2017), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.authcheckdam.pdf

[18] *See generally,* 2008 ABCNY Report, note 16, at 704n.20 (2008).

[19] ISBA Opinion 13-03 at p. 6, discussing *Sudzus v. Dept. of Empl. Security, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist. 2009).*

[20] *See* SICA Report at 508.

[21] Steven Lazarus, *et al., Resolving Business Disputes: The Potential of Commercial Arbitration, 52* AM. BAR ASS'N J. 169 (FEB. 1966) (BOOK REVIEW).

[22] *Shearson/American Express v. McMahon,* 482 U.S. 220 (1987).

[23] SICA Report at 512.

[24] *Id.*

[25] *Id.* at 514.

[26] *Id.* at 522-24.

[27] NASD Proposed Rule Change SR-2006-109, at p. 12 & n.11 (Sept. 14, 2006), available at http://www.finra.org/industry/rule-filings/sr-nasd-2006-109.

[28] There should be an express exception for law school clinic students operating under the supervision of a practicing lawyer.

[29] *See, e.g.,* FINRA Rule 12208(c) (policing those who are suspended from the bar or disbarred); FINRA Rule 12602(b) (requiring representation of a non-party witness in an arbitration by an "attorney"); FINRA Rule 12400(c) (giving special dispensation to chair-qualified arbitrators who have "a law degree and are a member of the bar of at least one jurisdiction").

[30] We do not address how such rule changes would affect state laws governing the practice of law. The short answer seems to be that that a FINRA rule would likely preempt conflicting state laws. *See* Cole, note 8, at 968-971. FINRA asserted as much in its response letter to comment upon the publication of its proposed amendments to Rule 12208. *See* letter from Mignon McLemore to Nancy M. Morris, at p.2 (Sept. 17, 2007), available at http://www.finra.org/industry/rule-filings/sr-nasd-2006-109. In any event, it is highly unlikely that any state—including especially New York—would require FINRA to permit non-lawyers to represent claimants in arbitrations against FINRA's own rules.

[31] FINRA Regulatory Notice 17-03, *Dispute Resolution Party Portal* (Jan. 2017). We leave aside as probably inconsequential the likely criminal conduct of non-lawyers masquerading as attorneys by entering false information into DR Portal. Eventually it may be possible for DR Portal to incorporate automatic look-ups to verify bar information in real-time, but even without that, we are confident that adversary counsel will spot the rare imposter without FINRA's help.

Response to Question 1:

I have been an arbitrator for FINRA and its predecessors, the NYSE and NASD, since 1990. During that time, I have presided on relatively few arbitrations involving clients using non-attorney representatives.

In New Jersey, non-attorneys representing clients in arbitrations are, at least arguably, practicing law without a license. It follows that an arbitrator who presides over or is a panelist in such an arbitration may be aiding and abetting the practice of law without a license. New York appears not to have a similar view. In my experience, NARs do not self-regulate; they will represent clients regardless of whether state bar rules regard such representation as practicing law without a license.

One must look closely at papers filed with FINRA to discover when a claimant is represented by a non-lawyer; NARs do not make their status obvious.

My experiences with NARS have, without exception, been negative: NARs have been discourteous to everyone and made numerous baseless objections and irrelevant arguments, resulting in unnecessarily long and unpleasant hearings. I now decline to serve on any panel where a client is represented by a non-lawyer.

Response to Question 2:

I have presided in arbitrations involving claimants who represented themselves, sometimes with the help and moral support of a close relative. I found arbitrations in these situations to proceed reasonably.

Responses to Questions 3 and 4: No information.

Response to Question 5:

Based on my experience, I believe FINRA should amend the Codes to prohibit NAR firms from representing clients in FINRA cases.

As a member of the California Bar Association and a public FINRA arbitrator, I wish to offer my comments regarding the "Efficacy of allowing compensated non attorneys to represent parties in FINRA arbitrations." (the proposal).

It is my understanding the reason for the proposal is because of financial reasons some stock broker customers are finding it difficult to retain an attorney on a contingency or limited payment against their broker unless their claim is worth a certain amount of money. The option of being ones "own attorney" is not open to many people for various reasons.

The main objection to proposal appears to be the proposed conduct would fall under the unlawful practice of law doctrine and/or the non law licensed person would not have the same experience as the present attorneys who practice in the area.

California, like most states by statute, prevents the practice of law by attorneys not licensed by the State. (California Business and Professions Code Section 6126). However, the term "practice of law" is not defined
by statute and rests upon court decisions.

I have no doubt that a program for non attorneys *could be* crafted by FINRA to train non law licensed persons to only represent parties in FINRA arbitrations without violating the unlawful practice of law prohibition.

However, I also have no doubt that at least in the beginning of such a program, the non law licensed persons will not have the same knowledge as well as the experience as the present licensed attorneys who, based on my experience, are very well versed in the law and practice of FINRA arbitrations. It may be appropriate at the beginning to limit the non law licensed person to cases with a value of less than a certain amount and/or have the non law licensed person to be associated with an experienced attorney. I could also speculate that the rule against the arbitrator doing their own legal research would face re-examination.

Respectfully submitted,

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VIA EMAIL SUBMISSION TO PUBCOM@FINRA.ORG

November 17, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-34

Dear Ms. Asquith:

The purpose of this letter is to provide the Financial Industry Regulatory Authority, Inc. ("FINRA") with comments on the above referenced Regulatory Notice which was issued by FINRA on October 18, 2017.

I am an attorney whose practice is exclusively devoted to the representation of individual and institutional investors in their disputes with the securities industry. Moreover, I am the current Chairman of FINRA's National Arbitration and Mediation Committee ("NAMC") and a public member of the NAMC; the former Chairman of FINRA's Discovery Task Force Committee ("DTFC"); a former member of the Securities Investor Protection Corporation ("SIPC") Modernization Task Force; and a former President and current Director Emeritus of the Public Investors Arbitration Bar Association ("PIABA").

It is my understanding that the Regulatory Notice requests comment on the efficacy of allowing compensated non-attorney representative ("NAR") firms to continue to represent clients in the FINRA Dispute Resolution forum.

In May of 2017, in connection with my participation as a member of the faculty on the 2017 Securities Arbitration & Mediation Hot Topics program that was presented by the Association of the Bar of the City of New York, I authored the attached article entitled "Non-Attorney Representatives (NARs) – Do They Present a Clear & Present Danger to the Integrity of FINRA Arbitration?"

Based on the information presented in my article, it is my opinion that NARs, who receive compensation for representing investors in arbitration proceedings, threaten FINRA's fair, efficient and effective venue of dispute resolution, constitute a clear and present danger to the investing public and must be immediately banned.

In the event that you should have any questions with respect to the preceding, please do not hesitate to contact me.

Very truly yours,

Maddox Hargett & Caruso, P.C.

s/ Steven B. Caruso

Steven B. Caruso

Non-Attorney Representatives ("NARs") – Do They Present a Clear & Present Danger to the Integrity of FINRA Arbitration?

Steven B. Caruso
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Introduction:

Under the FINRA Code of Arbitration Procedure for Customer Disputes ("FINRA Code"), the representation of a party in a Financial Industry Regulatory Authority ("FINRA") arbitration proceeding is governed by Rule 12208 ("Representation of Parties") which states as follows:

> (a) Representation by a Party
>
> Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.
>
> (b) Representation by an Attorney
>
> At any stage of an arbitration proceeding held in a United States hearing location, all parties shall 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.
>
> (c) Representation by Others
>
> Parties may be represented in an arbitration by a person who is not an attorney,

> unless: state law prohibits such representation, or 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.
>
> (d) Qualifications of Representative
>
> Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

A number of recent arbitration decisions have called into question the appropriateness and/or interpretation of subsection (c) of FINRA Code Rule 12208 ("Representation by Others") in the context of non-attorney representatives (NARs") who have represented investor Claimants in FINRA arbitration proceedings.

Discussion:

Based on a recent review of FINRA arbitration awards and various internet searches, there appear to be four (4) primary NAR firms that purport to be currently appearing in FINRA arbitration cases on behalf of investor Claimants: Cold Spring Advisory Group LLC, Vindication Recovery Services Inc., National Advisory Network, Inc. and Stock Market Recovery Consultants, Inc.

Cold Spring Advisory Group LLC ("CSAG")

CSAG is a "consulting firm" that was incorporated in Nevada in 2013 and is currently based in New York City.

On its website (www.coldspringadvisory.com), CSAG states that "we are not a law firm and do not provide legal advice. Cold Spring Advisory Group has a national network of lawyers specializing in securities arbitration and investment loss recovery. Our advisory group will recommend your case to a lawyer within our network who is best suited to fit

your special needs. Any lawyer we recommend for your case works on contingency so there are no hidden fees or additional expenses" and that "[o]nce preliminarily qualified, the client will enter into a retainer agreement with Cold Spring Advisory Group and remit the agreed upon consulting fee."

CSAG's website further states that "[o]ur panel of investment experts is comprised of former brokers with over 25 years of trading experience and branch management at prestigious brokerage firms throughout the country who have maintained books of business with clients worldwide. This direct experience gives us the ability to successfully identify broker misdeeds that may otherwise go unnoticed."

While information as to CSAG's purported "national network of lawyers specializing in securities arbitration and investment loss recovery" or its "panel of investment experts" who conduct potential case evaluations is noticeably absent from its website, a recent review of FINRA arbitration awards indicates that CSAG has been identified as the representative for investor Claimants in twenty two (22) reported awards[1] since April of 2016 – the majority of which were "simplified" arbitration proceedings that were decided based on the submission of written pleadings.[2]

Of these twenty two (22) arbitration awards, fourteen (14) awards resulted in all of the claims having been dismissed[3]; four (4) arbitration awards indicate that some or all of

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[1]/ These arbitration awards are identified by their applicable FINRA case numbers and the dates that the indicated awards were issued: 16-01643 (March 8, 2017); 16-00519 (March 1, 2017); 16-01655 (February 27, 2017); 16-00350 (February 24, 2017); 16-00441 (February 10, 2017); 15-01228 (January 20, 2017); 15-01225 (January 6, 2017); 16-01121 (December 28, 2016); 16-00673 (December 22, 2016); 15-03326 (October 24, 2016); 15-02865 (October 13, 2016); 16-00201 (September 30, 2016); 16-00786 (September 16, 2016); 15-03282 (August 18, 2016); 15-02851 (July 29, 2016); 16-00351 (July 19, 2016); 15-00673 (June 22, 2016); 15-03158 (June 3, 2016); 15-01416 (May 17, 2016); 15-03002 (May 16, 2016); 15-01160 (May 5, 2016); and 15-01911 (April 8, 2016).

[2]/ In simplified arbitrations, no hearing is held unless the claimant requests one. If no hearings are held, the arbitrator will render an award based on the pleadings and other materials submitted by the parties. See, e.g., *Simplified Arbitrations*, FINRA Office of Dispute Resolution, available at http://www.finra.org/arbitration-and-mediation/simplified-arbitrations (last visited April 1, 2017).

[3]/ These arbitration awards are identified by their applicable FINRA case numbers and the dates that the indicated awards were issued: 16-01643 (March 8, 2017); 16-00519 (March 1, 2017); 16-01655 (February 27, 2017); 15-01228 (January 20, 2017); 15-01225 (January 6, 2017); 16-01121 (December 28, 2016); 15-03326 (October 24, 2016); 16-00201 (September 30, 2016); 16-00786 (September 16, 2016); 15-03282 (August 18, 2016); 15-00673 (June 22, 2016); 15-03158 (June 3, 2016); 15-01416 (May 17, 2016); and 15-01160 (May 5, 2016).

the named Respondents did not participate in the arbitration proceedings and/or did not appear at the evidentiary hearing (which raises a substantial question as to the collectability of the monetary damages that had been awarded)[4]; and, in one (1) arbitration proceeding, in particular, not only were the investor claims dismissed in their entirety, but the investor Claimants were then assessed damages for a counterclaim that had been asserted by the Respondents as well as responsibility for the imposition of monetary sanctions that had been levied against the investor Claimants.[5]

It is also important to note that, in two (2) of the more recent awards involving CSAG, the arbitrators in those proceedings issued reasoned awards that included "findings" that were not only highly critical of the involvement of CSAG and its employee Jennifer Tarr, but both of which also determined that their involvement in these arbitration proceedings violated state law and constituted the unauthorized practice of law.[6]

Finally, notwithstanding CSAG's representation that it "has a national network of lawyers specializing in securities arbitration and investment loss recovery" and that its "advisory group will recommend your case to a lawyer within our network who is best suited to fit your special needs," in all twenty two (22) of the arbitration awards mentioned above, the CSAG employee who is identified as having represented the investor Claimants is the same Jennifer Tarr, mentioned above, who has "admitted" that she is not an attorney who is licensed to practice law.[7]

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[4]/ These arbitration awards are identified by their applicable FINRA case numbers and the dates that the indicated awards were issued: 16-00350 (February 24, 2017); 16-00441 (February 10, 2017); 16-00673 (December 22, 2016); and 16-00351 (July 19, 2016).

[5]/ This arbitration award is identified by its applicable FINRA case number and the date that the indicated award was issued: 15-01225 (January 6, 2017).

[6]/ See, *Simon v. Aegis Capital Corp. et al.*, FINRA Dispute Resolution Arbitration No. 15-02865 (October 12, 2016) and *Halling v. Cape Securities Inc. et al.*, FINRA Dispute Resolution Arbitration No. 16-00519 (March 1, 2017), copies of which are attached to this submission under the respective designations of Attachments 1 and 2.

[7]/ See, *Simon v. Aegis Capital Corp. et al*, FINRA Dispute Resolution Arbitration No. 15-02865 (October 12, 2016).

Vindication Recovery Services Inc. ("VRS")

VRS is a company that was incorporated in New York in 2010 and is currently based on Long Island in Mount Sinai, N.Y.

On its website (www.marketvindication.com), VRS states that it "is an asset recovery team, we are not lawyers and do not render legal advice" and that it "can help protect your rights as an investor" because "[i]f wrongdoing did take place we will be able to identify it due to our unique and vast experience as industry insiders" with a "comprehensive asset recovery team experienced in every aspect of the brokerage industry."

VRS' website further states that it "utilizes in excess of 15 years of experience in detecting a stock broker's wrongdoing through portfolio analysis and market research" and that it "provide[s] a support system in assisting investors in recovery of stock market losses due to broker and other brokerage industry wrongdoing" and [the] "potential recovery of lost market assets through arbitration."

While information as to VRS' purported "team" of "industry insiders" who claim to have "unique and vast experience" is noticeably absent from its website, a recent review of FINRA arbitration awards did not provide any indication that VRS has been identified as the representative for investor Claimants in any reported awards.

It is noteworthy and material, however, that, in VRS' original 2010 incorporation filing with the New York State Department of Corporations, the Chief Executive Officer of the company is listed as Paul Shechter who, according to various internet postings, is alleged to be the same individual/former broker who was the subject of a FINRA disciplinary complaint filed in September 2013 (which had alleged abusive sales practices with at least 10 customers, unauthorized trading, unsuitable recommendations and the falsification of books and records) that was then settled in April 2014 with sanctions that included a two (2) year suspension and a fine of $25,000[8] and that he

[8]/ See, *Dept. of Enforcement v. Paul Shechter*, Disciplinary Proceeding No. 2009016159107 (Complaint dated September 26, 2013) and *Dept. of Enforcement v. Paul Shechter*, Disciplinary Proceeding No. 2009016159107

may be the same individual/former broker who, according to his BrokerCheck report, was also the subject of a regulatory enforcement complaint that had been initiated by the Illinois Securities Department in 2007, had been associated with a large number of brokerage firms that have been expelled from the securities industry, and has a history of at least five (5) reportable customer complaints.[9]

National Advisory Network, Inc. ("NAN")

NAN is a company that was incorporated in California in 2016 and is currently based in Long Beach, California.

On its website (www.nationaladvisorynetwork.com), NAN states that it "is a registered Legal Document Preparation Company and Certified Mediation firm. Experts in consumer protection laws and laws governing the sales of securities, joint ventures and limited partnerships, National Advisory Network specializes in assisting clients with resolving disputes with investment companies that violate industry laws and regulations."

NAN's website further states that it "[i]f you have an investment that hasn't been performing the way you were told it would, it's probably worth looking into. We have a specific department devoted solely to research and investigation in order to determine if there are any red flags about your current investments. If there's something that looks a little funny, we're more than happy to guide you through the steps that you can take to address the situation properly."

(Settlement dated April 28, 2014), which are respectively available at http://disciplinaryactions.finra.org/Search/ViewDocument/34487 and http://disciplinaryactions.finra.org/Search/ViewDocument/35769 (last visited April 1, 2017).

[9]/ FINRA collects, compiles, organizes, indexes, digitally converts and maintains regulatory data from registered persons, member firms, government agencies and other sources and maintains the data in its proprietary Central Registration Depository ("CRD®") database and system. FINRA releases portions of such data through FINRA BrokerCheck, which provides data from the CRD system to the investing public. [See, *BrokerCheck Report for Paul Stuart Shechter*, CRD # 2589423, available at https://brokercheck.finra.org/individual/summary/2589423 (last visited March 31, 2017).

While information as to NAN's purported "department" of "experts in consumer protection laws and laws governing the sales of securities" is noticeably absent from its website, a recent review of FINRA arbitration awards did not provide any indication that NAN has been identified as the representative for investor Claimants in any reported awards.

Stock Market Recovery Consultants, Inc. ("SMRC")

SMRC is a company that was formed in 2003 and is currently based on Long Island in Uniondale, N.Y.

On its website (http://1800stockloss.com), SMRC states that its "objective is to provide professional, affordable representation for burnt investors through negotiation and arbitration" and that it "offers a valuable service by representing investors suffering from investment losses with the expertise and experience of many years in the securities industry to successfully recover your money."

SMRC's website further states that "[w]e exclusively represent the burnt investor, and have extensive experience in the process of securities related claims before FINRA. We help investors recover money that was lost as a result of fraud, negligence and other misconduct."

The co-founders of SMRC are stated to be Benjamin Lapin, a non-attorney, who purports to be "[r]ecognized as an expert in securities arbitration" with "an extensive trading background of over 20 years [who] has been involved in over 1000 securities disputes" and Mitchell Markowitz, another non-attorney, who purports to be "a recognized expert in matters relating to investment fraud in the financial services industry and is highly experienced in dealing with regulatory agencies."

While information as to the purported recognition of the expertise of Messrs. Lapin and Markowitz and/or their experience with arbitration proceedings and/or trading is noticeably absent from SMRC's website, according to a May 2010 article that appeared in The New York Times, it was alleged that Mr. Markowitz appears to have been the

same individual who had pled guilty in Essex County Superior Court, in New Jersey, to criminal charges that involved an attempt to collect nearly one million dollars as part of an insurance fraud scam designed to cash-in on a million dollar insurance policy.[10]

A recent review of FINRA arbitration awards indicates that SMRC has been identified as the representative for investor Claimants in eighty eight (88) reported awards since August of 2004 – and while a detailed analysis of the results of those awards are beyond the scope of this article, it is noteworthy that The New York Times, in its May 2010 article, concluded that "[w]hen the cases make it to a panel of arbitrators, however, the crusaders of Coney Island Avenue [i.e., SMRC] usually go home empty-handed; in a couple of cases, their clients were even told to pay the brokerage house."[11]

Conclusion:

"FINRA operates the largest securities dispute resolution forum in the United States, and has extensive experience in providing a fair, efficient and effective venue to handle a securities-related dispute."[12]

When victims of misconduct by their investment professionals are potential prey for NARs who avoid complete transparency of their qualifications, it suggests a scenario which threatens FINRA's "fair, efficient and effective venue" of dispute resolution and constitutes a clear and present danger to the investing public.

When victims of misconduct by their investment professionals are potential prey for NARs who avoid complete transparency of the material aspects of their business and/or employment histories, it suggests a scenario which threatens FINRA's "fair, efficient and

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[10]/ See, *Swatting at Wall Street From a Bunker in Brooklyn*, The New York Times (May 21, 2010), available at http://www.nytimes.com/2010/05/23/nyregion/23critic.html (last visited April 1, 2017) ("Mr. Markowitz pleaded guilty in 2004 to insurance fraud in a million-dollar scam involving jewelry"). See, also, *N.Y. Insurance Adjuster, Four Others Plead Guilty to Million Dollar Scam*, Insurance Journal (April 28, 2004), available at www.insurance journal.com/news/east/2004/04/28/41627.htm (last visited April 1, 2017).

[11]/ See, *Swatting at Wall Street From a Bunker in Brooklyn*, The New York Times (May 21, 2010), available at http://www.nytimes.com/2010/05/23/nyregion/23critic.html (last visited April 1, 2017).

[12]/ See, *Arbitration and Mediation*, FINRA Office of Dispute Resolution, available at http://www.finra.org/ arbitration-and-mediation (last visited April 1, 2017).

effective venue" of dispute resolution and constitutes a clear and present danger to the investing public.

And when victims of misconduct by their investment professionals are potential prey for NARs who are permitted to represent investor Claimants without any oversight by the regulatory community and within an atmosphere that does not require any ethical accountability by NARs, it suggests a scenario which threatens FINRA's "fair, efficient and effective venue" of dispute resolution and constitutes a clear and present danger to the investing public.

Date Submitted: April 3, 2017

AWARD
FINRA DISPUTE RESOLUTION

CASE #: 15-02865
Jay R. Simon vs. Aegis Capital Corp., Robert Jay Eide, Kevin C. Meade, Nicholas Francis Milano, Anthony Michael Monaco, Sr., Jonathan Edward Rago, George Gregory Kott, and Kevin Charles McKenna

REPRESENTATION OF PARTIES:
For Claimant Jay R. Simon, hereinafter referred to "Claimant": Hilton M. Weiner, Esq., Law Office of Hilton M. Wiener, New York, New York.

For Respondents Aegis Capital Corp., Robert Jay Eide, Kevin C. Meade, Nicholas Francis Milano, Anthony Michael Monaco, Sr., and Jonathan Edward Rago, hereinafter collectively referred to as "Respondents," and George Gregory Kott and Kevin Charles McKenna: Gregg J. Breitbart, Esq., Kaufman Dolowich & Voluck LLP, Boca Raton, Florida, and Rina Bersohn, Esq., Kaufman Dolowich & Voluck LLP, New York, New York.

NATURE OF DISPUTE: Customers vs. Member and Associated Persons

Statement of Claim filed on or about: October 21, 2015.
Amended Statement of Claim filed on or about: March 29, 2016.

Statement of Answer to Statement of Claim filed by Respondents on or about: December 23, 2015.
Statement of Answer to Amended Statement of Claim filed by Respondents on or about: April 19, 2016.

CASE SUMMARY: In the Statement of Claim, Claimant asserted the following causes of action: 1) suitability; 2) churning; and 3) failure to supervise. In the Amended Statement of Claim, Claimant added an additional cause of action for unauthorized trading. The causes of action relate to Claimant's purchase of shares in GT Advanced Technologies, Kandi Technologies, and Taser International, Inc.

In the Answer to the Statement of Claim and Answer to Amended Statement of Claim, Respondents denied the allegations in the Statement of Claim and Amended Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED: In the Statement of Claim and Amended Statement of Claim, Claimant requested an award representing the net out-of-pocket losses of $29,806.00 and case preparation costs of $3,500.00 for a total award of $33,306.00, and such other and further relief as the Arbitrator deems just and equitable under the circumstances.

In the Answer to the Statement of Claim, Respondents requested dismissal of the Statement of Claim, and assessment of all forum fees against Claimant. Respondents Milano, Rago, and Meade requested that this matter be expunged from their records maintained by the Central Registration Depository ("CRD"), in accordance with applicable rules and procedures.

In the Answer to the Amended Statement of Claim, Respondents requested dismissal of the Amended Statement of Claim, and assessment of all forum fees against Claimant. Respondents Milano, Rago, and Meade did not request expungement in the Answer to the Amended Statement of Claim.

FINDINGS: Claimant's original and amended Statements of Claim ("SOC" and "ASOC," respectively) and Final Submission ("FS") were filed on October 21, 2015, March 29, 2016, and July 29, 2016, respectively, by Cold Spring Advisory Group, LLC ("CSAG") and its representative, Jennifer Tarr, which collectively was Claimant's representative until September 6, 2016.

In Claimant's ASOC and FS, Claimant alleges three causes of action against Respondents for suitability, churning, and failure to supervise and seeks recovery of $29,806.00 for losses incurred plus "case preparation costs" of $3,500.00. Respondents' representatives, Gregg J. Breitbart, Esq., and Rina Bersohn, Esq., both of whom are admitted to practice law in New York, but not in Arizona, and are members of the New York law firm of KAUFMAN DOLOWICH &VOLUCK LLP, filed Respondents' Answer to Claimant's SOC and ASOC and Respondents' FS, in which they deny Claimant's causes of action, both from an evidentiary and legal standpoint. Mr. Breitbart and Ms. Bersohn have represented Respondents throughout this arbitration.

The following constitutes the undersigned Arbitrator's Findings, Conclusions and Award in this matter after having reviewed all of the parties' pleadings and submissions, the applicable provisions of the FINRA Code of Arbitration Procedure for Customer Disputes and relevant and applicable federal and Arizona law cited by Respondents—other than for two FINRA Rules, Claimant cited no authority in support of his claims—the undersigned Arbitrator finds, concludes and orders as follows:

Claimant's Representation

Rule 12208(c) of the FINRA Code of Arbitration Procedure provides that "[p]arties may be represented in an arbitration by a person who is not an attorney, ***unless ... state law prohibits such representation.***" (Emphasis added). "The Arizona Supreme Court has exclusive jurisdiction over the regulation of the practice of law in Arizona." *State v. Eazy Bail Bonds,* 224 Ariz. 227, 229, ¶ 9, 229 P.3d 239, 241 (App. 2010). Under the Arizona Supreme Court's rules, the representation of a party in an arbitration by another person constitutes the "practice of law." Ariz. Sup. Ct. R. 31(a)(2)(A)(3). By this rule, the Arizona Supreme Court prohibits the representation of a party in an arbitration conducted in Arizona by anyone who is not admitted to practice law in Arizona. *See* Ariz. Sup. Ct. R. 31(b). The Arizona Supreme Court provides an exception under its rules that allows *a lawyer* (such as Respondents' representatives who are admitted to practice law in a state other than Arizona, to represent a party in an arbitration when

that arbitration is conducted in Arizona and involves federal law. *See* Ariz. Sup. Ct. R. 31(d)(27) and Ariz. Sup. Ct. R. 42, E.R. 5.5(c)(2 and 3) and (d). However, CSAG and its representative, Jennifer Tarr, have admitted that they are not licensed to practice law in Arizona or any other State.

In light of the above, both Claimant's and Respondents' representatives were ordered to submit briefs and authority by September 9, 2016 on the issue of whether or not CSAG and Ms. Tarr's representation of Claimant was authorized. Instead of submitting a brief, CSAG and Ms. Tarr withdrew as Claimant's representative on September 6, 2016 and two days later on September 8, 2016, Hilton M. Wiener, Esq., who is admitted to practice law in the State of New York, filed his Notice of Appearance as Claimant's representative.

Respondents submitted their brief arguing that CSAG and Ms. Tarr were not authorized to represent Claimant, that Claimant's "last-minute" substitution of Mr. Weiner as Claimant's representative was untimely in light of the fact that CSAG and Ms. Tarr had prepared and filed all of the pleadings in support of Claimant's claims and had participated in discovery and this arbitration for over a year. Accordingly, Respondents asked that all of Claimant's causes of action against Respondents be dismissed, which in light of CSAG and Ms. Tarr's violations of Rule 12208(c) and Arizona law, would be appropriate. *See, e.g., Sternberger v. Gilleland,* No. CV-13-02370-PHX-JAT, 2014 WL 3809064, at *12 (D. Ariz. Aug. 1, 2014) (striking pleading because it was filed by a non-attorney); *Villone v. United Parcel Services, Inc.,* No. CV-09-8213-PCT-LOA, 2009 WL 4824796, at *1 (D. Ariz. Dec. 9, 2009) (holding that if plaintiff, who had been represented by a non-lawyer, wanted to allege a claim, he would "need to sign an amended complaint and represent himself or [he would] be allowed a reasonable opportunity to retain a lawyer, appropriately licensed to practice law in Arizona … to file an Amended Complaint ***or [his] Complaint may be dismissed.***" (Emphasis added)].

Based on the foregoing, **IT IS HEREBY ORDERED that under Rule 12208(c) of the FINRA Code of Arbitration Procedure, as limited by Arizona law, CSAG and Ms. Tarr cannot and could not represent Claimant in this arbitration.** *See Eazy Bail Bonds, supra,* 224 Ariz. at 229–30, ¶¶ 11–15, 229 P.3d at 241–42 (holding that appearance of, and pleadings filed by, non-attorney as party's representative were defective because such constituted prohibited practice of law, resulting in judgment for other party); *see also, Shufelt v. Criswell,* No. 2 CA-CV 2012-0024, 2012 WL 3044287, at *1, n.1 (App. July 26, 2012) (holding that non-attorney could not represent appellant in an appeal); *Tompkins v. Bayview Loan Servicing, L.L.C.,* No. 1 CA-CV 10-0548, 2011 WL 2739034, at *1 (App. July 14, 2011) (same).

Consideration of CSAG and Ms. Tarr's Prior Submissions

Based on the foregoing authority, the undersigned Arbitrator could dismiss Claimant's ASOC, as Respondents have requested, and the undersigned Arbitrator could refuse to consider any of the Claimant's submissions that CSAG and Ms. Tarr previously filed on his behalf, including any of the facts and arguments set forth therein in making a determination about whether or not Claimant is entitled to an Award against Respondents based on the claims stated in Claimant's ASOC.

Instead of filing a new SOC and FS, as part of Mr. Weiner's Notice of

Appearance, he stated that he "adopt[s] all pleadings and submissions previously filed on Claimant's behalf." However, under the above authority, the mere statement that he adopts everything that CSAG filed is insufficient to make those pleadings and submissions qualified for consideration. Either Claimant or his newly designated legal representative had the opportunity to sign and file, but did not, a *new* SOC and FS, both of which could have more adequately restated Claimant's claims and provided supporting legal authority in contrast to CSAG's deficient pleadings. Moreover, Mr. Weiner's mere "adoption" of CSAG's pleadings is defective in light of the fact that the second FS that he submitted is not a new submission at all because it is dated some six weeks before he filed his notice of appearance in this matter.

Nevertheless, giving Claimant the benefit of the doubt and his "day in court," the undersigned Arbitrator has reviewed Claimant's ASOC and his FS that CSAG and Ms. Tarr filed on his behalf, including the facts, claims, arguments and evidence contained therein, as well as all of Respondents' defenses, arguments and authority and evidence they have submitted. Although FINRA arbitration rules do not provide for explained decisions in simplified arbitrations, such as this arbitration, the undersigned Arbitrator feels that it is important for Claimant to understand why he is not entitled to recover any damages from Respondents under his claims as presented in his ASOC and FS. Based on a review of all of the evidence submitted in this matter by both Claimant and Respondents, the undersigned Arbitrator finds and concludes that ***Claimant has not sustained his burden of proof on any of his claims.***

Findings and Conclusions re Claimant's Claims
Based on a review of all of the evidence submitted by both Claimant (notwithstanding the fact that the evidence submitted by CSAG and Ms. Tarr could be disregarded) and Respondents, the undersigned Arbitrator makes the following findings of facts and conclusions of law:

1. During the year prior to and the year after Claimant opened his non-discretionary account at Respondent Aegis Capital Corp. ("Aegis") in 2014, he had accounts at five other brokerage firms, including the firm that Respondents Jonathan Rago and Nicholas Milano were at and who handled Claimant's account there before moving to Aegis.

2. For his accounts at the five other brokerage firms, as well as for his account at Aegis, Claimant knowingly executed and understood the new account forms in which he stated that his net worth was over $1 million, he owned his own business and earned over $100,000.00 a year, he had over $100,000.00 in liquid assets, his investment objective was either speculation or growth, his risk tolerance was high, and in some instances, even "maximum" risk, and he understood that he could lose his entire investment as a result of his practice of short-term trading and buying high risk and speculative stocks.

3. In all of the brokerage accounts described above, Claimant traded low-priced, high risk, speculative stocks on a short-term basis, which for the most part, resulted in losses ranging from a few dollars to thousands of dollars, including the losses he incurred in his Aegis account.

4. Claimant's trading activity in his Aegis account was essentially the same type of trading that he did in his other brokerage accounts and resulted in similar losses, which are the basis for his claims against Respondents.

5. The three stocks that Claimant bought and sold in his Aegis account, which resulted in an aggregate loss of over $29,800.00 for which he now seeks recovery from Respondents, are the same type of speculative, low-priced stocks that he bought and sold in his five other brokerage accounts and included one of the same stocks that Claimant bought and sold for a small profit in one of his other brokerage accounts before he opened his account at Aegis.

6. Contrary to Claimant's assertions, the credible evidence shows that Respondents Rago and/or Milano, who executed the trades of those stocks in Claimant's account at Aegis, discussed the stocks with Claimant and did not withhold any relevant information from Claimant before they executed those trades, which Claimant authorized.

7. That Claimant knew about and authorized the trades of the three stocks in question is further demonstrated by the fact that Claimant paid for all of those stock purchases after the trades were made, he never raised any objection to those trades, and he continued doing business with Respondents. Moreover, in at least one instance, Respondent Milano actually dissuaded Claimant from buying more shares of one of the stocks.

8. Claimant traded in just three stocks in his Aegis account during a six-month period, which trades he authorized, and such trading was not out of line with his past trading history or unreasonable or unsuitable in light of his stated investment objectives and risk tolerance, which Respondents were fully aware of when those trades occurred.

9. In light of Claimant's stated financial condition and his own trading choices and history, his total investment of approximately $50,000.00 in the stocks in question at Aegis was not overly concentrated.

10. Based on the above facts and evidence, Claimant, who was an experienced stock trader, was a stock speculator and the stocks that were traded in Claimant's Aegis account were suitable.

11. Under the applicable law, Claimant has not met his burden of proving the stocks in question were unsuitable, that the purchases of those stocks were unauthorized, or that Respondents churned his account, and Claimant's allegations of unsuitability, unauthorized trading and churning lack any merit.

12. Based on the above facts, evidence, conclusions and applicable law, Claimant has not met his burden of proving that Respondents Aegis, Robert Eide, Kevin Meade, and Anthony Monaco, Sr., failed to properly supervise Respondents Rago and Milano, and Claimant's claim of improper supervision lacks any merit.

Therefore, IT IS ORDERED that Claimant is entitled to No Award against Respondents either because of (a) the invalidity of Claimant's prior submissions,

and/or (b) the evidence submitted by Claimant, as refuted by Respondents, is insufficient.

IT IS FURTHER ORDERED that Claimant shall be responsible for 100% of the FINRA forum fees related to this arbitration.

IT IS FURTHER ORDERED that Claimant and Respondents shall bear their own attorneys' fees and any other fees incurred for their respective representations.

AWARD: The Arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Claimant's claims are denied in their entirety. Claimant is entitled to no award against Respondents either because of (a) the invalidity of Claimant's prior submissions, and/or (b) the evidence submitted by Claimant, as refuted by Respondents, is insufficient. 2) Claimant and Respondents shall bear their own attorneys' fees and other fees incurred for their respective representations. 3) All other relief requests are denied. 4) FINRA Office of Dispute Resolution shall retain the $600.00 filing fee that Claimant deposited previously. 5) The Arbitrator has provided an explanation of his decision in this Award. The explanation is for the information of the parties only and is not precedential in nature.

OTHER FEES: FINRA Office of Dispute Resolution has previously invoiced Respondent Aegis Capital Corp. the $750.00 Member Surcharge Fee and $1,750.00 Member Process Fee.

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

On December 9, 2015, Claimant dismissed with prejudice Respondents George Gregory Kott and Kevin Charles McKenna.

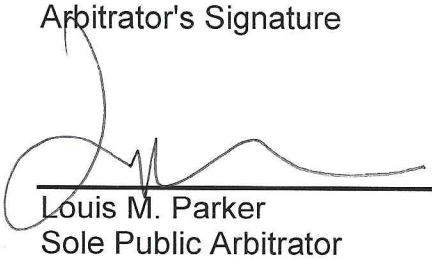
The Arbitrator notes that in the Answer to the Statement of Claim, Respondents Milano, Rago, and Meade requested that this matter be expunged from their records maintained by the CRD. The Arbitrator also notes that Respondents Milano, Rago, and Meade did not request expungement in the Answer to the Amended Statement of Claim. As such, the Arbitrator did not rule on the merits of Respondents Milano, Rago, and Meade's request that this matter be expunged from their records maintained by the CRD.

ARBITRATOR

Louis M. Parker - 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



10/12/2016

Louis M. Parker
Sole Public Arbitrator

Signature Date

October 13, 2016
Date of Service (For FINRA-DR office use only)

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
Tom Halling

Case Number: 16-00519

vs.

Respondents
Cape Securities Inc.,
Lon Charles Faccini, Jr.,
and Michael Allen Lovett

Hearing Site: Kansas City, Missouri

Nature of the Dispute: Customer vs. Member and Associated Persons

REPRESENTATION OF PARTIES

For Claimant Tom Halling: Jennifer Tarr, Cold Spring Advisory Group, New York, New York.

For Respondents Cape Securities Inc. ("Cape Securities"), Lon Charles Faccini, Jr. ("Faccini"), and Michael Allen Lovett ("Lovett"): Judy A. Newcomb, Esq., Cape Securities, Inc., Foley, Alabama.

CASE INFORMATION

Statement of Claim filed on or about: February 16, 2016.
Claimant signed a Submission Agreement: February 16, 2016.
Claimant filed an Answer to Respondents' Amended Counterclaim on or about: January 10, 2017.

Statement of Answer and Counterclaim filed on or about: April 18, 2016.
Cape Securities signed a Submission Agreement: April 14, 2016.
Faccini signed a Submission Agreement: April 15, 2016.
Lovett signed a Submission Agreement: April 22, 2016.
Amended Answer and Counterclaim filed on or about: November 30, 2016.

CASE SUMMARY

Claimant asserted the following causes of action: unsuitability, failure to supervise, and breach of fiduciary duty. Claimant alleged that Respondents made unsuitable recommendations and over-concentrated his account with various investments, such as FirstHand Technology Value Funds, Amarin Corp., Kior, Inc., and Magic Jack Vocal, and that he lost nearly $20,000 in only 13 months after opening his account at Cape Securities.

Unless specifically admitted in their Answer, Respondents denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Respondents asserted the following causes of action in their Amended Counterclaim: breach of contract and abuse of process. Respondents alleged that Claimant failed to notify them in a timely fashion after receiving the trade confirmations of any errors, and therefore, Respondents reasonably assumed that the activity in Claimant's account was consistent with Claimant's directions and stock strategy.

Unless specifically admitted in his Answer, Claimant denied the allegations made in the Amended Counterclaim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested:

Compensatory Damages:	$ 19,772.00
Punitive Damages:	$ 27,128.00
Costs:	$ 2,500.00
Other:	Unspecified

In the Amended Statement of Answer, Respondents requested that each and every claim made by the Claimant be denied, that Claimant take nothing by way of the Statement of Claim, that Respondents be awarded their costs and attorneys' fees, that this matter be expunged from any and all regulatory records of Respondents, that Claimant be assessed all costs and attorneys' fees Respondents will incur to expunge their regulatory records, that all FINRA forum fees be assessed to Claimant, and for such other relief and further as the Arbitrator deems just and proper.

In Respondents' Amended Counterclaim, they requested:

Compensatory Damages:	$ 40,000.00
Attorneys' Fees:	Unspecified
Costs:	Unspecified
Other Monetary Relief:	Unspecified
Expungement	

In the Claimant's Answer, he requested that the Arbitrator deny the relief sought by Respondents in their Amended Answer and Counterclaim.

OTHER ISSUES CONSIDERED AND DECIDED

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

On or about June 22, 2016, Respondents submitted a Summary of Additional Submission of Evidence. On or about June 22, 2016, Claimant filed a Final Submission.

On or about July 25, 2016, the Arbitrator requested that the parties provide any additional or supplementary materials to support their requests for fees on or before August 3, 2016. On or about August 3, 2016, Claimant filed a Request for Fees and Damages. On or about August 3, 2016, Respondents filed an Itemization of Damages.

On or about September 12, 2016, FINRA informed the parties that it had received the Arbitrator's ruling on the merits of Claimant's claim, but that a hearing was needed to determine Respondents' requests for expungement. On or about October 17, 2016, Respondents notified FINRA that they were no longer requesting expungement in this matter.

On November 1, 2016, FINRA notified the parties that because Respondents' Counterclaim requested unspecified monetary damages, a panel of three arbitrators would be appointed pursuant to Rule 12401(c) unless the parties agreed to have this case proceed with a single arbitrator.

On or about November 2, 2016, Claimant requested a hearing and for three arbitrators to be appointed in this matter. On or about November 11, 2016, Respondents filed a Motion to Serve and Publish the Award and/or Conform the Pleadings to the Evidence ("Motion to Serve Award"). On or about November 16, 2016, Claimant filed an Opposition to Respondents' Motion to Serve Award and requested sanctions against Respondents. On or about December 6, 2016, Respondents' filed a Reply in Support of the Motion to Serve Award and objected to Claimant's request for sanctions.

On or about November 30, 2016, Respondents filed an Answer and Amended Counterclaim. On or about December 1, 2016, Claimant filed an Objection to Respondent's Filing of an Amended Answer and Counterclaim.

On December 21, 2016, the Arbitrator entered the following Order:

1) Respondents' Motion to Accept the Amended Answer and Counterclaim is granted.
2) Claimant's request for sanctions is denied.
3) Claimant is provided 20 days to file a written response to Respondents' Amended Answer and Counterclaim.
4) Claimant's request for a hearing is granted.
5) The Simplified Arbitration Case seeks damages by the parties for less than $50,000, and as such will remain with a single arbitrator and the only arbitrator chosen by the parties in this matter, and not a three-arbitrator panel.
6) A telephonic hearing will be held with the goal of minimizing additional expenses to all parties.
7) The sole issue to be discussed during this hearing pertains to conforming the evidence to the pleadings, which will now include the Original Claim, Amended Answer and Counterclaim, and Response to Counterclaim.
8) It is further noted that Claimant failed to file a written response to the originally filed Answer and Counterclaim.
9) Parties are to submit three (3) mutually agreed upon hearing dates and times to FINRA, within 20 days of the response date.

