

THE INTERFACE OF FINRA ENFORCEMENT PROCEEDINGS IN FINRA ARBITRATION PROCEEDINGS

**PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION
ANNUAL CONFERENCE, HYATT REGENCY COCONUT
POINT, BONITA SPRINGS, FLORIDA
OCTOBER 9 – 12, 2018**

**BREAK-OUT SESSION #7
THURSDAY, OCTOBER 11, 2018 AT 11:00 A.M.**

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Timothy J. O'Connor²

Introduction

Lawyers representing investors in pending securities brokerage customer claims in FINRA arbitration proceedings are often faced with the decision as to whether or not to cooperate with FINRA Enforcement. Notably, retail customers of FINRA member broker dealers and are not subject to the jurisdiction of FINRA Enforcement proceedings and can freely choose to ignore requests for information and testimony from FINRA Enforcement attorneys and investigators. Further, FINRA Enforcement has broad discretion to pick and choose whatever cases it might decide to investigate and/or prosecute and there is not set formula as to whether or not any specific situation will be selected for prosecution. Indeed, FINRA Enforcement has taken a pass on any number of significant matters, while at the same time deciding to vigorously prosecute lesser individual broker misconduct matters.

The average Claimant involved in a FINRA arbitration proceeding has no meaningful understanding of the difference between what FINRA Enforcement does and what happens in

¹ This article is incorporated into the 2018 PIABA Annual Meeting materials to accompany the breakout session to be held on Thursday, October 11th at 11:00 a.m. which will be moderated by Mr. O'Connor, at which time Christopher J. Kelly, Esq., Senior Vice-President, FINRA Enforcement Department, will also be presenting a detailed presentation including the various particulars of FINRA Enforcement proceedings, addressing the interface with FINRA Enforcement proceedings and Arbitration Proceedings. The author acknowledges the assistance of Michelle Ong, Senior Director, Medial and External Communications, FINRA, as well as in coordinating their participation of Christopher Kelly.

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FINRA arbitration proceedings. Indeed, at first glance many Claimants operate under the misunderstanding that main goal of FINRA Enforcement is to help recover their monies for them as opposed to disciplining brokerage firms and their individual brokers. Further yet, once educated on this issue, some Claimants nonetheless remain desirous of exacting whatever pound of flesh they can from those who have victimized them, without fully appreciating the simple fact that FINRA Enforcement has a wholly different agenda, acts in its own realm and pursues whatever remedies it does, without any substantive decision-making input from claimants.³

FINRA's chameleon-like character has been referred to as both a "quasi-governmental agency", as well as a "private not-for-profit corporation and a self-regulatory organization that is registered with the Securities and Exchange Commission as a note and securities association pursuant to § 15A of the Securities Exchange Act of 1934", with the court (In Securities Exchange Commission v. McGinn, 2011 WL 13136028 (NDNY 2011)) noting "...[w]hile a government entity such as the SEC cannot direct a private entity such as FINRA in the execution of that entity's responsibilities, these entities are not prohibited from sharing information and evidence independently obtained".

The PIABA FINRA Enforcement Survey

In February of 2018 the Public Investors Arbitration Bar Association circulated a membership wide questionnaire seeking responses to various questions regarding the experiences of individual members with FINRA Enforcement matters. The responses included the experience of individual members on issues relating to cooperation with FINRA Enforcement, accessing FINRA Enforcement transcripts and exhibits in the context of arbitration proceedings

³ Recently FINRA commenced the consolidation process for its two distinct Enforcement Divisions one for Trading-based disciplinary matters initiated by Market Regulation, Surveillance and Examination Programs and the other Division which has handled case referrals from regulatory oversight departments such as Member Regulation, Corporate Finance, the Office of Fraud Detection and Market Intelligence and Advertising Regulation.

and overall opinions regarding FINRA Enforcement as relates to its interface with arbitration proceedings.⁴

While most participants in the survey indicated that they have cooperated with FINRA Enforcement in matters relating to pending arbitration proceedings which they have handled in the past, many respondents indicated that they have also suggested to clients that they not directly cooperate with FINRA Enforcement for a number of reasons, including the sentiment that FINRA Enforcement would not act on a clear indication of wrongful conduct, a desire to avoid the client's personal actions being the focus of a possible weakness which Respondents might exploit or file closeout/no-action letter related concerns. Some members have also opined that they have preferred not to have their clients participate in any FINRA Enforcement investigations, complaints or hearings until after their arbitration claims have been resolved.

