



Effective Motions And Presentations Before The FINRA Arbitration Panel

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Effective Motions and Presentations Before the FINRA Arbitration Panel: A View From the Chair

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NASD ----- FINRA July 2007

- In July 2007 the SEC approved the formation of a new SRO (Self Regulatory Organization) to be Successor to the NASD (National Association of Security Dealers)
- The NASD and the Member Regulation, Enforcement and Arbitration Functions of the New York Stock Exchange were consolidated into the Financial Industry Regulatory Authority (FINRA). See SEC Release No. 34-56145.
- Today FINRA is the largest independent regulator for all security firms doing business in the United States.

NASD ----- FINRA July 2007 (cont.)

- FINRA's mission is to protect America's investors by making sure the Security Industry operates fairly and honestly.
- FINRA oversees over 4,400 brokerage firms and 162,930 branch offices, approximately 630,020 registered security representatives. They do this with approximately 3,200 employees whom operate from Washington, D.C. and New York with 20 regional offices across the country.
- The comments from this presentation are not the positions of FINRA and are only reflective of the opinion of this author. The author acknowledges the FINRA website as his source of statistical information.

Statistics of Cases Pending Before FINRA

- As of May 2012 new filings against 2011 were down 6%.
- The approximate turn around time for most hearing decisions has increased to approximately 17 months.
- In 2010 it was 14½ months.
- Historically the number of cases that settled through mediation were between 77% and 85% from year to year.

Arbitration Cases Filed

Year	Cases	Year	Cases
1997	5,997	2005	6,074
1998	4,938	2006	4,614
1999	5,608	2007	3,238
2000	5,558	2008	4,982
2001	6,915	2009	7,137
2002	7,704	2010	5,680
2003	8,945	2011	4,729
2004	8,201	Through May 2012	1,997

Arbitration Cases Served by Controversy Involved

Type of Controversy*	2008	2009	2010	2011	May 2012
Margin Calls	64	128	83	80	22
Churning	212	306	270	236	102
Unauthorized Trading	248	478	397	288	124
Failure to Supervise	1,029	2,691	2,372	2,007	701
Negligence	1,602	3,405	2,698	2,249	838
Omission of Facts	1,201	2,453	1,941	1,603	591
Breach of Contract	1,658	2,802	2,184	1,904	675
Breach of Fiduciary Duty	2,836	4,206	3,162	2,589	974
Unsuitability	1,181	2,473	1,974	1,619	569
Misrepresentation	2,005	3,408	2,601	2,102	773
Online Trading	3	0	0	0	0

- *Each case can be coded to contain multiple controversy types. Therefore the columns in this table cannot be totaled to determine the number of cases served in a year.

Types of Cases Before FINRA

Security Types Involved in Arbitration Cases

Type of Security*	2008	2009	2010	2011	5/2012
Corporate Bonds	163	373	239	179	61
Certificates of Deposit	31	71	41	31	18
Mutual Funds	1069	1556	863	652	186
Options	149	275	161	161	58
Common Stock	773	1367	862	838	313
Limited Partnerships	33	73	80	104	33
Annuities	236	300	208	172	57
Preferred Stock	115	481	232	197	48
Variable Annuities**	47	300	279	212	102
Derivative Securities**	801	607	228	54	4
Auction Rate Securities**	299	276	149	80	32

* Each case can be coded to contain multiple security types. Therefore the columns in this table cannot be totaled to determine the number of cases served in a year.

** Tracking of these statistics began on February 1, 2008.

Awards

Results of Customer Claimant Arbitration Award Cases

Year Decided	All Customer Claimant Cases Decided (Hearings & Paper)	Percentage Decided of All Customer Claimant Cases Closed	Percentage (and Number) of Cases Where Customer Awarded Damages
2007	671	18%	37% (245 cases)
2008	474	20%	42% (199 cases)
2009	669	21%	45% (304 cases)
2010	882	20%	47% (415 cases)
2011	670	16%	44% (297 cases)
2012	268	17%	48% (128 cases)

What's New in FINRA

The SEC approved FINRA's proposal to give investors permanent option of all public arbitration panels.