10) Respondents' Motion to Serve Award is taken under advisement, pending disposition following the telephonic hearing.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims, each and all, are denied in their entirety.

2. Respondents' Counterclaim is denied in its entirety.

Based upon review of all pleadings and documents submitted by both Claimant and Respondents, and after consideration of the arguments presented, the sole public arbitrator is issuing this Explained Decision:

The Arbitrator found that as both parties requested less than $50,000.00 in damages, the case would remain as a simplified case. No party requested additional discovery following the filing of Respondents' Amended Answer and Counterclaim.

Pursuant to Claimant's request for a hearing, the Arbitrator ordered that a telephonic hearing be held to conform the pleadings to the evidence.

On February 2, 2017, at the start of the recorded telephonic hearing, Jennifer Tarr, the Representative from Cold Spring Advisory Group requested, an in-person hearing. FINRA Case Administrator Patrick Walsh directed Ms. Tarr to the Arbitrator's Order, dated December 21, 2016, indicating the hearing would be telephonic and that this was the opportunity for parties to present witness testimony to support the pleadings. Respondents' counsel, Ms. Judy Newcomb, reported that she was prepared to call two witnesses, if necessary. Neither party called witnesses during the hearing.

Findings and Conclusions on Claimant's Claims and Respondents' Counterclaim
On January 19, 2012, Claimant, Tom Halling, a highly experienced active investor and successful farmer, opened a new non-discretionary account at Cape Securities with Faccini. At the time, he had four open brokerage accounts at different firms. Prior to opening the account, he told Faccini of his 30+ years of general investment experience, 15 years of stock trading, and experience margin trading. This Account Form shows: previous investment experience, "high" investment objective, "speculative," risk tolerance, "aggressive (high degree of risk/high activity)", and investment time horizon, "short (0-5 years)." The new account was to be funded by "income."

Claimant did not want fixed-income products or a diversified investment account at Cape Securities; he wanted to trade speculative investments. Claimant opened the account in January 2012, added margin privileges in March, stopped adding outside funds in May 2012, ceased trading in December 2012, and closed

the account in March 2013. Claimant engaged in stock purchases, mostly on margin, with twelve companies. These trades were funded by checks, wire transfers, and trades.

Claim of Unsuitability

Under the applicable law, Claimant has not met his burden of proving unsuitability because he supplied no legal, or statutory authority or evidence to support qualitative unsuitability or quantitative unsuitability. The credible evidence in the record shows that Faccini made recommendations based on Claimant's age, employment background, financial profile, investment objective (speculative), risk tolerance (aggressive), investment experience (high), and trading experience (30+ years of investment, 15+ years of trading and sophisticated knowledge of margins). Faccini knew this account constituted only a small percentage of Claimant's overall investments. Claimant shared his margin trading experience, indicated his other accounts were currently trading on margin, and disclosed that he was actively trading elsewhere. He expressed awareness of risks posed by this kind of trading, which were also defined in the New Account and Margin applications.

At no time before November 2015, did Halling complain to Respondents of unauthorized, unapproved, or dissatisfied trading activity or strategies or change his investment objective. During the hearing, Claimant relied upon an expert report; however, this report was never provided to FINRA, the arbitrator, or referenced specifically as an Exhibit in the Statement of Claim or any other filed pleading. Thus, this report and any reliance upon it by Claimant will not be considered.

A review of the record shows Claimant knowingly executed and understood all forms. Respondents showed this account was reviewed daily, each position was recommended based on the objective and risk tolerance, and each trade was reviewed on its merit. Claimant's trading pattern was within the parameters of a highly experienced customer seeking a speculative objective in a short-term time horizon, and who expected to take on a high degree of risk. Claimant's trade authorizations were evidenced through outside payments to fund transactions, and receipt of trade confirmations and monthly statements. Based on this record, Claimant, an experienced stock trader and stock speculator, knowingly engaged in this trading and all transactions and activity generated from this account were suitable.

Claim of Failure to Supervise

Based on the above facts, evidence, conclusions and applicable law, Claimant failed to meet his burden of proving that Cape Securities failed to supervise this brokerage account and Respondent's Compliance Officer, Lovett failed to supervise the Registered Representative Faccini. Respondents produced the firm's written supervisory procedures, explained how these procedures were followed both with the representative and the account, and demonstrated how the representative acted in good faith in making recommendations. Claimant responds with broad accusations, and no law or statutory authority. Claimant

provided no rational connection between Lovett's attached BrokerCheck® report and this account to demonstrate any failure to supervise.

Claim of Breach of Fiduciary Duty

Claimant failed to submit any common law or statutory authority explaining how Respondents owed Claimant a fiduciary duty. Claimant also failed to produce evidence demonstrating how Respondents breached any fiduciary duty. The unrefuted record shows Claimant to be a knowledgeable, highly experienced and successful investor and entrepreneur, who maintained a non-discretionary brokerage account. Although Claimant received personalized recommendations, he made his own independent investment decisions about when to trade on margin. He received trade confirmations after each transaction and monthly statements. He never complained about trades until years after he closed this account. Based on the circumstances describing the opening of Claimant's account, when coupled with the frequent firm communications between the representative and Claimant, the record shows nothing to establish any misconduct or breach of fiduciary duty.

Claimant requests the Arbitrator make a referral to FINRA Department of Enforcement for further investigation of potential forgery on the new account forms for Halling. After unsuccessfully attempting to resolve this matter with Claimant, Respondents filed a written response supported by statements from a Cape Securities supervisor and copies of the relevant documents directly refuting the allegation. The supervisor explained, consistent with FINRA Rule 4512 and SEC Rule 17a-3(a)17, how Cape Securities initially opens trading accounts without a signed customer contract so long as the firm has certain details, noting neither FINRA nor SEC require a customer to sign a contract to open an account. Next, Cape Securities requires every customer, within two weeks of opening the account, to return a signed application verifying his information and acknowledging the terms and conditions. Then, a supervisor verifies the verbal representations were consistent with the signed document received. Here, Faccini faxed the unsigned initial account application to the firm's home office where the Cape Securities supervisor verified Claimant's identity and opened the account. Next, Faccini sent the customer the application for signature and placed the returned signed application in Claimant's file. The Cape Securities supervisor approved the application after verifying for suitability that the information had not changed. Claimant produced nothing, in the form of evidence or argument, to refute this response or support this serious allegation. Based on careful examination of all submitted materials, Claimant's request for referral to FINRA is denied.

Respondents' contend Claimant's Statement of Claim was not properly signed or executed by a person lawfully representing Halling, a Kansas resident, or by Claimant as established by FINRA Rules because Claimant's non-attorney representative, Cold Spring Advisory Group, is a non-attorney limited liability corporation. Respondents argue that although FINRA Rules permit a party in arbitration to be represented by a non-attorney person, where allowed by law, FINRA Rules do not permit a corporation to represent a party. Respondents assert no pleading was signed by a person on behalf of Halling and at no time

was any request made to cure this defect in the pleadings by a subsequent pleading, document or statement. Respondents raise this issue in every filed pleading and during the hearing. During oral argument, Respondents' counsel also claimed this case was frivolous.

Claimant's representative submitted no written response in a subsequent filed pleading authorizing the representation of Claimant, discussing this signature issue or seeking to withdraw as Claimant's representative. During the telephonic hearing, Ms. Tarr replied that her firm was "a new element in FINRA," and stated, without citing any authority, that a signature was not required.

Claimant's Submission Agreement in the Electronic Signature section states: "By entering your electronic signature below, you are one of the following: (1) the claimant; or (2) a person with legal authority to bind the claimant; or (3) a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the claimant; or (4) an attorney who has actual or implied written or verbal power of attorney from the claimant to sign on the claimant's belief and thus, bind the claimant to the terms of the Submission Agreement as if the claimant signed the form personally." The Electronic Signature Section of this Submission Agreement identifies Claimant as, "Mr. Tom Halling." The signature section indicates, "/Tom Halling th/." The capacity section, indicates, "Representative."

To initiate an arbitration, FINRA Rules require every claimant properly sign the Submission Agreement and the Statement of Claim. The signatory section denotes Halling is not representing himself. No particular individual in this section is named as his "representative," and no explanation is provided how this representative has the authority to bind Claimant to the terms of this Submission Agreement. In examining the beginning of the on-line Submission Agreement, Claimant's representative is identified as Jennifer Tarr, a non-lawyer employee of a company, not a law firm, which represents customers in FINRA arbitrations. Cold Spring Advisory Group is not a member of FINRA. However, Jennifer Tarr is not specified as Claimant's representative on the Statement of Claim.

FINRA Dispute Resolution operates the largest securities dispute resolution forum in the world. FINRA Dispute Resolution facilitates efficient resolution of monetary, business, and employment disputes among investors, securities firms, and employees of securities firms. FINRA provides the first line of oversight for brokers-dealers and the first line of defense for investors by virtue of its comprehensive oversight program. FINRA Dispute resolution handles intra-industry employment and business disputes and investor/investment disputes involving stocks, bonds, mutual funds, and other types of securities.

FINRA's website provides investors with several options for investors to resolve securities-related disputes. In the section of How to Find an Attorney, FINRA states "You should consider hiring an attorney to represent you during the arbitration or mediation proceedings to provide direction and advice. Even if you do not choose to hire an attorney, brokerage firms are generally represented by

an attorney. If you cannot afford an attorney, some law schools provide legal representation through securities arbitration clinics." The website goes on to say, The Office of Dispute Resolution staff members cannot provide specific recommendations for finding an attorney or other legal representative, but offers general advice on how to find an attorney who specializes in resolving securities complaints.

Effective December 24, 2007, Rule 12208(c) of the FINRA Code of Arbitration Procedure for Customer Disputes was amended to provide that, "[p]arties to a FINRA arbitration maybe represented by a person who is not an attorney, **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." The purpose behind these changes was to simplify the process, provide parties more flexibility and control over the arbitration process and to provide straight-forward procedures and rules for parties to follow. The changes also added a provision requiring every Customer Statement of Claim and pleading be signed by a person.

The FINRA website, in discussing the Rule for possible non-lawyer representation, states one should, "[p]lease be aware that representation by a non-attorney might be considered to be the unauthorized practice of law in some jurisdictions, so please check with the State Bar (or similar organization) for more information."

Jurisdictions prohibiting non-lawyers from representing parties provide the following reasons supporting their restriction: non-lawyers are not bound by the rules of professional conduct lawyers required by the jurisdiction, professional rules are designed to protect clients from abusive practices of regulated lawyers; representation by non-lawyers may promote frivolous litigation or litigation that should never have been filed.

The Kansas Supreme Court and the Rules of Professional Conduct have consistently and firmly held non-attorney representatives are not authorized to practice law in its jurisdiction and individuals can only be represented by a lawyer, if they are not representing themselves www.law.cornell.edu/ethics/KS_CODE.HTM. The Kansas Supreme Court recognizes only four categories of individuals who may appear in the courts of the state: (1) members of the bar who have licenses to practice law; (2) individuals who have graduated from an accredited law school and have a temporary permit to practice law; (3) legal interns; and (4) non-lawyers, who may represent only themselves and not others. State ex rel. Stephen v. Adam, 243 Kan. 619, 623, 760 P.2d 683 (1988); see State ex rel. Stephen v. Williams, 246 Kan. 681, 690-691, 793 P.2d 234 (1990). Kansas lawyers are given a special franchise to appear in Kansas Courts because of their education, standards of character and fitness, examination, and standards of ethics and professional conduct. Rules of the Kansas Supreme Court. Rules 226, 706, 707, 709. These distinctions of education and special abilities authorize lawyers to represent and appear for others in Court.

In State ex rel. Stephen v. Williams, 246 Kan. 681 (1990), The Supreme Court held while an individual, "may appear in court on his own behalf…he has no franchise or authority to appear for or on behalf of any other person or entity… or to assist any such person or entity in any manner which requires legal knowledge and training." In 1993, the Board of Tax Appeals requested guidance and received an opinion from the Kansas Attorney General about what conduct by non-lawyers was permitted in cases before The Board of Tax Appeals, advising them, "a non-attorney representative may not engage in the unauthorized practice of law, and therefore may not examine witnesses, file pleadings, make legal arguments, or perform any functions deemed to be the practice of law. Ks. Atty. Gen. Opin. No. 93-100 (July 26, 1993). Thus, under Kansas law, neither non-attorney representative Jennifer Tarr nor Cold Spring Advisory Group is authorized under the law to represent Claimant.

Kansas heavily regulates the unauthorized practice of law to prevent non-lawyers from representing a person in an arbitration to protect public interest and welfare. It specifically prohibits non-lawyers from appearing on behalf of another person, drafting documents affecting the legal rights of another, representing others in binding arbitration proceedings where opening statements are made, documentary evidence and witness testimony is presented, and arguments are made based upon violations of statutes or common law. In this case, these representatives totally disregarded and/or ignored Kansas law and FINRA Rules believing they were exempt because they were "a new element in FINRA."

Lastly, Claimant did not attempt to cure the signature violation by having Halling personally sign the pleadings or having an authorized person file an appearance and sign all unsigned submissions. Neither Jennifer Tarr nor Cold Spring Advisory Group ever attempted to define the capacity upon which the representation is based or explain the authority in upon which it is authorized to bind the Claimant without a signature on any pleading.

FINRA Rules of Procedure require an individual person, and not a corporation, to sign the Submission Agreement and Statement of Claim to certify they have read the procedures and Rules of FINRA relating to arbitration, and agree to be bound by them. Ms. Tarr refused to sign the pleadings.

Under FINRA Code of Arbitration Procedure, and as limited by Kansas law, the pleadings are stricken, as neither Cold Spring Advisory Group nor non-attorney Jennifer Tarr can represent Claimant in this arbitration, and even if we were to address the merits, Claimant has not met his burden of proof on any count, so all awards are in favor of Respondents.

If the Arbitrator has provided an explanation of her decision in this award, the explanation is for the information of the parties only and is not precedential in nature.

3. Other than forum fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter.

4. Any and all claims for relief not specifically addressed herein, including punitive damages, attorneys' fees, and expungement, 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	=$ 600.00
Counterclaim Filing Fee	=$ 1,700.00

**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 that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, Cape Securities Inc. is assessed the following:

Member Surcharge	=$ 750.00
Member Process Fee	=$ 1,750.00

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) hearing session @ $ 450.00/session	=$ 450.00
Hearing Date: February 3, 2017 1 session	
Total Hearing Session Fees	=$ 450.00

The Arbitrator has assessed $225.00 of the hearing session fees to Tom Halling.

The Arbitrator has assessed $225.00 of the hearing session fees jointly and severally to Cape Securities Inc., Lon Charles Faccini, Jr., and Michael Allen Lovett.

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

ARBITRATOR

Lynn Hirschfeld Brahin - 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

/s/ Lynn Hirschfeld Brahin — 3/1/17

Lynn Hirschfeld Brahin
Sole Public Arbitrator

Signature Date

3/1/17

Date of Service (For FINRA Office of Dispute Resolution office use only)

ARBITRATOR

Lynn Hirschfeld Brahin - 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

Lynn Hirschfeld Brahin
Sole Public Arbitrator

3/1/2017
Signature Date

Date of Service (For FINRA Office of Dispute Resolution office use only)

To: FINRA, et. al
pubcom@finra.org;

RE: Questions about elimination of NAR parties

I would like to comment on NAR (non-attorney representative) firms, individuals or others that participate in arbitration. ADR (alternative dispute resolution) was created as a means to be fair, less formal, less expensive, less combative, more beneficial and more expeditious to participants; while at the same time, reducing the burden cast upon the taxpayer and overloaded court system. Anytime we look to restrict or prevent a NAR, firm or otherwise, access to participation in an ADR process, we must first ask ourselves: are we doing this for personal gain or benefit to the process and is our intervention perverting the original intent established by SCOTUS?

ADR was not intended nor created to employ juris doctoral representatives and is counterproductive to jurisprudence as ADR, including arbitration, is not based upon interpretation of law and at most citation of statutory law. Statutory and common laws do govern our society, but ADR was created to resolve disputes to which jurisprudence is not in question or that which can be resolved via third-party neutral intervention.

When we restrict, FINRA or State or other, the rights to an effective ADR process in which would impede the intended purpose; we spit in the face of SCOTUS and the American people. Chief Justice Warren Burger and the clear headed legislative representatives within the states established ADR with the aforementioned original premise and said such intended purpose should not be infringed by scholarly distortion but in fact be sustained by reinforcement of ethical practice standards.

Let me elaborate upon my reasoning based upon your stated activities report as follows:

1. using the forum as a vehicle to employ inappropriate business practices;
2. requiring retainer agreements that reflect a non-refundable fee of $25,000;
3. representing parties in hearing locations where state law prohibits such representation or, in the alternative, handling only small claims (decided on written submissions) to avoid hearing locations in which the unauthorized practice of law would become an issue;
4. signing required arbitration submission agreements with the name of the NAR firm to avoid naming an individual representative who could be engaging in the unauthorized practice of law;
5. pursuing frivolous or stale claims to attempt to elicit settlements; or
6. breaching confidentiality provisions in settlement agreements by posting a picture of the settlement check to market the NAR firm's services.

Sighting your issues above (1, 2, 5, 6) appear to be ethical issues which through simple industry standards and/or third-party credentialing processes; such as that established by FINRA, the American Bar Association (ABA), Texas Mediator Credentialing Association (TMCA), and Great Plains Mediation and Arbitration (GPMAA), would be curtailed. Establishing guidelines in which a set standard should be followed and then produce these standards to the participants; FINRA will have performed due diligence and any further intervention would violate the party's freedom of choice established within ADR. Primarily, it exceeds FINRA's scope to force participants into a practice that exceeds their God given free will which has already been set and citied by SCOTUS.

Now in respect to the problematic situations listed above (3, 4); these situations are, within my purview, governmental intrusion of people's rights and freedoms which were established by SCOTUS; thus, illegal awaiting the indomitable appeal. ADR was established for the people's choice and said choice has been perverted by medaling, whether or not, the intentions were solicitous or devious.

In conclusion, I do support NAR as an option for parties to choose, with the prerequisite, parties need information on fair and ethical practices. FINRA should not curtail nor encourage the elimination of NAR parties to proceed over or represent within an ADR process as said process was created by SCOTUS for a fair, inexpensive, less formal, and expeditious dispute resolution process.

For the Non Atty Rep comment file

November 15, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006

Thomas Flack
1101 West Adams Street
Jefferson, IA 50129

RE: Non-Attorney Representation in Arbitration Comment Letter

Dear Ms. Asquith,

I am an 80-year-old farmer from Iowa. I was contacted by a New York brokerage firm that told me they were going to do great things for me and that I should invest with them. At the end of the day, dealing this brokerage firm was my worst nightmare because they had lost most of my life savings. I was put in a position that I lost money that I should have never invested because I was overcome with the constant high pressure sales tactics that I never have experienced in my life. I was now faced with new pressure, of losing my farming operation due to the money that I had lost.

Cold Spring Advisory contacted me and only after looking over all my statements and trade confirmations, explained to me in detail that I had a good case for arbitration and a chance to get back some if not all my money. This firm educated me to what was going on in my account and exactly how they lost my money, it was then I realized how little I knew about the stock market and the games being played in my account.

I had explained to Cold Spring that the minimum needed to get my bank whole on a loan was $60,000 and that I needed that money quick. Cold Spring Advisory acted professional at all times, held my hand through the entire process and kept me informed. In the end, they even cut their contingency percentage to 20% so I can net $60,000 to fully pay off my bank and save my farming business. When I walked in the bank with the $60,000 check from Cold Spring Advisory my bank was stunned, more so because they saw all these bad reviews on the internet about Cold Spring and they were extremely skeptical about their services. John at Cold Spring explained to me that the reviews weren't real customers but actual brokers posing as customers to try to sway incoming potential customers from using such a service in order to avoid arbitrations. To me, I feel nothing on the internet is true and I am glad I put my trust in this firm and finally the mistreated investor finally prevailed.

FINRA is now seeking comment about such firms like Cold Spring and I am happy to answer the request;

What experience did I have with a NAR firm in the forum?

It was a good experience, I spoke with John at Cold Spring a lot, I had a fine experience with them, I wish we got a little more money but my banker was on my butt so bad that I had to have

that $60,000 and the banker didn't believe I was even going to get that, he even called John at Cold Spring, a time or two, explained that I needed $60,000 to clear out the bank and save the farming operation.

Do you believe you received competent representation by the NAR firm? *YES, absolutely!*

What was the economic impact? *$60,000 net to me and by saving the farming operation, years of earnings that I needed to support my family, which could equate to hundreds of thousands of dollars.*

Have you been unsuccessful in obtaining attorney representation in arbitration? *No, because I did not even know that I had the opportunity to get back my money if it was not for Cold Spring contacting me and explaining my rights and what happened to me, I wouldn't have a clue what to do or who to contact.*

Do you think FINRA should amend the codes to restrict NAR firm activities in some way or even prohibit entirely*? I think it would be a big mistake by FINRA to restrict firms like Cold Spring, how would I have ever even known that there was a forum and a process to file a claim. I would be a desperate man now if I hadn't gotten that call from Cold Spring. I would recommend anyone to us them and I have, by being one of Cold Springs references. People call me all the time and I am happy and grateful to not only help Cold Spring but I feel I am helping these people as well that certainly need help like I did.*

Would it be helpful to forum users if FINRA published a checklist of questions on the FINRA website that investors could review before hiring a NAR firm? *I don't think that would be helpful, for one, I didn't even what FINRA was, so I certainly wouldn't have gone to their website and second, I feel that the same brokers and broker dealers writing false complaints, might find a way to spin that into a negative light and use it for their benefit of why not to hire a NAR firm.*

Thank you for allowing me to respond in this open forum, I hope what I wrote was helpful.

Thomas Flack

Thomas Flack

December 1, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street
Washington, DC 2006

Michael J. Stott
403 Lakewood Drive
Richmond, VA 23229

I am sending this email in response to your call for comment regarding the allowance of non-legal representation in arbitration matters under FINRA jurisdiction. Let me state categorically that I would be inalterably opposed to the discontinuance of this practice. As one who has used brokerage services for years and remains naive and inexperienced in the art of high finance, I welcome the presence of such non-legal advocates in the restitution game.

I am a 74-year-old swim coach and a communications professional. Beginning in 2015 I used Cold Spring Advisory to represent me in my case against a New York brokerage firm and four of their representatives. Sadly, I lost my case. I can assure you it wasn't from lack of trying on Cold Spring's part. My experience with Cold Spring from Day One to the days following the announcement of my case loss was as professional and above board as I could have imagined.

From the very beginning Cold Spring did a complete analysis and informed me of the broker abuses that went on in my account -- which was mostly churning and excessive trading. They explained the process of arbitration, gave me no guarantees of a win and told me honestly that most cases do settle before arbitration. I conducted my own vetting process. From the beginning to the end, Cold Spring delivered on the promises they made to me.

They arranged for forensic reports, supplied expert witness testimony, paid all cost to FINRA, discovery, picked arbitrators, etc. More importantly, they advised me intelligently and honestly throughout the entire process. When I made inquiries, they answered immediately. I did have several surprises – and they came from the forensic report which showed that in order for my account to break even, my brokers would have to profit more than 194% on an annual basis. How unrealistic. My brokers turned over my account over 91 times. They hid their commissions by doing markups and markdowns and did not inform me in the process. Gullible me. I was sure the brokers were charging me the minimum. That feels like broker abuse to me.

Here is the supreme irony. Back in May 2016 Don Fowler, from the brokerage firm, called me and offered me a settlement of $12,000. I chose to proceed with the case. Yes, I lost but I put the blame squarely on the arbitrator who read briefs from the defendant that contained incorrect information and patent untruths about me and my finances. My one fault with the FINRA system is there is not a chance for rebuttal, but then I assume such action would advance to law suit status and not arbitration.

If FINRA truly wants to help the investors, I suggest a better job of educating arbitrators or better yet, putting laws in place to prevent this abuse. I wish I had seen *The Wolf of Wall Street* before entering into business with the brokerage firm that brought Cold Spring to my attention. In another irony I now understand that two of those brokers who inflicted financial harm on me are involved in yet another SEC enforcement action against them for a continuation of their churning practices!

I endorse the work Cold Spring did for me and for all other reputable dispute resolution firms that perform with honesty and integrity on the consumers behalf.

Respectfully,

Michael Stott
804-288-8808
C – 804-921-8808
Fax (804-288-8809)
michaeljstott@comcast.net

My comments regarding the questions asked in Regulatory Notice 17-34 are as follows:

1. **What experiences have you had with a NAR firm in the forum? Do you believe the party received competent representation by the NAR firm? What was the economic impact to you or your firm of the experience?**

Answer

I have only had one such experience in my approximately 20 years as an arbitrator for FINRA/NASD. Approximately 5 years ago, as a panel chair I was presented with a Statement of Claim which struck me as being unusually poorly drafted. It was heavy on legal jargon, but it fell significantly short of the factual allegations needed to state a claim. Furthermore, the allegations were self-contradictory, and not in the accepted manner of pleading in the alternative. I assumed this was prepared by a singularly incompetent lawyer.

During the Initial Pre-Hearing Conference, the NAR disclosed that he was not a lawyer. I responded with a statement that I would investigate whether the representation was the unauthorized practice of law and would act accordingly.

Later, I complained to FINRA staff. They indicated that the representation was authorized under FINRA rules. Again, I said I would investigate whether the representation was the unauthorized practice of law and would act accordingly.

I then inquired of the Illinois State Bar Association whether this was the unauthorized practice of law and what were my legal obligations if it was. Several months later, the ISBA responded with a lengthy and thoroughly researched written opinion that the NAR was illegally practicing law. They said that if I was unable to resolve this problem with FINRA staff, I should contact the Illinois Attorney General.

I shared the opinion with FINRA staff, but they said they disagreed and would not require the NAR to withdraw. I then contacted the Illinois Attorney General, which advised the NAR that it was investigating whether the NAR was practicing law illegally. At that point, the NAR withdrew. I do not recall whether the claimant obtained a licensed attorney or simply represented himself. At any rate, shortly thereafter the case settled.

I do not believe the party received competent representation from the NAR. Other than an expenditure of time, the NAR representation had no economic impact on me or on my employer.

5. **Do you believe that FINRA should amend the Codes to restrict NAR firm activities in some way, or to prohibit entirely NAR firms from representing clients at the forum? If so, what are the appropriate restrictions?**

Answer

I believe FINRA should amend the Codes to prohibit NAR firms entirely.

7. **Are there other relevant benefits and costs associated with the further restriction on NAR firms that were not discussed in the economic impact analysis? What are the effects of these benefits and costs, and what are the magnitudes of the effects?**

Answer

Yes.

For one thing, FINRA attorney-arbitrators should not be placed in the uncomfortable position of having to report FINRA or the NAR firms to law enforcement as aiding the unauthorized practice of law. Likewise, FINRA attorney-arbitrators should not be placed in the position of withdrawing as arbitrators because of a concern about aiding such an unauthorized practice.

It is no answer to point to Code of Arbitration Procedure Rule 12208(c), which forbids NAR representation when "state law prohibits such representation." As demonstrated from my experience, the requirements of state law may be unclear. These disputes should be avoided altogether.

For another thing, the only reason I personally became aware of this issue was because the quality of legal draftsmanship of the NAR firm was so markedly below the standards of even a modestly qualified lawyer. I was trying to visualize how I could chair a hearing with such inept representation. Should I hold the NAR firm to the same standards as a lawyer? Or should I accommodate inexperience or even incompetence, as I would with a *pro se* party? There is no good answer.

NAR firms should be prohibited in FINRA proceedings.

Leonard A. Nelson
FINRA Arbitration No. A15680

November 22,2017

MARY INGLIS

2349C PALOLO AVENUE HONOLULU, HI 96816

FINRA COMMEMT TO NON-ATTORNEY REPRESENTATION

To Whom It May Concern,

My experience with a non-attorney firm, Cold Spring Advisory, has been nothing short of wonderful. It all started when my local financial advisor (we have a very small portfolio) received our transfer of account from our New York brokerage firm and recognized that there were very bad things happening in our New York account. My local advisor suggested we call FINRA or someone to look over our New York account because she thought we should be able to recoup monies from the broker abuses that we had experienced. There was a lot of damage done in our account, over $100,000, when we were very clear telling our broker our instructions with our account, then he did the complete opposite. I knew we needed help, so I went to the internet to do research and that's how I found Cold Spring Advisory. Cold Spring was very honest and upfront by telling us that they would not proceed with a case until they did their due diligence prior to taking on our case. So, I got them all the information that they needed to determine if we had a good enough case for Cold Spring to take on. After reviewing all our documents, they called us to tell us the good news that we had all the elements for a good arbitration. Since that phone call, it has been nothing but a positive experience the whole way thru. I absolutely feel Cold Spring was a very competent firm that handled our case perfectly. Our economic experience was wonderful, we received our settlement check on time as promised and with that money we were able to do a whole bunch of home improvements and other stuff that we weren't able to do before and we are very happy that we could now accomplished those things that were life changing to my family.

In reference to comparing Cold Spring Advisory to attorney firms, I feel we really couldn't afford an attorney, most wanted an hourly fee and that was something we were not interested in and others wanted up to 50% of our settlement which we were not interested in as well. Cold Spring's economic was perfect for us, a small amount upfront and 25% of the settlement., which was lowest we heard of.

When poised with the question whether we feel FINRA should impose restrictions or prohibit NAR firms like Cold Spring Advisory our answer is, NO, NO, NO, absolutely not! These firms should not be limited nor prohibited. I feel a company like Cold Spring is the only recourse that not very wealthy people have. I can't go hire a lawyer, they are just too expensive whether on the front end or their huge contingency fees on the back end. Why shouldn't the little people out here have the option of a NAR firm. I feel this is another way big bureaucracy agencies like FINRA try to control and limit the investor options, let the investor choose, isn't the more options we have to obtain representation better? FINRA should not try to control everything, if FINRA was there for us as our first line of defense, by not getting broker abused, I would not have been in the arbitration system in the first place.

SINCERELY,

Mary Inglis

MARY INGLIS

Ronnie Bartness
71645 31 5th Street
Hartland, Minnesota 56042

To FINRA,

I understand your organization is seeking comment about Non-Attorney Representatives and their role in the arbitration process, for the purposes of possibly restricting their function or even prohibiting them all together. Below is my comment about this subject.

I had a very good experience with my NAR firm, Cold Spring Advisory. They spelled out what I can win and what I can settle for, they were completely upfront about all possible outcome scenario's, even the worst case which would be the possibility of losing my case. I must admit, I had my suspicions that maybe this group could be bad as well because I already got burned by two different brokers, so of course, at first was apprehensive about doing anything more with New York groups. I certainly didn't want to lose any more money, but I ended up putting my trust in Cold Spring Advisory and it did pay off. As far as the stockbrokers, they are a bunch of smooth talkers, and being from the mid-west, we are more trusting of people, but the stockbrokers are not trust worthy at all, so I guess I learned my lesson with them. But, Cold Spring did their job and I came out on the large end of the stick, even after I paid the upfront money to get my case properly prepared.
I do believe Cold Spring Advisories work was very competent, especially the forensic booklet was extremely thorough by listing all my transactions over the course of over three years and showed where every dollar went, including margin interest. commissions, profits and losses and brokerage fees.
The report created by Cold Spring was so concise and comprehensive, I felt it made a major difference to the outcome of my case and that's why I received a sizable amount back. I feel that report was so complete, the other side couldn't find holes in my case, that might have hurt the final outcome.
When I went into this, I really didn't expect to get that large of a settlement that I did, because I have been burned before, but it turned out good and the economic was certainly to my advantage and I am very happy I hooked up with Cold Spring.
I do have one other experience with a law firm handling litigation for me, not in arbitration but state court, about a company selling corn overseas to China, that effected prices of the corn. The law firm is suing the company to recover our losses, however they are taking 66% of the recovery and the suit is being dragged on for a very long time. Where Cold Spring took a much less percentage fee, under 33% and the process took only about 15 months to complete.
For the fact that I had such a positive experience with my NAR firm, I don't think FINRA should restrict firms like Cold Spring Advisory because Cold Spring has a purpose and it is doing its job out there, protecting people that are completely unaware of these wolves in the world and what they are doing too trusting investors by not giving them a fair shake. So Finra should not amend codes to restrict or prohibit NAR firms functioning in the arbitration forum. Finra has its place and Cold Spring has their place, there no question about that. I just can't understand why Finra would want to restrict these firms? To restrict Cold Spring from doing their job makes no sense to me at all. May be good for the attorney at a 66% rate or maybe good for the

smooth-talking stock brokers so they have less arbitrations, but certainly not good for the investors out here. Let these firms continue to do good work for hard working people like myself. No system is perfect, but as the old saying goes, if it's not broke, don't try to fix it.

I have said my peace,

Ronnie Bartness Nov 22 17

Ronnie Bartness

Roger Hambright
8709 N.E. 37th Avenue
Vancouver, WA 98665

I had a dispute with a New York brokerage firm and Cold Spring Advisory went to bat for me, we ended receiving a large settlement, not all my losses, but a good amount of it. Cold Spring Advisory made me comfortable because they were completely 100% behind my claim, which was a legitimate claim. I stand behind them one hundred percent.

I feel I received very competent representation, Jennifer Tarr represented us the entire time and did a very good job going up against the attorney for the brokerage firm and I am very satisfied with her performance.

The economic result that we experienced due to Cold Spring's efforts; I ended up getting back 70% of our losses, which I was very happy with. Cold Spring exceeded my expectations with this result against a broker that I feel is very illegitimate and continues to work in the securities industry to this day. I feel FINRA should concentrate on efforts to remove this type of broker from the industry and to not trying to remove or curb NAR firms that help clients like me.

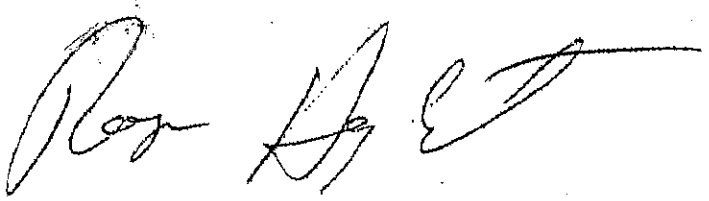
I found Cold Spring Advisory from a flier they have sent out and besides that, I did not know of anyone, attorney or not, that does this type of work, so I was happy they had found me through that mailing. I knew I was swindled by a crooked broker but I did not know what recourse I had until I received the information from Cold Spring.

About the economics of retaining Cold Spring or an attorney; the only litigation I have ever been involved with, was paying for and dealing with my daughter's divorce attorney. He required an initial retainer, then there was subsequent billing so I never really knew when the billing was going to stop. I prefer Cold Springs ideology of one payment does all, so I knew exactly what I was in for. When all was said, and done, Cold Spring reduced their contingency fee and I received exactly what I thought I was going to get without any further deductions or disbursements. I found them true to their word and honest.

I absolutely do not think FINRA should restrict or prohibit NAR firms, as far as I know there is no other entities out there to help people that have been swindled by crooked brokers other than hiring an attorney which I feel would cost a lot more money and more then Cold Spring requires. I think Cold Spring is a necessary body to contend with to go against fraudulent brokers and the things they put investors through. I think FINRA should leave this subject alone and actually be supportive of NAR firms. People don't know where to go and who to turn to, when they have been cheated out of their life savings. Firms like Cold Spring, whom I think is the largest of NAR firms, I think they are a necessary form by getting knowledge out and what investors can do to get your money back by filing suit and putting these crooked brokers out of business.

I never heard of FINRA, so in my opinion, for FINRA to put a checklist on their website is a complete waste of time. Cold Spring Advisory told me about FINRA, normal people, like myself, who do not invest much but get convinced by a smooth-talking broker that takes our savings, we don't know about FINRA, we don't see them advertise themselves, so what good would a checklist be to people like me. Also, what is to say if that checklist somehow turns people off to NAR firms, where would that put them, certainly not in a better position than me, who got back 70% of my losses, solely because of Colds Spring Advisory.

ROGER HAMBRIGHT



Russell Wilson
1128 Greenfield Drive
EL Cajon, CA 92021

November 16, 2017

FINRA
1735 K Street NW
Washington DC 20006
Attn: Marcia Asquith

Ms. Asquith,

The first thing Cold Spring Advisory did for me they educated me how the brokers were getting paid and making their money by charging me. I didn't understand that process because my broker always told me he wasn't charging me a commission and I was always curious how he was making money because I figured he wasn't doing this for free nor did I think he would, but I couldn't figure it out, so educating me was very helpful. Cold Spring taught me how the broker was using tricks using marking ups/downs. Then once I figured that out, Cold Spring taught me how to go after my broker by guiding me through the process of how to go after him by getting forensics done and how to show how my broker was taking the money and using my account to get it. Once we went through that process of how to legally go after him to get the money back. I didn't know about the arbitration process and did not know I had recourse. Cold Spring informed me of how the arbitration process worked when I didn't know it even existed and how to go through it and walk me thru all the steps. They introduced me to an attorney, because I am a resident of California and representation by an attorney is a requirement in my state.
I firmly believe I received competent representation by my NAR firm to the extent I won my arbitration for $157,300 because of Cold Spring Advisory. To this day however, I have not been paid one penny because my broker Patrick Teutonico , who has 11 disclosures, , 8 customer complaints, 1 criminal disclosure and has even been previously suspended by FINRA was able to go into bankruptcy to avoid paying my arbitration. How does FINRA allow this to happen to an investor? Why isn't their safeguards for people like me in my position?
I think it is crazy that FINRA is worried about NAR firms and concerned about protecting the public investors about this nonsense when there is a huge hole in this existing forum. I feel FINRA should be concerned about helping investors getting their money when investors go through an entire FINRA arbitration process, win their case and gets nothing because of a loop hole. I feel victimized by FINRA, not to have such obvious safe guards in place for this, what I understand is a major problem, a $60 million-dollar problem a year. When I read this notice, I fell off my chair when a FINRA spokesman said the cost would be "prohibitively high" imposing insurance requirements. I find it puzzling that there is no mention to what Senator Warren has been taking about, imposing a $100 fee for every broker, which FINRA could collect $60 million a year to pay victimized investors like myself that went through the entire process, won my case then collect through the created sludge fund. What about my broker

Mr. Teutonico? I understand he has the right to go into bankruptcy, but FINRA, if it imposed certain simple new guidelines, FINRA I'm sure could make rules not allow this broker registration so he can continue to victimize another investor like myself. Bottom line, FINRA can stop this by not allowing brokers who claim Bankruptcy to specifically avoid paying arbitration awards to be licensed. I am sure if this rule was in place, we would see a lot less bankrupted brokers and they would be living up to their obligation to pay the investors they hurt.

I am attaching my NYS judgement, that Cold Spring Advisory helped me get. They went above and beyond the arbitration process to get me this judgement. I am looking for FINRA to go above and beyond this subject matter and get to what investors really care about, the money scammed out of us by your brokers back in our pockets!

Russell Wilson

Russell Wilson

CARS TRUCKS AND CREDIT, LLC
5323 WEST TENNESSEE STREET
TALLAHASSEE, FLORIDA 32304
850-386-5757 PHONE
850-574-4627 FAX

November 22, 2017

Marcia Asquith
FINRA
1735 K Street NW
Washington, DC 20006

COMMENT LETTER

Dear Mr. Asquith

I am a 60-year-old businessman that owns a small used car and truck dealership in Tallahassee, Florida. We are hardworking people that built a business from the ground up with honesty and integrity. My experience with a New York broker has been nothing of the same. I received a phone call from a broker Patrick Teutonico who had learned I had received $183,000 in death benefits from the 2009 passing of my wife and insisted I invest it with him. Well, shortly after I suffered $152,000 in losses while paying over $91,000 in commissions and fees.
Cold Spring Advisory had contacted me and asked if I had suffered any losses in the stock market, I then explained the story to them. Before taking me on as a client, they had recreated my account by assembling all my previous statements and trade conformation to give me a free evaluation. Soon after they educated me that I had a great churning case and that Patrick, who always told me he did not earn money on my account, milked me out of $91,000 on commissions, which was 60% of my Losses! CSAG, went on to

fight for me and guided me to help me get my money back. I successfully won our case through a long and tedious FINRA arbitration. I was overjoyed when the award came down in our favor only to find out after 30 days, Teutonico filed for bankruptcy and we received nothing. CSAG still never left our side by continued follow ups and even got me a New York attorney to follow his case in bankruptcy court, which it is currently still there today. CSAG also had followed up with articles and informed me about Senator Warren (MA) advocating for FINRA to set up a fund were each broker would pay $100/year into a fund that could generate of $60 million a year for investors like me, who won his arbitration case to collect from. My question here is simply, why is FINRA not implementing this to protect investors like me and investors in my situation? I think it is strange and very odd that a simple solution can exist and no one at FINRA is addressing this issue. Instead, your organization is doing studies and what looks to me, spending a lot of time and money into protecting the public from NAR firms that are helping the investors. FINRA should be focusing on a more important role of implementing this $100/year for brokers to protect investors from this significant problem. I just cannot understand what is going on here, pick your battles, and this is the battle you choose to pick, NAR firms? FINRA must do more to protect the clients that are harmed, not by anything but getting our money, that's what investors care about. Meanwhile, FINRA still registers brokers like mine to do more damage to undeserving future investors,
The suggestion of amending FINRA's website to educate and talk about NAR firms is absurd. I had no clue about your organization or the arbitration process even existed in the first place. I am not suggesting you advertise about yourselves either, so we learn about your organization. Rather put those advertising dollars into the fund, now which would really help us investors bottom line, CSAG was competent, educational, and did a great job for me, I give them a grade A, Teutonico a F, for ripping me off and FINRA a big F in protecting investors by not

implementing simple and reasonable solutions for nonpayment in arbitration wins. Let this be the topic going forward.
Let's get this fund going!