Other members voiced concerns that any participation or information provided to FINRA Enforcement might only serve to harm their arbitration claim. Still yet, other survey respondents made known their own desire to be in charge of information brought to FINRA as opposed to letting a client wander into a problematic direct exchange with FINRA. Additionally, several respondents have indicated they have been successful in obtaining audiotapes, videotapes, stenographic transcripts from Enforcement proceedings, with some respondents also indicating that they were not provided with these requested categories of items until after Enforcement had closed their file on a case. Arbitration Panel issued subpoenas directed to FINRA's Office of General Counsel are generally considered the most effective way to access these items.

⁴ Fifty-two members responded to the PIABA's FINRA Enforcement Survey of various questions relating to the experience of PIABA members relating to the FINRA Enforcement interface involving pending Claimants' claims at the FINRA Office of Dispute Resolution.

FINRA Enforcement

FINRA Enforcement maintains offices in 16 cities including Rockville, MD, New York, Chicago, Boston, Boca Raton, Los Angeles and Woodbridge, New Jersey and also maintains a network of attorneys to assist in hearings before the Office of Hearing Officers and appeals to the National Adjudicatory Council, the SEC, the United States District Court for District of Columbia and the United States Supreme Court. FINRA Enforcement proceedings are somewhat secretive and even when matters are resolved, as most of them are, through Acceptance Waiver and Consent (AWC) Agreements, there is oftentimes no readily accessible transcript of proceedings, nor a full enumeration of all exhibits and documents considered leading up to an AWC Agreement.⁵

FINRA Rule 8210 and a FINRA Enforcement Rule 8210 Letter

FINRA Enforcement has a very powerful procedural authority to compel the production of documents and testimony through Rule 8210 which says:

Provision of Information and Testimony and Inspection and Copying of Books

(a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

⁵ AWC's and FINRA Enforcement complaints are public through FINRA's Disciplinary Actions online database (www.finra.org/industry/finra-disciplinary-actions-online).

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control.

FINRA member firms and brokers who fail to comply with this Rule are subject to all categories of vigorous penalties including monetary fines and lifetime bans from the industry. Targets of FINRA Enforcement request pursuant to Rule 8210 have little choice but to comply with these demands, however arbitrary, capricious or abusive they may seem.

This rule gives FINRA Enforcement attorneys one of the most powerful regulatory investigative tools of any industry. How powerful is it? Well, FINRA member firms and associated persons are not even permitted to raise the Fifth Amendment objection to the production of responsive documents and information. If they fail to produce documents for this reason, they will surely be summarily suspended or have their licensure summarily taken away. One of the agreements to remaining in the business is that member firms and associated persons will abide by FINRA Rules, including FINRA Rule 8210. Thusly, the failure to abide by the rule is the surest ticket to an industry ban.

On the Record Proceedings

On The Record Proceedings can proceed with in depth questioning as long as FINRA Enforcement attorneys deem it necessary to pursue them. In certain cases, FINRA Enforcement has been known to keep Enforcement cases open in the investigative stage for many years prior to filing a formal complaint against an investigation target. Some have argued that FINRA Enforcement proceedings have failed to afford any modicum of due process and challenges have been made to FINRA Enforcement on this basis. Separate and apart from On The Record testimony and exhibits and documents and other information produced by targets and third-parties in the context of the pre-complaint phase of FINRA Enforcement proceedings, FINRA

Enforcement may also prepare its own investigation reports and other internal memoranda and findings even in matters not going to full hearing, but rather, those resolved by way of AWC Agreements.

Some counsel for Respondents argue that FINRA Enforcement is well aware that the average individual broker is wholly without the financial resources to fight a FINRA Enforcement proceeding through all levels of appeal which would include an appeal from an adverse determination of FINRA Enforcement Office of Hearing Officers to the FINRA National Adjudicatory Council, the United States District Court for the District of Columbia Circuit, the Securities and Exchange Commission and the United States Supreme Court. FINRA Enforcement proceedings have in certain circumstances dragged on for over ten years from their investigative stage through the exhaustion of appeals.