(New) Regulatory Notice 12-35

- **Amendments to Mediation Code to Provide the Mediation Director with Discretion to Determine Whether Parties to a FINRA Mediation May Select a Mediator Who Is Not on FINRA's Mediator Roster**
- **Effective Date: August 6, 2012**
- **Under FINRA Rule 14107 of the Code of Mediation Procedure, parties to a mediation may select a mediator from FINRA's roster or from a source of their own choosing, including a mediator who is not on FINRA's mediator roster. In limited instances, the Director of Mediation may assign a mediator. The SEC approved amendments to the Mediation Code granting the Mediation Director discretion to determine whether parties may select a mediator who is not on FINRA's mediator roster.**
- **The amendments are effective on August 6, 2012, for all mediation cases filed on or after the effective date.**

(New) Regulatory Notice 12-25

- **Implementation Date: July 9, 2012**
- **In November 2010, the SEC approved FINRA's new suitability Rule 2111. FINRA then issued Regulatory Notice 11-02, which announced the SEC's approval of the new rule and discussed its requirements. FINRA also issued Regulatory Notice 11-25, which offered further guidance on the rule and announced a new implementation date of July 9, 2012. The new suitability 12-25 notice is available in a 29 page publication.**

(New) Pilot Program for Large Cases

- **On July 2, 2012 FINRA launched a pilot program for large arbitration cases announcing that cases involving claims of \$10 million or more, the program enables parties to customize the administrative process to better suit special needs of a larger case and allow them to bypass certain FINRA arbitration rules.**

(New) Regulatory Notice 12-30

- **Effective Date: July 23, 2012**
- **FINRA Rules 12800 and 13800 increased the limit for Simplified Arbitration from \$25,000 to \$50,000.**

(Kind of New) Discovery Guide

- **Discovery Guide for 2011 is effective for claims filed after May 16, 2011.**
- **This replaces Discovery Guide 2007.**

(Kind of New) Regulatory Notice 11-02

- **Effective Date: October 7, 2011**
- **The SEC approved FINRA's proposal to adopt rules governing know-your-customer and suitability obligations for the consolidated FINRA rulebook. These rules took effect on October 7, 2011. The implementation date is July 9, 2012. It is Regulatory Notice 11-25 as it pertains to the new implementation date and additional guidance on consolidation FINRA rules governing know-your-customer and suitability obligations.**

Prehearing Conference

- Recommend the parties confer before the pre-hearing conference to pick three dates that the parties can agree on for the hearing of the arbitration.
- Recommend a cut-off date for propounding discovery.
- Stipulate the parties have accepted the panel.
- May be possible to avoid the costs of the assessment of the pre-hearing conference by submitting this information in advance to the arbitration panel.

Motion Practice

Motions to Dismiss

- January 8, 2009 FINRA released that the SEC approved FINRA rules to drastically limit motions to dismiss an arbitration.
- “If a party in an arbitration case files a dispositive motion before Claimant finishes presenting its case, the arbitration panel can only grant the motion for three reasons:
 - The parties have settled their dispute in writing;
 - There is a “factual impossibility” meaning the party could not have been associated with the conduct at issue; or
 - The motion could be granted under the eligibility rule that requires parties to bring arbitration claims within six years of the events at issue.

Motions to Dismiss (cont.)

- The new rule also requires the arbitrators to conduct a hearing on the motions to dismiss and the decision to grant the dispositive motion be unanimous. The panel is also required to issue a written explanation of the decision to grant the dismissal.
- Finally, a party is prohibited from re-filing a denied motion to dismiss unless specifically permitted by an Order of the panel.

Discovery Motions

- Present a proposed Order for the arbitrator to sign in a Word format, together with the motion to compel, so that the arbitrator is in a better position to track the request for the motion and the ruling sought, recognizing that the arbitrator's services are practically voluntary at this juncture, and in many cases the arbitrators do not have the professional staff to support the drafting of the Order.

Briefing Before the Hearing

- At the pre-hearing ask the chair if it is permissible to submit hearing briefs.
- Prepare a hearing brief and submit the same at the time of the exchange of the witness lists.

Day of Presentations

- Make sure that all pertinent witnesses are live. Too often expert witnesses have appeared by phone.
- Be mindful that the arbitrators are not judges that hear cases day in and day out.
- On the other hand, they are not juries that require theatrics.
- Be assured the arbitrator will have read the claim and response and look forward for evidence to support each.