Donnie Pate
President
CARS, TRUCKS and Credit

Cornell University
Law School

Lawyers in the Best Sense

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December 7, 2017

Via Electronic Filing (pubcom@finra.org)

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 17-34 (Non-Attorney Representatives in Arbitration)

Dear Ms. Asquith:

The Cornell Securities Law Clinic ("Clinic") welcomes the opportunity to respond to FINRA Regulatory Notice 17-34 (the "Notice") on the Financial Industry Regulatory Authority ("FINRA") Codes of Arbitration and Mediation Procedure ("FINRA Code"). The Clinic is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment in the largely rural "Southern Tier" region of upstate New York. For more information, please visit: http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/index.cfm.

FINRA has asked for comment regarding the efficacy of allowing compensated non-attorney representatives ("NAR firms") to represent parties in FINRA arbitrations and mediations. The current FINRA Code permits NAR firms to represent clients in securities arbitration and mediation (subject to certain exceptions). FINRA conducted a review of the use of NAR firms in response to a request by the FINRA Dispute Resolution Task Force in their 2015 Final Report and Recommendations. As set forth in the Notice, FINRA found that NAR firm activities included inappropriate and prohibited conduct, thus warranting this request for comment.

After reviewing the Notice, we believe that FINRA has not provided enough information to warrant the complete elimination of NAR firms in securities arbitrations and mediations.

Other commenters (e.g. *Securities Arbitration Commentator* and Maddox Hargett & Caruso, P.C. comment letters) have provided strong anecdotal evidence of inappropriate conduct by NAR firms. However, we also believe that FINRA should gather more systemic information sufficient to assess the magnitude of inappropriate NAR firm conduct and should make that information publicly available. Attorney misconduct is also anecdotally prevalent in securities arbitrations and mediations, and we accordingly believe that in order to fairly evaluate the use of

NAR firms, FINRA should provide comparable data on attorney and NAR firm conduct. Additionally, we believe FINRA has failed to differentiate the impact of NAR firms in arbitration versus mediation.

Without substantial evidence of the scope of inappropriate conduct by NAR firms, we believe that this policy ensuring that investors with small claims have representation warrants maintaining some use of NAR firms.

If FINRA does intend on moving forward with a rule proposal as to the NAR firms, we believe that part of the proposal set forth in an article attached to the comment letter from the *Securities Arbitration Commentator* may be a reasonable compromise. The article suggests that NAR firms should only be permitted where the case is a single arbitrator case with a claim of no more than $100,000 under Rule 12401 or a Simplified Arbitration under Rule 12800. Upholding the use of NAR firms in these cases would maintain the public policy of providing access to representation for investors with small claims, while eliminating the use of NAR firms in larger, more complicated cases. Additionally, we agree with that proposal that FINRA should specifically distinguish the work of NAR firms from the Securities Arbitrations law school clinics.

The Clinic appreciates the opportunity to provide feedback on this Request and hopes that FINRA will consider some of the concerns raised in this feedback letter to further the goals of protecting investors.

Respectfully submitted,

William A. Jacobson, Esq.
Clinical Professor of Law
Director, Cornell Securities Law Clinic

Daniel S. Sperling
Cornell Law School '18

Well it's pretty obvious that most of the attorney's comments are against allowing NAR representatives during arbitrations. It's called "follow the money". So let me take the other side of the argument by explaining my situation and history. I am NOT an attorney. I have been a FINRA arbitrator (A12605) since 1993 after spending 12 years as a broker and branch manager. I have also been a consultant and expert witness for both claimants and respondents. I am chair qualified and have served as a chair on cases since 2000. In or about December 2003 I was asked by a friend to represent him in an arbitration (case #03-01802). We prevailed and the claims were dismissed & denied. Yes, you read that correctly -- I represented the Respondent in this case. Now let's go to the basis of the arguments about whether or not a representative in an arbitration needs to be an attorney. Not ALL arbitrations are about the law. Most (and I say that not lightly) are based on common sense and following the rules (not the law) of the industry. They also based on whose testimony the arbitrators believe. I have found during my many arbitrations that many of the attorneys attempt to persuade arbitrators by testifying themselves (cleverly hidden in their witness questioning). Finally I am not anti-attorney-I simply want to allow any claimant or respondent to make their own decision as to who will represent them-whether the decision is based on monetary considerations or otherwise. As an NRA-I do not pretend to "practice" law as is suggested by many of the previously made comments-I simply want to bring out the facts of the case and let the arbitrators make the decisions.

Respectfully submitted,

Anthony W. (Bill) Kashouty
558 Hideaway Lane East
Hideaway TX 75771-5242

A12605

903-882-9854
Cell-903-316-2668

Ret. Capt. Stephen Mitchell
9 Cold Spring Road
Huntington, NY 11743

FINRA c/o Marcia Asquith
1735 K. Street NW
Washington, DC 20006

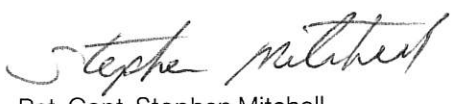
Comment Letter on Non-Attorney Representation

I hired Cold Spring Advisory, a NAR firm, and had a very pleasant experience with them. I able to recoup over six figures, which was 60% of my losses, in a settlement with a New York Broker dealer. I was referred to Cold Spring Advisory by a business associate. Cold Spring was competent and professional, at all times,, especially in my mediation hearing, where their expertise in the industry really came through. I am a 66-year-old retired police captain, with only my pension and savings to rely on. I have two small children with my second wife, so the economic value that this settlement had on my life was very important that benefited my family, myself and my future endeavors.

This is my first experience in my life with any litigation, so I cannot compare NAR firms to attorney's representation, however I was completely satisfied and proud how Cold Spring Advisory represented me in my arbitration/mediation.

Since Cold Spring did such a good job for me, I, definitely, do not think FINRA should restrict/prohibit NAR firms in the arbitration forum because people like me would not be able to recoup monies that had been lost due to broker abuse. I think Cold Spring Advisory is very fair firm, helping people that were hurt by unscrupulous brokers. Cold Spring even reduced their back-end contingency fee, so I could increase my net to offset any upfront monies paid for forensics, expert witnesses, Finra filing fees and mediation cost.

I don't think it would be helpful for Finra to add to its website a checklist for investors to see before hiring an NAR firm because Finra is not Cold Spring Advisory, Cold Spring is the firm that goes out of its way to try to help hurt investors so why should Finra try to hinder investors with restrictions or checklists which might impair Cold Spring Advisory trying to help and educate investors in my position.



Ret. Capt. Stephen Mitchell

Wilton Scronce

101 Thornburg Drive Southeast
Conover, NC 28613

11/21/17

Marcia Asquith

RE: Non-Attorney Representation in FINRA Arbitration

I had the privilege of having Cold Spring Advisory represent me in arbitration. They were professional and thorough; my outcome was very satisfactory. I was pleased because I almost lost hope of getting any of my money back from my losses and I was very happy what Cold Spring Advisory did for me. I also do believe Cold Spring was very competent in representing my case to the arbitration panel, by being very diligent. I am certainly not the best record keeper in the world, Cold Spring was able to obtain all my records that were needed for my case. I am amazed how they could accomplish this difficult task because there were so many documents needed for this process, in the end they were able to win the case for me.

I had losses of over $50,000, with the brokerage out of business and the individuals not registered at the time, Cold Spring was still able to get me very close to my total losses, completely unbelievable to me. I can't imagine an attorney that only knows the legality of my case would be able to accomplish the same

thing Cold Spring was able to do. Securities industry people is what I hired, whom know the ins and outs of this business, on top of savvy business decisions, to me was the key ingredients to my success.

I have some experience with attorneys throughout my business career, I find attorneys to be very expensive and my outcomes were not very good. In contrast, Cold Spring was affordable and very cost effective, no hidden fees, no tricks, just straight up honesty. I received the correct amount of money quickly with no run arounds. I feel I was very lucky to find Cold Spring off the internet, because to me, it was a shot in the dark at that time however, my outcome was a success.

Finally, I do not think FINRA should prohibit such firms like Cold Spring Advisory, especially for a small person like myself, I feel Cold Spring was the only firm that could help me because other attorney firms would not take my case because it was too small of a claim for them.

As for FINRA posting about NAR firms, questioners or checklist, I don't have any comment on that.

I can't speak for all NAR firms, but I would refer Cold Spring Advisory to anyone out there who needs help with getting money back from stock losses due to broker misconduct.

Warm Regards,

Wilton Scronce

AIDIKOFF, UHL & BAKHTIARI

9454 WILSHIRE BOULEVARD
SUITE 303
BEVERLY HILLS, CALIFORNIA 90212
WWW.SECURITIESARBITRATION.COM

PHILIP M. AIDIKOFF
ROBERT A. UHL§
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OF COUNSEL
DAVID HARRISON*

PHONE (310) 274-0666
FAX (310) 859-0513

*ALSO ADMITTED NEW YORK
†ALSO ADMITTED DISTRICT OF COLUMBIA
◊ALSO ADMITTED TEXAS
§RETIRED FROM FIRM

December 11, 2017

Via Email Only
pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

I am a partner at Aidikoff, Uhl and Bakhtiari, a law firm devoted to the representation of individuals and institutions in disputes with Wall Street and the financial service industry. I am a the immediate past Chairman of FINRA's National Arbitration and Mediation Committee (NAMC) and a former President of the Public Investors Arbitration Bar Association (PIABA).

The purpose of this letter is to provide FINRA with comments on the above referenced Regulatory Notice concerning compensated non-attorney representatives. My comments therefore do not reflect other types of non-attorneys that appear in the forum including law school students that are supervised by their clinics and well meaning non-compensated persons.

One of the most significant decisions that an aggrieved investor or other user in the forum will make – often outcome determinative – is the choice of selection of counsel. The FINRA securities arbitration forum is the primary place of resolution for disputes amongst customers, representatives and financial institutions. Though often perceived to be an informal arbitration process, securities arbitration has evolved into a highly specialized proceeding.

In instances where a party hires a for-compensation non-attorney representative they are often hiring a person that may be suspended or barred from the securities industry. Therefore, the client may be unknowingly or unwittingly putting the outcome of their matter in the hands of a representative that has troubling issues with honesty, integrity or are otherwise unable to manage their own financial affairs. This is to say nothing of the fact that a non-attorney representative often lack even the most basic legal training. Non-attorney representatives are not subject to oversight by a state bar association and the basic ethics rules that attorneys are expected to adhere to. Non-attorney representatives do not have client trust accounts and are not

subject to any oversight concerning their handling or disbursement of client funds. Nor are they compelled by ethical obligations to act or to refrain from acting in a manner that an attorney would. Compensated non-attorney representative may and do charge fees that licensed attorneys would find unethical or not permitted by law.

I have spoken to and reviewed information from investors who have in the past been represented by compensated non-attorney representatives. Permitting compensated non-attorney representatives to appear on behalf of parties in the FINRA forum represents is unacceptable.

It is my opinion that FINRA should immediately take all steps necessary to prevent compensated non-attorney representatives from appearing in the forum.

Very truly yours,

AIDIKOFF, UHL & BAKHTIARI

RYAN K. BAKHTIARI
rkb@aublaw.com

AIDIKOFF, UHL & BAKHTIARI

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December 11, 2017

Via Email Only
pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

I am a partner at Aidikoff, Uhl and Bakhtiari, a law firm devoted to the representation of individuals and institutions in disputes with Wall Street and the financial service industry. I am a past Chair of FINRA's National Arbitration and Mediation Committee (NAMC) and a former President of the Public Investors Arbitration Bar Association (PIABA).

The purpose of this letter is to provide FINRA with comments on the above referenced Regulatory Notice concerning compensated non-attorney representatives. My comments therefore do not reflect other types of non-attorneys that appear in the forum including law school students who are supervised by their clinics and well meaning non-compensated persons.

FINRA arbitrations are generally complex and require a familiarity with both the applicable law as well as the rules of the forum. The notion that it is an informal process akin to a small claims court is nonsense. Having practiced in this field for more than twenty-five years, I have encountered numerous examples of customers hiring compensated non-attorney representatives and having their cases mishandled.

In addition, non-attorney representatives are not governed by any state bar or ethics rules. In my view, FINRA will be advancing the cause of investor protection by preventing these unqualified people from appearing in the forum.

Very truly yours,

AIDIKOFF, UHL & BAKHTIARI

PHILIP M. AIDIKOFF
pma@aublaw.com

PMA/ls

Alvin Lincoln
6209 WIPPRECHT STREET
HOUSTON, TX 77026

FINRA
Washington d.c.

Non-attorney representation comment letter

I am a 68-year-old retired metro bus driver in Houston Texas. I received a call from cold spring advisory about stock market losses. I told them that I always felt that I was taken advantage of, from a broker dealer in NY. It took a while for them to gather all the information, but they ended up taking on my case after a free evaluation. From the start, Cold spring helped me every step of the way and in the end, they ended up settling my case to my liking. The firm paid me, however the broker did not make all his payments and I'm still out about $3000, which I'm not happy with but it's not cold springs fault. cold spring is getting an attorney to work on applying a judgement on the broker, who is now not in the securities industry. Even without the $3000 that the broker did not pay, the settlement still was still good enough that made sense to me to hire cold spring.
I did have experience with a lawyer in another case and my experience was not as good as with cold spring because the attorney ended up with more money than me and I did not think that was fair.
I do not think FINRA should in anyway restrict firms like cold spring, this would limit my choice and force me to go with an attorney or do it myself and I don't think I could have done this on my own. I really appreciate cold spring services and what they did for me.

Alvin Lincoln

Houston Texas

WEXLER BURKHART HIRSCHBERG & UNGER LLP
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JOLIE G. KAHN
JOEL B. MEIROWITZ

ERROL A. BURKHART (8/38 – 11/11)

December 14, 2017

Via E-mail

Marcia E. Asquith
Office of the Corporate Secretary
FINRA 1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

This letter is written to comment on the efficacy of allowing compensated non-attorney representatives ("NAR companies") to represent parties in arbitration. This law firm has an established history practicing in the securities arbitration field and has dealt with such companies in several matters. For the reasons set forth below, we are of the opinion that NAR companies pose a serious threat to the effectiveness, fairness, and quality of securities arbitration. Furthermore, we strongly believe that such representatives present a substantial risk of harm to investors. Therefore, the FINRA Code of Arbitration Procedure ("the Code") should be amended to prohibit NAR companies entirely.

Pursuant to Rule 12208 parties to an arbitration may not be represented by non-attorneys if State law prohibits such representation or the representative has previously been barred from the securities industry.[1] Many States prohibit this type of representation and have deemed it to constitute the unauthorized practice of law.[2] These States and their respective bar committees

[1] Rule 12208(c)

[2] Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. Davis L. Rev. 921, 949 (2015). Florida, Illinois, Virginia, Alabama, and Arkansas are among the states that prohibit NAR firms from appearing in arbitrations.

found that representing a party in arbitration constitutes the practice of law because it requires substantive legal analysis as well as practical lawyering skills including motion practice, examining witnesses and presenting opening and closing arguments at the hearing.[3] States that prohibit non-attorney representatives in arbitration include, but are not limited to: Alabama, Arkansas, Arizona, California, Connecticut, Florida, Illinois, Kansas, Ohio, and Virginia.[4]

FINRA arbitrations require the same expertise and lawyering skills listed above. Furthermore, the legal and financial issues argued in a FINRA arbitration are complex issues that require the degree of skill and care of a lawyer who is bound to uphold ethical rules. As others have noted, NAR companies are not bound by such rules; therefore, there may be little to no recourse for consumers harmed by a non-attorney representative's ineffective assistance of counsel.

Investors may be fraudulently led to believe that they have an actionable claim by NAR companies, after payment of an "Investigation" fee. If an attorney engaged in such conduct, the client could seek recourse through a malpractice suit. NAR companies, on the other hand, cannot be sued for malpractice because they are not held to the professional or ethical standards of attorneys. Permitting such conduct diminishes the legitimacy of securities arbitration as an effective means of dispute resolution.

Even restricting the appearance of non-attorneys to states in which the practice is prohibited has proven to be ineffective. NAR companies have found ways to skirt such rules by filing paper-only claims and avoiding appearance in the state. This firm has also dealt with a NAR company that is indirectly owned and controlled by a previously barred member of the securities industry. He has shifted ownership of his company several times to circumvent the FINRA Rule prohibiting barred members from representing others in arbitrations. This shows that while Rule 12208 aims to prevent fraudulent behavior in arbitrations, it has little bite in practicality and stronger measures need to be put in place.

NAR companies may argue that ownership by a barred member does not prohibit other non-barred employees from appearing in arbitrations. This argument falls short and FINRA should consider a piercing the corporate veil analogy. Courts pierce the corporate veil where the owner dominated and controlled the corporation and used this control to commit fraud which was the proximate cause of injury.[5] A similar analysis should be undertaken when barred members of the industry form asset recovery firms to continue to prey on unwary investors.

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[3] *Supra* note 2 at 950.

[4] *Supra* note 2; *See also*, *infra* notes 12-13; *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1 (Cal. 1998); *In re Peterson*, 163 B.R. 665 (Bankr. D. Conn. 1994); *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52, (Ohio 2004).

[5] *See, Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135 at 141 (1993); *See generally, U.S. v. Best Foods*, 524 U.S. 51 (1998).

Both the SEC and FINRA have addressed the risk of NAR companies in the past. On August 6, 2016 the SEC released an Investor Alert regarding Asset Recovery Companies.[6] The Alert notes that these companies charge investors exorbitant fees to file boilerplate complaints and send a demand letter to the opposing party.[7] Importantly, the SEC notes that these are steps that the investors can take "easily on their own, free of charge."[8] FINRA similarly issued an Investor Alert warning investors of the risk of "Recovery Scams."[9] This Alert notes that fraudulent recovery companies will often seek out investors who have traded in speculative securities and lost money.[10] Both Alerts underscore the serious risks posed by allowing NAR companies to continue to solicit investors and attempt to represent them in arbitrations. Investors stand to lose even more through recovery scams, further exacerbating their market losses.

This firm has learned of cases in which the harm caused by NAR companies is glaringly apparent. In one instance, an investor from California was fraudulently induced to pay a retainer fee which he never recovered. The company cold-called the investor several times offering to help him recoup losses in his brokerage account. The investor did not believe his losses were recoverable due to the speculative nature of his portfolio, but he agreed to let the company represent him after repeated telephone solicitations. The NAR company required him to sign a contract entitling the company to 30% of any funds recovered and to pay a non-refundable $9,800 processing fee. The investor paid the fee and has never heard from the company again.

Unfortunately, the scenario above is not an outlier when dealing with NAR companies. In July 2017, a former NAR company client filed a claim against the company for failure to repay $375,000 in loans.[11] The investor was convinced to "invest" his settlement funds into the company with the promise of payable interest. However, like the investor from California, this investor sent his funds to the NAR company and has not heard from them since. Mishandling client funds or failing to return retainer fees that have not be earned is rightfully one of the most harshly punished forms of attorney misconduct. If such conduct were allowed to occur unpunished, it would sully the ethical reputation of our profession. However, NAR companies have no incentive to return client fees because there is little the client can do to claim them.

If that conduct is not disconcerting enough, NAR companies' performance in arbitration is frequently inept. These companies often bring claims in states which have outlawed non-attorney representation. The claims proceed through the normal process only to be dismissed at

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[6] *Investor Alert: What You Should Know about Asset Recovery Companies*, SEC.GOV, (Aug. 9, 2016), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_assetrecovery.html
[7] *Id.*
[8] *Id.*
[9] *It Can Be Hard to Recover from "Recovery" Scams*, FINRA.ORG, (Sep. 19, 2016), http://www.finra.org/investors/alerts/it -can-be-hard-to-recover-from-recovery-scams
[10] *Id.*
[11] *See* AFF. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT: *Kenneth B. Rowan v. Cold Spring Advisory Group LLC*, INDEX NO: 605223/2017 *available at* https://iapps.courts.state.ny.us/webcivil/FCASSearch

hearing for the unauthorized practice of law.[12,13] As a result, investors are forced to drop their claims altogether or the entire process is delayed for several months.

In the instances that NAR companies are authorized to appear in arbitration, they rarely achieve positive outcomes for their clients. A search of the FINRA Awards Database focusing on just one NAR company returned 27 award results. Of these awards, approximately 74% were dismissed with approximately 32% of those dismissals resulting in expungement recommendations. This demonstrates that NAR companies are willing to bring frivolous and unfounded claims in an effort to extort settlements from broker-dealers and harm associated persons unnecessarily. Furthermore, any valid claims brought by NAR companies rarely achieve positive outcomes for their clients because of the poor quality of representation. A majority of the awards secured by this NAR company were against respondents who either failed to appear at the hearing or appeared pro se.

Attorneys who violate their ethical rules are subject to serious sanctions including suspension and disbarment. These rules prohibit conduct such as tampering or destroying evidence, failing to respond to discovery requests, and suborning perjury. NAR companies are not bound by the same rules so there is no recourse if they engage in such conduct. On the contrary, NAR companies are behooved to manipulate the arbitral process by destroying evidence, ignoring discovery requests, and suborning perjury because it allows them to strengthen their case with no fear of reprisal. Such conduct destroys the integrity of FINRA arbitrations and delegitimizes the process.

Rule 12208 was a laudable attempt to afford smaller investors the opportunity to secure representation in FINRA arbitrations in cases that attorneys would not take. However, in practicality, the Rule has been manipulated by NAR companies to fraudulently exploit unwary investors. The classic rationale for allowing NAR companies to appear in arbitration is that it affords investors with small claims the ability to pursue these actions. However, such investors can already receive competent and free representation from pro bono services such as law school clinics. These clinics are overseen by licensed attorneys and the work is performed by full-time law students. The level of work performed by these clinics is far superior to the boilerplate complaints filed by NAR companies and it costs the investors nothing. Furthermore, as the SEC noted, most of the actions taken by NAR companies can easily be performed by the investors themselves. Therefore, the investors gain little from NAR company representation.

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[12] *Tom Halling v. Cape Securities Inc., Lon Charles Faccini, Jr., and Michael Allen Lovett*, 2017 WL 947700 (2017) (Brahin, Arb.).

[13] *Jay R. Simon v. Aegis Capital Corp., Robert Jay Eide, Kevin C. Meade, Nicholas Francis Milano, Anthony Michael Monaco, Sr. Jonathan Edward Rago, George Gregory Kott, and Kevin Charles McKenna*, 2016 WL 6125023 (2016) (Parker, Arb.).

FINRA should amend the Code to prohibit non-attorney representation entirely. These companies have proven over time that they are incapable of providing competent representation for aggrieved investors. Their involvement in the FINRA dispute resolution process undermines its effectiveness, fairness, and efficiency. Their conduct destroys the credibility and integrity of FINRA arbitrations and the entire process is compromise by their involvement. As such, NAR companies should be prohibited from representing investors in FINRA forums.

Very truly yours,

Stephen B. Wexler

SBW/bo

2325-gen

December 15, 2017

Via E-Mail to pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34 (non-attorney representatives in arbitration), dated October 18, 2017 ("Notice 17-34")

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on Notice 17-34.[2] Notice 17-34 requests comment on whether FINRA should continue to permit compensated non-attorney representatives ("CNAR firms") to represent customer claimants in securities arbitration and mediation. In the interests of investor protection and the integrity of the arbitral forum, and for the reasons further detailed below, SIFMA recommends that FINRA henceforth prohibit CNAR firms from representing customer claimants.

As a threshold matter, we remain supportive of FINRA's position of allowing customer claimants to appear pro se – just as they may in court, or together with the help of a trusted relative or friend, or with the assistance of a law school arbitration clinic. At the same time, proceeding in FINRA's arbitral forum without the benefit of direct representation by a duly licensed attorney is not without its risks.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Notice 17-34, available at http://www.finra.org/industry/notices/17-34.

The FINRA Code of Arbitration for Customer Disputes is 50-pages in length and contains over 80 rules, each with numerous subparts. Many of the rules have also been subject to frequent amendments and include interpretive materials and related regulatory notices. The rules are thus fairly sophisticated and the arbitration process is fairly complex. A claimant customer's representative may be called upon to advise his or her client in the following areas, among others:

> (1) advising investors as to whether or not they are compelled to arbitrate under their investor-broker agreement; (2) advising investors of the eligibility rules and statute of limitations for any potential claims; (3) advising investors as to the scope of the arbitrators authority; (4) advising investors whether to settle the dispute before filing a claim; (5) advising investors as to the merits of specific claims and defenses; (6) advising investors whether attorneys or expert witnesses should be hired; (7) advising investors whether a petition to stay the arbitration should be filed; (8) advising investors on the possibility and merits of related or alternative civil actions; (9) conducting discovery including depositions; (10) oral advocacy including; presenting evidence, raising objections, examining witnesses and voir dire of experts, preparing opening and closing arguments; (11) written advocacy including preparing and filing the initial written states of claims, answers, counter-claims, motions, and legal memoranda; (12) confirming, collecting or vacating and arbitral award.[3]

In order to reasonably protect the rights and property of a customer claimant, the person giving the foregoing advice should possess legal skill and a knowledge of the law greater than that possessed by the average layperson.[4]

FINRA cannot ensure the competency of CNAR firms.

Notice 17-34 acknowledges that the competency of CNAR firms is a key element in weighing the costs and benefits of whether such firms should continue to be allowed to represent customer claimants. An attorney's competence is evidenced by, among other things, his or her graduation from an accredited law school, passage of the bar exam, completion of a robust bar application, and acceptance into a state bar association. With respect to a CNAR firm, however, FINRA has no current means to measure or ensure competency, nor respectfully, should it put itself in the business of doing so.

FINRA cannot ensure the accountability of CNAR firms to their clients or to FINRA.

Attorneys are subject to professional and ethical standards that establish a minimal level of conduct below which the attorney may be subject to a bar complaint and disciplinary action – up to and including disbarment – by his or her bar association. In addition, most attorneys carry malpractice and/or professional liability insurance. CNAR firms, on the other hand, are not subject to any conduct rules, or to oversight or discipline by a licensing board, and it is uncertain what insurance coverages, if any, they carry. Thus, FINRA has no identifiable means to hold CNAR firms accountable to either their clients or their duties and obligations in FINRA's arbitral forum.

[3] *See Fla. Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1180 – 81 (Fla. 1997).

[4] This statement remains true regardless of whether a particular state bar association concludes that representing a client in FINRA arbitration technically constitutes the "practice of law." *See id.* at 1182 (concluding that it does).

FINRA is aware of ongoing harmful conduct by CNAR firms towards customer claimants.

Notice 17-34 also acknowledges at the very outset that there are only a small number of CNAR firms regularly practicing in the forum, but that these firms continue to engage in a litany of abusive and harmful practices towards customer claimants including, among many others, charging excessive fees, and pursuing frivolous claims. There is little doubt that these ongoing malpractices are the result of the combination of CNAR firms' lack of competence and lack of accountability to both their clients and the arbitral forum.

Any marginal benefits that CNAR firms may provide to customers with smaller claims are overwhelmingly outweighed by the above-described costs and burdens imposed by CNAR firms. CNAR firms represent a known, clear and present danger to investor protection and forum integrity that requires immediate attention. We reiterate our recommendation that FINRA henceforth prohibit CNAR firms from representing customer claimants.

We believe that our recommended ban should be accompanied by additional FINRA investor education on representation options for customer claimants in the FINRA forum. We are hopeful that such a ban might encourage further engagement by law school arbitration clinics, and present a new opportunity for law firms who may want to specialize in smaller claims.

Thank you for the opportunity to share the foregoing recommendations to better protect investors and enhance the integrity of FINRA's arbitration forum. If you have any questions or would like to further discuss these issues, please contact the undersigned.

Sincerely,

Kevin M. Carroll

_____

Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: ***via e-mail to*:**
Robert L.D. Colby, Chief Legal Officer, FINRA
Richard W. Berry, Executive Vice President and Director FINRA-DR

Dr. Robert Abrahamsen
52 Tempy Lane
Wayne, ME 04284

December 12, 2017

Marcia Asquith
Office of the Corporate Secretary
FINRA 1735 K. Street NW
Washington D.C. 20006

Re: FINRA Regulatory Notice 17-34

This letter is to serve as my comment about Non-Attorney Representation in FINRA Arbitration. I retained Cold Spring Advisory, an NAR firm, to represent me in the FINRA arbitration forum against my brokers and their brokerage firm because they basically stole my money. Cold Spring Advisory was completely competent in every way. They generated forensic reports that broke down where every penny went in my account. Of course, most of the dollars went to pay extremely high commissions to my brokers. Then, Cold Spring hired an independent expert witness to go over my reports to make his own determination of churning, excessive commissions and unsuitable investments in my account. Cold Spring also not only helped me obtain all my discovery documents, but also bate stamped and redacted what was needed to be properly presented when turned over to respondent's side. They also brought in an attorney for me when required and helped that attorney get a significant settlement in my favor.

I am aware that attorneys do represent claimants in arbitration for the most part, however my experience with attorneys have been, they are very costly. Cold Spring Advisory is way less expensive than any attorney I ever hired or dealt with.

I do not think FINRA should prohibit or restrict my ability to go out and hire an NAR firm to represent me for all the reasons above, nor do I think FINRA should create some sort of a checklist on its website because who's to know if that checklist would be replete and I suspect that probably, it could not be even possible, to put all that information on a website. To be honest, I am not a fan of government agencies and I do not feel FINRA would do a good enough job to put the correct information that is needed, therefore I would not trust FINRA's website and not trust what is written on their website to use it as a platform of information. I would do my own research to make better decisions for myself.

Dr. Robert Abrahamsen

Leon Kuefler
29727 383rd Avenue
Belgrade, MN 56312

FINRA
Washington DC

This letter will serve as my comment to Finra's review of allowing compensated non-attorneys to represent clients in arbitration. I am fully support for having a non-attorney represent the public in arbitration because I used one, Cold Spring Advisory and they won my case against Spartan Capital for $41,842.00. Obviously, because it turned out good for me and I had a positive experience, I found them extremely competent. I also found Cold Spring's platform very economical and fair. Even after I won my award, Spartan Capital tried to overturn my arbitration award in NY State Court. However, Cold Spring, at their own expense hired an attorney to represent me in that action, that case was finally denied and Spartan paid the entire amount of the award.
I do not understand why Finra would consider prohibiting or restricting NAR firms and I am not in favor of Finra doing so. If that was the case I would have never got back the money I wrongly lost because of some very bad brokers. Let the NAR firms, like Cold Spring Advisory, keep doing what they do.

Leon J Kuefler

Leon Kuefler

Jonathon Byrd
22 127 Waterfront E Drive
Maurepas, LA 70449

RE: FINRA Comment Letter on Non-Attorney Representation

I hired a non-attorney firm called Cold Spring Advisory to handle two cases for me after I had received a cold call from them. I think they did an exceptional job for me. What impressed me the most is they got all my paperwork together and in order, I don't believe I could have done that myself nor do I think most people could, so in getting all my paperwork in order, Cold Spring did an excellent job. I do believe Cold Spring was competent and professional in handling my cases. They ended up farming my cases out to a lawyer however, they never left my side. They accumulated my discovery documents, did an entire forensic report and constantly stayed in touch with me by updating me as well as getting additional documents the entire time. The attorney and Cold Spring representatives went to my hearing on the first case and I was awarded a total of $252,193. My second case they had settled for me, which I was happy with.

What I leaned from CSAG is that my brokers really mishandled my accounts by unknowingly charging me a tremendous amount of commissions and doing things for themselves and not doing the right thing for me. The losses really hurt me and my family those brokers took a lot of money. All I was trying to do was the right thing for my family by investing our money wisely so we can make some extra money. The brokers told us that they can invest our money the right way and I could make a lot of money with them, however the brokers were just looking out for themselves by put themselves first and lined their pockets with our money as our account continued a downward spiral.

I don't know about any other representation that does what Cold Spring does, so I am happy they reached out to me, if they hadn't I would have just lost everything and wouldn't have known about arbitration. However, I think if I would have had an attorney, I would have spent a lot more then I paid Cold Spring Advisory to get my money back.

I don't believe FINRA should restrict in anyway NAR firms like Cold Spring, unless FINRA is going to do the job of collecting all the paperwork and doing all the things Cold Spring Advisory did for me, but I doubt that will ever happen. I think Cold Springs knows what they are doing, they kept up with me and got everything done the proper way, I understand they are doing it for a fee, but the way they presented everything to me was terrific which allowed me to fully understand through their forensic reports was real helpful to me. I think it would be helpful to anybody because most people out here that is trying to make money in the stock market and are getting hurt from bad brokers would be completely lost without services like Cold Spring. I certainly couldn't have to done without them. I also don't think a regular lawyer wouldn't have been able to do what Cold Spring did for me either. I am sure there are some lawyers out there who might be able to but it would be very few because most lawyers do not strictly do arbitration litigation, it's to niche of a market. Cold Spring specializes in this alone and does nothing else,

other lawyers may do some of this work but they also do many other types of litigation. I would rather go with the guys that do solely FINRA arbitration work and that all they do.

I think it's a shame that these brokers can befriend someone and tell investors they are going to make them all this money in the stock market only to find out about bogus commissions that are hidden, the broker make a ton of money, then are able to get away with it even when they get arbitrated against and lose, they just go bankrupt and go back to exactly what they were doing and go back to work which is exactly what happened to me on the case we were awarded $252,193, I received nothing. I understand through articles I have seen that this is a serious problem and I feel this is the issue that FINRA should be considering. In one article that I have read FINRA refunded its members $23 million dollars. I think FINRA should put those funds into an account to help pay unpaid arbitration awards to help investors like me. I understand there are other alternative ideas that would solve this problem. FINRA should implement one of them and quickly. It's just not fair that an organization like FINRA, that was created to protect investors, is not solving this problem. When I read the report that accompanied this non-attorney representation issue, a FINRA spokesman stated that an "insurance requirement" would be too costly, isn't that the obvious! Yet, the FINRA spokesman did not mention other proposals on the table and much less complicated solutions like the one I mentioned previously or the idea to create a $60 million-dollar fund for unpaid awards by accessing $100 a year to each licensed individual. If this serious problem is addressed and solved, then FINRA would be doing its job by protecting the investors out here and I just don't FINRA doing that, not when their interest is focused on NAR firms.

Jonathan Bryd

Jonathan Bryd

12-6-17

662-902-5200

COMMONWEALTH *financial network*®

VIA ELECTRONIC MAIL

December 15, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34, Non Attorney Representatives in Arbitration

Dear Ms. Asquith:

In its Regulatory Notice 17-34, the Financial Industry Regulatory Authority, Inc. ("FINRA") solicited comments regarding the continued permission of Non-Attorney Representatives ("NAR"s) to represent clients (presumably claimants) in FINRA arbitration proceedings.

Commonwealth Financial Network® ("Commonwealth") is an independent broker/dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 2,000 registered representatives ("RRs") who are independent contractors conducting business in all 50 states.

For the reasons set forth below, Commonwealth joins the many other individuals and firms that have already expressed concerns with FINRA continuing to allow NARs to represent clients in securities arbitration and mediation proceedings. FINRA should amend the Codes of Arbitration and Mediation Procedure to prohibit NARs and NAR firms from representing clients in securities arbitration and mediation proceedings.

Maintaining the Integrity of the System

Commonwealth shares the belief of many other commenters that certain base-line standards must be upheld in order to maintain the integrity of the arbitration forum. Requiring parties to be represented by qualified, even if not experienced, counsel, is a minimum requirement that should be enforced.

FINRA arbitration, although intended to be less formal and more streamlined than civil litigation, is nonetheless a nuanced and unique system of dispute resolution. Many of the attorneys (both claimants' and respondents') are familiar with the intricacies of the system.

Most experienced attorneys have frustrating anecdotes about the folly of dealing with pro-se opposing parties. Although a party should always maintain the right to proceed pro-se, he or she

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should not be entitled to have an unqualified third party represent him/her to the detriment of the professional decorum that should accompany every proceeding. Arbitration, after all, is a legal proceeding and should be treated as such.

Additionally, for better or for worse, many registered representatives believe the FINRA arbitration forum is already skewed in the customers' favor. Allowing NAR's to represent customers further erodes confidence in the fundamental fairness and integrity of the forum.

Accommodating the Inexperienced Party Will be Costly and Inefficient

Allowing an inexperienced and unqualified individual to represent a customer often leads to the individual "learning the ropes" at firms' expense. A panel hearing, or even a prehearing teleconference should not be treated as a legal internship for an NAR. The added time involved in arbitration due to the individual's longer learning curve causes arbitrations to veer from proceedings where everyone knows the ground rules to an inefficient exercise of fits and starts, where otherwise-unnecessary detours to explain elementary rules (either substantive, evidentiary or procedural) become the order of the day. NARs adversely affect the quality of an arbitration at the expense of the firms who are required to pay for additional sessions that would otherwise not be needed.

The unnecessary time involved in dealing with spurious arguments or generally educating an NAR leads to increased expenses for member firms. Keep in mind that the firms generally bear the brunt of the arbitration costs and legal fees as their attorneys do not work on a contingent fee basis the way claimant's representatives tend to.

The Customer's Right to Adequate Counsel

It is to everyone's benefit when the proceeding itself is run with high standards by skilled, experienced advocates. A customer without qualified counsel is clearly disadvantaged by inferior representation. Moreover, the absence of professional conduct standards, malpractice insurance and supervisory or licensing oversight causes NAR clients to proceed with an NAR at great risk.

Panels Seek to Accommodate the NAR

Arbitrations should be fair and impartial proceedings. They work best when all sides are represented by equally skilled and qualified counsel. It is not uncommon that a panel, in an effort to accommodate the inexperienced NAR, acquiesces to the unorthodox and even impermissible requests or proffers of evidence made by the NAR. This deference to inexperience has likely caused the pendulum to swing too far against member firms by making the arbitration a forum where "anything goes" rather one based on rules and precedent.

Allowing NARs to Represent Customers Lowers the Already Low Bar for Filing a Claim

Although customers should have the ability to have legitimate grievances heard in a timely and efficient manner, there should be minimum thresholds in place to ensure that the process involves only those customers pursuing genuine claims and is not abused by those who seek only to be perpetuate a perceived grievance that has no validity. The threshold to submit a claim is already a fairly easy hurdle to overcome. One of the few deterrents to frivolous claims is a customer's requirement to obtain a qualified, licensed attorney to represent him/her. Furthermore, professional attorneys have an ethical obligation to not bring frivolous claims. Permitting NARs to represent clients in these proceedings opens the door to more frivolous actions, burdening the system for not only member firms but FINRA staff as well.

The simplified arbitration procedure for smaller cases essentially already permits NARs, as neither the respondent firm nor the arbitrator knows the true identity of the drafter of the claimant's submission. Full-panel or single arbitrator hearings need not eliminate this minor barrier to entrance.

Sincerely,

Joe Tully
Assistant General Counsel

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC, 2006-1506

December 15, 2017

or via email at pubcom@finra.org

RE: Regulatory Notice 17-34, October 18, 2017

Dear Ms. Asquith,

1. The following comments are those of the Business and Securities Law Section Council, Illinois State Bar Association, responding to the above Regulatory Notice. The notice, in general, requested commentary on the efficacy of allowing compensated non-attorneys to represent parties in arbitration.

2. The staff commentary in the Regulatory Notice noted that non-attorney firms are currently permitted to represent investors in complaints against broker-dealers, and that one of the complaints received by FINRA is that such NAR firms have so represented investors "in hearing locations where state law prohibits such representation." The Section Council notes that such representation is illegal in Illinois, under three authorities:

a. The Attorney Act, 705 ILCS 205/1, which specifies that:

"No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State. No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney, nor may an unlicensed person advertise or hold himself or herself out to provide legal services."

b. The Corporation Practice of Law Act, 705 ILCS 220/1, which specifies that:

"It shall be unlawful for a corporation to practice law or appear as an attorney at law for any reason in any court in this state or before any judicial body, or to make it a business to practice as an attorney at law for any person in any said courts or to hold itself out to the public as being entitled to practice law or to render or furnish legal services or advice or to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in any other way or manner to assume to be entitled to practice law, or to assume, use and advertise the title of lawyers or attorney, attorney at law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law, or to furnish legal advice, furnish attorneys or counsel, or to advertise that either alone or together with, or by or through, any person, whether a duly and regularly admitted attorney at law or not, it has, owns, conducts or maintains a law office or an office for the practice of law or for furnishing legal advice, services or counsel."

c. The Rules of the Illinois Supreme Court, Rule 701 ff., outline requirements for education, passage of a state bar examination, and personal character and fitness that must be met for admission to the practice of law. The Rules further provide that the Illinois Attorney Registration and Disciplinary Commission may seek sanctions for unauthorized practice, see Illinois Supreme Court Rule 752(a).

d. Our supreme court has defined the practice of law as " 'the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.' " *People ex rel.Chicago Bar Ass'n v. Barasch,*406 Ill. 253, 256, 94 N.E.2d 148 (1950) (quoting *People ex rel. Illinois State Bar Ass'n v. Schafer,* 404 Ill. 45, 50, 87 N.E.2d 773 (1949))."

3. The Section Council notes that FINRA arbitration decisions may need to be implemented with the assistance of civil court judgments. FINRA should note that it has been held that a judgment obtained by persons unauthorized to practice law is void, cf. *Downtown Disposal Serv. Inc. v. the City of Chicago,* 943 N.E.2d 185, 407 Ill.App.3d 822, 347 Ill.Dec. 895 (Ill. App., 2011). That court noted that application of the nullity rule is automatic, id. at 943 N.E.2d 194-95, "Accordingly, it is well settled that the 'effect of a person's unauthorized practice on behalf of a party is to require dismissal of the cause or to treat the particular actions taken by the representative as a nullity.' " (Emphasis added.) Sperry, 214 Ill.2d at 390, 292 Ill.Dec. 893, 827 N.E.2d 422 (quoting Pratt–Holdampf v. Trinity Medical Center, 338 Ill.App.3d 1079 1083, 273 Ill.Dec. 708, 789 N.E.2d 882 (3d Dist.2003))."