Acceptance, Waiver and Consent (AWC) Agreements

Most FINRA Enforcement investigations settle in AWC (Acceptance Waiver and Consent) Agreements between FINRA Enforcement and FINRA broker dealer members and/or FINRA associated persons. These usual settlements occur without a formal complaint being filed and without ever going to formal hearings before the FINRA Office of Hearing Officers. The only testimony available in AWC settlements would usually be that given before the OTR (On The Record) proceedings pursued by FINRA Enforcement leading up to the entry into an Acceptance Waiver and Consent (AWC) Agreement for FINRA.

Unlike direct and cross-examination encountered in a more formal, adversarial FINRA Office of Hearing Officers disciplinary proceedings commenced by FINRA Enforcement by way of an Enforcement Complaint, OTR proceedings typically do not involve the mutual direct and cross-examination processes seen in adversarial hearings. Targets of investigations are usually

not allowed to bring in their own witnesses or question FINRA Enforcement attorneys or witnesses in any meaningful, substantive fashion, investigators in OTR proceedings, nor are they allowed to subpoena witnesses for their own defense or offer evidence for their own defense. Cases that do not settle by way of mutually agreed upon AWC's usually proceed to the disciplinary complaint phase.⁶

Subpoenas for FINRA Enforcement Proceedings for Use in Arbitration Proceedings

Up until recently, FINRA Enforcement would respond to the subpoenas for investigative files by turning over virtually all file contents in closed investigations that have resulted in an AWC, excepting attorney work product, without redaction. More recently, FINRA has been fighting these subpoena requests, even seeking to limit the responses to FINRA Rule 8210 requests and responses, claiming various privileges and other rationales not to produce, also suggesting that counsel seek the items sought directly from Respondent's counsel. Also notable, under the Federal Arbitration Act, signatures of all three arbitrators is required on the subpoena in order to properly compel production from FINRA.⁷ FINRA rules, however, allow for a single arbitrator, usually the chairperson or designated discovery arbitrator, to issue subpoenas or orders in accordance with the FINRA Code of Arbitration Procedure in routine discovery related matters.

The production of transcripts of prior testimony of FINRA member firms and their licensed professionals can be essential in FINRA arbitration proceedings, particularly in the context of preparing both direct and cross-examination of FINRA member firms and

⁶ Statistics indicate that 84% of all complaints filed by FINRA Enforcement and proceeding through OHO hearings result in some form of penalty being determined by way of a decision of the FINRA Office of Hearing Officers. These penalties could include admonition censure, suspension, life-time bars and monetary fines, as well as injunctive relief.

⁷ Attorneys should insist on obtaining full production of FINRA Enforcement investigative files in every case in which there is a relevant AWC.

professionals. Without access to transcripts and exhibits, claimants in FINRA arbitration proceedings can clearly be deprived of due process and fairness, particularly in circumstances where member firms, their personnel and/or their FINRA licensed professionals decide not to appear, testify or otherwise not be available to participate in FINRA arbitration proceedings. While FINRA Enforcement might fight the production of transcripts, exhibits and relevant documents and information, it is clear that a full and fair adjudication cannot be had in many circumstances without access to them.

Rule 12513 (the Order of Appearance Rule) of the FINRA Code of Arbitration Procedure gives the panel the authority to divert the appearances of member firms and their associated persons as witnesses or to compel the production of documents and/or information without a subpoena, and also affords counsel for parties in FINRA arbitration proceedings to include requests for additional documents and information not specifically enumerated on the Discovery Guide and FINRA Regulatory Notice 11-17. FINRA member firms and licensed professionals who are the subject of FINRA Enforcement proceedings oftentimes will not be in possession of OTR proceeding transcripts, and they must then be specifically requested by other means by Claimant's counsel at considerable cost. Stenographically transcribed written transcripts of OTR proceedings are very expensive and, in many instances, FINRA Enforcement targets will simply not request them because of this. As FINRA Enforcement has the luxury of protracting OTR proceedings for as long as they deem necessary, one can envision many thousands of pages which, \$3.00 a page, can easily exceed \$10,000.