Awards

- When making the final damage request, presented at the close of the hearing, be mindful the arbitrators are asked in the Award Form whether or not the final damage request is different than that which was in the pleadings.
- Often the math seems sloppy from both sides and enough time does not appear to have been spent by either party in this area.

Explained Decisions

- Explained decisions are now available.
- The codes of arbitration procedure require arbitrators to provide an explained decision if the parties file a joint request for one at least 20 calendar days prior to the first scheduled hearing date. The explained decision is a fact-based award stating the general reasons for the arbitrator's decision, and does not need to include legal authorities or damage calculations. The panel will determine how to allocate the \$400 assessment for the explained decision to the parties at the conclusion of the case.

Expungement

- If an Order of Expungement is requested the panel must hold a recorded hearing session, by telephone or in person, to decide if the request for expungement.
 - See Rules 12805 and 13805 for customer and industry cases respectively.
 - The panel is asked whether or not the hearing was in person or telephonically.
 - The panel is asked whether or not the parties reached a settlement in the case, and if they did, did the panel review the settlement documents and consider the amounts of payments made to any party and other terms and conditions of the settlement.
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- Then if the expungement request is granted, the panel must identify which of the following 2008 findings it makes in order to grant the expungement:
 - That the claim, allegation, or information is factually impossible or clearly erroneous;
 - Or the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds;
 - The claim, allegation, or information is false.
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- And, if the expungement is granted, the panel must provide a brief written explanation of the reasons for its finding that one or more of the Rule 2080 Grounds for Expungement applies to the facts of the case.

- In intra-industry claims only, the panel is directed to review defamation claims, and if the claim is between a FINRA member firm and a current or former associated person and the panel intends to order the expungement of information not related to the customer dispute from the central registration depository (CRD) state whether the expungement order is based on the defamatory nature of the information, and if so, the panel must clearly state in the award that the expungement order is based on the defamatory nature of the information in the CRD system.

Disciplinary Referral

- Arbitrators are asked in every case if a referral is appropriate for disciplinary referral, and if so, the arbitrators are asked to contact the staff assigned to the case for guidance and a copy of the arbitrator disciplinary referral form.

About Tony Soukenik

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Anthony J. Soukenik is a shareholder of Sandberg Phoenix & von Gontard and serves on the Executive Committee. Tony is a member of the Business Law Practice Group and focuses his practice in the areas of banking, corporate law, estate planning, real estate and federal and state taxation. Tony is now available to mediate civil disputes.

Prior to joining Sandberg Phoenix, Tony was a shareholder at McSweeney, Slater and Merz, P.C. Tony served as a Law Clerk to the Honorable James Reinhart and Honorable Kent Karohl, Missouri Court of Appeals.

Tony has been named to the Missouri & Kansas Super Lawyers in the Business and Corporate areas, and he was also named a Five Star Wealth Manager for St. Louis.

Tony is a member of the Community Associations Institute; Home Builders Association of Greater St. Louis; Member of the Board, Network of Sacred Heart Schools; Member and Former Chair, DePaul Health Center Foundation; Member and Co-Chair, City of Hazelwood Board of Appeals; Member of the Advisory Board, First National Bank of St. Louis; FINRA, Financial Industry Regulatory Authority Arbitrator; Former Vice President and Commissioner of the St. Louis Regional Convention and Sports Complex Authority; Former Member, Saint Louis University Gift and Bequest Council; Past President, Community Association Institute, St. Louis Chapter, 1988; Former Lecturer, Saint Louis University; Past Member, Old Jamestown Area Planning Study, St. Louis County Planning Department; Former Trustee of the Metropolitan Sewer District - 2001-2003; Past Member, Metropolitan Sewer District, Storm Water Advisory Committee; Past Member, Metropolitan Sewer District, Strategic Business Plan Advisory Committee.

Education

- LLM, Taxation, from Washington University (1993)
- Juris Doctor, from Saint Louis University School of Law (1986)
- B.S. in Accounting, cum laude, Jesuit Honors Program, from Saint Louis University (1982)