4. The court was clear as to the reason for this nullity rule: "The purpose of the nullity rule is to protect litigants from the mistakes of ignorant individuals and the schemes of the unscrupulous, as well as to protect the court in its proceedings from individuals who lack the requisite skills. Janiczek, 134 Ill.App.3d at 546, 89 Ill.Dec. 673 481 N.E.2d 25" (Id., (347 Ill.Dec. 905 , 943 N.E.2d 195.)

5. The Section Council notes that these concerns and reasons for prohibition of unauthorized law practice apply to FINRA arbitrations involving Illinois residents, wherever held. Current FINRA regulations permitting such practice, and any amendment to same authorizing easier corporate practice by firms not subject to state ethics, law practice education, and other rules that bind attorneys are and will remain unenforceable in Illinois, and should be drafted to prohibit such practice elsewhere. Securities laws are complex, and their proper enforcement (and defenses to enforcement actions) require considerable legal skill and knowledge.

Pursuant to Illinois State Bar Association policy, this letter has been reviewed and approved by ISBA President the Hon. Russell W. Hartigan (ret.).

Respectfully Submitted,

/s/ Brian Johnson
Brian Johnson, Chair
Section Council
Section of Business and Securities Law
Illinois State Bar Association

/s/ William Price
William Price, Member
Section Council
Section of Business and Securities Law
Illinois State Bar Association

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December 15, 2017

via email - pubcom.finra.ord
Kenneth Andrichik
Senior Vice President and Chief Counsel
Office of Dispure Resolution

Dear Mr. Andrichik:

We are two former chairmen of the Supreme Court of the State of Texas' Unauthorized Practice of Law Committee. We are responding to your invitation for comment on the proposition of non-lawyers representing parties in FINRA arbitrations. Each of us has extensive experience in the unauthorized practice of law (UPL), litigation, arbitrations, and, in Mr. McCullough's case, FINRA mediations.

It is our experience that, generally speaking, non-lawyers are not prepared to act as advocates, generally not knowing the procedural rules or rules of evidence, though the rules of evidence are not required to be strictly applied. However, Mr. McCullough relates that he has seen some effective non-lawyer representation in very small FINRA mediations, especially when the non-lawyer is very familiar with the industry. That is usually in the form of a former broker and/or expert in securities.

Nonetheless, we are concerned because these non-lawyers are not bound by any state's Rules of Professional Conduct, cannot "malpractice", and do not carry insurance in the event of a malpractice.

We suggest, then, a compromise. We advocate setting an upper limit on the amount in dispute that can be handled by a non-lawyer. That would result in minimizing damage a non-lawyer can do if the resulting advocacy is poor.

We hope you will carefully consider our suggestion. Should you have any questions, please do not hesitate to get in touch with us.

Sincerely,

James D. Blume
F. Witcher McCullough III

James D. Blume

F. Witcher McCullough III

JDB:com

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December 15, 2017

E-MAIL TO PUBCOM(@.FINRA.ORG

Marcia E. Asquith, Esq.
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-34

Dear Ms. Asquith:

The purpose of this letter is to provide the Financial Industry Regulatory Authority, Inc. with comments on the above referenced Regulatory Notice which was issued by FINRA on October 18, 2017.

I am a lawyer whose practice includes the representation of individual investors in their disputes with securities firms. I also taught business ethics at Suffolk University Business School for fifteen years.

It is my understanding that the Regulatory Notice requests comment on whether FINRA should continue to allow compensated non-attorney representative ("NAR") individuals and firms to represent clients in the FINRA Dispute Resolution forum.

It is my opinion that NARs, who receive compensation for representing investors in arbitration proceedings, threaten FINRA's fair, efficient and effective venue of dispute resolution, constitute a clear and present danger to the investing public and must be immediately banned. I have been asked to step in after these so called “representatives” have botched their clients’ claims. It is also my understanding the results these “representatives” have achieved in cases that have gone to decision have been almost uniformly terrible for the investors. The horror stories are many and the clients have no recourse. All states have oversight over lawyers’ conduct and most lawyers carry malpractice insurance. NARs lack both.

There are reasons that most, if not all states prohibit the unauthorized practice of law by non-lawyers. There can be little doubt practice before FINRA is the practice of law. The respondents in all of our cases are represented by lawyers. There are no pro se

investment firms. It is unfair and unethical for FINRA to allow the unwary public to be preyed upon by largely unskilled NARs before FINRA arbitration panels.

In the event that you should have any questions with respect to the preceding, please do not hesitate to contact me.

Yours very truly,

/s/ John E. Sutherland

Richard Sacks
Telephone: 415-987-3256
Email: richardatirs@yahoo.com

December 15, 2017

VIA E-mail: Submission to PUBCOM@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: NTM 17-34 Efficacy of NARs

Dear Ms. Asquith:

FINRA's concerns about NARs, as detailed in NTM 17-34, namely their "efficacy" are baseless. Efficacy, as defined in Webster's dictionary is "the power to produce an effect" and there is absolutely no evidence, because no one has ever performed an analysis on this subject, that suggests NARs obtain lesser awards or settlements for their clients than attorneys do.

Without an appropriate investigation / study comparing the two, FINRA is simply relying on opinion rather than fact. Isn't that precisely the opposite of what FINRA's most fundamental rule is concerning the handling of customer accounts? Namely that FINRA members, and their registered personnel must always have a reasonable basis behind their recommendations. As further explained below, such is not the case and couldn't be farther from the truth. NARs perform as well, if not better for their clients than their attorney counterparts do at FINRA DR. If FINRA has any evidence to the contrary, they have not put it forth in NTM 17-34. It doesn't exist.

At this time there is no evidence, other than anecdotal stories, by mostly PIABA members (Public Investors Arbitration Bar Association), that NARs don't perform as well as attorneys on behalf of their customers, and they are more likely to take advantage of their clients because, well, they are not regulated. Sounds good perhaps, but that is really all it is, just sound.

Further, I believe that the change to Rule 13208, below, can offer a good solution on how FINRA can address their "efficacy" concerns of while not depriving the public of free choice. I believe the "facts" hold up well that the majority of NARs, over the past 25 years, have performed extremely well while acting on behalf of their clients' best

interests.

Before most NARs became NARs, many were successful, knowledgeable and trustworthy FINRA associated persons. Why FINRA and its predecessor NASD believe it necessary every 10 years or so to question the efficacy of NARs is probably a more relevant question.

Absent a showing from FINRA that there is currently a genuine basis for concern about NARs, then this current exercise is perhaps another attempt to take what has been good and destroy it in pursuit of the perfect. Or, perhaps it's just another attempt by PIABA to exclude competitors from the marketplace. Regardless, making FINRA arbitration even more legalistic by excluding non-attorneys I believe threatens FINRA's often-stated mandate of providing a "fast, fair and relatively inexpensive" dispute resolution mechanism.

I say that because I believe that FINRA arbitration, although not perfect (what system of justice is always fair and never fails, in our own minds of course), has worked quite well on behalf of the public over the past 30 years. And NARs have been a large part of the FINRA arbitration process. We are not a sideshow. And, by constantly casting NARs to appear to be just a tiny portion of the marketplace, i.e., helping customers with such small losses that no attorney can afford to take them on, FINRA does an injustice to the public.

Having ignorant law school students drafting simplified complaints (no evidentiary hearing required), for that portion of the public that needs representation the most, is a genuine disservice. I ought to know as for a couple of semesters I trained University of San Francisco law school students on this subject, for the Investor Justice Clinic. They are often bright and eager to learn but ignorant of the industry, ignorant of life and their published results show that.

In my experience a "strong claim", even if only for $50,000 in losses, which requires an evidentiary hearing, will yield the highest percentage recovery of any type of claim filed with FINRA, if for no other reason than the legal costs securities firms will have to pay to defend against it. But, from the attorney perspective, who wants to take on a claim where the greatest amount they are likely to obtain is $50,000 at best. Then measure that against the work they have to put in to move the claim along.

Review the case with the client, prepare and file a statement of claim, review the answer with your client, issue discovery requests above and beyond that which is required to be produced by each party, participate in pre-hearing telephone conferences, file motions, rank arbitrators, prepare for hearing, including the preparation of exhibit books, then actually go to hearing and try the case. All for at best a $15-20,000 fee, assuming $50,000 is awarded. But, for someone with a large office staff to handle the paperwork, and the ability to essentially try this type of case in their sleep, it places the brokerage firms in a very bad place.

It is much better for respondent brokerage firms to pay the client more than they believe they should in order to settle, because the only other option is to pay a defense attorney about as much as they would have to pay to settle the case, or more. Simplified arbitration, generally speaking, does not yield as good results for the public as going to an evidentiary hearing.

But, FINRA has ended up sending many abused public customers that could obtain significant awards by going to a full evidentiary hearing, to these law school clinics instead of referring them to NARs, who have the ability and the desire to help these types of customers. FINRA should look into the "efficacy" of these law school clinics.

The above statements are made by someone that has filed over 1300 claims with NASD/ FINRA from 1991-2014 and tried more than 225 of those to an award. In many cases we were referred our clients by attorneys because they believed we would do a better job for their clients than they could. We had many clients that were also attorneys. During that time period there has been no evidence ever put forth by anyone that suggests that NARs are not effective, nor evidence that suggests attorneys obtain better awards for their clients than NARs do. Most importantly, there is no evidence that NARs represent any danger to the public as compared to attorneys, or say stockbrokers.

Yet, if one reads the published comments concerning NTM 17-34, one might think otherwise. And, of course, that's the entire point. To scare people into thinking something must be wrong with non-attorneys appearing as representatives in FINRA arbitrations.

As I understand by this notice, FINRA would like to make certain, as if that were truly possible, that public customers that were ripped off by their brokerage firms, obtain the very best representation possible, and thereby receive the very best awards/settlements possible, by being represented by an attorney, as opposed to someone that isn't an attorney, in their FINRA arbitration proceedings. That is certainly something that deserves further investigation because in my humble opinion the notion that FINRA would like to see the public obtain the largest awards or settlements possible against its member firms just doesn't pass the smell test.

Anecdotal stories, emanating primarily from PIABA members about certain NARs alleged misbehavior, is tiny compared to the extraordinary horror stories about attorneys taking people's money, making promises and then failing to perform. Once it becomes obvious that the subject firm refuses to settle, and the attorney must prepare for hearing, then the attorney typically advises his client(s), "you better take whatever we can get, otherwise you could get stuck with arbitrator fees, expert witness fees, and maybe even the other side's attorney fees". Many attorneys do that frequently because many, if not most, struggle to earn a living. Many clients came to us because their attorneys essentially "lost interest" in pursuing their claims, once it became evident that they would have to actually "work" for it.

If you ask most attorneys why they took a certain client on, if they are being brutally honest they will tell you "because they paid me". It's not about whether or not the case is really worth pursuing, it's much more about whether or not the attorney will be able to pay his office rent and salaries. Once the tidy up front retainer is had, then the attorney will figure out what to do next. That is precisely why most people are afraid of attorneys "are they telling me the truth, or do they just want my money".

When arbitration began at NASD the industry wanted their branch managers (or compliance personnel) to be able to represent the broker's or firm's actions, to avoid attorney fees, but also to allow attorneys not licensed in all states, to appear in any state their employer firm had offices, without the need and expense to associate in local counsel. All for the primary NASD stated purpose of keeping arbitration at FINRA "fair, quick and inexpensive". I believe not allowing NARs will have the opposite effect.

The primary reasons why NARs emerged at NASD DR was because most attorneys in the late 80's: 1) were not price competitive; 2) lacked actual hands on knowledge of the securities industry; 3) lacked the financial resources to maintain a sufficient staff to handle the enormous paperwork load, both incoming and outgoing; 4) lacked strong negotiating skills; 5) lacked marketing skills; and 6) lacked the ambition to succeed and 7), didn't believe the public could get a fair shake in arbitration at FINRA. Rest assured the only reason NARs are active at FINRA is because there was a need, and NARs saw that need and acted on it.

What is also glaring to me about NTM 17-34 is FINRA's utter failure to point out that there have been no formal complaints made against NAR's at either the NASD, FINRA or the SEC from at least 1991-2010. I would think a simple fact like that might be important enough to include in NTM 17-34, in order to place the subject of NAR representation under a fair light.

Imagine that for just a moment, over a 20 year time frame, involving far more than 100,000 securities arbitration/litigation claims, more than during any other time period in NASD/FINRA history, not a single formal complaint about the services NARs provided to the public were received by either NASD/FINRA/SEC! But, it appears that some PIABA members believe otherwise. Of course, they are entitled to believe whatever they want but beliefs are not the same as facts.

I came to learn of this unique fact in or around 2009 via litigation (Sacks v. SEC Case No. 07-74647) that neither FINRA nor the SEC could produce any evidence suggesting NARs represented any danger to the public. Albeit, in all honesty I would have suspected something in their files to suggest somewhere, at some time, some NAR did something they should not have done. But, the SEC's cupboard was empty.

Just to be clear, that also translates to NASD/FINRA being unable to provide a lick of evidence to the SEC that NARs were a threat to the public, even NARs with a disciplinary history. I wonder how many complaints the SEC or FINRA received about attorneys appearing in their forum during this same timeframe. Perhaps someday

FINRA will open up on this subject, and they will actually do an analysis of attorney vs. non-attorney results based on facts, not innuendo. That would definitely be in the public's best interests. And, with today's computers, that analysis should be a piece of cake. Why hasn't FINRA actually performed such an analysis is the question, which would provide solid answers, based on facts, about NARs' efficacy.

And without such an analysis, otherwise referred to as "due diligence" one can positively make the following statement "**there is no evidence to suggest NARs perform any worse or any better than attorneys on behalf of their clients, because no one at FINRA has bothered to perform such an investigation**". Nevertheless, FINRA is contemplating preventing the public from retaining a NAR, while having no reasonable basis to do so. Isn't that precisely what customers allege in their complaints as wrongdoing, most of the time, ie, "lacking a reasonable basis".

Therefore, I must assume that something happened over the last few years to have brought the subject of NARs up again. Or perhaps, as I suspect, this is either about attorneys looking to eliminate their competition, particularly in light of the extremely low number of customer complaints filed at FINRA over the past few years. Or, this is about member firms looking to protect themselves against the more knowledgeable NAR vs. an ignorant attorney.

As you may surmise or know I am a (retired) NAR. From 1991-2014 my firm, Investors Recovery Service, filed over 1300 separate claims, the majority involving public customers, along with a smaller percentage representing industry clients. My many years as both a salesperson and a supervisor made it easy for me to both understand and empathize with abused brokers, along with abused customers.

Our claims averaged well under $200,000 in losses in the early 90's, but by 2009 our claims averaged over $1,000,000. That means many of our clients had losses well over $1 million. One might ask, with losses so large why would individual investors choose a NAR over an attorney. That is simple.

If a prospective client spoke with us for 10 minutes, they knew that we knew far more than most any attorney they may have spoken to. In fact, I preferred and often told prospective clients, call an attorney first, and then call us. As you probably know, there is no shortage of attorneys that specialize in securities arbitration readily accessible online, or the FINRA web page.

Before becoming a NAR I was a branch manager and a principal in my own firm, first licensed in 1974. It is also a fact that former branch managers are some of the most important participants in the FINRA arbitration process. That is because they understand the customary rules and practices of the securities industry, and how they are actually applied, in the real world. That is why NASD/FINRA wants and is justified in having an industry arbitrator, rather than all non-industry arbitrator panels. But, that is a choice and in my opinion, a correct industry arbitrator, meaning not conflicted, is the better

choice. That is because we speak the same language.

Who better to understand, and explain to other arbitrators, what really happened between a customer and a broker, than a former branch manager, with 10 -20 years experience, or more in the industry, including the managing of registered reps. That individual is the one most responsible for ensuring their employee brokers are not acting contrary to the customary rules and practices, as well as their employers rules. That individual is often the one that speaks with upset customers or certainly the broker, to get at the truth. And, that individual is generally the one that "failed to properly supervise" as often alleged in customer complaints, so they have much at stake.

Therefore, my suggestion on how to best deal with the question of NAR efficacy raised by NTM 17-34 would be to add the following to FINRA rule 13208, item c,

Representation by others, to add the following fourth bullet:

> "Individuals that are not attorneys and actively represent parties in the FINRA forum must possess a minimum of 10 years employment history within the securities industry, with no less than 5 years experience as a branch manager or higher."

By doing so, FINRA will have done all it can reasonably do, or should do, to protect the public from unscrupulous NARs who might take advantage of their clients, or at least that is the image FINRA is projecting by the publication of this Notice. Any individual that has served in a supervisory capacity for at least five years has already proven their trustworthiness and knowledge of the securities industry in the FINRA arena. Why should anyone assume that if one is not an attorney, they must by definition be untrustworthy and incapable of doing a credible job. That's a fairly huge leap of faith to take. But, that is exactly what is going on if this Notice results in the baring of NARs.

Also, the majority of the most sought after expert witnesses, retained by both claimants and respondents, are former branch managers. That is because the testimony of these experts at evidentiary hearings is often highly relied upon by FINRA arbitrators. These experts are best suited to explain to arbitrators how the "customary industry practices" apply to any particular claim/set of circumstances, because they are essentially lifelong industry employees, with extensive supervisory experience. That is the background I brought with me as a NAR. That is a background I believe all NARs should have, if they are going to represent parties at FINRA.

Therefore, why wouldn't these same individuals make excellent advocates at a FINRA Dispute Resolution hearing? While there are a few attorneys whose knowledge of the securities industry is quite high, not a one, unless they worked in the industry in a supervisory capacity can truly understand the day-to-day realities of working within the securities industry as well as an experienced branch manager. And, because of their specialized knowledge of the industry, it is not at all uncommon for arbitrators at

evidentiary hearings to rely on what I/they had to say. For the most part, defense attorneys didn't like that one bit.

That was the premise behind opening Investors Recovery Service, namely to offer our clients superior knowledge of the securities industry, in most cases greater than, but certainly rarely, if ever less, than any attorney, even one with substantial securities industry knowledge / experience. When legal questions arose from time to time, there was no shortage of legal advice at our disposal, at no cost to our clients.

Legal knowledge is fungible, meaning one can obtain such knowledge from most any competent attorney. But industry knowledge can only be obtained from experienced industry professionals. That is why most attorneys almost always will retain an industry expert in some capacity in order to explain to them what they need to know about their case and about their client. Most attorneys are not qualified to represent parties at FINRA, unless they have associated in an industry expert. That may not apply to all PIABA attorneys, but to most. Last time I heard, one only needed to have completed one claim at FINRA to be admitted into PIABA. That is hardly an exclusive club,. It is also misleading the public into believing that if they retain a PIABA attorney, they are retaining someone with extensive FINRA DR experience.

As best as I can recall over the past 26 years, every NAR I knew of in California had been a former branch manager, or higher (i.e. Regional Manager). In my opinion it is this "inside knowledge" that only former branch managers possess that can make them highly effective advocates. No wonder our respondent firms fought us for years in the courts. It wasn't because we weren't doing an "effective" job for our clients. It was quite the opposite. And, for those attorneys out there that clearly don't know or understand the law, non-attorney representation in a FINRA arbitration is legal in California.

So, when the question of NAR efficacy comes up, which it seems to do every 10 years or so at FINRA, along with it's predecessor NASD, someone such as myself will always wonder, what's really up. Are they out to get me? Again? I retired in 2014, and I strongly believe NAR's with a supervisory background provide a valuable service, not only for the public, but for industry personnel as well.

NARs have also created a highly competitive environment that caused securities attorneys to re-invent their business practices.

For example, PIABA attorneys are trained on how to obtain up front money from their potential clients. Stuart Goldberg, the founder of PIABA, wrote the book on this subject almost 30 years ago, and believed that an attorney should always obtain an up front retainer because it: 1) bound the client to the attorney; and 2) assured the client was being truthful with them. Sounds good, but like many times, that's all it is, just sound, not substance.

NARs with a supervisory background have a fairly good idea just how strong or weak a potential claim may be. They don't need to retain an expert to advise them of the merits

of any particular claim. They know how to research and analyze a claim, because this is precisely what they frequently did as branch managers. They know how to determine losses, they understand loss causation, because they come from an industry background. And, they understand what is important to arbitrators, because they essentially speak the same language. They know exactly what questions to ask, and documents for them to produce, in order to determine if their potential client is being entirely truthful.

And, because they usually don't ask for up front retainers, other than to cover filing fees etc., the potential client feels much more comfortable, because they appreciate the fact that someone is going to work hard on their behalf, with the only expectation of being paid for their hard work, by obtaining a satisfactory settlement or arbitration award.

Eliminate NARs and I believe the very first thing PIABA attorneys will do, en masse, is require up front money, because much of the attorney's competitors are out of business. That certainly won't be good for the public and will result in fewer claims filed. After all, most clients who sustained substantial investment losses are justified in believing "am I just throwing good money away after bad".

That is a huge subject on someone's mind, and NARs exploited that by offering " no recovery, no fee" arrangements. In fact before NARs came along in the late 80's, the likelihood of obtaining experienced competent legal representation at NASD arbitration on a straight contingency fee basis was highly unlikely, if not outright impossible.

I also find it ironic that while some PIABA members have commented negatively about NARs, in response to NTM 17-34, last month PIABA has simultaneously taken the very public position that the public cannot trust FINRA because its board of governors is too aligned with the securities industry, even its so-called public members.

FINRA on the other hand believes, and has for as long as I can remember, that having the experience of former securities industry persons on their board is beneficial for the markets, the investors, and the industry. PIABA apparently does not believe so.

But ironically, isn't that similar to what NARs, who have a strong supervisory background within the securities industry, that come before its arbitration panels, provide to public investors? The similar experience, the knowledge and the wisdom gained from working many years within the industry, the same as FINRA's board members possess. Why would that be a bad thing for the public?

I am hopeful that those who read this letter will actually begin to understand the subject and benefits of non-attorney representation by former branch managers (could be expanded to include compliance directors etc.) and come to a conclusion that these types of NARs are hardly a danger to the public. To the contrary, they should be perceived as a threat to the securities industry, just because of what they know about it. Few PIABA attorneys possess a knowledge of the industry, like true industry professionals have. That's also not an opinion, just a fact. And, maybe that is the motivation behind NTM 17-34.

So far, at least from 1991-the present no one has actually demonstrated the courage to state the truth about these types of NARs. They know more about the securities industry than most any attorney in the country. Certainly far more than most PIABA members, whose knowledge of the industry comes mostly, if not entirely from experts they have spoken with, not from their own actual experience working within the securities industry. And, the securities firms know this as well. Their defense attorneys would much prefer going against an attorney, particularly one with little real knowledge of the industry than a former industry professional.

For all the above I believe that NARs provide the public with a valuable alternative to attorneys. They can provide a knowledge of the securities industry that few attorneys possess, and an understanding of the issues in dispute, without the need to retain an expert to advise them, which is most often performed at the public customer's expense. Moreover, they are far less likely to file "frivolous" claims, precisely because of their knowledge. What exactly is the point of filing a frivolous claim when working on a contingency fee basis.

And, because of their past experience working within the securities industry, an ability to quickly recognize who is being truthful, and who isn't. That is perhaps the most important point because public customers, generally speaking, don't sue brokers simply because they lost money. They sue because they were lied to. And that is pretty much what arbitrators look for, namely who is being truthful and who isn't, when testifying before them.

I very much look forward to FINRA performing an appropriate analysis on this topic because of its great importance. The last thing FINRA would want to do is bar a certain type of representative from its forum that actually obtains better/higher settlements or awards than attorneys. Anyone with half a brain can understand that without such an investigation, FINRA would lack a reasonable basis to bar NARs. And, in doing so, actually harm the public, although it would benefit "securities attorneys" and the industry, ie the less money firms have to pay out in awards or settlements, the better it is for the industry.

In order for FINRA to accurately, or even remotely determine the efficacy of NARs an analysis between complaints about attorneys obtained by NARs vs. attorneys must be performed. And of course, who is making the complaint. It should be the customer, almost by definition. How problematic is it for the public client of a NAR if an attorney defending his clients at FINRA files a complaint about a NAR? Attorneys always have the ability to file a formal complaint in court if anyone, including a NAR were to violate the law or cause harm to their client(s).

As regards FINRA's concerns as expressed in NTM 17-34, because these type of NARs, before they became NARs were demonstrably successful, knowledgeable and trustworthy experienced FINRA associated persons, in good standing, with substantial supervisory experience I believe they provide FINRA with a "reasonable basis" to not be

anymore concerned about their conduct at FINRA DR than their counterpart attorney.

They have personally handled and or supervised the investing of many millions of public investor dollars, without a serious problem. That alone should certainly be enough to reassure FINRA that this type of non-attorney representative is hardly problematic for the public, and far more problematic for the respondent brokers and brokerage firms they go after.

NTM 17-34 is precisely about whether or not NARs obtain "better or worse awards" than attorneys do for their clients. Efficacy "the power to produce an effect". That can only mean that FINRA, by publishing this Notice, would like to make certain that the public obtains the best awards or settlements possible when going to arbitration

FINRA, by publication of NTM 17-34, has clearly aligned itself with the public on this issue of non-attorney representation. They want to have a high confidence factor that when a customer of a securities firm goes before its arbitrators, they will be suitably represented by someone that both knows what they are doing, and has the moral character to act appropriately with the public customers they represent. And by their representative's efficacy, will therefore have the best chance possible of receiving the most amount of money possible, either through settlement or arbitration.

I believe the facts, once ascertained from the many thousands of claims filed by NARs at FINRA DR over the last 30 years, not just a few, will show that the "efficacy" of NAR's to be no less than that of attorneys.

Yours truly,

Richard Sacks

FINRA is presently conducting a review of the efficacy of continuing to allow compensated non-attorneys (NARs) to represent clients in securities arbitration, and has requested comments on forum users' experiences with NAR firms. I write as an arbitrator (since 1977) and mediator (since 1995 when the mediation program began in the forum), as a former Chair of the NAMC, and Member of the recent FINRA National Task Force, to report my personal experiences with NARs, and to concur wholeheartedly with two excellent previous submissions, one from Richard P. Ryder of *Securities Arbitration Commentator (SAC),* and another from Steve B. Caruso, Esq, a practicing lawyer in the forum from *Maddox, Hargett & Caruso, PC*, New York City. Both urge that compensated NARs no longer be permitted to appear in customer arbitrations (except for supervised students in law clinics), because, as Mr. Caruso notes, they "threaten FINRA's fair, efficient and effective venue … and constitute a clear and present danger to the investing public…" I completely agree, and urge FINRA to take prompt action on the matter to bar NARs from practicing.

I have had a number of personal experiences with compensated NARs who solicit business from the public and are not affiliated with any law school clinics, and they have uniformly been unfortunate. Their work is often shoddy, sometimes with boilerplate pleadings that have little applicability to the case at hand, and with arguments that are high in volume but low in quality. They can be rude and disrespectful, to their clients as well as opposing counsel, and sometimes even to the mediator. They overcharge compared to usual legal fees, and it is abundantly clear their primary interest usually is in extorting as much as they can get for themselves rather than protecting the best interests of their clients. I don't work for them any longer, in part because I became embarrassed that they are allowed to participate in our forum. Permitting them to practice does a disservice to customers and all the rest of us who work for FINRA because we all get tarred with their brush. You must stop it as soon as you can, whether the law in a state allows it or, as is more often the case, does not!

In his letter to you, Rick Ryder highlights an excellent article from a 1988 issue of *SAC* (Vol. 2016, No. 8) written by Aegis J. Frumento, Esq. and Stephanie Korenman, Esq. of *Stern Tannenbaum & Bell, LLP*, in New York City, which reviews the history of NARs. It notes that NAR's have been viewed, first by SICA twenty years ago, and then FINRA, and the SEC, "as not being in the best interests of investors," and yet they continue to practice. I urge you to consider the persuasive arguments in this fine SAC article which documents the checkered history of the practice, and how it evolved from the "law of the shop." It concludes with a strong recommendation that non-lawyer advocates not be permitted to appear in customer arbitrations. They suggest the prohibition not apply to supervised law students under the guidance of a lawyer involved in the clinic, and I agree with that. I have handled many mediations with such clinics, and that representation has always been first class. I also applaud FINRA's efforts to encourage the clinic's growth and development by providing financial support to some of them.

Steve Caruso is former President and current Director Emeritus of PIABA, and the current Chair of the FINRA NAMC, and is very well informed on the impact of NARs in our forum. He has written an excellent article on the subject, originally published by the Association of the Bar of the City of NY, which he submitted to you, documenting chapter and verse of some the shoddy and shady practices of various NARs. He asks, *"Do They Present a Clear and Present Danger to the Integrity of FINRA Arbitration,"* and he answers the question in the affirmative. I couldn't agree more!

It seems there is only one submission so far to FINRA on this question from a lawyer practicing in the forum that is supportive of keeping NARs. There are none in support from mediators and arbitrators. It appears the NARs have also drummed up some testimonials from a couple of former clients who admit their lack of knowledge and sophistication in these matters.

Nonetheless, it is abundantly clear that the overwhelming view of most knowledgeable practitioners, lawyers, neutrals and regulators, is that it is time to end this unwise and potentially harmful practice which is destructive to customers and to the proper conduct of the forum.
Thank you for the opportunity to submit my comments on this very important subject.

Philip S. Cottone,
Mediator and Arbitrator

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December 15, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
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Washington, DC 20006-1506

VIA E mail: Submission to PUBCOM@finra.org

Re: NTM 17-34

Dear Ms. Asquith:

The subject of non-attorney representation (NAR) at industry arbitrations has come up before. In the mid-1990s the NASD commissioned a study on NARs as part of a Task Force headed by retired SEC Chair David Ruder. The Ruder Report reviewed the status of NARs, acknowledged that they were permitted in most states and called for additional study. It did not suggest that NARs be banned. FINRA has done no further study.

In 2005, the NASD submitted a change to the arbitration rules that would have effectively barred NARs. That change was denounced by consumer groups as being anti-consumer and withdrawn when the SEC told the NASD that it would not be accepted.

There is no evidence that NARs do a poor job representing customers. No one can demonstrate any reason for a wholesale bar of NARs from FINRA arbitration.

The main complaint here is that they do not carry insurance, which is true of many attorneys in many states. No one is suggesting that attorneys practicing in FINRA arbitrations must carry malpractice insurance. No one requires that the Member firms carry insurance adequate to pay awards.

It is also claimed that one NAR charges an upfront fee. So do many lawyers. It is more anti-consumer, in my perspective, for a consumer to hire an attorney on a contingency and then be told that he needs to hire an “expert” for a fixed fee or on the clock to assist.

This issue seems to always rear its head when the market is high, fewer customers have losses and the number of claims filed diminishes. Plaintiffs' lawyers seek to keep the NARs out of the mix because it would lessen the competition they face for claims to be filed.

I have participated in more industry arbitrations as a representative than most if not all of the other commentators. I represented the industry for 15 years and then customers for 25 years. I have been also been an arbitrator and expert witness many times. I have worked with 3 NARs multiple times and dozens of lawyers. Very few of the lawyers were as good as the NARs.

Arbitrators are fact finders. To ascertain the facts in any proceeding it is imperative that the customers' representative understand the transaction being litigated. Most of the lawyers with whom I have worked never worked in the industry. They have no knowledge of industry regulations, customs or procedures. Many would not know a long call from a long bond.

At the end of the day many of the claims come down to the question "was this order appropriate for this customer?" Two of the three NARs for whom I did multiple cases were retired branch office managers. They had years of experience approving individual orders. They knew that they would not have approved the orders that they were complaining about and they knew exactly what questions to ask the defendant broker and manager about it. They were the same questions they would have asked the broker if the order had been presented to them for approval.

The prime anecdotal issue now being raised seems to be that some NARs take a $25,000 deposit before they will accept a claim. No one puts a gun to any customer's head to accept those terms. Plenty of lawyers advertise their willingness to handle cases on contingency. I have represented professional traders who were willing to pay by the hour because the amount of money involved was too large to justify a contingency. Frankly, when did the fee agreement come under FINRA's purview?

How is it different from an attorney who takes a $15,000 - $25,000 deposit for costs and spends that money on an expert to tell him what he should have known before he started? How can an attorney justify the costs of a court reporter or agree to depositions?

One of my first assignments as an expert in NASD arbitration was for a noted attorney in a margin case. I was contacted just 30 days or so before the hearing. That attorney was confident of a win because his client had received a written margin call that stated that the client had until Thursday to bring in the deficiency and the account was sold out on Tuesday. That attorney was shocked when I told him that a member firm could sell out the account at any time notwithstanding what the margin call said and even if a call had never been issued.

I was called more recently by an attorney who had filed a claim involving a private placement. I had represented other purchasers of the same program against other firms. The sponsor had held himself out as being a successful real estate developer. I had done the homework and knew that there was at least one bankruptcy and a regulatory action that were not disclosed. I had alleged that each of the other firms had failed to conduct a reasonable due diligence investigation and had settled each claim.

That attorney never heard of a due diligence exam, had no idea of its purpose or how to conduct one correctly and never mentioned the phrase "due diligence" in the claim. He was trying valiantly to make a 10b-5 claim and prove intent when all he needed to do was prove negligence.

Neither of these situations should be surprising. They do not teach how a margin account works or how to conduct a due diligence exam in law school. Most of the lawyers representing customers have never worked in the industry nor have any idea how the industry works.

In any FINRA arbitration the best representatives are those lawyers and NARs who *have* worked in the industry. The last time the question of NARs came up I recommended that every person representing a party in arbitration be required to take basic registered representative training or something similar. I believe strongly that the smarter the representatives are about the processes and procedures of the industry, the more smoothly and efficiently the arbitration process will work.

When I first did industry arbitrations in the 1970s there were very few lawyers. NARs were very much a part of the landscape. The firms would often be represented by a branch office manager. The customer often represented himself. The customer would speak his piece and then the broker would tell the arbitrators his side. On more than one occasion, a panel might hear two different cases in a single day.

Many lawyers oppose NARs because they believe that only lawyers can effectively argue the law and represent clients. Yet every day all over the country there are labor arbitrations being handled by employer VPs and union shop stewards and it all works out just fine. The Social Security Administration trains NARs to work on its claims and appeals. Judge Richard Posner, recently retired from the US Court of Appeals has opined that most civil cases would be better in court without the lawyers as well.

To my fellow members of the bar who will certainly take umbrage at my comments, let me suggest that we owe it to the public to clean up our own act before we take on NARs. Based upon statistics compiled in those states that have remedial programs, somewhere around 8% of lawyers are stressed to the point where their ability to provide representation is impaired by drugs or alcohol.

Anecdotally, I can attest to the defense lawyer who would come back to the arbitration from afternoon break amped up with white powder on his mustache. And perhaps you have heard of the plaintiff's attorney who failed to show up at the hearing but was found later in the day asleep in his car with a crack pipe on the seat.

Too real? Too anecdotal to ban all lawyers? There are lot fewer NARs so there are a lot fewer addicts and abusers among them being foisted on the investing public.

If the issue is getting the best representation for every client, then why are Wall Street trained New York lawyers banned from representing customers in arbitration in Florida and New Jersey? The lawyers there are guarding their turf. That is the only reason anyone actually cares

about NARs. FINRA and the SEC could fix that situation just by declaring that FINRA arbitration procedure is pre-empted by federal law and allow lawyers and NARs to appear in any state.

If there is a problem with bad actors then FINRA needs a system to discipline the bad actors. That would include NARs, attorneys and arbitrators. I know that some defense lawyers have told stories to arbitrators that they would never try to foist on a judge in court. I have seen them cite overturned cases and swear to industry policies that do not exist. I know that some arbitrators have fallen asleep or worse, actually believe what they heard the industry lawyers put forth in a prior case and carry it forward to other cases.

In 2004 the NASD imposed large fines against member firms for wholesale discovery abuses in many arbitrations stemming from the tech wreck. In each of those arbitrations the firms were represented by attorneys who intentionally held back key documents. Not a single one of those attorneys was banned from continuing to represent its client in arbitration.

FINRA can streamline the system, provide better investor protection and reduce the number of cases if it would just bar member firms from selling variable annuities or speculative private placements to senior citizens. It could stop offering "a day in court" as the only remedy to aggrieved customers, review the claims as they are filed and encourage arbitrators to assess whether the RR is a compliance problem and report it.

FINRA could act as a regulator instead of a neutral in cases where the underlying product is flawed. Going back to the Prudential Securities limited partnerships in the 1980s there have been flawed products that the SROs have insisted be arbitrated one claim at a time.

FINRA could review those situations where there are multiple claims against individual brokers and ban those brokers from the industry once and for all. The current policy suggests that it is the claimant's representatives who are at fault for multiple claims because they unfairly advertise for claims against "innocent" brokers. As if the people seeking the claims caused the loses.

Instead, FINRA wastes its time with NARs, again.

Respectfully,

Irwin Stein, Esq.

December 18, 2017

VIA EMAIL SUBMISSION TO PUBCOM@FINRA.ORG

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-34

Dear Ms. Asquith:

I write in regards to FINRA Regulatory Notice 17-34, which was issued by FINRA on October 18, 2017. The Regulatory Notice requests comment on the efficacy of allowing compensated non-attorney representation ("NAR") firms continue to represent clients in the FINRA Dispute Resolution forum.

I am an attorney whose practice is devoted to the representation of individual investors in their disputes with the securities industry. I have represented over 1,000 investors in FINRA arbitration cases over the past twenty (20) years. I currently serve as an Officer and a Member of the Board of Directors of the Public Investors Arbitration Bar Association ("PIABA").

Many of the aggrieved investors who contact my law firm have had dealings with non-attorney representatives and, across the board, the experiences are alarming. Many of these non-attorney representatives are barred stockbrokers or attorneys. They are not bound by any ethical rules and they routinely solicit aggrieved investors directly on the phone with aggressive sales tactics and outlandish promises.

Historically, arbitrators used customs and norms to resolve parties' disputes. Today, arbitration is very different. Complex statutory claims and sophisticated legal arguments are often at issue, and the more complex the case, the more likely it is that the parties are involved in expansive discovery practice and pre-hearing motions. FINRA arbitration in particular has evolved into a complex legal process. Many FINRA arbitrators are lawyers, and arbitration hearings closely resemble a trial in court: opening statements, examination and cross examination of witnesses, evidentiary objections, and closing arguments.

For those reasons, it is no surprise that the opposing party (the brokerage firms) are always represented by sophisticated and experienced attorneys and never a non-attorney representative.

Based on my twenty (20) years' experience representing investors in FINRA arbitration cases, it is my strong view that FINRA will advance the cause of investor protection by prohibiting compensation of non-lawyer representatives from appearing in the FINRA arbitration forum.

Sincerely,

David P. Meyer

ILLINOIS STATE
BAR ASSOCIATION

Charles J. Northrup
General Counsel

Bailey E. Felts
Associate Counsel

Via email at pubcom@finra.org

Marcia E. Asquith
Office of Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC, 20006-1506

RE: Regulatory Notice 17-34 (October 18, 2017)

Dear Ms. Asquith:

I am submitting these comments on behalf of the Illinois State Bar Association's Unauthorized Practice of Law Task Force. The Task Force discussed the above referenced regulatory notice at its most recent meeting and reiterates the ISBA's position, as fully expressed in ISBA Professional Conduct Advisory Opinion 13-03, that non-lawyers representing parties in FINRA proceedings constitutes the unauthorized practice of law. Pursuant to ISBA policy, this letter has been reviewed and approved by ISBA President the Hon. Russell W. Hartigan (ret.).

In response to an inquiry about whether a non-lawyer can represent parties before a FINRA proceeding, the ISBA's Professional Conduct Committee concluded that such participation constituted the unauthorized practice of law. The Committee's rationale is fully expressed in Advisory Opinion 13-03, which was approved by the ISBA Board of Governors in January, 2013. A copy of the Opinion is attached. After a description of applicable Illinois law, the crux of the Opinion is that the nature of the representation compels lawyer participation. Factors considered include the complexity of the subject matter involved, the adversarial positions taken, and procedural formalities such as filing pleadings, possible discovery, examination of witnesses, and the conduct of evidentiary hearings.

The ISBA has a long and appropriate tradition of protecting the public by supporting reasonable and justifiable restrictions on non-lawyers engaging in the practice of law. The cases discussed in Opinion 13-03 reflect longstanding Illinois law and remain valid. While Illinois law provides a small window for non-lawyer representation of parties in some very limited administrative circumstances, those circumstances do not appear to be present in FINRA proceedings.

Finally, the ISBA is aware of other, non-FINRA, arbitration proceedings that give full effect to Illinois' restrictions on non-lawyer representation. The Task Force is aware of at least one proceeding where Opinion 13-03 was relied upon, in part, as authority for dismissing a proceeding where one of the parties was represented by a non-lawyer. Accordingly, FINRA's adoption of unambiguous regulations with respect to non-lawyer representation would help to further uniform regulation and guidance in Illinois.

Thank you for the opportunity to submit these comments. If you have any questions, or require any additional information, please do not hesitate to contact me.

Very truly yours,

Charles J. Northrup
General Counsel

attachment

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December 18, 2017

Via Email Only
Marcia E. Asquith
Office of the Corporate Secretary FINRA
1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: *Regulatory Notice 17-34 - Non-Attorney Representatives in Arbitration*

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") to govern the conduct of securities firms and their representatives. In particular, our members and their clients have a strong interest in FINRA rules relating to FINRA's Code of Arbitration Procedure.

FINRA, through Regulatory Notice 17-34, seeks comment regarding whether to continue allowing non-attorney representatives (NARs) to represent parties in representation. PIABA believes that it is in the best interests of investors to not allow NARs to represent customer claimants in FINRA arbitration, with limited exceptions. In particular, PIABA believes that only family members and law students from securities law clinics should be able to continue to represent investors. Outside of those narrow exceptions, the use of NARs in FINRA should be barred.

There are many drawbacks to allowing NARs to represent investors in arbitration. NARs do not follow any ethical code of conduct like attorneys are required to do, NARs do not maintain malpractice insurance, NAR communications with clients are not protected by the attorney-client privilege, and NARs are engaging in the unauthorized practice of law. PIABA's concerns are not hypothetical. Allegations of misconduct have been raised regarding NARs, including requiring investors to pay large and non-refundable retainers, settling cases without investors' authorization, and even representing investors without their consent.