Counsel representing claimants in FINRA arbitration proceedings can also appeal directly to the panel pursuant to FINRA Arbitration Rule 12512 (the Subpoena Rule) requesting the issuance of a subpoena and order of appearance or to otherwise compel the appropriate

individual in the employ of FINRA Enforcement to produce specific transcripts, exhibits and other records at FINRA Enforcement proceedings. In most instances, these requests are handled by the FINRA Office of General Counsel. This is not to say, however, that they will be produced, and one can surely expect a challenge from FINRA Enforcement on one or several bases and this process might ultimately end up in Federal Court proceedings pursuant to the Federal rules of Civil Procedure.

Grounds which FINRA Enforcement might rely upon in refusing to produce On The Record and hearing transcripts, exhibits and other documents and information would include personal confidential identifying information such as account numbers, dates of birth, Social Security numbers, as well as lack of jurisdiction, prosecutorial confidentiality, investigative privilege, prosecutorial privilege, work product privilege, attorney client privilege and certainly other creative claims to prevent production.

FINRA Office of Hearing Officers Proceedings

The FINRA Office of Hearing Officers is the first level of adjudicators in disciplinary proceedings and they hear testimony, admit exhibits and decide cases brought by FINRA Enforcement. These cases are prosecuted by FINRA Enforcement, in the first instance, and are initiated by a Complaint filed by FINRA Enforcement, usually after the inability to effectuate a settlement with investigation targets by waiver of an Acceptance, Waiver and Consent (AWC) Agreement.

FINRA Office of Hearing Officer panels consist of one full time employee of the Office of FINRA Hearing Officers and two FINRA licensed associated persons of a FINRA member firm. FINRA Enforcement has its own in-house resources including staff attorneys and administrative personnel who assist in the hearing process and all related procedures associated

with the scheduling of hearings, the actual holding of hearings, motion practice and the like. Hearings are generally held in close proximity to where the subject Registered Representative and/or member firm has transacted the underlying business being complained of in the Complaint filed by FINRA Enforcement.

FINRA Enforcement proceedings at both the On The Record stage, as well as those before the Office of Hearing Officers (OHO), are not open to the public and the recorded audio proceedings, transcriptions of testimony and exhibits are generally not made available to the inquiring public.⁸ Counsel and parties seeking access to hearing proceedings and exhibits are oftentimes required to pursue a labor-intensive, tortuous process involving various approaches to access Enforcement proceedings including discovery demands in pending arbitration matters, requests for arbitration panel orders to compel the production of FINRA Enforcement matters or even applications to Federal Court to compel the production of subpoenaed matter.

An open window to these OHO proceedings is through the written decisions of the FINRA Office of Hearing Officers or the National Adjudicatory Council, a FINRA committee that reviews initial decisions rendered in FINRA disciplinary and membership proceedings, as the case may be, two separate adjudicative bodies.⁹

The FINRA National Adjudicatory Council

The National Adjudicatory Council Committee members consists of fourteen individuals drawn from the Securities Brokerage Industry, academia, institutional investment and retired securities industry professionals. In contrast to the hearing panel chairs in hearings before the

⁸ FINRA proceedings are also not subject to the Freedom of Information Act, nor does FINRA Enforcement have any clearly defined written procedures as to how a party might access audio files, transcripts and exhibits. Experienced practitioners suggest, however, that an arbitrator's subpoena diverted to the FINRA Office of General Counsel is not the most appropriate procedure to access these items.

⁹ www.finra.org/industry/oho.

FINRA Office of Hearing Officers, who are full-time adjudicators of cases brought by FINRA's Enforcement Department or the FINRA Market Regulation Department against FINRA members, FINRA National Adjudicatory Council members are unpaid volunteers.¹⁰ The Hearing Officers of the FINRA Office of Hearing Officers are designed to be impartial adjudicators of disciplinary cases brought by the FINRA Market Regulation Department or the FINRA Enforcement Department. While they are not involved in the investigative process, they do have the authority to make *di novo* reviews of findings and fact and testimonial and evidentiary records of cases heard by the FINRA Office of Hearing Officers.