PIABA recently released a report related to the problems with allowing NARs to represent investors in FINRA arbitration. A copy of that report is attached hereto and incorporated by reference.

In sum, PIABA supports a rule change that bars NARs from representing investors in FINRA arbitration, with limited exceptions for family members and law school securities clinics. I want to thank you for the opportunity to comment on this important issue.

Respectfully submitted,

Andrew Stoltmann, President
Public Investors Arbitration Bar Association

A Menace to Investors:
Non-Attorney Representatives in FINRA Arbitration

Authored by:
Andrew Stoltmann, Stoltmann Law Offices, Chicago, Illinois; and
David Neuman, Partner, Israels & Neuman PLC, Seattle, Washington[1]

Acknowledgements[2]

INTRODUCTION

When investors sue their broker or brokerage firm, they can hire an attorney who is licensed to practice law in a particular state. Alternatively, in many states investors have the option of hiring someone who is not licensed to practice law if the claim is filed through FINRA, the Financial Industry Regulatory Authority.

FINRA Rule 12208 generally allows non-attorney representatives ("NARs") to represent investors in its arbitration forum, provided that the investor's state permits such representation. NARs often do not maintain malpractice insurance, have no ethical code or constraints like attorneys do, and do not face potential sanctions from any regulatory or licensing body like a state bar association. Essentially, this system exposes

[1] Andrew Stoltmann is a Chicago based securities and investment fraud attorney. He is serving as President and a member of the Board of Directors for the Public Investors Arbitration Bar Association (PIABA), an international, not-for-profit, voluntary bar association of lawyers who represent claimants in securities and commodities arbitration and litigation. PIABA's mission is to promote the interests of the public investor in securities and commodities arbitration by seeking to: protect such investors from abuses in the arbitration process; make securities arbitration as just and fair as systematically possible; and, educate investors concerning their rights.

David Neuman is an attorney and partner of the law firm, Israels & Neuman, PLC, in Seattle, Washington. He is a member of the PIABA Board of Directors. Mr. Neuman focuses his practice on representing investors who bring claims against securities brokerage firms and stockbrokers for investment losses.

[2] The authors want to thank Christine Lazaro, Hugh Berkson, Ryan Cook, Marnie Lambert, Joe Peiffer, and Michael Edmiston for their input on this report. The authors also thank PIABA's executive director, Robin Ringo, for her continued and significant assistance in pursuing PIABA's mission of protecting investors.

the investor who was victimized by her broker to potential further victimization, with little chance of recovering damages caused by an unscrupulous or negligent NAR.

This report will examine the representation of investors in FINRA arbitration proceedings by NARs, particularly those who represent investors for compensation. It will discuss the applicable FINRA rules that govern this practice, the pitfalls of NAR representation, and some of the particular NAR firms that often represent investors in FINRA arbitration. After detailing the status of the NAR problem, the report will identify what FINRA should do to better protect investors' interests.

BACKGROUND

FINRA (the Financial Industry Regulatory Authority) is a not-for-profit organization that, through powers delegated from the Securities and Exchange Commission ("SEC"), regulates the securities brokerage industry. FINRA's stated mission is to protect investors "by making sure that the broker-dealer industry operates fairly and honestly".[3] FINRA also touts itself as being "dedicated to investor protection and market integrity through effective and efficient regulation of broker-dealers".[4]

FINRA counts among its members several thousand securities brokerage firms.[5] FINRA member firms almost universally require their customers sign account agreements containing arbitration clauses, stating that the customer can seek redress against the brokerage firm or its brokers only through binding arbitration, administered through FINRA Dispute Resolution, a department of FINRA.

[3] *See* FINRA, at http://www.finra.org/about (last visited Nov. 9, 2017).
[4] *Id.*
[5] *See Statistics*, FINRA, https://www.finra.org/newsroom/statistics#currentmonth (last visited Nov. 9, 2017) (stating that as of October 2017, there were 3,756 member firms and 635,073 registered representatives under FINRA).

FINRA Dispute Resolution promulgates rules for its Code of Arbitration Procedure, which rules govern the administration of claims between investors and FINRA member firms and brokers.[6] These rules govern all aspects of the arbitration procedure, including the filing and answering of complaints, the exchange of documents and information through discovery, and proceeding with an evidentiary hearing to ultimately determine liability.

The FINRA Code of Arbitration Procedure Rule 12208 governs who may represent parties within the forum. That rule provides that parties, including investors, can be represented by almost anyone. Unfortunately, investors who get victimized by their broker or brokerage firm sometimes find themselves victimized for a second time when an NAR provides substandard and ineffective representation in their FINRA arbitration claim. While all licensed attorneys are not created equal, at least they have licenses, standards and ethical rules that set a high standard of care. NARs, who increasingly represent investors in FINRA arbitration, have no such rules, duties or standards. Further they are not trained in advocacy as attorneys are, and as a result, often do a poor job of aggressively advocating for their clients.

Investors deserve better. FINRA has issued a Regulatory Notice, 17-34, seeking comment on the efficacy of allowing compensated NARs to represent parties in arbitration.[7] PIABA is supportive of FINRA's initial efforts to address this issue, and requests that FINRA adopt rules which would prohibit NARs from representing investors in arbitration, with limited exceptions.

[6] *See* FINRA, RULE 12100 *et seq*.
[7] *See* FINRA, NOTICE TO MEMBERS 17-34 (2017), *available at* http://www.finra.org/industry/notices/17-34.

FINRA'S RULES PERMITTING NARS IN ARBITRATION

FINRA Rule 12208 governs the representation of parties in arbitration claims involving customers. Rule 12208(a) provides that a party may represent themselves, and Rule 12208(b) provides that parties may be represented by an attorney in good standing and admitted to practice to the highest court of any state, unless state law prohibits such representation.[8]

Rule 12208's sections (c) and (d) provides that non-attorneys may also represent parties, with certain restrictions:

> **(c) Representation by Others**
> Parties may be represented in an arbitration by a person who is not an attorney, unless:
> • state law prohibits such representation, or
> • 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.
> **(d) Qualifications of Representative**
> Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.[9]

FINRA Rule 12208 explicitly permits NARs to represent parties, with very limited exceptions. The exceptions in the rule are not sufficient to adequately protect investors.

HISTORY OF FINRA RULE 12208

FINRA's predecessor, the NASD (National Association of Securities Dealer) enacted NASD Code of Arbitration Procedure Rule 27. In 1996, the NASD recodified these rules under a new numbering system and converted Rule 27 to Rule 10316. That rule simply stated that "All parties shall have the right to representation by counsel at

[8] *See* FINRA, RULE 12208(a) and (b).
[9] *See* FINRA, RULE 12208(c) and (d).

any stage of the proceedings."[10] No other guidance on this rule was provided at the time.

Then in 2005, the NASD proposed amending its representation rule.[11] The NASD ultimately withdrew that proposal, and filed a new representation rule proposal in 2006.[12] In 2007, FINRA adopted Rule 12208.[13]

NASD's representation rule was originally written to address the multi-jurisdictional practice of law. Many states permit an attorney licensed in at least one state to represent clients in arbitration in states in which he or she is not licensed.[14] At the time of the initial proposed amendments, commenters raised concerns about NARs.[15] The NASD's 2006 proposal attempted to address those concerns.

The NASD considered that it may be difficult for investors to obtain representation if they had relatively small claims, such as those under $100,000 in losses.[16] However, the NASD was concerned about allowing NARs who had been punished by regulatory bodies (such as state bar associations or securities regulators) to represent individuals. The NASD concluded:

> While NASD remains concerned about some aspects of non-attorney representation, NASD does not wish to prohibit investors from retaining a non-attorney representative if that person is the only affordable representation available, and the requirements of the proposed rule are met.[17]

[10] *See* NASD, RULE 10316.
[11] *See* SR-NASD-2005-023.
[12] *See* SR – NASD-2006-109.
[13] *See* Order Approving Proposed Rule Change Relating to Representation of Parties in Arbitration, Exchange Act Release No. 34-56540 [SR-NASD-2006-109], 72 Fed. Reg. 56410 (Sept. 26, 2007).
[14] *See* SR-NASD-2006-109 at 7-9 (addressing the ABA Model Rule 5.5).
[15] *Id*. at 10.
[16] *Id*. at 12.
[17] *Id*. at 12-13.

Thus, the NASD thought it was prudent to allow NARs to represent investors, to ensure investors with smaller claims would not be denied representation, so long as the NAR had not been punished by a regulator – it prohibited representation by any NAR that had been suspended or barred from the securities industry. After the NASD merged with NYSE Member Regulation in 2007 to form FINRA, FINRA enacted Rule 12208 in its present form.

PROBLEMS WITH NARS

Although FINRA rules have permitted NARs to represent investors, certain NARs have compounded the damages investors have suffered. For example, NARs have been alleged to have charged investors $25,000 in non-refundable deposits for representation; taken settlement money that the investors were not aware of; and represented some investors without their consent.[18] FINRA is fully aware of these issues. In October 2017, FINRA Director of Dispute Resolution, Richard Berry, discussed these allegations in a public forum.[19] FINRA is not alone in recognizing the problems associated with NARs - the SEC[20] and NASAA (the North American Securities Administrators Association)[21] have also warned the public about "recovery companies" that charge a fee to assist individuals to recover money from investment scams.

[18] *See* Rita Raagas de Ramos, *FINRA Warns Against Rogue Non-Lawyer Reps*, FINANCIAL ADVISOR IQ (Oct. 13, 2017), https://financialadvisoriq.com/c/1764013/205263/finra_warns_against_rogue_lawyer_reps?referrer_module=mostPopularSaved&module_order=3.
[19] *Id.*
[20] *See What You Should Know About Asset Recovery Companies*, SEC (Aug. 9, 2016), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_assetrecovery.html (last visited Nov. 9, 2017).
[21] *See Informed Investor Advisory: Third-Party Asset Recovery Companies*, NASAA (Dec. 2015), http://www.nasaa.org/38322/informed-investor-advisory-third-party-asset-recovery-firms/.

There have been various articles and published research discussing the issues with NARs in FINRA arbitration.[22] Most recently, in October 2017, FINRA published Regulatory Notice 17-34, in which FINRA asked for feedback as to whether FINRA should allow NARs to continue to represent investors in its forum.[23] As of December 11, 2017, fourteen people or firms had commented on Regulatory Notice 17-34, with nine of the commenters being opposed to allowing NARs, three commenters in support of allowing NARs, and two commenters pointing out the purported positives and negatives of NARs. Both attorneys representing parties in FINRA arbitration, and arbitrators who presided over them, have commented on the notice. One of the arbitrators who commented on this Notice mentioned that she would no longer agree to serve as an arbitrator where a party is represented by an NAR.[24]

There are a number of reasons why representation by NARs is problematic. Several states do not permit NARs to represent parties in arbitration, however NARs may still be operating in those states, with little protection for investors. Moreover, parties are deprived of many of the basic attorney-client protections that would be available if the investor was represented by an attorney. NARs have no ethical code or constraints like attorneys do, and do not face potential sanctions from any regulatory or

[22] *See* Securities Industry Conference on Arbitration*, Report on Representation of Parties in Arbitration by Non-attorneys,* 22 FORDHAM URB. L.J. 507, 512 (1995); Ariel Kaminer, *Swatting at Wall Street from a Bunker in Brooklyn*, N.Y. TIMES (May 21, 2010) (quoting one defense lawyer as stating that dealing with a particular NAR "is one of the most frustrating experiences I've ever dealt with…It's like hondling at a flea market with these guys"); Adam J. Gana, *Should Non-Attorneys Represent Parties in FINRA Arbitration for Compensation?,* NYSBA JOURNAL (Jan. 2015); Aegis J. Frumento & Stephanie Korenman, *Rethinking Non-Lawyer Advocacy in FINRA Customer Arbitrations*, SECURITIES ARBITRATION COMMENTATOR Vol. 16, No. 8 (Mar. 2017).

[23] *See* FINRA, NOTICE TO MEMBERS 17-34 (2017), *available at* http://www.finra.org/industry/notices/17-34.

[24] *See* Micalyn S. Harris*, Comments on Efficacy of Allowing Compensated Non-Attorneys to Represent Parties in Arbitration*, FINRA (Nov. 6, 2017) http://www.finra.org/sites/default/files/notice_comment_file_ref/17-34_harris_comment.pdf.

licensing body like a state bar association. It is unlikely that the NARs will have malpractice insurance, and there may be no meaningful way to obtain information about problems others have had with the NAR.

Representation by NARs May be the Unauthorized Practice of Law

FINRA Rule 12208(c) allows non-attorneys to represent clients in its arbitration forum, unless "state law prohibits such representation". Because of the extent of what NARs do in the context of representing investors in a FINRA arbitration, many states consider the conduct of NARs to be the practice of law. NARs interview clients, draft pleadings, develop litigation strategy, engage in discovery, negotiate settlements, engage experts, and conduct examination of witnesses at the arbitration hearing, all of which involves legal skill and knowledge. This unauthorized practice of law by non-attorneys in arbitration is illegal in some states.

Several states' highest courts have ruled that representation by a non-attorney in arbitration constitutes the unauthorized practice of law, including Arkansas[25], Arizona[26], and Ohio[27]. Other states have instead provided guidance regarding the unauthorized practice of law in arbitration through bar rules and advisory opinions, like

[25] *See NISHA, LLC v. TriBuilt Const. Group, LLC*, 388 S.W.3d 444, 451 (Ark. 2012) (holding that "a nonlawyer's representation of a corporation in arbitration proceedings constitutes the unauthorized practice of law").
[26] *See In re of Creasy,* 12 P.3d 214 (Ariz. 2000) (concluding that a disbarred attorney violated an order of disbarment because he engaged in the practice of law by representing party at private arbitration proceeding).
[27] *See Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.3d 348, 350 (Ohio 2004) (finding that the representation of parties in securities arbitration by non-attorneys constituted the unauthorized practice of law).

Alabama[28], Florida[29], Illinois[30], Kansas[31], Louisiana[32], and Washington[33]. Yet other states, like New York, have found that NARs are allowed to represent investors, as long as the forum's (FINRA's) rules allow it.[34] However, most states have been silent on the issue of whether the appearance of NARs in an arbitration forum constitutes the unauthorized practice of law.

Some states require out-of-state attorneys to file an application or affiliate with local counsel to represent in-state clients in arbitration, but there are no such similar rules for NARs. California requires that certain procedures be followed if an out-of-state attorney is representing a client in an arbitration in the state. An attorney not licensed to practice in California must affiliate with an attorney licensed in California and submit

[28] *See* Ala. State Bar Office of Gen. Counsel Disciplinary Comm'n, Formal Op. R0 2014-01, at 1 (2014), *available at* https://www.alabar.org/assets/uploads/2014/08/2014-01.pdf (finding that a non-lawyer cannot represent a party in court-ordered arbitration, as such would constitute the unauthorized practice of law).

[29] *See Fla. Bar re Advisory Op. on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178 (Fla. 1997) (finding that the representation of parties by a non-attorney in securities arbitration violates the State's bar rules, including the unauthorized practice of law).

[30] *See* Illinois State Bar Ass'n, ISBA Professional Conduct Advisory Opinion 13-03 (Jan. 2013) (stating that "[A] nonlawyer's representation of parties to a FINRA arbitration generally constitutes the unauthorized practice of law"). The opinion even suggested that FINRA arbitrators notify FINRA and the Illinois ARDC (Attorney Registration and Disciplinary Committee) if a non-attorney represents a party in FINRA arbitration.

[31] *See* Kansas Attorney Gen. Opinion No. 93-100 (July 26, 1993) (stating that "a non-attorney representative may not engage in the unauthorized practice of law, and therefore may not examine witnesses, file pleadings, make legal arguments, or perform any functions deemed to be the practice of law").

[32] *See* La. R. Prof. Conduct, Rule 5.5(e)(3)(iii) (stating that appearing on behalf of a client in any hearing or proceeding, including in front of an arbitrator, is deemed the practice of law).

[33] *See* Washington Gen. Rule 24(a)(3) (defining the practice of law to include representation of another person or entity in a "formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review").

[34] *See DePalo v. Lapin*, Index No. 114656/2008 (Sup. Ct. NY June 30, 2009) (stating that "New York has no prohibition which would have prevented Lapin from representing an individual in a FINRA arbitration") (citing *Williamson v. John D. Quinn Construction*, 537 F.Supp. 613, 616 (S.D.N.Y. 1982) (noting that under New York law representation of a party in an arbitration proceeding by a non-lawyer does not constitute the unauthorized practice of law)).

an Out of State Attorney Arbitration Counsel form.[35] With respect to California, FINRA procedures require the out-of-state attorney to submit this form to FINRA, gain approval from FINRA, and then submit the approved form to the State Bar of California, along with a $50 processing fee.[36] FINRA procedures also require that out-of-state attorneys affiliate with local counsel for several other states (including Florida, Michigan, and Ohio) before serving a customer's claim on a respondent.

NARs are not required to comply with the same procedures as licensed attorneys under FINRA's rules. FINRA, and some states, therefore require additional steps for attorneys in the FINRA arbitration forum, but the same is not required of NARs.

Investors Lack Basic Protections when Represented by an NAR

Unlike licensed attorneys, NARs are not bound by codes of conduct. Licensed attorneys are bound by an ethical code of conduct, including state conduct rules, primarily modeled on the American Bar Association's Model Rules of Professional Conduct.[37] Licensed attorneys who violate these ethical codes subject themselves to discipline, such as fines, suspensions, or even expulsion from the practice of law. The state bar associations report instances of attorney misconduct. Additionally, investors receive additional protections when working with attorneys, such as the attorney-client privilege. NARs, however, are not subject to any such rules or guidelines, leaving investors vulnerable when an NAR represents them.

[35] The form can be found on the State Bar of California website at http://www.calbar.ca.gov/About-Us/Forms#osaac (last visited Nov. 9, 2017).
[36] *See* FINRA OFFICE OF DISPUTE RESOLUTION, PARTY'S REFERENCE GUIDE 48-50 (April 2017), *available at* https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf.
[37] A complete list of the ABA Model Rules of Professional Conduct can be found on the ABA's website at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Nov. 9, 2017).

Lack of Ethical Guidelines

Attorneys are bound by rules of professional conduct. Such rules often prohibit attorneys from soliciting clients by initiating contact with prospective clients in-person, via telephone, or real-time electronic contact (such as instant messaging), with limited exceptions.[38] The commentary to ABA Model Rule 7.3 discuss the concerns with directly contacting prospective clients:

> There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.[39]

However, some NARs (through their affiliates or "consultants") have admitted to cold-calling prospective clients and soliciting them to initiate FINRA arbitration proceedings.[40] Unfortunately, NARs' potential use of these tactics, which are impermissible for licensed attorneys, are not governed by any regulator (like a state's bar association) and subjects the investor to potential abuse.

[38] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2016).
[39] *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 2 (2016).
[40] *See* Affidavit of Louis Ottimo, *National Securities Corp. v. Cold Spring Advisory Group LLC et al.*, Index No. 653483/14 (Sup. Ct. NY, Feb. 29, 2016).

Lack of Disciplinary History Available

Many state bars, like California[41], Florida[42], Iowa[43], and Texas[44], provide the general public with disciplinary information about attorneys licensed in their states, which can be found by searching the states' websites. Like FINRA's rationale behind BrokerCheck, potential clients can review whether a particular attorney they're considering hiring to represent them in their dispute with their broker has been previously sanctioned or punished for violating ethical rules. Such information is not readily available for an NAR, if it exists at all. Because they are neither regulated nor supervised, it is difficult for an investor to determine if a particular NAR has any disciplinary history.[45]

Lack of Malpractice Insurance

NARs generally do not have insurance to cover potential misconduct. While attorneys are not required to have professional malpractice insurance in most states, many do for practical reasons. Some state bars that do not require attorneys to carry insurance often require the attorney to disclose whether he or she has insurance, which is then disclosed on the state bar's website or directory (such as Illinois'[46] and Colorado's[47] state bar websites), so that investors are aware of their uninsured status.

[41] The State Bar of California's disciplinary information can be found after searching for an attorney at http://members.calbar.ca.gov/fal/membersearch/quicksearch (last visited Nov. 9, 2017).
[42] The same can be found on the Florida Bar's website at https://www.floridabar.org/directories/find-mbr/ (last visited Nov. 9, 2017).
[43] The Iowa Judicial Branch Office of Professional Regulation carries a similar search function at https://www.iacourtcommissions.org/SearchLawyer.do (last visited Nov. 9, 2017).
[44] The State Bar of Texas also provides a similar function at https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&Template=/CustomSource/MemberDirectory/Search_Form_Client_Main.cfm (last visited Nov. 9, 2017).
[45] As discussed above, because NARs are not governed by bar associations, it is unlikely there is even an entity available to record misconduct of NARs.
[46] The attorney search function on the Illinois Attorney Registration and Disciplinary Commission is located at https://www.iardc.org/lawyersearch.asp (last visited Nov. 9, 2017).
[47] The Colorado Supreme Court Office of Attorney Regulation Counsel's attorney search function can be found at http://www.coloradosupremecourt.com/Search/AttSearch.asp (last visited Nov. 9, 2017).

Many legal malpractice insurance carriers will not extend coverage to anyone who is not licensed to practice law, meaning that it may be difficult for NARs to obtain meaningful legal malpractice insurance. If the NAR is negligent or commits malpractice while representing an investor and does not have insurance, it is unlikely the investor will be able to be compensated for the NAR's misconduct, especially if the NAR is thinly capitalized.

Lack of Attorney-Client Privilege

When an attorney represents a client, communications between the attorney and client are almost always subject to the attorney-client privilege. Under such privilege, the attorney cannot disclose any confidential communications without the client's consent, and those communications are not discoverable by the opposing side. The comments to ABA Model Rule 1.6 describe the rationale for this:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.[48]

For the privilege to apply, there must be a relationship with an attorney. For example, under New York law, "no attorney-client privilege arises unless an attorney-client relationship has been established".[49] But there is no privilege where an NAR is representing an investor. Communications between the investor and the NAR are not privileged and therefore discoverable, meaning the opposing side could request

[48] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 2 (2016).
[49] *See Priest v. Hennessy*, 409. N.E.2d 983 (NY 1980).

production of all communications between an NAR and the client. This could be particularly harmful to the client, who may be disclosing legally damaging information to the NAR without any idea that those communications can be obtained by the opposing side.

ISSUES WITH PARTICULAR NARS

There are a number of NARs that currently solicit and represent customers in FINRA arbitrations. While this is not an exhaustive list, the background and conduct of these NARs are illustrative of the issues facing FINRA and investors who hire NARs to represent them in arbitration.

Cold Spring Advisory Group

Background

Cold Spring Advisory Group ("CSAG") is an NAR firm that has appeared in a number of FINRA arbitrations. CSAG is a firm based in New York City and owned by Michelle Ottimo. There are a number of "consultants" who work for the firm, and CSAG also sometimes refers cases to attorneys.[50]

It is believed that Michelle Ottimo is not licensed to practice law in any state. Michelle Ottimo's husband, Louis Ottimo, is a consultant for CSAG. Frederick Amato is another consultant for CSAG. Both Louis Ottimo and Frederick Amato are former brokers, and it is believed that neither is licensed to practice law in any state. Pursuant to FINRA Rule 12208, Louis Ottimo would be prohibited from representing an investor

[50] *See About Us,* COLD SPRING ADVISORY GROUP, https://www.coldspringadvisory.com/about-cold-spring-advisory-group (last visited Nov. 27, 2017). This also raises a question as to whether an attorney who takes on referred cases from CSAG can legally share fees with a non-attorney. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2016) (prohibiting attorneys from sharing fees with a nonlawyer, with exceptions). However, the purpose of this report is not to examine the propriety of those attorneys accepting cases from an NAR and whether any fees are shared.

on behalf of CSAG. Accordingly, CSAG avoids this prohibition by having another employee, Jennifer Tarr, appear on its behalf in all of the arbitrations in which CSAG has appeared. Ms. Tarr is not licensed to practice law in New York or any other state.[51]

Louis Ottimo

In an affidavit filed in a state court action in 2016, Louis Ottimo admitted that he was a "consultant" and "manager" of CSAG.[52] Louis Ottimo has quite the troubled regulatory and legal history. According to FINRA's BrokerCheck, Louis Ottimo (CRD number 2606438) was affiliated with seven different brokerage firms between 1995 and 2014.[53] Four out of those seven brokerage firms have been expelled from the securities industry.

BrokerCheck also discloses that in August 2013, FINRA brought a regulatory action against Louis Ottimo[54] related to his affiliation with EKN Financial Services, which was owned in part by his father, Anthony Ottimo, Sr.,[55] and for which Ottimo was a representative. FINRA alleged that Louis Ottimo failed to timely disclose numerous liens and judgments against him, as well as a 2010 bankruptcy filing. FINRA also alleged that he made material misrepresentations and omissions in connection with the sale of a private placement that he and EKN created. FINRA further alleged that Louis Ottimo failed to disclose significant negative information concerning his prior business experience and that his misconduct resulted in personal monetary gain. In July 2015,

[51] A search on New York State's Unified Court System website (http://iapps.courts.state.ny.us/attorney/AttorneySearch) reveals that a Jennifer Elyse Tarr is a licensed attorney in Illinois and New York and works at Proskauer Rose's New York City office. However, it is believed that this is not the same Jennifer Tarr affiliated with CSAG.
[52] *See* Affidavit of Louis Ottimo, *National Securities Corp. v. Cold Spring Advisory Group LLC et al.*, Index No. 653483/14 (Sup. Ct. NY, Feb. 29, 2016).
[53] *See* FINRA, BROKERCHECK REPORT: LOUIS OTTIMO (2017).
[54] *See FINRA Department of Enforcement v. Louis Ottimo*, FINRA No. 2009017440201 (Mar. 15, 2017).
[55] *See* FINRA, BROKERCHECK REPORT: EKN FINANCIAL SERVICES, INC. 3-5 (2017).

FINRA barred Louis Ottimo from the securities industry.[56] After Louis appealed this decision to the National Adjudicatory Council ("NAC"), but after a hearing on the merits, the NAC upheld Ottimo's lifetime bar in March 2017.[57]

BrokerCheck further discloses that Louis Ottimo was the subject of at least two customer complaints. In 1999, Louis Ottimo was ordered to pay $20,061 regarding allegations of unauthorized trading. In 2010, he was the subject of a second customer complaint alleging unauthorized trading, but the claim was denied and not pursued further by the customer.

Louis Ottimo also filed a Chapter 7 bankruptcy in the Eastern District of New York on October 25, 2016.[58] According to the bankruptcy petition, Louis Ottimo disclosed that he had only $9,000 in assets (consisting of just furniture, household furnishings, and clothing) but over $4.52 million in liabilities.[59] The largest debt owed by Louis Ottimo was a $1 million mortgage on his primary residence in Syosset, New York[60]. He owed over $150,000 in federal taxes from 2006 to 2010, as well as over $34,000 in taxes owed to the State of New York.[61] He had several other large debts:

a) $875,000 pursuant to a judgment from an action to collect a debt arising from a promissory note;
b) $185,631 pursuant to a judgment related to EKN Financial Services;
c) $933,500 arising from a personal loan;
d) $150,000 to FINRA for fines and penalties;
e) $60,921 for a deficiency on a repossessed boat;
f) $525,060 pursuant to a judgment against Ottimo as the guarantor of debt due for unpaid commercial rent;
g) Another judgment against Ottimo for unpaid commercial rent for $138,803;
h) $330,791 pursuant to a judgment arising from a breach of contract; and

[56] *See FINRA Dept. of Enforcement v. Louis Ottimo*, FINRA No. 2009017440201 (Jul. 10, 2015).
[57] *See FINRA Dept. of Enforcement v. Louis Ottimo*, FINRA No. 2009017440201 (Mar. 15, 2017).
[58] *See* Louis Ottimo Chapter 7 Bankruptcy Petition, *In re Louis Ottimo*, Case No. 8-16-75005-reg (E.D.N.Y. Oct. 25, 2016).
[59] *Id.* at 8, 15.
[60] *Id.* at 16.
[61] *Id.* at 17-18.

i) $4,800 to a company for boat repairs and storage.[62]

Interestingly, in his bankruptcy petition which was filed eight months after he admitted to "consulting" and "managing" CSAG, Louis Ottimo claimed that he was unemployed and had zero income.[63] Rather he disclosed that his wife gets monthly "interest and dividends" as a "member" of CSAG.[64] In his Statement of Financial Affairs, Louis Ottimo also claimed that he had not received any income from employment for the previous two years.[65] While his 2016 affidavit indicates he "consults" and "manages" for CSAG, he is apparently doing so for free.

Frederick Amato

Frederick Amato is another CSAG representative. A review of FINRA's BrokerCheck reveals that a Frederick Amato (CRD number 2288663) worked for five different brokerage firms between October 2000 and May 2011. According to FINRA's BrokerCheck, Amato was charged with one count of bookmaking in Florida in 1999. He was convicted for one count of gambling, a misdemeanor, and was sentenced to one-year probation.

Complaints against CSAG

CSAG itself has also been the subject of several complaints. National Securities Corp., a FINRA member firm, brought a complaint against CSAG, Louis Ottimo, Anthony Ottimo, Sr., Fred Amato, and a number of other individuals, in state court in New York.[66] National Securities Corp. alleged that employees of CSAG contacted

[62] *Id*. at 18-26.
[63] *Id*. at 31.
[64] *Id*. at 31-32.
[65] *Id*. at 36.
[66] *See* Memorandum of Law In Support of Motion for Expedited Discovery, *National Securities Corp. v. Cold Spring Advisory Group LLC et al*., Index No. 653483/14 (Sup. Ct. NY, Nov. 12, 2014).

numerous customers in Tennessee and solicited them to initiate arbitration claims against National Securities Corp.[67] National Securities Corp. further alleged that CSAG employees may have unlawfully obtained its proprietary roster of customers in order to solicit these potential arbitration claimants.[68]

Louis Ottimo's affidavit filed in the National Securities Corp case, referenced above, helps illustrate CSAG's business practices. He states that CSAG "obtains its customers from recommendations, cold calls, email blasts, fax blasts, and mailings".[69] CSAG also "purchases lists and data basis from various services including InfoUSA, Dun and Bradstreet, and lists from the internet".[70] Ottimo also described the cold-calling practices of CSAG, stating that "when calls are made by a representative of Cold Spring, the caller asks whether the person has sustained a loss in the stock market and, if so, advises such person of the nature of the services that Cold Spring offers".[71] CSAG's cold-calling practices would likely be prohibited by state bar associations, yet, as an NAR, CSAG appears to be able to engage in this conduct.

CSAG was also the subject of at least one complaint by one of the attorneys, Hilton Wiener, to whom it "referred" cases. Wiener sued CSAG and a number of other individuals who worked or "consulted" with CSAG, alleging that that he had been retained by CSAG to represent an aggrieved couple in Florida, but he was never paid.[72] A mediation to try to settle the case was eventually set, but the harmed investors terminated their relationship with Wiener just prior to the mediation.[73] Wiener alleged

[67] *Id*. at 1-2.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* Complaint, *Wiener v. Mulligan et al*., Index No. 602501/17 (Sup. Ct. NY Apr. 18, 2017).
[73] *Id*. at ¶¶ 25-26.

that CSAG then settled the case on behalf of the couple at the mediation, without paying Wiener for his services.[74] It was alleged that Louis Ottimo and Jennifer Tarr represented the investors at the mediation.[75]

Wiener's complaint also makes allegations about how CSAG's business model works. Wiener alleged that CSAG "requires that its clients pay a substantial amount of money for what it describes as a forensic evaluation of the accounts that suffered the alleged losses", and that CSAG charges "10-$25,000 for the forensics evaluation."[76] Wiener further alleged that CSAG may "offer its clients…a referral to an attorney for the purpose of representing the client in a FINRA arbitration proceeding."[77]

CSAG's Awards

The FINRA award search reveals that CSAG has been involved in at least 27 arbitration cases.[78] Jennifer Tarr represented the claimants on behalf of CSAG in each of those cases. In the 27 cases found, CSAG sought a total of $2,352,274 on behalf of its clients. CSAG's clients were awarded a zero in 19 out of those 27 cases, resulting in investors receiving a positive award in only 29.63% of CSAG's cases, compared to the national average, which was most recently 41-42%.[79] In the eight cases where CSAG was successful, CSAG delivered the following results:

a) In Case No. 15-03002, CSAG's client was awarded $50,000 (100% of the amount requested) against three associated persons, none of whom were represented by counsel;
b) In Case No. 16-00351, CSAG's client was awarded $50,000 (100% of the amount requested) against four associated persons, one of whom was not

[74] *Id*. at ¶¶ 29-35.
[75] *Id*. at ¶ 30.
[76] *Id*. at ¶¶ 16-18.
[77] *Id*. at ¶ 19.
[78] As the award database does not record settlements unless there was a corresponding request for expungement by the firm or broker, it is highly likely that CSAG represented investors in a larger number of cases than captured in the database.
[79] *See Dispute Resolution Statistics*, FINRA, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (last visited Nov. 27, 2017).

represented by counsel and three of whom did not even file a response to the complaint;

c) In Case No. 15-02851, CSAG's client was awarded $44,734 (100% of the amount requested) against an associated person who defended the claim;
d) In Case No. 16-00673, CSAG's client was awarded $46,500 (93% of the amount requested) against two associated persons who did not file a response to the complaint;
e) In Case No. 16-00441, CSAG's client was awarded $32,517 (72.7% of the amount requested) against a terminated FINRA member firm (which did not file a response) and an associated person who did not file a response to the complaint;
f) In Case No. 16-00350, CSAG's client was awarded $298,737 (101.5% of the amount requested) against three associated persons, including one who was not represented by counsel and another who did not file a response to the complaint;
g) In Case No. 16-00402, CSAG's client was awarded $233,703 (75.7% of the amount requested) against an associated person who did not respond to the complaint; and,
h) In Case No. 15-01911, CSAG's client was awarded $41,482 (100% of the amount requested) against a FINRA member firm that defended the claim.

Out of the $2,352,274 in damages sought by CSAG on behalf of its clients, its clients were awarded a total of $752,673, or roughly 31.99% of the damages sought. However, nearly all of those "wins" by CSAG were against brokers, many of whom did not respond to the complaint or were not represented by counsel. The collectability of these awards is highly questionable (which is, of course, an entirely different problem). Indeed, only one out of the thirteen associated persons from the cases referenced above is still in the securities industry, as the rest have been kicked out for failing to pay an arbitration award.[80] Considering arbitration awards that were decided against a FINRA member firm (not its associated persons) that was still in business, and associated persons who are still in the securities industry after the award was rendered, CSAG's

[80] In *Kabat v. Rappa*, FINRA No. 15-02851, Pasquale Rappa was ordered to pay $44,734. Rappa is still in the securities industry, so it is likely that this award was paid.

clients were likely only awarded a total of $86,216, or 3.66% of the damages sought for all of its 27 cases.

Incredibly, there are some CSAG clients who did even worse than getting a zero. One such customer was ordered to pay the respondent firm and one of its associated persons $45,000 (consisting of $37,500 in damages and $7,500 in discovery sanctions).[81]

CSAG's detrimental impact on some investors' claims is not merely potential or hypothetical. In two of the 27 cases identified for this report, investors' cases were dismissed primarily because CSAG's representation of the investor violated the particular state's rules related to the unauthorized practice of law. In *Simon v. Aegis Capital Corp. et al.*, FINRA Case No. 15-02865, the arbitrator dismissed the investor's claims because CSAG and Jennifer Tarr were engaging in the unauthorized practice of law. The arbitrator in *Simon* discussed this issue at length in the October 2016 award, stating:

> Rule 12208(c) of the FINRA Code of Arbitration Procedure provides that "[p]arties may be represented in an arbitration by a person who is not an attorney, ***unless … state law prohibits such representation.***" (Emphasis added). "The Arizona Supreme Court has exclusive jurisdiction over the regulation of the practice of law in Arizona." *State v. Eazy Bail Bonds,* 224 Ariz. 227, 229, ¶ 9, 229 P.3d 239, 241 (App. 2010). Under the Arizona Supreme Court's rules, the representation of a party in an arbitration by another person constitutes the "practice of law." Ariz. Sup. Ct. R. 31(a)(2)(A)(3). By this rule, the Arizona Supreme Court prohibits the representation of a party in an arbitration conducted in Arizona by anyone who is not admitted to practice law in Arizona. *See* Ariz. Sup. Ct. R. 31(b). The Arizona Supreme Court provides an exception under its rules that allows *a lawyer* (such as Respondents' representatives who are admitted to practice law in a state other than Arizona, to represent a party in an arbitration when that arbitration is conducted in Arizona and involves federal law. *See* Ariz. Sup. Ct. R. 31(d)(27) and Ariz. Sup. Ct. R. 42, E.R. 5.5(c)(2 and 3)

[81] *See Hessong v. Cape Securities, Inc.*, FINRA Case No. 15-01225 (Jan 6. 2017).

> and (d). However, CSAG and its representative, Jennifer Tarr, have admitted that they are not licensed to practice law in Arizona or any other State.[82]

During the course of the arbitration, Ms. Tarr withdrew from representation of the investor, and Hilton Wiener, the same attorney referenced above who later sued CSAG, entered an appearance. Wiener failed to file a new, amended complaint and sought only to "adopt" all previous pleadings filed by CSAG and Tarr. However, the arbitrator found that this was insufficient and dismissed the investor's claims.

Unfortunately, this is not the only instance where a CSAG client's claims were dismissed because CSAG's representation violated state law. In *Halling v. Cape Securities et al.*, FINRA No. 16-00519, the arbitrator found that CSAG's representation of the Kansas investor violated Kansas law:

> The Kansas Supreme Court and the Rules of Professional Conduct have consistently and firmly held non-attorney representatives are not authorized to practice law in its jurisdiction and individuals can only be represented by a lawyer, if they are not representing themselves…
> * * *
> Under FINRA Code of Arbitration Procedure, and as limited by Kansas law, the pleadings are stricken, as neither Cold Spring Advisory Group nor non-attorney Jennifer Tarr can represent Claimant in this arbitration, and even if we were to address the merits, Claimant has not met his burden of proof on any count, so all awards are in favor of Respondents.[83]

The attorney for the Respondent raised this issue several times prior to and during the evidentiary hearing, and Ms. Tarr provided no authority that her representation of the investor was in compliance with Kansas law.[84] Because this ruling was entered as the final arbitration award, the investor did not get an opportunity to seek other representation.

Stock Market Recovery Consultants

[82] *See Simon v. Aegis Capital Corp.*, FINRA No. 15-02865 (Oct. 13, 2016).
[83] *See Halling v. Cape Securities, Inc.*, FINRA No. 16-00519 (Mar. 1, 2017).
[84] *Id.*

Background

Stock Market Recovery Consultants ("SMRC") is a firm based out of Brooklyn, New York. SMRC was co-founded by Benjamin Lapin and Mitchell Markowitz.[85] Neither Lapin nor Markowitz have been licensed to practice law in New York, and it is believed that they are not licensed to practice law anywhere else.

An investor seeking help recovering losses would not find anything negative about Markowitz's background on the SMRC web site. Conspicuously absent from his glowing background described on the web site is the fact that he pled guilty in 2004 to fraud in a nearly one-million-dollar scheme involving jewelry.[86] As part of his guilty plea, Markowitz was required to give up his public adjuster's license and paid a $10,000 fine.[87] Markowitz and co-defendants allegedly "conspired to purchase 20,000 pieces of inexpensive costume jewelry, grossly over-insure the inventory, produce phony purchase receipts reflecting a greater value than the jewelry's worth,…and purposely damage the jewelry in order to file a phony insurance claims".[88] Markowitz allegedly submitted an inflated insurance claim totaling $973,638.[89] It seems this misconduct does not squarely fit within the restrictions contained in FINRA Rule 12208, allowing Markowitz to appear as an NAR in the FINRA forum.

SMRC's Awards

A review of FINRA's arbitration award database shows that SMRC has been involved in 61 cases between January 2013 and August 2016 (as SMRC has not been

[85] *See About Us*, SMRC, http://1800stockloss.com/about-us/ (last visited Nov. 9, 2017).
[86] *See* Ariel Kaminer, *Swatting at Wall Street from a Bunker in Brooklyn*, N.Y. TIMES, May 21, 2010.
[87] *See Four Others Plead Guilty to Million Dollar Scam*, N.Y. INSURANCE ADJUSTER (April 28, 2004) https://www.insurancejournal.com/news/east/2004/04/28/41627.htm.
[88] *Id.*
[89] *Id.*

identified in an arbitration award since then).[90] However, about a third of those cases (19 out of 61) were referred and lateralled to a licensed attorney at some point in the arbitration process.[91] It is not clear how much of the representations in those cases were handled by SMRC before the referrals.

Out of the 42 remaining cases, Lapin handled 37 of the cases by himself as the NAR. Out of those 37 cases, 28 cases settled.[92] In one case, Lapin represented the investor in a request for expungement by a broker.[93] Out of the eight remaining cases, not one penny was awarded to an investor represented by SMRC through Lapin. A review of these eight remaining awards demonstrates a disturbing trend:

a) In Case No. 11-03706, the customer's case was dismissed for discovery sanctions;
b) In Case No. 12-00525, the customer's claims were denied, and Lapin withdrew from representation one day before the first day of the arbitration hearing;
c) In Case No. 11-02571, the claims were withdrawn without any settlement to the customer;
d) In Case No. 13-00723, the claims were withdrawn without any settlement to the customer. The award stated that "Claimants never review[ed] the claims…before they were filed and never intended to make the claims";
e) In Case No. 10-03658, the claims were withdrawn after discovery without any settlement to the customer;
f) In Case No 11-00600, the claims were dismissed without prejudice after the customer died; and,
g) In Case Nos. 13-00099 and 13-00043, the customers' claims were denied.

[90] Again, it is likely SMRC represented additional investors whose claims may have been settled and no award issued.
[91] Again, the purpose of this report is not to examine whether an attorney who takes on referred cases from NARs can properly share fees with a non-attorney, which is a separate issue. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2016) (prohibiting attorneys from sharing fees with a nonlawyer, with exceptions).
[92] In a vast majority of the cases that settled, the broker sought expungement of the complaint from his or her record. In one particular case, Lapin represented a customer who sought $1,000,000 in compensatory damages. The broker in that case sought expungement, and the award stated that the "amount of settlement was only a small fraction of the amount requested". *See Goldstein v. UBS Financial Services, Inc.*, FINRA No. 12-01361 (Jan. 2, 2014).
[93] *See Stern v. Rivetna*, FINRA No. 13-01785 (Oct. 2, 2013).

While there is very little information available about the settlements brokered by SMRC for investors in most of the cases, the remaining cases that went to hearing demonstrate that SMRC has engaged in questionable conduct.

Lapin and Markowitz co-represented investors in the five remaining cases reviewed. Out of those five cases, the customers' claims were dismissed in four of the cases. In the fifth case, SMRC sought damages of $100,000 against a *pro se* broker while withdrawing claims against the brokerage firm on the first day of the arbitration hearing.[94] The customer was awarded $34,407, although only against this *pro se* broker, and as such, the collectability of this award is questionable.

In the 13 cases where the claims were considered on the merits, SMRC sought total compensatory damages of over $2.8 million on behalf of customers. SMRC was only able to get a favorable award in one case, resulting in a "win" rate of 7.69%.[95] Moreover, SMRC's customers were only awarded an average of 1.23% of the damages they were seeking,[96] and that award's collectability was questionable.

[94] *See Garrett v. Emerald Investments, Inc.*, FINRA No. 10-01289 (June 28, 2013). The award does not mention whether a settlement was reached exchange for this "withdrawal".

[95] By comparison, FINRA's website contains statistics on how often investors are awarded at least some damages pursuant to an arbitration award. According to FINRA's website as of November 27, 2017, investors received at least some damages in 42% of cases in 2013; 38% of cases in 2014; 42% of cases in 2015; 41% of cases in 2016; and 41% of cases in 2017. *See Dispute Resolution Statistics*, FINRA, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (last visited Nov. 27, 2017).

[96] As a comparison, a study by Edward O'Neal and Daniel Solin of NASD arbitration awards from 1995 to 2004 showed that, on average, the amount an investor can expect to recover in an arbitration hearing varied from 38% of the requested damages, as a high in 1998, to a low of 22% in 2004. *See* EDWARD S. O'NEAL & DANIEL R. SOLIN, MANDATORY ARBITRATION OF SECURITIES DISPUTES: A STATISTICAL ANALYSIS OF HOW CLAIMANTS FARE.

Investors Arbitration Specialists

Background

Investors Arbitration Specialists ("IAS") is a firm based in San Diego, California, and it is operated by Arthur S. Leider. Leider has operated IAS since 1993,[97] but it has been registered as an LLC since 2009. Leider is not licensed to practice law in the State of California, and it is believed that he is not licensed to practice law in any jurisdiction.

Leider (CRD number 860215) was previously registered in the securities industry. He worked for 14 different brokerage firms between December 1978 and August 2000, two of which were later expelled from the securities industry.

In 1994, Leider worked for a brokerage firm called Lam Wagner, Inc. In November 1995, a customer of Lam Wagner, Inc. brought a civil complaint against Leider and John Winnick, alleging fraud in the offering and sale of stock, debentures, and warrants of Altus International Telecommunications, Inc. ("Altus"), which were unregistered securities.[98] Leider was also on the Board of Directors of Altus.

Leider and Winnick were found jointly and severally liable to the customer for $217,500, interest, and costs. The court also found that Leider and Winnick "converted [investor's] money from the escrow account for their own personal use."[99] In 1996, Leider was also punished by the Wisconsin Commissioner of Securities for this conduct.

According to his BrokerCheck report, Leider was also ordered to pay $150,000 to a customer while he worked with Prudential in the late 1980s.[100] The customer alleged unsuitable investments and excessive trading.

[97] *See About Us,* INVESTORS ARBITRATION SPECIALISTS, http://www.investorsarbitration.com/about.htm (last visited Nov. 9, 2017).
[98] *See* FINRA, BROKERCHECK REPORT: ARTHUR STEVEN LEIDER (Nov. 8, 2017).
[99] *Id.*
[100] *Id.*

IAS Awards

Leider, working for IAS, represented at least eight investors (three of whom were in California) in FINRA arbitration between 2013 and the present.[101] Three of the cases settled. In the remaining five cases, Leider represented four investors and one broker.

IAS's clients requested a total of $6,488,068 in compensatory damages in these five cases. In four cases (including the case where IAS represented a broker claimant in an industry case), the claims were dismissed. In one of these cases, all of the forum fees were assessed against the customer claimant,[102] and in another case, nearly all of the forum fees were assessed against the customer claimant ($14,450 in this particular case).[103] In IAS's lone victory, the investor requested $86,358, and was awarded $70,333[104]. Thus, Leider and IAS's "win" rate in FINRA arbitration was 20%, while their average recovery out of these five cases was 1.084%.

Investors Recovery Service

Background

Investors Recovery Service ("IRS") is a firm based out of Novato, California. IRS is operated by Richard Sacks,[105] and it was also previously co-operated by Irwin Stein (although it is unclear whether Mr. Stein still is affiliated with IRS). Irwin Stein was a licensed attorney in the State of New York who first became licensed in 1975, but as of October 2017, his status is "delinquent."[106]

[101] As with CSAG and SMRC, it is likely IAS handled more cases on behalf of investors than was captured by the award database.
[102] *See Nigohosian v. Charles Schwab & Co., Inc*., FINRA No. 11-03358 (Feb. 12, 2014).
[103] *See Mapes v. Bowers*, FINRA No. 15-03485 (June 5, 2017).
[104] *See Wagner v. FSC Securities Corp*., FINRA No. 15-00193 (Feb. 25, 2016).
[105] *See About Investors Recovery Service,* INVESTORS RECOVERY SERVICE, http://www.investorsrecoveryservice.com/aboutus.html (last visited Nov. 9, 2017).
[106] *See Attorney Search*, N.Y. STATE UNIFIED COURT SYSTEM, http://iapps.courts.state.ny.us/attorney/AttorneySearch (last visited Nov. 9, 2017). Irwin Stein was not licensed to practice law in California.

IRS's website indicates the following:

> **At *Investors Recovery Service*, our objective is to provide professional, affordable representation for abused investors through negotiation and securities arbitration.** *Investors Recovery Service* provides investors with knowledge and expertise in the securities industry equal to that possessed by the brokerage firms to help you recover stock market losses due to investment fraud or stock broker fraud or misconduct.[107]

Sacks previously owned and operated a brokerage firm called Sacks Investment Company, Inc., also based in Novato, California. Sacks and his company were fined $101,891.20 back in January 1991 by the NASD, regarding allegations that Sacks charged unfair prices to customers with markups ranging from 5.4% to 100% above contemporaneous costs.[108] Sacks was also alleged to have guaranteed a customer against a loss, used a customer's account for a second inventory account for the firm, executed fictitious trades to facilitate a loan, and operated the firm without a financial and operations principal.[109] Sacks was also suspended for 60 days and required to requalify as a principal. Moreover, the firm was prohibited from engaging in principal transactions for two years.

Sacks and Sacks Investment Company appealed the decision to the SEC. The sanctions were modified, with the fines being raised to $159,956.42, and Sacks was barred from the securities industry in any capacity.[110] Sacks Investment Company was also the subject of at least a half-dozen other regulatory actions.[111]

[107] *See* INVESTOR'S RECOVERY SERVICE, http://www.investorsrecoveryservice.com/ (last visited Nov. 9, 2017) (emphasis in original).
[108] *See Disciplinary Actions (January 1991)*, FINRA, http://www.complinet.com/qfcra/display/display_plain.html?record_id=&rbid=1159&element_id=4633 (last visited Nov. 9, 2017).
[109] *Id.*
[110] *See* SEC News Digest, Issue 93-114 (June 16, 1993).
[111] *See* FINRA, BROKERCHECK REPORT: SACKS INVESTMENT COMPANY, INC. (Nov. 9, 2017).

IRS Awards

From January 2013 to October 2017, IRS has represented customer claimants through eight awards. Out of those awards, customers were represented by Irwin Stein four times, and Richard Sacks four times. Out of Sacks' four cases, each case settled for undisclosed amounts, and as such, the arbitrators did not render any final awards on behalf of IRS's clients.[112] Pursuant to FINRA Rule 12208, Sacks should have been prohibited from representing investors because he had been barred from the industry.

Vindication Recovery Services

Background

Vindication Recovery Services ("VRS") claims through its website that it "supports injured investors through portfolio analysis and potential recovery of lost market assets through arbitration."[113] A public records search indicates that VRS has its headquarters in Mount Sinai, New York, and was incorporated in October 2010.

VSR is run by Paul Shechter, a former broker (CRD #2589423), who worked for eleven different brokerage firms. Six of those firms were kicked out of the securities industry by FINRA or the NASD.[114]

Shechter has also been disciplined by various securities regulators. In September 2013, FINRA brought a regulatory action against Shechter.[115] FINRA alleged that between January 2007 and April 2010 (while Shechter was with iTradeDirect.com Corp.), that he engaged in abusive sales practices. FINRA's allegations included instances of unauthorized trading, unsuitable recommendations, falsifying firm records

[112] This report did not analyze the cases of Irwin Stein, because he is a licensed attorney.
[113] *See* VINDICATION RECOVERY SERVICES, www.marketvindication.com/home (last visited Oct. 25, 2017).
[114] *See* FINRA, BROKERCHECK REPORT: PAUL SHECHTER (Nov. 9, 2017).
[115] *See* FINRA Dept. of Enforcement v. Shechter, FINRA No. 2009016159107 (Sept. 26, 2013).

regarding customers' suitability factors, and engaging in excessive trading/churning with turnover ratios ranging from 16 to 58 and cost-to-equity ratios from 57% to 235%. In April 2014, "without admitting or denying" the allegations against him, Shechter was fined $25,000 and suspended from the securities industry for two years.[116]

The Illinois Securities Department also brought a complaint against Shechter in December 2007.[117] Illinois alleged that Shechter "cold-called" an Illinois resident, he misrepresented the customer's risk tolerance and investment experience on an account application, and then traded his account, on margin, with the primary purpose of increasing commissions at the detriment of the investor[118]. After Illinois initiated its investigation, Shechter allegedly called and texted the investor in an attempt to harass and intimidate him.[119] Illinois alleged that the investor lost $230,000 in his account.[120]

The Illinois Securities Department brought another complaint against Shechter in May 2009, also naming iTradeDirect.com Corp., Eric Alt (the President and CEO of iTradeDirect at the time) and Brian Sanders (the Chief Compliance Officer at iTradeDirect.com). Illinois made similar allegations as it had done in its December 2007 complaint. Illinois also alleged that Alt and Sanders failed to adequately supervise Shechter. These claims were eventually settled by Shechter in January 2010, who was ordered to pay $150,000, and he was also put on heightened supervision for one year.[121]

Moreover, Shechter has also been the subject of five customer complaints.[122] The complaints allege unauthorized trading, misuse of margin, and excessive commissions.

[116] *See* FINRA Dept. of Enforcement v. Shechter, FINRA No. 2009016159107 (Apr. 28, 2014).
[117] *See In the Matter of Paul S. Shechter*, File No. 0700550, Ill. Sec. Dept. (Dec. 10, 2007).
[118] *Id.* at ¶¶ 6-10, 21-24.
[119] *Id.* at. ¶¶ 53-56.
[120] *Id.* at ¶ 62.
[121] *See* FINRA, BROKERCHECK REPORT: PAUL SHECHTER (Nov. 9, 2017).
[122] *Id.*

VRS Awards

A review of FINRA's award database shows no arbitration awards where VRS or Shechter has represented a claimant or any other party.

SOLUTIONS

FINRA has requested comment on whether it should amend the Codes to restrict NAR firm activities in some way, or to prohibit entirely NAR firms from representing clients at the forum. FINRA should bar representation of investors by NARs, with a few notable, limited exceptions. Rule 12208 leaves a massive loophole for NARs to conduct the unauthorized practice of law, to the detriment of investors throughout the country who have already been victimized by their financial advisor or brokerage firm. In its current form, FINRA Rule 12208 allows NARs with questionable backgrounds to represent investors. More generally, investors who have already suffered from misconduct by a firm and broker, should be ensured that they will not suffer harm a second time by unregulated NARs.

As reflected above, the rule, as currently formed, still permits representation by NARs who have been found to be bad actors, including recidivist brokers. While the current rule makes an effort to weed out attorneys who have been disbarred and those persons expelled from the securities industry, the rule is not working. People like Louis Ottimo, Arthur Leider, Richard Sacks, and Paul Shechter are still operating as NARs, sometimes taking advantage of loopholes in the existing rule by operating through other people who then act as the "representative" for purposes of Rule 12208. Moreover, Mitchell Markowitz, who lost his license as a public insurance adjuster for running a million-dollar insurance scam but was never barred from the securities industry, is still permitted to represent investors as an NAR under the current rule.

Investors may not fully understand the repercussions of being represented by an NAR. Several investors have had their claims dismissed because the NAR was engaged in the unauthorized practice of law. Others have been sanctioned because of misconduct in the arbitration process. When an investor has his or her claim dismissed because of an NAR's misconduct, that investor will likely have no other recourse for recovery.

Likewise, the success rate of these NARs has been sub-par. While that by itself may not necessarily require elimination of NARs, if one considered all of the other issues discussed above (expulsion from the securities industry, customer complaints while they were in the securities industry, bankruptcies, bookmaking charges, insurance fraud, etc.), the comparatively low success and amount-of-recovery rates are considerable problems. The fact that some investors got a zero primarily because their NAR's representation violated state law is a serious concern.

Accordingly, FINRA should bar the practice of allowing NARs to represent investors in FINRA arbitration, with very limited exceptions. First, immediate family members (spouses, siblings, children, or parents) should be allowed to represent their family members in a FINRA proceeding. Many elderly investors may need to rely on children or grandchildren to assist them through the process, and spouses should also be able to assist, if necessary.

Second, there are many law schools that have established securities arbitration clinics and allow law students to represent customers in FINRA cases. Several of these clinics have received some funding from FINRA.[123] The clinics provide a valuable

[123] *See* Press Release, FINRA, *FINRA Foundation Announces $1 Million in Grants to Fund Securities Advocacy Clinics* (Jan. 28, 2010), *available at* http://www.finra.org/newsroom/2010/finra-foundation-announces-1-million-grants-fund-securities-advocacy-clinics.

resource, in that they typically represent customer claimants with relatively small claims, often too small for many attorneys to be able to take. These customers get representation from the clinics through the law students, often without any cost or at little cost to the customer. The students provide help under the supervision of the clinic directors, who are attorneys, typically well-experienced in the arena. While the client enjoys the assistance provided by well-supervised law students, those students gain valuable, practical experience in representing a client through a legal proceeding. Any change to the NAR rule by FINRA should include an exception to continue to allow law students from securities arbitration clinics to represent investors in FINRA arbitrations.

FINRA has the ability to bar NARs from representing clients in its arbitration forum. FINRA is generally granted authority to issue rules, pursuant to Section 15A of the Securities and Exchange Act of 1934. FINRA already creates its Code of Arbitration Procedure that governs how Statements of Claim and Answers are filed, how parties exchange documents and information through discovery, how arbitrators are selected and empaneled, where arbitration hearings are held, etc. FINRA also has the ability to limit NARs' representation of investors in its arbitration forum, and it should severely limit such representation in the manner proposed in this report.

FINRA has already promulgated rules as to what qualifications an arbitrator must have to be in FINRA's pool of arbitrators.[124] FINRA requires "arbitrator applicants must have a minimum of five years of paid business and/or professional experience and at least two years of college-level credits."[125] If FINRA can control which persons it

[124] *See* FINRA, RULE 12100(y); *Apply Now,* FINRA, http://www.finra.org/arbitration-and-mediation/apply-now (last visited Nov. 9, 2017).
[125] *See Apply Now,* FINRA, http://www.finra.org/arbitration-and-mediation/apply-now (last visited Nov. 9, 2017).

deems to be qualified enough to preside over these cases, it should also make rules that govern who can represent parties in its forum too. With the noted exceptions above, FINRA should bar NARs from representing customers in FINRA arbitration.

It is clear investors have already been harmed through the representation by NARs. FINRA has the ability to restrict the appearance of NARs in its forum, and it should do so, as outlined above.

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FILE NO.

December 18, 2017

VIA EMAIL

Marcia E. Asquith
Office of Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506
(pubcom@finra.org)

Re: FINRA Regulatory Notice 17-35
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

I am a partner in the law firm of Johnson, Pope, Bokor, Ruppel & Burns, LLP. I have represented individuals and institutions in disputes with broker/dealers and investment advisers for more than 25 years. I am a past president of the Public Investors Arbitration Bar Association ("PIABA"), and I am a current director emeritus of PIABA.

I write to provide comments on the above-referenced regulatory notice, which addresses compensated non-attorney representatives ("CNARs").

The handling of a FINRA arbitration proceeding on behalf of a customer claimant is a complex and nuanced legal matter. Aggrieved customer claimants are entitled to the best possible representation to seek recovery of their lost investment funds, often retirement savings. It is my opinion that CNARs are incapable of providing the best possible representation for a number of reasons. First, they are not regulated, as attorneys are by bar associations. Second, CNARs are not bound by any code of conduct or ethical rules, including the requirement to be truthful with any tribunal and to safeguard and properly handle client funds. Third, it is not uncommon for CNARs to have checked professional backgrounds, including former registered representatives who have been barred from the securities industry. Fourth, in many states representing a customer claimant in a FINRA arbitration proceeding would constitute the unauthorized practice of law. Finally, most, if not all, CNARs do not have even the most basic legal training. Given the complexity of properly and successfully representing a customer

claimant in a FINRA arbitration proceeding, that lack of legal training could, and likely does, have disastrous consequences for a customer claimant represented by a CNAR.

I urge FINRA to bar CNARs from representing customers in the FINRA arbitration forum.

Sincerely,

JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP

Scott C. Ilgenfritz

SCI/dh

December 18, 2017

VIA EMAIL SUBMISSION TO PUBCOM@FINRA.ORG

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-34

Dear Ms. Asquith:

My law practice focuses on representing investors in FINRA arbitration. FINRA's primary role is to protect investors. Prohibiting compensated non-attorney representatives' ("NAR") firms from representing clients in securities arbitration is a critically important step that must be taken to protect investors. Doing so will help ensure that investors get the representation they deserve when pursuing claims through FINRA's arbitration process.

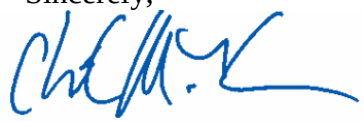
With few exceptions, non-attorneys have no business representing investors in FINRA arbitration. Customers' claims against securities firms are governed by a complex interplay of state and federal law and regulatory rules. FINRA's conduct rules and guidance are voluminous, comprising thousands of rules, notices, interpretive materials, and other resources, many of which have undergone frequent amendments over the years. The FINRA Code of Arbitration Procedure for Customer Disputes is a complex set of over 80 rules and subparts. Customer cases routinely involve complex motion and discovery practice. Arbitration hearings require sophisticated advocacy skills, including raising objections to preserve the claimant's legal rights and cross-examining hostile witnesses and experts. Quite simply, non-lawyers are not up to the task in being able to handle these important responsibilities.

With regard to NAR firms in particular, not only do they and their employees lack the requisite legal training to effectively represent clients; they also lack oversight by any supervisory body to hold them accountable. Unlike licensed attorneys, who are subject to professional codes of conduct and ethical oversight by the bar, NAR firms operate on the periphery, free from any professional or ethical restraints. In fact, NAR firms are guided solely by one overarching concern: profit. It then should be little surprise when, as FINRA notes in Regulatory Notice 17-34, allegations arise about NAR firms charging excessive retainers and fees; violating state rules governing the unauthorized practice of law; pursuing frivolous claims; and breaching confidentiality provisions in settlement

agreements. These and other instances of egregious misconduct occurring in the FINRA arbitration system must be stopped.

For these reasons, I strongly urge FINRA to adopt a rule prohibiting NAR firms from representing investors in securities arbitration.

Sincerely,



Chad M. Kohler

CMK/tcb

Frank Mulligan
1505 Bel Aire Court
Point Pleasant, NJ 08742

FINRA
c/o Marcia Asquith
1735 K Street NW
Washington DC 20006

Ms. Asquith,

This letter will serve as my comment to FINRA Regulatory Notice 17-34 about Non-Attorney Representatives in arbitration. I am a 71-year-old retired school teacher that hired Cold Spring Advisory, an NAR firm to represent me against a New York stock broker firm that I felt did wrong doing in my account. I knew I made the right choice of hiring this firm from the very start. They knew exactly what they were talking about, the explained very diligently the complete process of arbitration and even all possible outcomes, including a loss. Cold Spring was competent to the extent they settled my claim in mediation for approximately 60% of my losses. This outcome exceeded my expectations and was very important to my family because if it wasn't for Cold Spring, my retirement account would be in shambles.

Since I had a very good experience with this NAR firm, I do not think FINRA should restrict firms such as Cold Spring Advisory. I believe people should be able to make their own choices, it's when our choices are limited, the consumer seems to pay the higher price.

Thank you,

Frank Mulligan

VIA ELECTRONIC MAIL

December 18, 2017

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34; Request for Comment on the Efficacy of Allowing Compensated Non-Attorneys to Represent Parties in Arbitration (Notice)

Dear Ms. Asquith:

On October 18, 2017, the Financial Industry Regulatory Authority, Inc. (FINRA) published its request for comment regarding the efficacy of continuing to permit non-attorneys to represent clients in FINRA mediations and arbitrations and whether non-attorney representatives should be subject to increased restrictions. The Financial Services Institute[1] (FSI) appreciates the opportunity to comment on the Notice. While FSI recognizes that non-attorney representatives (NARs) provide an important service to investors, particularly those with small value claims, FSI supports placing additional requirements on NARs, which we outline in more detail in our comments below.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives.[2] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners with strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial

[1] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

[2] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.[3]

Discussion

A. Benefits and Pitfalls of NARs in the FINRA Mediation and Arbitration Processes

As explained in the Notice, FINRA Codes of Arbitration and Mediation Procedure (Codes) permit compensated persons who are not licensed as attorneys to represent investors in FINRA arbitration and mediation. The Codes do include certain exceptions that are discussed below in detail. For reasons we outline in more detail in this section, we believe attorney representation is more desirable than representation by a NAR. We believe the skills, experience and required standards of conduct that attorneys bring to the mediation and arbitration process boosts the integrity of the process and, where practicable, is in the best interest of the investing public. However, we also understand that not all investors can afford attorney representation and other representation, such as law school arbitration clinics, are not always available. In those circumstances, we acknowledge that NAR firms can play an important role in the FINRA adjudication process.

A licensed attorney will, presumably, have the knowledge and experience to skillfully navigate the complexities of a FINRA mediation or arbitration. Further, communications between those attorneys and their clients are subject to attorney-client privilege. Meaning, attorney-client communications are shielded from compulsory disclosure, even in the presence of a legal demand. This allows investors the freedom to openly discuss the facts and circumstances of their claims without fear that the information may, subsequently, be used against them. With few exceptions and limitations, it also allows attorneys to ask whatever questions needed to perform a thorough analysis of the matter, without concern that the representative may later be called to testify against the client. This freedom of exchange is an important part of client representation that is lacking in the relationship between a NAR and an investor; and helps the arbitration process move along expeditiously and efficiently.

Moreover, attorneys are subject to ethical rules. These rules, among other things, often prevent attorneys from pursuing frivolous claims. NAR firms, however, are free to bring frivolous claims in an effort to obtain fees, which clogs up the arbitration and mediation forums with claims that should have never been initiated.

Further, where appropriate, investors, attorney adversaries, or even arbitrators may report attorneys who fail to follow ethics rules, or who are otherwise derelict in their

[3] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016).

representation. In lieu of taking individual legal action, the attorney may be reported to the bar of the state in which he is licensed. NARs, on the other hand, may not be subject to licensure requirements or analogous disciplinary oversight. An investor may be able to sue the NAR by bringing an individual legal action, which would result in the investor, once again, finding themselves thrust into a complex legal proceeding. For these reasons, there is little doubt that representation by licensed attorneys is preferable over representation by a NARs. Nonetheless, as stated above, we understand this preference in not an option for all investors.

Often, the question facing investors is not whether to elect a higher cost attorney over a lower cost NAR. [4] Instead, in the absence of an available legal clinic or familial representation, the issue is whether the investor should hire an attorney versus representing himself.[5] An investor who represents himself is unlikely to understand the legal issues presented in the case or have the skill to navigate the legal process. Conversely, a NAR that has experience representing clients in FINRA forums may be able to better navigate the process. Moreover, with self-representation, the investor's lack of skill is typically accompanied by a lack of objectivity. A NAR may be more objective than the investor.

B. Suggested Restrictions on NARs

i. Strict Enforcement of Existing FINRA Rules

FINRA rules place restrictions on who may act as a NAR. First, an individual may not act as a NAR, if state law prohibits that representation.[6] Currently, Florida, the District of Columbia and Illinois, are among the states that have determined that nonlawyers who represent customers in a FINRA arbitration are engaged in the unauthorized practice of law.[7] Second, disbarred or suspended attorneys, and individuals who have been barred or suspended from the securities industry, may not act as NARs.

Still, FSI's members have reported that disbarred attorneys and individuals who have been barred from the securities industry are acting as NARs. These individuals are offenders with a demonstrated inability to follow rules and their participation in the mediation or arbitration process, not only violates FINRA rules, but it also demeans the integrity of the process. Thus, an important first step is ensuring that the current rule-based restrictions are adhered to.

ii. Examination and Qualifying Process for NARs

The outcome of the arbitration process obviously impacts the aggrieved investor. Thus, the individual investor protection considerations are incontrovertible. However, the guiding legal precedent, and awards, stemming from the arbitration process impact not only the aggrieved investor, but also have a fundamental impact on marketplace integrity, overall. Therefore, we suggest that, like most other individuals who meaningfully participate in the securities industry, individuals who want to act as NARs should be required to pass a basic skill examination.

[4] *See, generally,* Regulatory Notice 17-34 at p. 3.
[5] *Id.*
[6] See FINRA Rules 12208, 13208 and 14106.
[7] See, e.g., Ill. Bar. Ass'n Opinion No. 13-03 (January 2013) (holding that while FINRA arbitrations do not require involve the same legal complexities as court proceedings, representation provided by non-attorneys in this forum involves the use of legal knowledge and skill and, as such, constitutes the unauthorized practice of law), available at http://lawprofessors.typepad.com/files/ill.13-031.pdf

The NARs qualifying examination should, at minimum, test the individual's knowledge of the securities industry, standards of accepted ethical conduct, and of the rules governing FINRA mediations and arbitrations. We suggest that to be eligible to take the qualifying examination, an individual should be able to demonstrate:

- A high school diploma, or an equivalent degree;
- A four-year college degree; or four years of experience working in the securities industry in a registered capacity; and
- A minimum of three years of experience working in the securities industry in a registered capacity, within the last ten years.

For the sake of clarity, individuals who do not have college degrees, would need a total of seven years of experience in a registered capacity. Three of those years would need to be within the ten-year prior immediately preceding the examination date.

Post examination, and each year thereafter, NARs should be required to certify under penalty of perjury that:

1. The individual has not been disbarred and is not suspended from the practice of law in any state;
2. The individual has not been barred and is not suspended from participating in the securities industry;
3. The individual has determined that his or her representation of investors does not require the individual to be a member of the bar of any state;
4. The individual agrees not to charge representation fees exceeding 25% of an investor's recovery (award or settlement amount paid to the investor);[8]
5. The individual shall provide competent representative to a client, including the skill, thoroughness and preparation necessary for the representation;
6. The individual shall act with reasonable diligence and promptness in representing a client; and
7. If, at any time, the representations set forth in paragraphs 1-3 (above) become untrue, the individual will promptly report the change in circumstances to FINRA and will no longer act as a NAR.

The NAR would also be required to provide a copy of this certification to each new client and this certification may be used by the investor in any subsequent litigation against the NAR.

The NAR should also have professional liability or similar insurance that would protect the investor in case of professional malpractice on the part of the NAR and should submit to a background check. The purpose of the background check is to confirm that individuals acting as NARs do not have felony convictions, convictions related to crimes involving fraud, manipulation or deceit, or to confirm that the NAR has not been suspended or disbarred from the securities

[8] Investors with low value claims, who cannot afford an attorney, would be the likely client base for NARs. Therefore, investor protection interests support implementing a maximum fee of 25% of any settlement or award. Attorneys typically charge a fee of between 33% to 40%. The discounted rate accounts for the absence of attorney-client privilege, non-applicability of ethics rules, and other differentials between NARs and attorneys.

industry or the practice of law. Any person who fails the background check, or does not meet the insurance requirements, should not be permitted to act as a NAR.[9]

Individuals who provide proof of insurance, pass the qualifying examination and background check, and submit the required certification to FINRA, will be placed on an approved NARs list. Only those individuals that are on the list would be permitted to act as NARs in FINRA mediations and arbitrations. The list should be made accessible to investors on FINRA's website and should be included in the initial documents FINRA provides to investors after a claim has been filed.

It is unlikely that this process would eliminate all issues deriving from non-attorney representation in FINRA proceedings. Nonetheless, it provides investors with continued access to representation by NARs, ensures that NARs are reasonably qualified to participate in the arbitration or mediation process, and assists FINRA in better ensuring that those who FINRA rules prohibit from acting as NARs, are not doing so. It would also serve to maintain the efficiency and cost-effectiveness of FINRA's Dispute Resolution Program.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with the Department on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 393-0022.

Respectfully submitted,

Robin Traxler
Vice President, Regulatory Affairs & Associate General Counsel

[9] Critically, The Social Security Disability Applicants' Access to Professional Representation Act of 2010 (PRA), Public Law No. 111-142 was enacted by Congress on February 27, 2010. Among other things, the PRA extends the Social Security Administration's authority to withhold 25% of a claimant's past due benefits for payment to "eligible non-attorney representatives". The eligibility requirements established for non-attorney representatives is substantially reflective of the proposed requirements suggested herein by FSI.

COLD SPRING
ADVISORY GROUP

December 18, 2017

VIA E-mail to PUBCOM@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: REGULATORY NOTICE 17-34

Dear Ms. Asquith:

Cold Spring Advisory Group, LLC ("CSAG") submits this response to FINRA's Request for Comments set forth in Regulatory Notice 17-34 (the "Notice"). CSAG is a non-attorney entity that has successfully represented investors in the FINRA Arbitration Forum (the "Forum") since 2014, and through its involvement with investors in securities arbitrations and mediations has been instrumental in the return to investors of assets in excess of $4,000,000. CSAG has first-hand knowledge of the FINRA Arbitration process, both its positives and its negatives, and is therefore uniquely qualified to provide input as requested in the Notice from the perspective of an established Non-Attorney Representative ("NAR") firm.

OVERALL POSITION

The position of CSAG is that NAR firms are an added resource to curtail the activities of unscrupulous brokers, broker/dealers, and the infectious wrongdoing that continues to plague the investor community. The Wolf of Wall Street existed and continues to exist, and unquestionably NAR firms help provide additional recovery avenues for investors. FINRA can implement protective measures to address concerns without using a broad stroke to eliminate this effective service currently available to help investors recover losses.

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CONCERNS ABOUT THE TASK FORCE REPORT METHODOLOGY

Preliminarily, however, CSAG is compelled to call attention to a serious failure of the Task Force's investigation of NAR's efficacy. Consistent with the self-serving nature of FINRA as its own financial money-making entity in which fines of brokerage firms are NEVER distributed back to the harmed investors (a fact that Senator Elizabeth Warren from Massachusetts is well aware and is investigating), FINRA now seeks to investigate the representation of investors without having surveyed the investors themselves! FINRA's Task Force did not receive a single shred of *investor* testimony in support of its Task Force conclusion according to Appendix III of the Task Force's report. CSAG requested transcripts of the testimony the Task Force heard, but was told that "The Task Force made only its final Report (attaching an interim summary that also was published) publicly available and made no recordings of any subcommittee or Task Force meetings." The Notice, therefore had to be the result of submissions by individuals and entities other than the individuals sought to be "protected", to wit, the investors.

It is simply remarkable that FINRA did not reach out to the individuals whom they allegedly are trying to protect. Had they done so, they would have inevitably determined that those individuals have received (speaking only through this firm's experience as a leader in the NAR field), results which exceed the statistical results submitted by PIABA and FINRA relating to awards and recovery. It is also a fact that FINRA has absolutely no idea of settlements which occurred through NARs on behalf of investors, because those settlements, like settlements through attorneys, are not reported. However, this submission will shed light on those recoveries in general terms because specifics cannot be disclosed due to the confidential nature of settlement agreements.

It is also troubling that the FINRA Department of Dispute Resolution did not present more information to the Task Force. FINRA had the ability to gather meaningful information to be presented to the Task Force by mailing a form letter questionnaire to the investors that have used the services of NARs. It is without question that FINRA's Department of Dispute Resolution has all the information in its database to correspond with every Claimant who filed a claim through the services of an NAR. FINRA fails to realize, or chooses not to realize, that most of the Claimants that retain NAR firms are located outside metropolitan areas where access to counsel is limited at best, and the chances of those investors reviewing a FINRA website for comments about their experience is remote at best. This lack of fair research is problematic and inexcusable if the true purpose of the Notice is to query investors who utilized the services of NARs.

ANALYSIS OF RESPONSES TO THE NOTICE

Of course, if the filings associated with this Notice are any indication of what may have been submitted to the Task Force, it is clear that members of the Plaintiff's Bar and Respondent's Bar barely submitted input, and it is also a fact that of all the thousands of participants in the Forum, only a mere handful have provided submissions to this Notice. It is easy to conclude, therefore, that the concern about NAR firms is conjured up by a few "bad apples in the bunch" who really are not looking out for the general welfare of the investor community, some of which, for example, are rural farmers in the Midwest of this country who have limited access to attorneys who know anything about the FINRA Forum.

One must ask why did the individuals and entities that submitted input to the Notice do so?[1] A review of the responses reflects that 5 sources provided input, (1) a few representatives of Plaintiff's Bar, (2) a few representatives of Respondent's Bar, (3) a few arbitrators, (4) firms like CSAG that support NAR firms and (5) Investors who were made aware of the desire for input. The explanations for the responses against NAR participation are simple: the Plaintiff's Bar is hypothetically losing business (it would be absurd to think for a moment that Plaintiff's Bar exists to serve the public without compensation), and the Respondent's Bar, while they should be thankful for the business of defending their broker and broker dealer clients, know that NAR participation increases the number of claims against their clients, which exposes those firms to net capital issues effecting the payment of legal fees. It is also a fact, that some of the responses to this Notice were submitted by law firms that represented the brokers against whom NARs filed complaints on behalf of investors. Many of their clients had CRDs that warranted revocation of licenses by FINRA's Department of Enforcement, but because of the laxity and failure of that Department to take aggressive action against dues-paying brokers, those brokers have been allowed to perpetuate abuse on the investor public, so of course those attorneys desire to see NARs and their marketing arms truncated.

With regard to the other categories of submissions, the Arbitrator Kashouty's input was, and is, clearly supportive of the efficacy of NAR firms and there is no stronger confirmation needed to show that experienced NAR firms can handle and represent investors in arbitrations just as well as "legal counsel", and that the "specialization" purported to be in the possession of lawyers is merely a mirage. The input from William Jacobson, an attorney and Director of the Cornell Securities clinic, is likewise supportive of the continued use of NARs, and FINRA simply can't overlook the fact that Mr. Jacobson administers a law school clinic which FINRA itself deems to be a resource for investors. Obviously, CSAG is a proponent of NAR involvement in the arbitration process and lastly, there are responses from investors, the actual individuals that

[1] CSAG has corresponded with Kenneth Andrichik (Senior VP and Chief Counsel) and Kristine Vo (Assistant Chief Counsel) of FINRA's Office of Dispute Resolution regarding the failure of FINRA to post Responses onto the portal in a timely manner. To the extent that responses are posted after the cut-off date, CSAG reserves the right to update this Response to address submissions accordingly.

FINRA seeks to protect. Unless FINRA takes those investor letters seriously, a decision to limit the role of NAR firms was made with a hidden agenda.

ADDRESSING THE ISSUES RAISED IN THE NOTICE

The Final Report of the Task Force, which was the basis for the Notice, reflected some "concerns" regarding NAR firms, but those "concerns" are completely, and surprisingly unsubstantiated. For example, while the Notice states that "Forum users have reported that NAR firms ***require*** retainer agreements that reflect a $25,000 non-refundable fee" (see page 2 of the Notice, emphasis added), this firm has no such requirement whatsoever and it is irresponsible that the Task Force made such a conclusion about NARs without providing or seeing evidence of that contention. Secondly, the Task Force had no evidence of what the fees that may be charged are used for. Each case is unique in terms of complexity and the degree of necessary analysis to create an effective statement of claim.

For example, in any given case, NAR firms may be required to literally analyze thousands of pages relating to an abused account in order to calculate mark-ups and mark downs, turnover ratios, cost-to-equity ratios, or to obtain expert testimony for which payment to a forensic entity would have to be rendered. The Task Force neither sought, nor was presented with the parameters of fees charged by NARs, so how could it make a determination that the fees were (a) unreasonable or (b) mandatory? The lack of identification of whom provided input into this contention is highly suspicious recalling, again, that no investor was presented to the Task Force, and CSAG suggests that this "evidence-less" contention was fueled by a law firm, lawyer, or pro se litigant that CSAG sued on behalf of an abused investor.

Similarly, and outrageously, the Task Force had no basis to contend that NAR firms file "frivolous or stale claims to attempt to elicit settlements". How could that contention be supported unless a Respondent or representative planted that idea with the Task Force since there are no awards in the FINRA Award Database reflecting such a conclusion involving NARs? It is also beyond comprehension how this can be a legitimate concern of FINRA given the multitude of decisions in its own FINRA Award Database where *legal counsel* has filed "stale or frivolous claims" that were outright denied pursuant to FINRA Rule 12206. If one searches the FINRA Arbitrations Awards Online site for cases involving Rule 12206 (the "Eligibility Rule") several attorney's names appear repeatedly. It is simply ludicrous that the Task Force suggested this as a concern to possibly justify denying investors access to NARs given the plethora of cases where individuals admitted to the Bar had cases dismissed outright.

The most unsubstantiated "contention" by the Task force is reflected in its "concern" that confidentiality provisions in settlement agreements were breached by posting a picture of a settlement check to market an NAR's services on a website (see page 3 of the Notice). The undersigned has no knowledge of any NAR firm posting any pictures of "settlement checks", other than CSAG so the "concern" has to be addressed by CSAG. While it is true that CSAG, with client permission, does post a "stock photographic check" with the amount of a settlement for purposes of advertising successful results, it is an absolute fact that the client is not identified on the posting, nor is the broker or brokerage firm that was involved in a settlement. There is absolutely NO basis to conclude that any Confidentiality Agreement was ever breached by the encrypted marketing of results obtained through the efforts of this NAR, and in fact, when litigated, the Supreme Court of the State of New York, dismissed that exact claim (see Supreme Court of the State of New York County of Nassau Spartan Capitals [sic] Securities v John Russo individually and as trustee of the John Russo Trust, and Cold Spring Advisory Group, Index No. 610284-16).

Likewise, the remaining "concerns" listed through the Notice are without substantiation, and speaking for this firm only, there is no avoidance of signing arbitration submission agreements with the name of this NAR to avoid naming an individual in an effort to circumvent the unauthorized practice of law (see page 3 of the Notice). To the extent that it occurred in one case, there is no systematic avoidance, and were FINRA to ask for input from this firm, it would provide copies of over 50 Statement of Claims filed by CSAG to prove the fallacy of this "concern".

Yet another contention that is beyond comprehension in the Notice, is the "concern "of the Task Force that "NAR firms handle only small claims (decided on written submissions) to avoid hearing locations in which unauthorized practice of law would be an issue" (see Page 2 of the Notice). The absurdity of this contention is beyond explanation. It is axiomatic that if a client has a claim of $50,000 or less, FINRA requires the Arbitration to proceed under Rule 12800 as a Simplified Arbitration. Claimant may choose between having their case decided on the papers submitted by the parties or to request a hearing with a single arbitrator. To suggest that someone other than the NAR firm or the client understood why a paper submission was chosen, is yet another twist in a badly written plot. It seems that if the Task Force and the adversaries to NAR participation had their way, the option for a case to be heard on the papers should be eliminated as well. If a client wants to limit his claim to $50,000 so that the cost of a case is limited, why shouldn't that Claimant be allowed to do so since that is the purpose of Simplified Arbitrations, to limit costs in obtaining justice.

With regard to the representation of Investors in arbitrations and mediations, and speaking for this NAR only, it is a fact that clients of this firm have participated in the settlement of cases resulting in payment by the wrongdoing firms and brokers in excess of $4,000,000. This has occurred NOT, as the Notice implies, as a result of filing frivolous claims, but as a result of

firms and brokers confronted with and realizing their wrongdoing by an entity that understands the trickery of brokers and broker dealers.

These results don't come because this NAR firm doesn't know what it's doing in the FINRA Forum. These results occur because this NAR knows exactly how the FINRA arbitration process works and seeks to hold brokers and brokerage firms accountable in a forum which this firm understands and has practiced within every business day since 2014. This firm is involved in the assistance of investors recovering funds every day and only exists for that purpose. It doesn't get involved in real estate closings, it doesn't prepare wills, and it is not distracted from its focus.

The brokerage industry does not like that this NAR firm knows, for example, about the use of New Account Forms that are pre-populated with "Speculation" as an objective with the hope the client signs it without noticing so in the event the investor sues the broker, the broker already has a "defense" in place. They do not like that this NAR firm knows about hidden commissions in Private Placements, and knows that mark-ups and mark downs are used to camouflage the commissions they charge, and knows how firms and brokers use deal flow to manipulate Commission over Asset (CoA) rations to their advantage.