The majority of members of the FINRA National Adjudicatory Council have had or still maintain professional interfaces or affiliations with the private sector securities industry, whereas some will argue that FINRA Enforcement's professional staff, given their full-time employment status with FINRA, are perhaps not as attuned to sensibilities and practicalities associated with making a living in the private sector, while dealing with the investing public. As with the FINRA Office of Hearing Officers, the FINRA National Adjudicatory Council has its own separate in-house resources including staff attorneys and administrative personnel who assist in the appeal process, as well as in the drafting, formatting and finalization of decisions on appeals from the FINRA Office of Hearing Officers, with additional findings of fact.

In most instances, documents and information considered by the FINRA National Adjudicatory Council on appeals are limited to the record of proceedings at the FINRA Office of Hearing Officers level of consideration. It should be important to note, however, that FINRA

¹⁰ Current NAC Committee members including Norman Ashkenas, Fidelity Broker Services, LLC, Evan Jeremy Charles, Bank of America, Jill E. Fish, University of Pennsylvania Law School, A. Christine Hurt, BYU Law School, Stephen A. Kohn, Stephen A. Kohn & Associates, Ltd., Elaine H. Mandelbaum, Citi Institutional Clients Group, Robert L. McDonald, J.L. Kellogg School of Management, John P. Meegan, Hefren-Tillotson, Inc., Joshua D. Rogers, Arete Wealth Management, Robert P. Scales, retired, John H. Sturc, Retired, C. Thomas Toll, Employees Retirement Systems of Texas ERS, Stephen J. Williams, retired and Susan Ferris Wyderko, Mutual Fund Director's Forum.

Rules also afford parties the right to submit additional documents and information at the FINRA National Adjudicatory Council level, on request. Additionally, the FINRA National Adjudicatory Council also has authority to make specific requests for additional documents, exhibits and information which it might feel necessary for full adjudication of an appeal from a FINRA Enforcement case.

There are no detailed procedures or rules as to how appeal hearings before the FINRA National Adjudicatory Council are conducted. Once a Notice of Appeal has been filed, a briefing calendar is set by the FINRA Office of General Counsel and the hearing is scheduled. The contents of briefs of FINRA Enforcement and respondents counsel filed with the National Adjudicatory Council can be wide ranging, but none of the current sitting members under the FINRA National Adjudicatory Council are attorneys. So, the counsel representing a party to an NAC appeal must give consideration to the extent to which lengthy case law and federal or state statutory case law citations are necessary. The record on appeal consists of a transcript of the hearings and all exhibits accepted into the record at the hearings before the FINRA Office of Hearing Officers.

Unlike an appeal before a multi-member Appellate panel in an Appellate court consisting of judges in a court of law, adjudicators hearing NAC appeals have wide latitude to ask any number of questions, seek clarification of factual issues and even ask opinion questions of counsel. While Respondents are free to attend, the possibility exists that NAC adjudicators might even consider asking direct questions of Respondents at these appeal hearings. In addition to the attendance of several attorneys representing FINRA Enforcement, an attorney from the FINRA Office of General Counsel will likewise be present to moderate the proceedings and the flow of the record while a stenographer records all verbal exchanges on the record.

The FINRA Board of Governors

The FINRA Board of Governors is comprised of 23 industry and public members, ten seats allotted for industry affiliated members and thirteen seats allotted for public members with one seat assigned to FINRA's Chief Executive Officer. They are appointed or elected for three-year terms and cannot serve more than two consecutive terms of a current or overtook the FINRA CEO is also a board member with William H. Heyman of the Travelers Companies, Inc., serving as the Chairman and Public Governor. As with the FINRA National Adjudicatory Council, they are not involved in the investigative process, they do have authority to make *di novo* reviews of findings and fact and testimonial and evidentiary records of cases heard by the FINRA Office of Hearing Officers.

An interesting, yet additional appeal on review of decisions of the National Adjudicatory Council is by way of an *ad hoc*, discretionary decision of the FINRA Board of Governors which has the authority to conduct a *sua sponte* review of an Appellate Decision of the National Adjudicatory Council. Under the Rules of FINRA's National Adjudicatory Council, their decision represents FINRA's final action unless the Board of Governors decides to conduct such a review.

Further, Rule 9349(c) "The FINRA Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the FINRA Board does not call the disciplinary proceeding for review, the proposed written Decision of the National Adjudicatory Council shall become final..."¹¹

¹¹ The disciplinary procedures of the National Adjudicatory Council are contained in Section 9300 of the FINRA Manual and the separate several Rules thereunder.

The Decisional History of the FINRA Office of Hearing Officers and the FINRA National Adjudicatory Council

The decisions of The FINRA Office of Hearing Officers, as well as the FINRA National Adjudicatory Council are readily available on the respective separate online website sub-sections of finra.org (www.finra.org/industry/oho; www.finra.org/industry/nac). Taking the time to read through several hundreds of decisions over the past decade will afford the practitioner some insights into prosecutorial trends being pursued by FINRA Enforcement, as well as the occasional tensions arising between FINRA Enforcement on one side, and the FINRA National Adjudicatory Council on the other side, when facing circumstances of overzealous prosecutions, faulty evidentiary findings, improper determinations of prosecutorial authority and due process challenges. Written decisions of the NAC can run the spectrum from very brief, short affirmances to detailed and particularized decisions with extensive citations to the record, statutory case and statutory law and FINRA rules and there are no specific guidelines as to the extent of detail required for these decisions.

Do the Decisions FINRA Enforcement and FINRA National Adjudicatory Council (NAC) Decisions Carry Any Precedential Value?

It is important to keep in mind that most of the adjudicators working for the FINRA Office of Hearing Officers, as well as the FINRA National Adjudicatory Council, are not lawyers. The FINRA Office of Hearing Officer panels that hear FINRA Enforcement proceedings, however, typically include at least one lawyer, the FINRA appointed Office of Hearing Officers Administrative Law Judge Chairperson, given the legal, evidentiary and other substantive and procedural issues that tend to beg for someone with a working knowledge of the law. The other two non-panel chair adjudicators who hear appeals on three-member panels at the FINRA National Adjudicatory Council, however, are typically not lawyers.

The written decisions of the Office of Hearing Officers, as well as those of the National Adjudicatory Council, frequently cite prior FINRA OHO and NAC decisions in support of their holdings, as well as giving frequent citation to one another's prior written decisions. Given the congressional grant of authority given to FINRA by Congress to decide industry member disciplinary matters, in addition to the more structured formatting and citations contained in these decisions, as opposed to the say the average decision of the FINRA Office of Dispute Resolution, one could argue that their decision, in fact, constitute persuasive authority, but probably not controlling authority.¹² From a historical perspective, several decisions of the FINRA Office of Hearing Officers are repeatedly cited as authority for appropriate levels of conduct to be followed by individual brokers and brokerage firms.¹³

Appeals to the United States District Court for the District of Columbia and the United States Supreme Court

The United States Court of Appeals for the District of Columbia routinely affirms decisions of the SEC (see for example Mathis v. United States Securities & Exchange Commission, 671 F.3d 210 (Second Circuit 2012)). The United States Court of Appeals for the District of Columbia Circuit, however, has ruled in favor of appellants on appeals from SEC affirmances of decisions emanating from the FINRA Office of Hearing Officers when they find that there has been an abuse of discretion on issues such as failing to consider and mitigating the circumstances and the imposition of restitution penalties (see SADD v. SEC, 718 F.3d 904 (DC Cir. 2013) and Siegel v. SEC, 592 F.3d 147 (DC Cir. 2010) and Paz Securities, Inc. v. SEC, 494 F.3d 1059 (DC Cir. 2007) and SADD v. SEC, 873 F.3d 297 (DC Cir. 2017) on the issue whether

¹² FINRA Enforcement was referred to as a private entity, noting “while a government entity such as the SEC cannot direct the private entity such as FINRA in the execution of that entity’s responsibilities, the entities are not prohibited from sharing information and evidence independently obtained (In Securities Exchange Commission v. McGinn, 2011 WL 13136028 (NDNY 2011)).