Simply stated, the industry doesn't like knowing they are in a fair fight because of this knowledge so they try their best to keep NAR firms out of the Forum, as they did in presenting to the Task Force. Their desires have nothing to do with protecting the public; it has everything to do with protecting their bottom lines and wallets. Paranoia is dangerous when a pen is in the hand of an adversary.

MISCELLANEOUS ISSUES

CSAG is also concerned about the failure of FINRA to allow the court system to deal with the unauthorized practice of law, where that issue belongs. In NO instance, has a Respondent, or their/its counsel sought a Declaratory Judgement in any state seeking a decision relating to the legitimacy of a NAR to appear in that state using the FINRA forum. This is the reason why FINRA received "serendipitous" input to the Task Force. The issues are not clear, and it is well documented at this point which states, by legislation and case law, require investors to be represented by counsel in those states (California, Illinois, and Florida for example). In fact, FINRA provides a notice to the Claimant upon filing cases with those states as jurisdiction, that counsel must appear in that state. The broad stroke action being proposed in the Notice therefore, is not necessary to protect investors, but rather, came because self-interested opposition to NAR firms provided their biased input to the Task Force to avoid judicial declaration, and the Task Force took the bait without support.

While there are undoubtedly individuals and entities whom are averse to the allowance of NAR firms in the Forum based upon their own financial insecurities (with complete disregard to the welfare of the investor public), the undeniable truth is that as far as this NAR is concerned, there are absolutely no decisions adverse to the ultimate resolution of a FINRA case in which there was a conclusive ruling that this NAR was involved in the unauthorized practice of law. Specifically, in those rare instances where it appeared that there was actual concern about a particular state's legislative or case law determination about NAR firms in general, (and not merely a smoke screen allegation by an adversary looking to distract the panel from the underlying merits of a broker's wrongdoing), this firm advised its client about the need to withdraw and to obtain counsel, and counsel was obtained to represent that client in the matter.

As a result of this mindful practice, there is not a single case available in the FINRA database where a client of this NAR firm received a decision or award in which that client was not represented by counsel at the time of the decision when an actual concern about the unauthorized practice of law was possible. The raising of the issue by a subjective adversary does not mean there is unauthorized practice of law, nor does the rare analysis of an Arbitrator in a case where an NAR firm no longer appeared on behalf of a Claimant.

Although entities such as PIABA and some of its members are convulsing to twist the arm of regulators to prevent the continued benefit to the public of specialized NAR assistance, their members cannot be allowed to do so by twisting the facts. There are certain members of PIABA who respect the NAR assistance, and certain members who have a hidden agenda to do all they can to prevent NAR firms from "taking a bite from their apple", and it has nothing to do with the welfare of the public. Were this the proper forum, this NAR firm could list pages of decisions by attorneys and members of PIABA in which their clients were denied relief, but this not the proper forum for such a discussion. Viewing the proposed action through objective lenses, there simply are no overwhelming facts to support a conclusion other than that NAR firms are as efficient as counsel, and there is no proof to the contrary. The FINRA database is replete with cases dismissed, and sanctions ordered against counsel, but no such data exists with regard to NARs.

The suggestion that investors may have no recourse against NARs if they are dissatisfied with NAR representation is again, preposterous, as FINRA has no idea whether an NAR has insurance to cover potential issues (most brokerage firms do not carry stock broker blanket bond coverage, which explains why so many awards are rendered uncollectable, and so many brokers declare bankruptcy to avoid investor recovery). Rather, FINRA could consider mandating NAR firms to carry insurance to remain a participant in the Forum, and also have law firms, especially solo practitioners do the same, because there is no proof that firms or lawyers carry insurance. This is a solution-driven suggestion to maintain investor protection which seems to be a concern, and rightfully so.

The Notice states that 1/5th of all filings are small claim filings and that investors have limited access to attorneys "because attorneys may not be willing to offer services given the small dollar amount of the dispute" (see page 3 of the Notice). The Notice then goes on to say that some of the investors are served by law school arbitration clinics, and others by NAR Firms. If FINRA were to disallow the representation of NAR firms, by its own admission, 1/5 of all FINRA claims would go unrepresented, or somehow miraculously, law school clinics, (which utilize law students that have not passed the bar exam and have no litigation experience whatsoever) would be representing investors. The guidance of a professor, or two, of over 1/5 of the cases filed at FINRA is simply a disaster waiting to happen. In addition, how would an investor located in Illinois who used a law clinic in New York or Washington, pay for the law students to travel to Illinois? The Notice even admits as such (see page 4 of the Notice, 1st paragraph). Would forensics be prepared by the law clinic? No, the client would have to absorb that cost, which is exactly what retainer fees with NAR firms cover anyway. The logic is absurd.

The Notice also states that there is no mechanism for investors to take action against NAR firms. That is completely wrong. The exact same mechanism exists for NAR, as it does for claims against lawyers. A lawsuit is filed. There is no guarantee whatsoever that a lawyer can honor a lawsuit by an investor, and FINRA should endeavor to determine how many clients have sued their lawyers over cases which resulted in sanctions, or outright dismissals.

A serious error of presumption in the Notice, is that all attorneys that practice in its forum are experienced securities attorneys. This is simply not true. But it is a fact that NAR firms only do securities work. The concerns raised, while likely valid to some extent, do not solve the problem of incompetent attorneys, of which there are many based upon the publically available awards alone. FINRA does not police attorneys although it has been asked to do so in many instances, and it should not extend itself beyond imposing reasonable assurances of compliance with NARs.

The Notice also correctly considers the potential of investors to not avail themselves of counsel due to the restriction of marketing imposed on the legal profession. Attorneys are generally prohibited from reaching out directly to investors, and it becomes cost prohibitive to reach out to the general public, thereby decreasing the likelihood of investors having redress over wrongdoing. This is most certainly the void that NAR firms fill in aiding and educating the investor community that has no idea about the ability to seek redress through FINRA's Department of Dispute Resolution.

CONCLUSION

The continued use of NAR firms by investors has not been shown to warrant the exclusion of NARs from appearing in the FINRA Forum. To the extent that FINRA desires additional layers

of protection and to enhance recovery in the case of investor complaints, there are options that can be required of *all* participants in the FINRA Arbitration Forum. There is no basis for extinguishing the use of NAR firms by investors, as NAR firms have proven to be an effective resource to an underserved and underinformed population of investors.

Respectfully Submitted,

Jennifer Tarr
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cc: Senator Elizabeth Warren
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December 18, 2017

VIA ELECTRONIC MAIL (pubcom@FINRA.ORG)

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34 (Non-Attorney Representatives in Arbitration)

Dear Ms. Asquith:

Lincoln Financial Network (LFN) is the marketing name for Lincoln Financial Advisors Corporation (CRD# 3978) and Lincoln Financial Securities Corporation (CRD# 3870), two broker-dealers and registered investment advisors affiliated with Lincoln Financial Group (LFG).[1] Currently, LFN maintains an affiliation with over 8,500 advisors, which include registered representatives, investment advisor representatives, insurance brokers and agents.

LFN appreciates the opportunity to comment on Regulatory Notice 17-34 and urges FINRA to prohibit compensated non-attorney representatives (hereafter "CNAR firms") from representing investors in FINRA arbitrations. As an initial matter, LFN supports the comment letter submitted by The Securities Industry and Financial Markets Association ("SIFMA") on December 15, 2017. LFN submits this comment to express its own observations about the impact of CNAR firms on the FINRA forum.

CNAR firms frustrate the fair, efficient, and effective resolution of disputes. FINRA arbitrations involving CNAR firms often involve poorly drafted and unclear statements of claim, insufficient discovery responses, tardy requests for continuances and extensions of deadlines, unnecessary motion practice, and other abuses and obstructions that contribute to unpredictability at the arbitration hearing. These abuses also result in a waste of arbitrator and FINRA case administrator time and unnecessary delays and

[1] The affiliated companies of Lincoln Financial Group act as issuers of insurance, annuities, retirement plans and individual account products and services. The affiliates include, but are not limited to The Lincoln National Life Insurance Company ("LNL") and Lincoln Life and Annuity Company of New York ("LLANY").

expenses for the parties. Finally, CNAR firms' abusive conduct subjects investors to substantial risks, including the risk of reliance on poor advice and exposure to sanctions. CNAR firms' lack of competence and accountability undermine the integrity of the FINRA Forum and harm both investors and opposing parties.

CNAR firms do not possess the necessary skills to properly evaluate the merits of investors' claims.[2] CNAR firms often bring frivolous and/or meritless cases. In these instances, investors are left in a worse financial position than they were prior to making their claim. The CNAR firms' business model requires investors to pay all applicable FINRA fees and other expenses associated with making the claim. Investors risk payment of thousands of dollars in expenses without any realistic or reasonable opportunity for recovery.

LFN does not agree that prohibiting CNAR firms from representing investors would significantly restrict investor access to advice in smaller matters (matters involving alleged damages of less than $100,000).[3] LFN has participated in a number of simplified arbitration claims (claims involving alleged damages of less than $50,000) filed by qualified attorneys. While it may be true that certain investor attorneys will not accept smaller claims, investors are not deprived of the ability to identify and retain qualified counsel simply because of the size of their claims. Licensed attorneys are willing to accept smaller claims because simplified arbitration, by its very design, requires less investment of time and resources by counsel. Implementation of a rule that prohibits CNAR firm involvement will ultimately benefit investors because smaller claims will be handled by competent legal counsel instead of CNAR firms.[4]

Thank you for the opportunity to share the foregoing comments. If you have any questions or would like to further discuss these issues, please feel free to contact me.

Sincerely,

Michael W. Arnold

Michael W. Arnold
AVP & Senior Counsel

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[2] See also 11/17/17 Comment Letter from Maddox Hargett & Caruso, PC and the article "Non-Attorney Representatives (NARs) - Do They Present a Clear and Present Danger to the Integrity of FINRA Arbitration." Mr. Caruso's article details the questionable qualifications of CNAR firms and the poor outcomes they consistently achieve for investors.

[3] LFN's experience has been that CNAR firms do not specialize in smaller matters, and, in fact, many matters pursued by CNAR firms involve substantial claims for damages.

[4] FINRA dispute resolution will also benefit through a reduction in the number of frivolous claims because attorneys are ethically bound not to pursue frivolous claims, where CNAR firms have no such ethical obligations.

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December 18, 2017

VIA EMAIL
Marcia E. Asquith
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1735 K Street, NW
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Re: Regulatory Notice 17-34, Non-Attorney Representation in Arbitration

Dear Ms. Asquith:

The Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University, operating through John Jay Legal Services, Inc. (PIRC),[1] welcomes the opportunity to submit this letter regarding FINRA's request for comment on the efficacy of allowing compensated non-attorneys to represent clients in securities arbitration and mediation. PIRC echoes FINRA's concerns regarding the competency and ethics of compensated Non-Attorney Representatives (NAR firms). Our main concern is ensuring that all investors, even those with claims under $100,000, can retain quality representation in FINRA's dispute resolution forum. As discussed below, if FINRA determines that NAR firms can provide such representation, PIRC believes that FINRA should put procedures in place to ensure adequate disclosure and verification to protect investors.

As a law school clinic, we see firsthand the difficulty for investors with small claims to obtain legal representation. Many of our referrals come from private attorneys who have determined that the investors' claims were too small to be financially viable for their firms. Our eligibility guidelines (and those of most, if not all, of the other law school securities arbitration clinics) include a damages limit of generally no more than $100,000 and are designed to fill the void for clients who cannot secure private legal representation due to the size of their claims.

[1] PIRC opened in 1997 as the nation's first law school clinic in which law students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt.

However, we understand that when clinic representation is not available due to lack of funding, jurisdictional issues, client preference, or other reasons, investors who cannot afford a private attorney may turn to NAR firms to assist them with their claims rather than bringing them *pro se* or not at all.

Although NAR firms could provide a valuable alternative for investors who are unable to obtain legal representation due to the small sizes of their claims, PIRC shares the concerns that are outlined in FINRA's Regulatory Notice, in particular the lack of professional conduct rules regulating these firms, as well as the lack of malpractice insurance requirements, licensing boards, and supervisory bodies. These deficiencies appear to have led to the unacceptable behaviors described in the notice and comments, including inappropriate business practices, excessive fees, unauthorized practice of law, representation by barred brokers, and poor quality representation by non-attorneys who do not understand the complexities of securities arbitration. As such, retaining a NAR firm can prove to be a double-edged sword for aggrieved investors. Not only were the investors harmed by their brokers, they now may be harmed again by NAR firms offering inadequate and, in some cases, unethical representation.

Based on the Regulatory Notice and the majority of the comments filed thus far, it appears that NAR firms provide more harm than good to investors and to the forum (though we acknowledge the submission of comments noting some success stories with NAR firms). PIRC encourages further research, possibly funded by the FINRA Investor Education Foundation, into whether investors fare better when represented by a NAR firm than when representing themselves *pro se*.

If FINRA determines that investors are better off being represented by a NAR firm than bringing a claim *pro se* or not bringing a claim at all and continues to allow NAR firms in the forum, PIRC believes the investors should be fully informed about the nature of that representation and FINRA should mandate that the NAR firms disclose and verify their adherence to all applicable state laws and FINRA rules. Rule 12208 permits parties to be represented by a person who is not an attorney, unless "(1) state law prohibits such representation, or (2) the person is currently suspended or barred from the securities industry in any capacity, or (3) the person is currently suspended from the practice of law or disbarred." However, according to Regulatory Notice 07-57:

> neither the staff nor the arbitration panel is required to verify the non-attorney's compliance with state law. If state law prohibits such representation or if the non-attorney representative is currently (i) suspended or barred from the securities industry or (ii) suspended from the practice of law or disbarred, the parties may raise the issue with the panel. Parties also may seek court or regulatory agency relief. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

We recommend that FINRA amend Rule 12208 to put the burden on the NAR firms to provide disclosures and verifications to FINRA and to their clients. NAR firms should be required to provide documentation that certifies that they are not in violation of relevant state law. Additionally, NAR firms should be required to disclose background information on all

employees and/or beneficial owners of the firm to ensure that no "barred" individual is practicing behind a veil. Finally, NAR firms should be required to disclose, in their retainer agreements, that they are not attorneys and therefore their communications with clients are not subject to the attorney-client privilege, and submit such agreements to FINRA for review and verification.

If FINRA determines that NAR firms provide a valuable resource to those investors who are unable to obtain legal representation due to the size of their claims, these safeguards should help ensure that aggrieved investors have additional recourse options while protecting them from being doubly harmed – once by their broker and then a second time by their non-attorney representative.

Respectfully submitted,

Pace Investor Rights Clinic

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December 18, 2017

VIA EMAIL TO PUBCOM@FINRA.ORG

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-34
Comment Concerning Compensated Non-Attorneys Representing Parties in Arbitration

Dear Ms. Asquith:

Obtaining legal assistance for FINRA matters involving less than $100,000 is very difficult for most investors. Unless an investor is lucky enough to live near a law school clinic or have a family member with a law degree willing to represent them on a *pro bono* basis, a regular American investor lacks access to economic justice if a dispute arises with his or her broker. As the director of a law school clinic, this is a problem I see nearly every day. If we are at our full capacity, we sometimes must turn away clients with valid claims. If an investor with a valid claim who resides in a jurisdiction with restrictive practice rules contacts us, we must likewise turn him or her away. In many of these circumstances, unless another clinic has capacity to assist the investor, these investors must either attempt to bring a claim on their own or work with a non-attorney representative (NAR).

While there may be significant risks to investors who proceed with a NAR, until law school clinics receive sustained funding to ensure that the existing clinics survive and more clinics can be added to high need areas, entirely eliminating NARs may cause more valid claims to go unfiled. Accordingly, FINRA should work with its law school clinical partners to identify funding sources to sustain and grow the high-quality, free law school clinics or place appropriate checks on NARs to ensure that investors are not harmed by them.

Currently, sixteen law school clinics provide legal representation to investors who are unable to obtain an attorney due to the size of their claim. Though each clinic has its own criteria for who they will represent, the clinics' eligibility guidelines allow us to provide free legal advice[1] to deserving clients. Our clients include retirees, hairdressers, mail carriers, welders, schoolteachers, and librarians.

Many securities arbitration clinics began with or at some point in time received financial support from the FINRA Investor Education Foundation or state regulators. Today, however, these sources do not fund new or existing clinics. Moreover, other lines of funding that supported the securities arbitration clinics due to our status as a consumer protection resource have also been discontinued. Unlike other types of law school clinics focused primarily on poverty law, securities arbitration clinics do not have access to outside funding sources despite the fact that our work often prevents aggrieved investors from becoming destitute.

Attorneys representing investors should be the norm due to the high level of protection they are required by law and ethical standards to provide to their clients. Attorneys owe a fiduciary duty to their clients. We must avoid conflicts of interest and protect confidential information from disclosure. We must provide competent and diligent representation. And we must do all of this for a reasonable fee, often continuing our representation even if our bills are not being paid.

Ensuring all investors who work with members and their associated persons are able to receive the services of a lawyer in the event a problem arises should be the norm. We recommend that FINRA investigate how to ensure all investors working with its members have access to economic justice.

Should it not be possible to secure attorneys for all aggrieved investors, we do not recommend entirely eliminating NARs. If clinics are not fully supported, more investors will need representation, and working with someone, albeit an unlicensed person lacking the protections lawyers provide, may be better than no representation. FINRA's focus on obtaining evidence and information concerning how investors interact with NARs is crucial. We are most concerned with the NARs whose practices we have anecdotally heard further victimize already harmed investors. Absent a fiduciary relationship like an attorney-client relationship, investors may be taken advantage of by a NAR. Investors are not protected from excessive NAR fees. NARs may not provide conflict-free, competent, or diligent advice. It is therefore critical to investor protection that after FINRA determines how NARs operate that steps then be taken to protect investors. Such steps might include a required disclosure about how a NAR differs from an attorney. NARs could be required to adhere to a fiduciary standard or carry insurance to protect against negligence or other malfeasance. NAR fees could be capped at a reasonable amount or they could be permitted to appear in the FINRA forum only if they did not charge for their services.

How NARs interact with investor clients is beyond our ken. We are familiar, however, with the protections that lawyers provide and urge FINRA to investigate sustaining and expanding the

[1] Under applicable law, while we do not charge our clients, we may seek reimbursement of the cost of our services from respondents under appropriate circumstances.

law school clinic program. Every investor, no matter the size of his or her investment portfolio, should have access to high-quality representation. We appreciate FINRA's efforts to investigate this important investor protection topic, and we look forward to further conversation. Please do not hesitate to reach out to us if you have any questions.

Best regards,

/s/ Nicole G. Iannarone

Nicole Iannarone
Assistant Clinical Professor

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December 18, 2017

Via email to pubcom@finra.org
Ms. Marcia E. Asquith
Officer of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 2006-1506

Re: **FINRA Regulatory Notice 17-34**
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

Thank you for the opportunity to comment on the issue of non-attorney representatives (NARs) in arbitration. I am writing this comment on behalf of the Securities Arbitration Clinic of St. John's University School of Law. The Securities Arbitration Clinic is part of the St. Vincent De Paul Legal Program, Inc., a not-for-profit legal services organization. The Securities Arbitration Clinic represents small aggrieved investors and is committed to investor education and protection. Accordingly, the Clinic has a strong interest in the rules governing the rights of customers pursuing claims in arbitration.

The Clinic itself has not had any direct contact with any NARs. Anecdotally, we believe several of our clients may have been approached by NARs before retaining the Clinic to represent them. One client conveyed that someone had "guaranteed" he would win his case, but would charge a 50% contingency fee.

The Clinic is concerned about the conduct outlined by FINRA in its regulatory notice, e.g. firms requiring a non-refundable retainer of $25,000, firms pursuing frivolous or stale claims in order to elicit settlement, and engaging in the unauthorized

practice of law. To the extent this conduct is occurring, it should not be permitted to continue. NARs are not governed by the same constraints governing attorneys. Most notably, there are no ethical rules limiting the conduct of the NARs. Individuals who fail to receive competent representation from an NAR may have no recourse.

The Clinic represents individuals, at no cost to the client, who cannot otherwise obtain representation. Usually, this is due to the size of the claim or concerns regarding collectability. Generally, the individuals with the small claims are especially vulnerable, because the losses may represent a substantial portion of their savings. It is essential, not just that these individuals have representation, but that they have competent representation. It does not appear that investors are receiving competent representation from NARs.

Given the reported problems associated with NARs who appear to operate regularly within the FINRA forum, the Clinic supports limiting the ability of such NARs to represent investors unless FINRA is able to meaningfully regulate them. The Clinic does not object to the ability of NARs who are not compensated, or NARs who are operating as part of a law school clinic, to represent investors.

Thank you for your consideration of this matter.

Very truly yours,

Christine Lazaro
Director

Mrs. Asquith,

I write to oppose compensated non-attorney representation in arbitration.

Participating as a representative for an aggrieved investor in a securities arbitration requires not only substantive knowledge of the securities laws and regulations, but also a firm understanding of the theories and principals of investing. One must carefully determine whether, in fact, an aggrieved investor has a proper claim, and if so, determine the proper measure of damages. Moreover, as the arbitration process has become more and more like formal court litigation, a knowledge of procedural and evidentiary rules is critical. Non-attorneys simply do not have such broad skill and knowledge sets.

Moreover, as attorneys, we are bound by the ethical rules of the states in which we are members of the Bar. Non-attorneys are obviously not subject to any such ethical obligations. Moreover, many of us carry malpractice insurance should we inadvertently default in executing a professional obligation owed to our clients. Non-attorneys do not provide such protections.

Many of the cases presented in arbitration involve conduct that has decimated an investor's lifetime of savings. Investors run the risk of again being harmed when represented by non-attorneys who do not know the procedural strategies to be employed offensively or defensively; who may not know how to properly assess the claims presented or the damages suffered; who are not bound by any ethical rules; and who likely cannot provide a meaningful remedy should they default in their presentation of cases. Since arbitration is generally final, the investor usually has only one opportunity to present their claim. Ineffective assistance by a non-attorneys is not a basis for setting aside an arbitration award. There are substantial risks in allowing a non-attorney to undertake the singular chance an investor has to recover their hard earned money, and FINRA ought not allow investors to be exposed to that risk.

The legislatures of the various States have prohibited the unauthorized practice of law because there is great danger when members of the public rely on non-attorneys to give them legal advice as to their rights and remedies. FINRA should similarly draw a clear line prohibiting non-attorneys from representing parties in the FINRA arbitration process.

Please note that I do not oppose law students, supervised by lawyers and/or professors, from representing investors in the FINRA forum.

Robert C. Port

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From the Desk of Samuel B. Edwards
sedwards@sseklaw.com

December 18, 2017

Marchia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

VIA Electronic Mail
pubcom@ginra.org

RE: Regulatory Notice 17-34 Comments

Dear Ms. Asquith,

My name is Sam Edwards. I have been an attorney representing customers in NASD/FINRA arbitrations for more than 15 years. In that time, my firm and I have represented thousands of investors and been counsel in hundreds of cases all across the country. I am also a member of FINRA's National Arbitration and Mediation Committee and on the Board of Directors for PIABA, an organization that devotes itself to protecting investors in securities arbitration. As a consistent practitioner in this area, I have a strong interest in the integrity of the forum and making sure it best protects investors who have been harmed. I strongly believe that Non-Attorney Representatives ("NARs") in FINRA arbitration hurt both the integrity of the forum as well as the investors FINRA arbitration is supposed to protect.

Over the years, a number of NARs groups have been created and attempted to represent investors in securities arbitration. Sadly, those NARs have almost always been run and staffed with former registered representatives with checkered pasts within the industry or elsewhere. Essentially, these individuals – for various reasons – can no longer make their living in the securities industry and are now trying to find another way to make their money from already aggrieved investors. This is often a second wrong to investors who do not typically understand the differences and disadvantages of being represented by a non-lawyer.

There are quite a few disadvantages that unsophisticated customers would not typically understand which will occur if they hire a NAR instead of a licensed attorney. For example, attorneys and their clients are afforded privileged communications which is vital to proper representation and effective communications between counsel and clients. As a matter of law, NARs receive no such privilege, meaning all of their conversations are discoverable. Additionally, NARS are not trained in the law, meaning they cannot give "legal advice", even when such advice is badly needed. As a result, the claims NARs present necessarily will lack proper legal foundation. While such legal inadequacies may not be an issue in some cases, as one arbitrator who commented on the notice stated, it is a large issue in other

cases and with other arbitrators. Some arbitrators, many of whom are attorneys, require strict adherence to the law in order to award in favor of a customer. Those same arbitrators make similar stringent rulings, in accordance with the law, on discovery issues that could be the difference between winning and losing a case. Furthermore, arbitrators are often asked to rule on legal issues, such as statutes of limitations, which would require legal analysis that a non-lawyer is not equipped to adequately handle. Last, non-lawyers may severely risk the sustainability of awards where they are involved. Since NARs necessarily cannot present adequate legal arguments, even the awards they win (which statistics show are far less than those where the customer has actual legal representation) may not result in money for the customer. That is, since the award may not be issued on the basis of a sound legal theory, as one would not be presented by a NAR, it is far more likely to be vacated if challenged. Moreover, if a respondent seeks to vacate an award, a NAR would be legally prohibited from representing the customer in that case as it would be the clear practice of law. As a result, the client will either have to incur more expenses to hire a new attorney, since the NAR cannot protect the award, or allow it to be vacated, making it worthless. Based on the above, and many other reasons, NARs are not adequate representatives for customers and thus do not best protect the interests of investors.

NARs also undermine the integrity of the FINRA arbitration system. As discussed earlier in this letter, and backed up extensively in PIABA's recently filed analysis of NARs, NARs have been historically created by and run by former registered representatives that can no longer survive in the securities industry. While FINRA changed the rules for NARs to exclude any suspended or removed member, there are many situations were a FINRA registered representative is not actually suspended, but because of their customer complaint or regulatory history (or even criminal history), they can no longer survive in the securities business. Unfortunately, those types of former registered representatives are often the ones behind NARs. Since these NARs are unregulated, they have no obligation to disclose these checkered histories to customers, who simply become another victim. Additionally, also because they are unregulated and unmonitored, NARs historically are very aggressive marketers for customers, reaching out directly to customers and enticing them to file cases, many of which are unwarranted (something NARs know attorneys are absolutely prohibited from doing). This hurts the FINRA arbitration system's integrity as frivolous cases are filed with NARs having no concern they could be sanctioned or otherwise in peril, since there is no one who has any control over NARs. My firm has received numerous calls over the years from customers who have been directly contacted by NARs (something unethical and disallowed in most states), who aggressively pushed the customer to send the NAR a check and to file a case, even if there was not a viable case.

The one argument that is repeatedly used to justify the existence of NARs is the need for them to help handle smaller cases. This is a false argument for at least two reasons. First, there are plenty of attorneys across the nation who handle smaller cases for investors. While my own firm regularly handles eight and nine figure cases on behalf of wealthy individual clients and institutional investors, we also handle small cases for deserving customers. We believe that is the right thing to do and we know many firms who do the same thing. In addition, there are a number of Law School Clinics that handle only small cases, typically for little or no fee. There is not a real need for NARs to handle small cases that attorneys do not want. Second, NARs do not limit themselves to only helping small investors. NARs are business enterprises who seek to make as much money as possible, often at the expense of already victimized customers. To that end, NARs routinely handle cases that are large enough for any reputable law firm because the NAR wants to make as much money as possible, not just to help investors. The problem with that situation is that such large cases often require extensive legal knowledge and preparation that

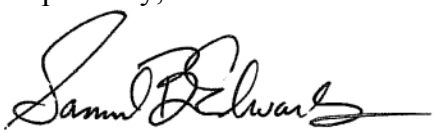
the NARs are not equipped or qualified to handle. The net result is that the wrong party is representing the customer, who is not going to get a fair deal in FINRA arbitration. That ultimately undermines customer confidence in the fairness of FINRA arbitration, undermining the integrity of the forum.

I certainly realize that these comments may be seen as self-serving, given that my firm and I are, in theory, in competition with NARs. However, I can assure FINRA that my firm and I are plenty busy and in no need to discourage competition, as long as it is valid completion that will help investors. My interest in writing this comment is not financial, but truly to do what is right for investors.

Over my more than 15 years of practicing in this forum, NARs have always been an issue. Over the last few years, more and more seem to have developed and have used the growth of the internet and other technologies to become even more prolific. While there surely are a handful of ethical NARs who are really trying to do the best thing for customers and sincerely believe they are the best alternative, those are, sadly, the exception. Moreover, even if these NARs have good intentions, that does not mean they provide the best option for customers. While attorneys are not always the answer to a question and are far from perfect, in this situation, they are a far better alternative for everyone involved. The imposition of rules of conduct, ethical standards and disclosure obligations require that attorneys meet certain requirements that NARs often flaunt. Attorneys are held accountable for their actions and will suffer stiff penalties if any of their obligations are not met. NARs operate without these rules or obligations, unquestionably to the detriment of investors.

FINRA publicly says its mission is “Investor Protection” and I firmly believe this is an investor protection issue. FINRA is operating an alternative to litigation and must make sure that it is a fair and valuable alternative. Requiring that those who represent parties in arbitration be licensed attorneys, just as FINRA requires brokers to be licensed, would be in the best interest of investors.

Respectfully,



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December 18, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

RE: Regulatory Notice 17-34, Non-Attorney Representatives in Arbitration

Dear Ms. Asquith,

Our firm duly submits this letter as a comment to Regulatory Notice 17-34. We are a law firm located in New York, and have experience working alongside non-attorney representatives ("NAR firms"). We believe that FINRA should allow for open representation and not restrict the use of NAR firms.

The regulatory notice correctly identifies that there is a representation gap where law firms choose not to represent investors with small claims; and where student clinics choose not represent clients above a certain income threshold or involved in a non-customer-broker dispute. NAR firms provide alternative representation to those who fall in the gap. Our experience with an NAR firm is that they provide excellent representation and deliver great results for their clients.

Transparency surrounding FINRA's dispute resolution forum is important here. The Status Report on FINRA Dispute Resolution Task Force recommended that "FINRA should adopt a policy of promoting, to the maximum extent possible, transparency about its dispute resolution forum." *See* https://www.finra.org/sites/default/files/DR_task_report_status_0 20817.pdf. FINRA arbitration should be open and impartial towards self-representation, non-compensated representation, NAR firm representation, attorney representation, and student clinic representation. Attorney representation should not be favored by FINRA so that people who engage other alternative representation, by choice or by force, obtain an unfavorable outcome in arbitration. The bias surrounding NAR firm representation affects the neutrality of the FINRA forum.

Now, to address some concerns raised in the Regulatory Notice. First, the Regulatory Notice states that no rules of professional conduct apply to NAR firms' activities. However, there are no rules of professional conduct applicable to arbitrators. Yet, FINRA has managed

to allow anyone to be an arbitrator. In fact, to be an arbitrator, "no previous arbitration, securities or legal experience is required to apply—just five years of paid work experience and two years of college-level credits." See https://www.finra.org/arbitration-and-mediation/become-finra-arbitrator. This very low bar keeps FINRA arbitration neutral to repeat players and industry insiders. Similarly, NAR firms keep arbitration open and accessible to non-industry insiders.

As the Regulatory Notice points out, "economically rational investors will likely retain the representation that provides the most benefits relative to its costs, including no representation if that is the most beneficial option." Thus, NARs who do not have insurance is simply another cost to be factored into this alternative form of representation. It it should be the investor's decision, and not FINRA's, as to whether they would benefit from the NAR firm's representation or avoid certain firms that do not have client protections for malpractice. The decision as to whether to incur additional costs should be the investors, as FINRA is a neutral and open forum.

Second, FINRA correctly points out that investors who do not have the option to use an NAR firm will incur additional costs. First, investors with small claims will be less likely to find beneficial representation. Second, the "loss of representation could result in worse arbitration outcomes." Third, the number of investors who are unaware they could seek recourse in arbitration could decline due to restrictions on the marketing by NAR firms. Repeat attorneys have clients who already know their right to recourse in arbitration. The process is more automatic for these attorneys' clients. Whereas, an investor with a small claim might just be made aware by NAR marketing of the availability of the arbitration forum for their dispute against their broker-dealers. Fourth, the quality and completeness of the information presented in arbitration could be affected.

Our firm has worked with an NAR firm on matters before FINRA. On one arbitration matter, the NAR firm represented an individual customer in is effort to recover against his broker-dealer. The NAR firm was able to assist the customer in recovering compensatory damages and hearing session fees against the respondent. The NAR firm requested the presence of counsel from our law firm because attorneys for the respondent broker-dealer were shaming the NAR firm. They were portraying to the arbitration panel that the NARs were incompetent and saying rubbish. Not only is this behavior detrimental to a valid customer complaint presented before the arbitration panel, but it also biases the panel against a customer represented by an NAR firm. Not every NAR firm can seek out a law firm to add credence to the arbitration room. This inherent bias against NAR firms distracts from and is detrimental to valid customer complaints who lose their opportunity to be heard before an unbiased, neutral arbitration panel.

On another arbitration matter, a law firm had initially rejected taking on this individual customer's case because the amount of damages initially sought were not worth its time or effort. The customer then sought representation from an NAR firm. The NAR firm was able to negotiate a settlement amount from the broker-dealer firm for a large sum. Thereby, customer was now an attractive client for the law firm, and the firm swooped in to try and represent the customer. However, the attorneys obtained the same result as the NAR firm. The law firm still billed the customer for its representation, even though they had not

achieved a different or better result. The NAR firm and the customer requested our law firm's assistance after attorneys swooped in when the monetary amount was advantageous.

FINRA should not entirely prohibit NAR firms from representing clients at the forum. If there should be restrictions at all, then the appropriate restrictions should be ones which prevent the unauthorized practice of law and to prevent fraud.

Instead, FINRA could consider providing an informative section on NAR, similar to its section on legal representation. The arbitration overview page that discusses legal representation does not provide a full account of the alternatives. *See* https://www.finra.org/arbitration-and-mediation/arbitration-overview. FINRA might consider having a full section on NAR.

Respectfully Submitted,

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December 17, 2017

Marcia E. Asquith
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Washington, DC 20006-1506

Re: Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Ms. Asquith:

Please allow this letter to serve as my response to FINRA's request for comment regarding non-attorney representatives ("NAR") in FINRA arbitration.

Allow me to preface this comment by stating that I have been honored and privileged to have been able to represent customers (and the occasional broker) in FINRA for approximately 5 years now. I have had the opportunity to arbitrate before some wonderful arbitrators (even in cases where I have lost), both attorney and non-attorney. I have also had the privilege of working with some absolutely fantastic attorneys (and some non-attorneys) on the other side of the aisle. Nothing that I say in this comment should be taken as an insult or denigration to any person.

I feel compelled to take the time to write this letter because of a number of the comments that have been submitted to FINRA despite the authors of such comments apparently not actually having any actual experience with any NAR firms. Instead, many of the comments seem to be filed by claimant's attorneys who potentially do not have a lot of business right now due to the 8-year bull market, or by respondent firms who don't like to be taken to arbitration. As can be clearly understood, the motivations behind such comments may be less than altruistic.

Accordingly, my comment should perhaps be accorded some additional weight, as my comment will be against my own interests. Obviously, the less competition in the

forum, the more clients potentially available for me to represent. However, I feel compelled to do what is in the best interest of investors, rather than in my own self-interest.

I do note as a proviso that I do not and cannot comment on all NAR firms. I have experience with only one particular NAR firm, which unfortunately has been the victim of unjustified attack in a couple of the comments previously submitted.

I began litigating in FINRA approximately 5 years ago. At the time, as a result of a mediation in one of my cases, I was introduced by a very well-known mediator in this forum to an NAR firm by the name of Stock Market Recovery Consultants ("SMRC"). The mediator believed that I could be of help for this firm.

Stock Market Recovery Consultants has been helping investors recover investment losses before FINRA for 15 years. In that time, they have helped hundreds of (if not over one thousand) investors recover millions upon millions of dollars, including numerous six-figure settlements. While originally SMRC litigated all the way through and including the hearings themselves, they stopped doing so because as an NAR firm, they felt that they were not given a fair chance by certain arbitrators, who seemed to have a bias against non-attorney representatives. Accordingly, SMRC began employing attorneys to handle the arbitration hearings in the event a case could not be resolved. SMRC has retained me on a number of occasions to handle hearings in certain of their cases. This is even reflected on some of the awards that I have been able to achieve over the years. I have recovered millions of dollars for investors in cases that originally began as SMRC cases.

SMRC will also seek my counsel and/or involvement in cases where there are particular legal issues involved. SMRC does not hold themselves out as attorneys, and they know their limitations and when a particular issue is above their ability, in which case they act accordingly and, in my humble opinion, responsibly.

To my own personal knowledge, SMRC also assists investors when nobody else will. There have been suggestions made in the comments previously submitted that perhaps NAR firms should be limited to claims of $100,000 or less. I believe that this suggestions will harm and not help investors. SMRC has helped hundreds of investors with claims over $100,000. The following is a typical scenario that I frequently encounter in my practice. I will get a call from a potential client who saw my name in some awards, or who was referred to me by SMRC, and the client has suffered a 6-figure or even 7-figure loss. The problem, however, is that the losses were incurred 6, 7, 8+ years before. When I ask the investor why they waited so long to attempt to do something, they respond that they tried and reached out to dozens of lawyers, and nobody was willing to take their case. Many times these investors live in small towns, and there are a few local lawyers, none of whom know anything about securities arbitration. Other times, the clients have reached out to multiple securities arbitration lawyers, but none of them were willing to take the case because the prospects for recovery were low or because the attorney wanted a 5-figure retainer up-front which the client could not afford. Obviously, a client who has just lost their life savings is not going to be able to, or willing to, risk whatever little money they have left. Unfortunately, unless I have a good faith argument to make to a Panel, I am

forced to turn these clients away, and people who would have had a good chance at recovery had they been able to find someone to help them instead recover nothing. Even when I have an argument that I can make, many times some arbitrators will take a strict stance and dismiss the claim on eligibility grounds.

I will give just two examples specifically involving SMRC, although I could give dozens more.

I had one case where my client knew a very well-to-do, big-name lawyer in his city. When he suffered losses in his account (several hundred thousand dollars of losses), he spoke to this lawyer friend of his who told him that he had no case and shouldn't even bother. Of course, not understanding anything about securities law, the contours of securities arbitration, or FINRA concepts such as suitability, this attorney was 100% incorrect. The client in fact, in my opinion, had a very good case, as he was an elderly gentleman whose retirement account had been invested in rather aggressive equities. The gentleman was referred to me by SMRC, and we filed the case, but due to the passage of time, the settlement value of our case was drastically reduced, and making matters worse, due to his advanced age, my client actually passed away prior to the hearing.

In another case in which SMRC retained me to handle the hearing, involving a widow whose husband had passed away from cancer leaving her with his accounts, in the middle of cross-examination, Respondent's counsel asked her why she had waited so long to file the claim. With tears pouring down her face, the widow emotionally exclaimed that she had spoken to dozen of attorneys, "but nobody would help me. I heard an advertisement on the radio for Stock Market Recovery Consultants, and I called, and they listened to my story and I begged them, will you help me? And Benjamin Lapin[1] said, I WILL HELP YOU!" Bear in mind that this was not a small case. This widow had suffered 6-figure damages (approximately $200,000), and yet no attorney was willing to take her case. The passage of time substantially impacted this case, and this investor was undoubtedly harmed by her inability to find representation prior to SMRC.

I know many, many respondent-side attorneys and mediators who absolutely love Benjamin Lapin and Mitchell Markowitz, the principals of SMRC. They cannot voice their support, for obvious reasons. SMRC has done nothing but help investors in FINRA for 15 years now. And that help has not been limited to only small claims. SMRC has helped investors with losses as low as a few thousand dollars to losses in the millions. The suggestion that only customers with small claims have been helped by NAR firms is a patently false absurdity.

FINRA's Notice mentions that FINRA has been informed of NAR firms taking up-front fees of $25,000. I know that FINRA cannot possibly be referring to SMRC, because SMRC does not take any up-front fees from clients. I am aware, however, of numerous Claimant's lawyers who take up-front non-refundable retainer fees in the 5-figures, due to the way that FINRA has devolved into a very expensive pseudo-court proceeding full of oppressive discovery and abusive motion practice, where rather than customers being able

[1] Benjamin Lapin is one of principals of SMRC.

to simply present their story and get a ruling, the customer does not stand a chance without spending tens of thousands of dollars on experts and expert reports. Accordingly, since up-front retainers are taken by some NAR firms as well as many (if not most) attorneys, I severely question why FINRA believes that this is a concern solely relating to NAR firms as opposed to the forum in general. It is not the representative that creates the need for these fees but the obscenely high standards that have unfortunately (and in my opinion, incorrectly) been created through practice for a claimant to have any shot at winning a case. If FINRA is aware of particular instances of fraud or overreach by particular NAR firms (or attorneys), then I would imagine FINRA certainly has the ability to deal directly with that NAR firm (or attorney), and the customer would certainly have legal options available to them in state court or federal court.

Similarly, I question the statement mentioned in the Notice, and parroted by many of the anti-NAR comments previously submitted, that NAR firms should perhaps not be allowed to represent investors before FINRA because they do not have malpractice insurance. To my knowledge, there is only one state in the country that requires attorneys to maintain malpractice insurance: the State of Oregon. I know plenty of attorneys who do not carry malpractice insurance. Is FINRA going to next start soliciting comments on what types of attorneys can practice before FINRA? Once FINRA starts deciding who can practice before it and under what conditions, despite the individual or firm not having done anything wrong, simply on the basis of a broad classification, it is a very dangerous and slippery slope until someone else starts deciding what other conditions and exclusions they want to start imposing.

Again, if FINRA is aware of particular abuses by particular firms, then that is something that FINRA undoubtedly has the jurisdiction to handle. However, to start imposing broad, and as demonstrated above, arbitrary rules on a subset of representatives is far too overbroad and will only have the effect of harming, not helping investors.

In fact, if FINRA is so worried about investors (as it should be, since FINRA's stated goal is investor protection) and insurance requirements, then FINRA should be soliciting comments on imposing insurance requirements on broker-dealers and brokers, and not on customer representatives. I have dozens of unpaid awards because the broker-dealer went out of business and there was no insurance coverage. Why is FINRA worrying about malpractice committed in the course of arbitration (a very difficult cause of action to maintain or win on in court regardless of the person allegedly committing the malpractice), and not the conduct of the broker-dealer leading to the arbitration in the first place?! Is FINRA aware of even a single case where an NAR firm was successfully sued for malpractice in state court but there were no funds to satisfy the award, or is this an academic straw-man submitted by those who would seek to do away with NAR firms for their own motivations? I am certainly aware of unpaid arbitration awards; being the recipient of current unpaid awards in the amount of millions of dollars. Why isn't this FINRA's primary concern?

FINRA's Notice also notes that there are no rules of professional conduct for NAR firms, whereas such rules exist for attorneys. However, this to me is a red herring. Under

the common law of every state in this country, NAR firms representing clients in arbitration would have the broadest of fiduciary duty to their clients, including the duties of care, good faith, loyalty, and competence. If an NAR firm chooses to act with anything other than absolute professional conduct, they would be putting themselves in severe harm's way. Some of the comments suggest that there is recourse for an aggrieved customer against an attorney but not an NAR firm. I do not understand this suggestion. Why is a lawsuit against an attorney for malpractice different than a lawsuit against an NAR firm for breach of fiduciary duty?

FINRA's Notice also mentions a concern that NAR firms use the forum for inappropriate business practices, or to file frivolous or stale claims in order to elicit a settlement. Inappropriate according to who? Frivolous or stale according to who? The broker-dealers who have lost the investors their life savings? The broker-dealers whose employees have engaged in fraudulent and unethical business practices? Is FINRA now usurping the role of the arbitrators to determine each case on its own merits? This section of the Notice really puzzles me. If I withdrew or failed to file a case every time a respondent told me that I had no case, or that my case was frivolous, I would have had only one case over the past 5 years. In these same cases, where I am told by the broker-dealer's attorney that the case was "stale" or "frivolous" or that I had "no case," I have gone on to win dozens of awards and settlements, including numerous 6-figure awards and settlements (including cases that I have taken over from SMRC, where I was informed by the respondent that the case was "stale" and/or "frivolous"). Clearly FINRA believes that arbitrators are competent to make such determinations, otherwise FINRA would adjudicate claims rather than arbitrators. If a claim is "stale" or "frivolous," arbitrators are certainly competent to make that determination. I do not shed tears for broker-dealers who make hundreds of millions or billions of dollars a quarter, or whose entire businesses are modeled on shady, boiler-room type tactics. If these brokerage firms would spend more time acting like responsible fiduciaries and monitoring their associated persons rather than trying to figure out what crazy new product they can use to squeeze out another commission from the customer, maybe there would be fewer investor losses and fewer arbitrations filed. Again, this type of argument leads to the same slippery slope mentioned above. FINRA should not be getting involved whatsoever in what constitutes an allegedly "stale" or "frivolous" claim. Trust me when I say that broker-dealers fare far better in FINRA than they would in court, otherwise they would not fight so hard every time the claimant's bar attempts to do away with mandatory arbitration. If these broker-dealers really think that FINRA's forum is being abused, then do away with the whole mandatory arbitration and let customers start filing claims in court, which will be ten times cheaper for customers in terms of forum fees, and where they will have far better chances of winning and far higher damages when they do win.

The fact is that restricting NAR firms would do nothing other than provide fewer options for defrauded investors, which as I described above, can have devastating consequences. It would also interfere with a customer's freedom to contract, which I believe would also violate the Federal Arbitration Act and the Supreme Court's interpretation thereof. Similarly, while I do not comment on whether those states who prohibit NAR practice are acting contrary to the FAA (and whose restrictions are therefore

preempted by, and consequently voided by, the Supremacy Clause), the fact is that every such State has the option to prosecute and obtain an injunction against such NAR firm should it deem such action appropriate.

The suggestion that FINRA needs to save customers from hiring NAR firms assumes that customers are unable to perform their own due diligence, and is implicitly quite insulting to the intelligence of investors. If NAR firms are holding themselves out as attorneys, then they are committing a crime. If NAR firms are not holding themselves out as attorneys, then what right does FINRA have to step in and tell investors that they cannot select the representatives of their choosing? As I stated above, with regard to the personal knowledge I have of SMRC, they are often the only ones willing to represent a customer without taking money upfront, something that hardly any attorney is willing to do. I would also imagine that clinics and the like have certain restrictions on the types of investors they are willing to represent (presumably elderly or low-income individuals), which means that for everyone else, FINRA's suggested restriction of NAR firms would effectively be precluding them from having any representation if they are unable to find an attorney willing to take their case.

One of the comments has pointed out that this very same concern regarding NAR representation in the NASD has been voiced for over 25 years. Nothing was done then, and yet here we are 25 years later. FINRA is still operating, broker-dealers are still operating, customers are still being represented, and arbitration decisions are still being rendered. Clearly this is not an issue that requires broad action. If there is a specific NAR firm that has been engaging in specific repeated abuses, then FINRA should take it up with that specific NAR firm.

If FINRA is really interested in investor protection, then there are far better things to be worried about. Rather than asking whether NAR firms are competent to represent investors before FINRA, we should be asking why FINRA has become so difficult to litigate in that one would even need an attorney in the first place. Arbitration is supposed to be a simplified process where an investor should be able to present their claim without the need for an attorney. Unfortunately, FINRA has become just a far more expensive substitute for court where the customers lose their right to have their case heard by a jury of their peers and where attorneys engage in abusive litigation tactics, particularly when it comes to discovery and motion practice. FINRA has become a forum where for some reason, common sense has gone out the window, and it has become almost mandatory to have to pay an expert tens of thousands of dollars otherwise the customer stands no chance of recovery. Instead of worrying about NAR firms and what I imagine is a minimal impact on the forum, FINRA should be asking real questions, such as why customers fare so much worse in FINRA than they would in court, and why so often even when a customer is successful, the damages awarded are a minute fraction of what a plaintiff would have received from a jury in court.

Some of the comments previously posted have listed anecdotal stories of a single negative experience with an NAR firm. I do not denigrate these opinions nor do anything other than commiserate with what must have been a very trying experience. However, I

can unequivocally state that FINRA's actions in painting any broad strokes (again, I am not stating that FINRA cannot and should not do something about repeated instances of particular abuses of which FINRA is made aware and which can be substantiated) will do investors far more harm than good.

Again, I cannot speak to my personal experience with NAR firms other than SMRC and their impact on investors. That experience and SMRC's impact on investors to my knowledge has been nothing but positive, and as a whole I believe SMRC has done more for investor protection than any other claimant's representative.

Respectfully Submitted,

Jonathan E. Neuman, Esq.

DKR

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December 19, 2017

Via Email Only
pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: FINRA Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

I am a partner and licensed attorney with the law firm Dimond Kaplan & Rothstein, P.A. I recently served on FINRA's National Arbitration and Mediation Committee (NAMC) and I am a long-time member of the Public Investors Arbitration Bar Association (PIABA). One of my firm's main practice areas, and most of my practice, is devoted to representing individual and institutional investors who have lost money as a result of investment fraud or broker or brokerage firm misconduct.

I write to comment on compensated, non-attorney representatives in FINRA arbitration proceedings. (Note: My comments exclude those non-attorney law students who represent investors through law school arbitration clinics and those non-attorney representatives, such as family members, who represent brokerage firm customers without compensation.)

The pursuit of a FINRA arbitration claim to recover investment losses is a significant undertaking. It generally will be the investor's only opportunity to seek the recovery of their losses and the binding and largely non-appealable nature of arbitration make the proper handling of a claim crucial. Brokerage firms typically are represented by experienced and knowledgeable attorneys and an aggrieved investor's choice of a representative can play a significant role in the outcome of the dispute. I have concerns that compensated, non-attorney representatives can put an aggrieved investor at a grave disadvantage and expose the investor to unnecessary risk.

While FINRA arbitration lacks many of the procedural rules of court proceedings, FINRA arbitration is governed by its own set of rules specific to the forum. As such, contrary to the perception that the FINRA arbitration is an informal, easy-to-understand process, it can be difficult to navigate for those who are not well-versed in the process. And over the years, the

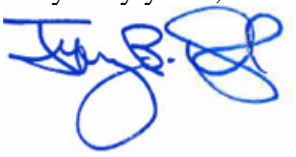
FINRA arbitration process has evolved into a specialized practice area that requires a skilled and experienced practitioner.

Aggrieved investors using paid, non-attorney representatives generally will not get the benefit of a someone who can navigate the intricacies of a FINRA proceeding with the skill of a trained lawyer. Therefore, aggrieved investors who hire such representatives may be risking their lone chance of a positive outcome of their dispute with a brokerage firm.

Non-attorney representatives are not governed by the strict ethical standards to which licensed attorneys are held. The standards to which attorneys are held involve matters including: treating clients honestly, properly and timely informing clients of the status of their cases, the amount of attorneys' fees that can be charged, the manner in which attorneys' fees that can charged, and the proper handling of client funds. Non-attorney representatives are not bound by such strict requirements, including no obligation to protect clients' recovered monies in trust accounts. Simply, aggrieved investors whose FINRA claims are handled by compensated, non-attorney representatives are not protected by rules that govern licensed attorneys. This is especially troubling because many non-attorney representatives have been suspended or barred from the securities industry for improper conduct involving a lack of integrity and abuse of customers.

I have discussed the handling of customer claims with at least one compensated, non-attorney and was appalled by the poor judgment and errant decisions displayed within the cases. No aggrieved investor should be subjected to such misguided and ungoverned representation. I believe that FINRA should act promptly and assertively to prohibit compensated, non-attorney representatives from representing aggrieved investors/customers in FINRA's arbitration forum.

Very truly yours,



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ANTHONY MICHAEL SABINO
MARY JANE C. SABINO (1957-2006)

ADMITTED IN NEW YORK
PENNSYLVANIA
AND THE UNITED STATES
SUPREME COURT

14 December 2017

VIA REGULAR MAIL

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re:*Non-Attorney Representatives In Arbitration*
FINRA Request for Comment, Reg. Notice 17-34

Dear Ms. Asquith:

I respectfully comment on the above. It is my considered opinion that FINRA *not allow* non-attorneys to represent parties in FINRA arbitrations, primarily because such non-attorneys unavoidably indulge in the unauthorized practice of law, and thereby endanger the public good by engaging in a highly regulated profession, but without the checks and balances that attorney regulation provides.

Briefly as to my *bona fides*, I have actively served as a FINRA arbitration Chair for over a decade, and a FINRA arbitrator for two decades. I have an active securities litigation and arbitration practice, and I teach securities arbitration and securities law at a major university. Respectfully, my opinions herein are grounded in those experiences, and my knowledge of the field.

I shall not burden you with details of matters which are, in my estimation, self-evident. Representing any party in a FINRA arbitration implicates, by necessity, issues of law, including, but not limited to, common law fraud, agency, and contract law. This is to say nothing with respect to the far more complex issues of securities fraud, control person liability, and FINRA rules and best practices, just to name a few. To be sure, the foregoing list is not exhaustive.

It is inevitable that any person rendering counsel to a party in a FINRA arbitration must, per force, give advice that is legal in nature. This cannot be avoided. And given that the dispensing of legal advice is a regulated professional practice, with a myriad of safeguards pertaining to education, ethics, and professional responsibility, permitting non-attorneys to act in a representative capacity in FINRA arbitrations is to condone the unauthorized practice of law.

To the nay-sayers that retort I am simply an attorney protecting his "turf," I respond "not at all." Rather, I seek to protect the public good.

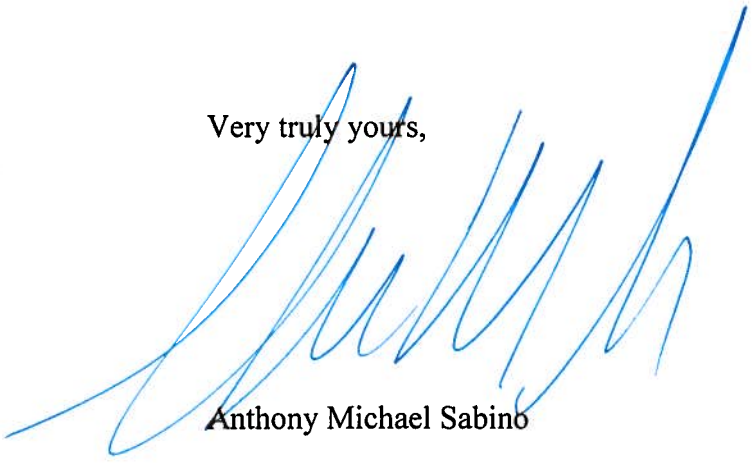
First, parties who do not wish to retain counsel can simply appear *pro se*. They may even obtain advice from non-attorneys outside the arbitral forum, if they so wish. Therefore, the prerogative of *pro se* appearances is preserved.

Second, non-attorneys who are derelict in their duties to properly represent a party in a FINRA arbitration evade any meaningful sanction for their misfeasance. If an attorney is deficient in her obligations to properly represent a client in a FINRA arbitration, there are a host of penalties that can be inflicted upon the wrongdoing attorney. But for the non-attorney, precisely because she is not an attorney, is immune from those remedies. In short, the public is exposed to such dangers, without hope of redress.

For all these reasons, I respectfully suggest that FINRA consider barring non-attorneys from representing parties in FINRA arbitrations.

I thank you for your time. I remain, respectfully,

Very truly yours,



Anthony Michael Sabino

AMS/dal

THADDEUS KABAT

15 A Main Street
Hatfield, MA 01038

FINRA REGULATORY NOTICE 17-34

NON-ATTORNEY REPRESENTATIVES IN ARBITRATION

MARCIA ASQUITH
OFFICE OF THE COPORATE SECRETARY
FINRA
1735 K STREET NW
WASHINGTON DC 20006

Dear Ms. Asquith,

On behalf of myself, I have had a very good experience with my non-attorney representation firm, Cold Spring Advisory. Throughout the process, I had very good communication with Cold Spring representatives and I would say they were competent in and thorough in handling my Finra arbitration. They have stayed on top of all aspects on a continual basis.
During this process what I had learned, which I did not appreciate, is that Finra does not require brokers to have insurance nor have they created a pool of funds to pay awards and settlements. As of now,when a broker is found guilty, victims like myself are threatened with the broker filing for bankruptcy, in which case I would receive nothing. Essentially being victimized once again. Cold Spring ended up having to renegotiate the terms of the deal so that I could get paid and did a great job of that. However, after one year we have only recovered $17,000 of the $46,000 awarded settlement with constant late payments by the broker. This was not fair, especially after I won my case. I should have just received my money and it should have been over with. Finra allows to many loopholes for their crooked brokers, when they should be more worried about the clients and how we are going to be paid, it's just not right! This is what I see, first-hand, what is wrong with the system, not NAR firms and certainly not Cold Spring Advisory. In my business, if I make a mistake, I must pay within 30 days, Why do these brokers get all the slack and Finra allows for this crap. How can Finra possibly allow these brokers to conitue to be members while they are currently owing millions of dollars to their victims.
Thank god, I was represented by this NAR firm, because I know that if I was with an attorney firm knowing the amount of time Cold Spring put into my case, there would definitely be no money left for me after the attorney fees were paid. Cold Spring had the correct formula from the start and it worked out for me in the end. It looks to me like the establishment wants to restrict NAR firms in some way, but it certainly is not the way us clients want it.

I saw Martin Kaplan's comment from Gurse Kaplin Nusbaum. What a self-serving joke of a letter that was and exactly what a lawyer would want which is to limit our options either to use a lawyer like him or to go pro se. Finra must see right through his comment and take it for what it is, another lawyer trying to corner the market for themselves.

I, without a doubt, received competent services from Cold Spring Advisory, they made the deal economical for me, they were attentive and they undeniably knew the securities business inside and out.

I have been involved with a lawsuit within my business and after 3 lawyers I ended up with nothing and the attorney ended up with all the money, great Canons of Ethics those attorney have. If I compare my experience with Cold Spring to my experience with attorneys, I got positive results out of Cold Spring compared to litigation bills from my attorneys without results, hands down I pick Cold Spring Advisory!

Cold Spring's method is calculable, straight forward, respected and honored, so you don't bleed to death, unlike with attorneys. I chose Cold Spring because it was a reasonable avenue, with real people, with real cooperation and in the end I was impressed with their operation and most important the results.

So, I don't think Finra should amend, the codes or restrict in anyway NAR firms, I feel I should be afforded my right to pick how and who I can hire to represent me to recover my funds. Finra should focus on dealing with the brokers who owe millions of dollars to their victims, instead of allowing them shelter to continue abusing innocent people without paying their debts. Finra should be more concerned with getting these awards into the hands of us victims instead of tying our hands during the arbitration process.

Sincerely,

THADDEUS KABAT

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December 21, 2017

Kenneth L Andrichick
Chief Counsel, Office of Dispute Resolution, FINRA
One Liberty Plaza, 165 Broadway
New York, New York 10006

Ken,

Following up on our recent telephone conversation, I wanted to submit my comments on the issue of non-attorney representation in FINRA arbitration.

I feel that a compromise may be in order between the current FINRA policy and the absolute ban proposed by Mr. Stoltman and others. Why not require that non-attorneys be required to be held to certain standards and be certified by FINRA?

I have been a FINRA arbitrator for 27 years and have dealt with nearly 200 cases ranging from claims for as little as a few thousand dollars to more than a hundred million. My interest in FINRA arbitration arose from a passion for day-trading and technical analysis of the markets at a time when I was pursuing my former career as a cancer research scientist. My involvement in arbitration led to an interest in becoming a FINRA mediator, which I qualified for in 2007. I subsequently became certified to conduct North Carolina Superior Court, Workers' Comp, Estates & Guardianships and Family Financial cases. I was spending so much time learning the law from bar review materials that I decided to go to law school. I took live online classes from the California School of Law which was approved by the state bar but not the ABA. I graduated with a JD cum laude in 2014, but elected not to take the California state bar exam since at that time passing it would not have entitled me to sit for the North Carolina bar exam. That has since changed, but I've decided not to pursue it. I've recently been certified to represent veterans in federal appeals cases and I state on my website that I will represent parties in FINRA arbitration. I have not to date done so, but feel competent to do so if the opportunity arises.

A few years ago I was arbitrating a North Carolina FINRA case when a month before the hearing I received a motion to disqualify from respondent's attorney based on the fact that claimant's representative was not an attorney. He cited some cases from other states and some cease and desist letters from the NC State Bar, none of which I deemed analogous or pertinent to the instant matter. I wrote the attached opinion and denied the motion. At the hearing the claimant's representative performed more competently than certain attorneys I've dealt with in the past.

While I'm certain there are some non-attorneys currently not suited to represent parties in this forum who are abusing the system, I'm sure there are others like the one I dealt with who are capable of doing a good job.

Therefore, I argue that a wholesale ban on non-attorney representation is unwarranted, but that some regulation may be required to curb what abuses may be in play at present.

Respectfully,

Leonard E. Benade, PhD JD

IN ARBITRATION BEFORE FINRA

TIMOTHY R HULLETT, CLAIMANT, vs. TD AMERITRADE, INC, RESPONDENT	FINRA DISPUTE RESOLUTION No. 11-01519

ORDER ON MOTION TO DISQUALIFY

The Chair has considered the written submissions of the parties as well as the oral arguments presented in a telephonic pre-hearing conference on January 5, 2012. The Chair has not considered the aspersions contained therein and cast by each party against the other.

This would appear to be an issue of first impression for FINRA arbitration venued in North Carolina. Both sides point to FINRA Rule 12208 which provides that a party may be represented by a non-attorney *unless state law prohibits*. Respondent cites the North Carolina Revised Uniform Arbitration Act (N.C.G.S. § 1-569.16): "A party to an arbitration process may be represented by an attorney or attorneys," and argues that this would prohibit Claimant's representative, a non-attorney, from appearing on Claimant's behalf in this proceeding. Respondent further argues that Chapter 84 of the North Carolina General Laws regarding the unauthorized practice of law also prohibits that

representation: Chapter 84-4 states that anything construed as the practice of law may only be performed by active members of the Bar of the State of North Carolina. Respondent points out that 84-5(b) provides the exception that permits out-of-state attorneys (such as Respondent's counsel) to serve as in-house counsel for corporations involved in non-legal business (such as Respondent). Claimant counters that FINRA arbitration code itself (Rule 12208) permits his representation and that Respondent has failed to adequately support his contention that North Carolina state law prohibits such representation. Claimant argues (FINRA Regulatory Notice 07-57) that 1) the arbitration panel is not required to verify the non-attorney's compliance with state law, 2) the parties may seek court or regulatory agency relief, and 3) that in the absence of a court order the arbitration proceeding shall not be stayed or otherwise delayed pending the resolution of such issues, and further from Rule 12208: "Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency."

Claimant asks that the motion be denied and stricken as irrelevant, and asks that the costs of opposing the motion be assessed to Respondent. Claimant also counter-moves to disqualify Respondent's counsel.

The Chair rules as follows: 1) Respondent's Motion to Disqualify is denied. 2) Claimant's request that the motion be stricken is denied. 3) Claimant's counter-motion to disqualify Respondent's motion is denied. 4) Claimant's

request to assess fees to Respondent is denied. The fees will be shared equally by the parties.

The Chair reached the decision to deny Respondent's Motion to Disqualify notwithstanding a conviction that a competent court or regulatory agency (namely the State Bar of North Carolina), would rule in Respondent's favor. Thus, Respondent's motion is not frivolous. The Chair agrees with Respondent that the Panel has the authority, as in *Sacks* (FINRA No. 09-00846), to disqualify given the appropriate authority. *Sacks*, however, is distinguishable since the disqualification was indicated by the representative's suspension from the securities industry according to FINRA Rule 12208 rather than an interpretation of state law. Respondent would argue that by saying "A party may be represented by an attorney or attorneys," N.C.G.S. § 1-569.16 prohibits by exclusion non-attorney representation. This is most likely the state's intention. Then let the state so say. The Chair notes that while the language of Chapter 84 and the many specific instances of unauthorized practice cited in the Authorized Practice Committee Notes of 12/08/2011 imply that Respondent's view would be that of North Carolina State Bar, each instance is decided on a case by case basis. The Chair also notes with interest an apparent contradiction in the State's position (offered by Respondent) and actual practice before FINRA. Respondent's counsel points out (supra) that he is permitted by an exception to represent Respondent as an out-of-state attorney because he is in-house corporate counsel. However, in the vast majority of FINRA cases venued in North Carolina, Respondents are represented by out-of-state attorneys who are not in-house counsel.

In summary, the Chair will not disqualify Claimant's representative absent a court order or Cease and Desist Letter from the State Bar. To do so at this point in the proceeding would appear to offend the "traditional notions of fair play and substantial justice."

So ordered this 29th day of January, 2012

L E Benade

Leonard E. Benade
Panel Chairperson

ILLINOIS STATE BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 13-03
January 2013

Subject: Arbitration and Mediation; and Unauthorized Practice of Law

Digest: A nonlawyer's representation of parties to a FINRA arbitration generally constitutes the unauthorized practice of law.

References: RPC 5.5(a), (c)(3); RPC 1.0(m)

In re Howard, 188 Ill. 2d 423, 721 N.E 2d 1126 (1976);

Lozoff v. Shore Heights, Ltd.,35 Ill. App. 3d 694, 342 N.E.2d 475 (2d Dist. 1976);

King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 828 N.E.2d 155 (2005);

Illinois State Bar Assn. v. United Mine Workers of America, 35 Ill. 2d 112, 219 N.E.2d 503 (1966);

Chicago Bar Assn. v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E. 2d 771 (1966)

*People ex rel Chicago Bar Assn. v. Goodman***,** 366 Ill. 346, 8 N.E.2d 991 (1937);

Sudzus v. Dept. of Employment Security, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist. 2009);

Colmar, Ltd. v. Fremantlemedia North America, Inc., 344 Ill. App. 3d 977, 801 N.E.2d 1017 (1st Dist. 2003);

Downtown Disposal Services, Inc. v. City of Chicago, 407 Ill. App. 3d 822, 943 N.E.2d 185 (1st Dist. 2011), *aff'd*, No. 112040 (2012);

ISBA Opinion 91-10 (October 1991);

ISBA Opinion 90-20 (January 1991);

ISBA Opinion 90-19 (January 1991);

ISBA Opinion 94-01 (July 1994);

ISBA Opinion 93-15 (March 1994).

FACTS

The inquiring attorney serves as an arbitrator for the Financial Industry Regulatory Authority ("FINRA"). FINRA is a private not-for-profit corporation which regulates all companies in the United States that do business in the securities industry. Its activities are overseen by the Securities and Exchange Commission, and one of its principal functions is to arbitrate disputes between securities firms and their customers.

FINRA publishes a detailed Code of Arbitration Procedure for Customer Disputes. The Code consists of eighty-five paragraphs covering such aspects of the process as the submission of pleadings, the taking of discovery (documents and other information are to be exchanged, but depositions and interrogatories are discouraged, only to be permitted in limited circumstances or upon agreement of the parties), the bringing of motions, the conducting of and presentation of evidence at the hearing (the rules of evidence are not required to be followed), the submission of legal briefs, and the issuance of awards, which may then be entered in a court of competent jurisdiction.

The inquiring attorney is the chair of an arbitration panel in a dispute between a securities dealer and three of its customers. At an initial pre-hearing conference held for scheduling and procedural purposes, the arbitrators learned that the claimants' representative is a nonlawyer employee of a company, not a law firm, which regularly represents customers in FINRA arbitrations. Such representative undertook at the preliminary hearing to submit, if necessary, a brief on legal issues involved in the proceeding, and recognized that if the brief submitted on behalf of the claimants was not persuasive, the arbitrators would assume that the law was adverse to the claimants. The inquiring attorney does not further specify the nature or extent of the pleadings submitted, the level of discovery or motion practice involved in the proceeding, or the amount involved. An evidentiary hearing is to be held.

Rule 12208 of FINRA's Code of Arbitration Procedure for Customer Disputes provides that parties to a FINRA arbitration may be represented by counsel, may represent themselves, or may be represented by a nonlawyer "unless state law prohibits such representation." The "Frequently Asked Questions" section of the FINRA website, in advising as to the Rule for possible nonlawyer representation, states that one should "[p]lease be aware that representation by a non-attorney might be considered to be the unauthorized practice of law in some jurisdictions, so please check with the relevant State Bar (or similar organization) for more information."

QUESTIONS PRESENTED

The inquiring attorney/arbitrator asks whether a nonlawyer's representation of parties to the FINRA arbitration constitutes the unauthorized practice of law in the State of Illinois and, if so, what are the inquiring attorney's ethical obligations.

OPINION

In *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, 344 Ill. App. 3d 977, 801 N.E.2d 1017 (1st Dist. 2003), the Illinois Appellate Court determined that, with certain exceptions, an out-of-state attorney's representation of a party to an Illinois arbitration did not constitute the unauthorized practice of law in Illinois. Such decision is consistent with subsequently adopted RPC 5.5, which is entitled "Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law," and provides, in part, that:

> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any other jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
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> (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission.

It is thus clear that an out-of-state attorney complying with the provisions of RPC 5.5(c)(3) may represent parties to an Illinois arbitration. The more difficult question, however, is whether the representation by a *nonlawyer*, who is not licensed to practice in any jurisdiction, of parties to an Illinois FINRA arbitration constitutes the unauthorized practice of law in Illinois.[1]

Rule 12208 of the FINRA Code of Arbitration Procedure provides that a party to a FINRA arbitration may be represented by a nonlawyer "unless state law prohibits such

[1] Our discussion of nonlawyer representation in a FINRA arbitration may or may not be applicable to arbitrations conducted by other agencies or entities, depending on the nature of the proceedings there involved and the extent to which a party representative's actions therein may be said to constitute the practice of law. Accordingly, our Opinion here, while possibly relevant to arbitrations conducted by other entities, is based solely upon proceedings involved in a FINRA arbitration.

representation." Rules of various other public agencies or private bodies provide even more broadly that parties to arbitrations held before them may be represented by nonlawyers, without reference to whether such is consistent with State law. *See* the Rules of the Illinois Board of Review of the Department of Employment Security, the Illinois Labor Relations Board, the Illinois Educational Labor Relations Board, the Illinois State Universities Retirement System, and the American Arbitration Association. However, while possibly relevant as a factor to be considered in determining whether a nonlawyer's conduct in an arbitration constitutes the practice of law, such is not determinative of the issue inasmuch as Illinois law recognizes that an individual may not engage in the unauthorized practice of law regardless of the existence of a rule of the governing body permitting a party to act through a nonlawyer. To the contrary, only the Supreme Court has the authority to define and regulate the practice of law, and no other body, whether it be the General Assembly, another public or administrative agency, or a private body has the authority to grant a laymen the right to practice law. *Downtown Disposal Services, Inc. v. City of Chicago*, 407 Ill. App. 3d 822, 943 N.E. 2d 185 (1st Dist. 2011), *aff'd*, No. 112040 (2012); *Sudzus v. Dept. of Employment Security*, 393 Ill. App. 3d 814, 914 N.E. 2d 208 (1st Dist. 2009). Thus, whether an agency's rules provide generally for representation by a nonlawyer, or instead, as in the case of FINRA, that such nonlawyer representation may occur only where not prohibited by state law, our inquiry remains the same; i.e., whether, under Illinois law, a nonlawyer's representation of parties to a FINRA arbitration constitutes the practice of law.

Nonlawyer representation of parties to an arbitration has been the subject of discussion in several jurisdictions and by legal commentators. In summary, reasons given in support of allowing such nonlawyer representation are: (1) that the rules of the governing body may provide for it; (2) that it is common for parties in certain kinds of arbitrations, such as labor-management dispute arbitrations, construction-dispute arbitrations, and franchising agreement arbitrations, to be represented by nonlawyers; (3) that parties may prefer the use of nonlawyer representatives for purposes of economy, efficiency, and specialized knowledge; (4) that depending on the body conducting the arbitration and the amount involved, nonlawyers may provide the only affordable representation available; (5) that in many instances the issues involved do not require the expertise of a lawyer; and (6) that the proceedings may be conducted more informally instead of being like a litigation.

Conversely, jurisdictions and commentators supporting a prohibition of nonlawyer representation in arbitrations as constituting the unauthorized practice of law discuss such factors as: (1) that public agencies and private bodies cannot themselves decide to allow the unauthorized practice of law before them; (2) that nonlawyers are not subject to ethical codes or discipline; (3) are not required to carry malpractice insurance; and (4) that nonlawyer representatives will be preparing pleadings, conducting discovery, submitting legal briefs and position papers, examining and cross-examining witnesses, advising clients as to legal issues, and otherwise performing tasks which constitute the practice of law; and (5) that it is not the nature of the body before which the acts are done which determines whether they constitute the practice of law, but rather whether the

giving of advice and performance of services affects important legal rights requiring a knowledge of the law greater than that possessed by the average citizen.

In fact, the issue of nonlawyer representation arose in a previous FINRA arbitration. *In re the Matter of the FINRA Arbitration Between Robert W. Ralston and Susan B. Ralston, Claimants v. Syndicated Capital, Inc. and Paul H. Heckle d/b/a Yosemite Capital Management, Respondents* (FINRA Arbitration 10-02276, July 7, 2011). There, the arbitrators learned at the commencement of an evidentiary hearing that the Claimant's representative was a nonlawyer. The panel recognized that such nonlawyer representation was not uncommon to a FINRA arbitration, but that it nonetheless raised the issue of unauthorized practice. The panel reached the somewhat unusual conclusion that the Claimant's nonlawyer representative could examine the Claimant's witnesses, but would not be allowed to examine the Respondent or the Respondent's witnesses.

A. Nonlawyer Representation at FINRA as the Unauthorized Practice of Law

We turn now to a review of Illinois law as relevant to determining whether a nonlawyer's representation of a party to a FINRA arbitration is the unauthorized practice of law.

While acknowledging that what constitutes the practice of law defies mechanical formulation, Illinois law recognizes that it encompasses not only court appearances but also services rendered out of court which include the giving of legal advice or requiring the use of any degree of legal knowledge or skill. *In re Howard*, 188 Ill. 2d 423,721 N.E. 2d 1126 (1999); *Lozoff v. Shore Heights, Ltd*., 35 Ill. App. 3d 694, 342 N.E.2d 475 (2d Dist. 1976). Activities recognized as constituting the practice of law include: a mortgagee's preparation of promissory notes and mortgages, *King v. First Capital Financial Services Corp*., 215 Ill. 2d 1, 828 N.E.2d 1155 (2005); services rendered by union members in handling workman's compensation claims, *Illinois State Bar Ass'n. v. United Mine Workers of America*, 35 Ill. 2d 112, 219 N.E.2d 503 (1966); and the drafting and attending to the execution of instruments relating to real estate titles, *Chicago Bar Ass'n v. Quinlan & Tyson, Inc*., 34 Ill. 2d 116, 214 N.E.2d 771 (1966).

In the Supreme Court's oft-cited case of *People ex rel Chicago Bar Ass'n. v. Goodman*, 366 Ill. 346, 8 N.E.2d 991 (1937), a nonlawyer who regularly solicited clients for the handling of workman's compensation claims provided advice concerning potential recoveries, negotiated settlements with insurance carriers, maintained actions before an administrative body, and secured orders approving settlements. He was held to be engaged in the unauthorized practice of law. The Court further supported this conclusion by recognizing that the worker's compensation practice required a trained legal mind to intellectually grasp the substantive provisions of the Workman's Compensation Act, the Federal Employer's Liability Act, and the common law as related to liability for damages for traumatic injuries. The Court went on to state that:

> It is immaterial whether the acts which constitute the practice of law are done in an office, before a court or before an administrative body. The character of the act done, not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law.

The *Goodman* decision was subsequently distinguished by the Appellate Court in *Sudzus v. Dept. of Employment Security*, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist 2009), where the Court permitted a nonlawyer to represent a party in a proceeding for job benefits before the Board of Review of the Illinois Department of Employment Security. The Court termed the Supreme Court's rationale in *Goodman* as being rooted in a recognition that the legal ramifications of the worker's compensation practice were pervasive, and noted that the nonlawyer's activities in *Goodman* routinely involved the solicitation of clients, the providing of legal advice to clients, the negotiation of settlements, the maintaining of claims before the Industrial Commission, and the securing of orders approving settlements, all of which, in their totality, clearly involved the practice of law. In the matter before it, however, the Court viewed the character of the activities involved in representing a person seeking to obtain unemployment benefits, coupled with the informal nature of the proceedings, the minimal amount involved and the long history of participation by nonlawyer representatives in such Board of Review proceedings, to justify the conclusion that the public does not require the protection that serves as the basis for classifying certain activities to constitute the practice of law.

We also inquire as to whether arbitration generally, by its nature, has been viewed by Illinois law as not involving the practice of law. Such would seem inconsistent with the Supreme Court's recognition in *Goodman* that it is the character of the acts done, as opposed to the place where they are committed, that is determinative of whether such acts constitute the practice of law. However, we would be remiss in not noting that the *Colmar* case, in determining that an out-of-state attorney's representation of parties in an Illinois arbitration did not constitute the unauthorized practice of law, the Court placed substantial reliance on the nature of an arbitration itself, and the differences between an arbitration and a judicial proceeding. The Court recited that arbitration is not a judicial proceeding, but is rather an alternative to such a proceeding, given that judicial fact finding, court procedures, evidentiary rules and other characteristics of the judicial process do not apply in arbitration. It stated further that the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination and testimony under oath are often limited or unavailable in arbitration; that arbitration does not rely on legal precedent, but instead provides for questions of law and fact to be determined by the arbitrator; and that arbitration provides no appellate procedure. Finally, the Court agreed with the statement that "to hold that arbitration was equivalent to a trial or hearing would extend the meaning of those terms beyond their intended meaning and would be contrary to the purpose of arbitration." These and other factors more closely related to the nature of the services being provided were relied upon by the Court in determining that an out-of-state attorney's representation of parties to an Illinois arbitration did not constitute the unauthorized practice of law in the State. Query, however, whether such factors relating to the nature of an arbitration would have been

given the same emphasis by the Court had it been deciding the propriety of a *nonlawyer*, as opposed to an *out-of-state attorney*, to represent parties to an arbitration in Illinois.

In any event, the Rules of Professional Conduct as adopted in Illinois effective in 2010 seem clearly at odds with any suggestion that arbitrations are themselves so nonlegal in nature as to render appropriate the representation of parties thereto by nonlawyers.

To this effect, RPC 5.5, which is the newly-enacted Rule on the subject of Multi-Jurisdictional Practice and the Unauthorized Practice of Law, speaks to the representation by out-of-state lawyers of parties to an Illinois arbitration, mediation, or alternative dispute resolution proceeding, and permits such representation in the circumstances set forth in section (c)(3) thereof. The Rule does not, however, provide either an unlimited right by out-of-state attorneys to represent parties to an Illinois arbitration, or provide any circumstances in which a non-lawyer, not licensed to practice in any jurisdiction, may represent parties to an Illinois arbitration. It would be incongruous to read RPC 5.5(c)(3) as setting forth guidelines specifying the circumstances in which an out-of-state attorney may represent parties to an Illinois arbitration, but at the same time view the Rule as permitting, without limitation, the representation of parties by nonlawyers in such arbitrations as not constituting the practice of law.

Moreover, the definition of a "tribunal" as is contained in RPC 1.0(m) recognizes that such term denotes a court, "an arbitrator in a binding arbitration proceeding" or a legislative body, administrative agency or other body acting in an adjudicative capacity. It goes on to state that a "body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interest in a particular manner." It is clear that a binding FINRA arbitration proceeding constitutes a tribunal as defined in the Rules of Professional Conduct, and that such proceedings are within the purview of further Rules pertaining to conduct before a tribunal. Such would seemingly be inconsistent with any contention seeking to view a binding arbitration as, by its nature, not including the practice of law by a party representative therein.

We thus arrive at the first question for which our opinion was requested; i.e., whether the acts and services provided by a party representative at a FINRA arbitration constitute the practice of law, thus rendering a nonlawyer's representation of a party therein as the unauthorized practice of law. We recognize that such a proceeding does not involve the same degree of legal complexities and formality as may be involved in a court proceeding, and that the issues and procedures involved even in two FINRA arbitrations may differ, making it difficult to make a blanket determination applicable to all FINRA arbitrations. We nonetheless are of the strong belief that the actions of a party representative in a typical FINRA proceeding as foreseen by the FINRA Code of Arbitration Procedure involves the giving of legal advice and the rendering of services requiring the use of legal knowledge or skill as to constitute the practice of law. Such belief is based both on the subject matter involved, which requires a knowledge of securities laws, as well as the fact that a typical FINRA proceeding is adversarial in

nature and includes the filing of pleadings, the exchange of documents and other information, the possible taking of discovery, although discouraged, the making of motions, the submission of legal briefs, and the conduct of an evidentiary hearing including the examination and cross-examination of witnesses. Thus, a nonlawyer representing a party to such a proceeding would constitute the unauthorized practice of law.

B. Ethical Obligations to Address the Unauthorized Practice of Law at a FINRA Arbitration

Presuming that such is the nature of the proceeding here involved, which appears to be the case, we are faced with the inquiring attorney's second question; i.e., what are his ethical obligations when he knows that representation of a party to the arbitration by a nonlawyer would constitute unauthorized practice under Illinois law? Such involves the effect to be given to RPC 5.5(a), which provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so*."

We have found little direct authority on the question of whether an attorney/arbitrator would be assisting in the unauthorized practice of law by not taking steps to prevent the nonlawyer representation from continuing. The most direct authority we have found on such issue comes from our earlier Opinion No. 93-15, in which we concluded, without analysis, that while a nonlawyer's representation of a party to an Illinois Department of Employment Security hearing constituted the unauthorized practice of law, an attorney's participation in the process, either as a hearing officer or as another party's representative, is not aiding in the unauthorized practice of law. We stated:

> Involvement in a matter where some other party violates the law or rules does not necessarily become an activity in aid of the unauthorized practice of law.

Other ISBA Opinions on the subject of assisting the unauthorized practice of law are of little guidance because in each the attorney's participation in aid of the unauthorized practice was substantially more direct than is the situation here. Thus, in ISBA Opinion No. 90-20, we concluded that a private institution's preparation of trust documents for consumers constituted the unauthorized practice of law, and that an attorney's assisting the institution in preparing the documents violated Rule 5.5; in ISBA Opinion No. 91-10, we deemed an attorney to be aiding the unauthorized practice of law by participating in a financial planning company's preparation of estate planning documents (similarly, *see* ISBA Opinion No. 90-19); and in ISBA Opinion No. 94-01, we said that a lawyer aids the unauthorized practice of law by limiting his role in a real estate transaction to the drafting of documents and delegating the gathering and dissemination of information, the resolution of problems arising from the documents drafted, and other problems which may arise at the closing, to the real estate broker.

Unlike the above-referenced matters, the attorney/arbitrator here has up to now had no hand in causing or furthering the unlawful practice by the nonlawyer party representative. This arguably changed, however, upon the arbitrator's becoming aware of the nonlawyer's representation of a party, and the fact that such representation would constitute the unauthorized practice of law. At that point in time, we believe that some duty evolves on the part of the attorney/arbitrator, as the person in control of the proceedings (subject to the authority of FINRA), to do more than merely allow the arbitration to go forward without taking further action on his part, notwithstanding the language of our previously referenced ISBA Opinion No. 93-15.

Accordingly, while we are not prepared to impose upon the attorney/arbitrator responsibility for preventing unauthorized practice, we believe that an arbitrator faced with such a situation should inform FINRA and, if necessary, notify the ARDC, the agency that has jurisdiction to investigate unauthorized practice pursuant to authority newly granted by Illinois Supreme Court Rule 752. It is not our view, however, that an attorney having taken such steps could be said to be assisting the unauthorized practice should he or she not withdraw as an arbitrator in the event that the steps taken do not result in the discontinuation of the nonlawyer representation.

CONCLUSION

The nonlawyer's representation of the claimants in the FINRA arbitration under the circumstances here present would appear to constitute the unauthorized practice of law. In such instance, the inquiring attorney should take available steps as discussed herein so as not to aid the unauthorized practice by the nonlawyer representative.