¹³ FINRA has the legal authority to permanently bar individuals from the investment advisory business for life (In Re Roman Sledziejowski, 533 B.R. 408 (USBK.ct. Southern District of New York 2015)).

a lifetime ban is punitive, rather than remedial, requiring remand for the Commission to determine in the first instance.

Interestingly, the Second Circuit has ruled that “Congress did not intend to authorize FINRA to seek judicial enforcement to collect its disciplinary fines (see Fiero v. Financial Industry Regulatory Authority, Inc., 660 F.3d 569 (Second Circuit 2011)). The United States Court of Appeals for the District of Columbia Circuit, however, has ruled favorably on appeals from SEC of affirmances of decisions emanating from the FINRA Office of Hearing Officers when they find that there has been an abuse of discretion on issues such as failing to consider and mitigating the circumstances and the imposition of restitution penalties (see SADD v. SEC, 718 F.3d 904 (DC Cir. 2013) and Siegel v. SEC, 592 F.3d 147 (DC Cir. 2010) and Paz Securities, Inc. v. SEC, 494 F.3d 1059 (DC Cir. 2007) and SADD v. SEC, 873 F.3d 297 (DC Cir. 2017) – issue whether lifetime ban was punitive, rather than remedial, required reman for commission to determine in the first instance.

Most recently, at the United States Supreme Court level, in Lucia v. Securities and Exchange Commission, 585 U.S. ____ (2018) The United States Supreme Court addressed the manner in which administrative law judges are permitted to act as adjudicators deciding cases within federal agencies, and specifically, the SEC. Prior long-standing law held that administrative law judges are not deemed to constitute “principal officers” but rather, “inferior officers” and thus are not required to be confirmed by the Senate under the Constitution’s Appointments Clause. This clause requires that “inferior officers” are only required to be appointed by principal officers (i.e. Commissioners or other Presidential appointees) as opposed to mere employees whose employment can be approved by lower level managers. The Lucia case involved a case commenced by the SEC’s Enforcement Division and decided by SEC

Administrative Court Proceedings, as opposed to a judicial court. Justice Kagan delivered the opinion of the Court, which held that SEC administrative law Judges are “Officers of the United States”, subject to the Appointments Clause. The United States Supreme Court is the last level of appeals emanating from the FINRA Office of Hearing Officers.

Should Attorneys for Claimants Cooperate with FINRA Enforcement?

When customers filing FINRA arbitration claims allege fraud and other categories of moral turpitude against FINRA member firms and their licensed professionals, such matters are reviewed by the Central Review Group within FINRA’s Fraud Detection and Market Intelligence which performs preliminary investigating on certain matters and analyzes regulatory filings, investor conflicts and other services of regulatory intelligence for potential misconduct. Notably, the FINRA Department of Fraud Detection and Market Intelligence serves as the reviewer of fraud related allegations in statements of claim filed with the FINRA Office of Dispute Resolution referring all such allegations to FINRA Enforcement for consideration of further action and inquiry in their discretion. In this context, while FINRA Enforcement can similarly decline not to pursue any investigation or inquiries (which it oftentimes does), FINRA Enforcement counsel and/or their investigators will oftentimes contact claimant’s counsel seeking their cooperation in arranging a voluntary interview with their client, as well as requests for documents and information.

This can be a time-consuming process to claimant’s counsel and there is no assurance that any benefit from such cooperation will inure to the client. Additionally, counsel for respondent firms and licensed professionals will surely do their best to make inquiry into any such exchanges and cooperation, contending or otherwise implying that claimant’s counsel has sought to assume an unfair advantage of all sought to game the arbitration process by pursuing

separate prosecutorial initiatives with FINRA Enforcement, separate and apart from FINRA arbitration proceedings.

FINRA Enforcement attorneys are subject to their own code of conduct and professional constraints which clearly limit and prohibit their ability to disclose any meaningful and substantive aspects of their pending enforcement cases. Essentially, as with prosecutions in most contexts it's a one-way street and Claimant's counsel hoping for any information, voluntary cooperation or insights into the scope and focus of FINRA Enforcement proceedings are almost uniformly are unlikely to learn anything.

Should FINRA Claimants and Their Counsel Cooperate With Requests for FINRA On The Record Testimony Requests of FINRA Enforcement Counsel?

Claimant's counsel have been successful in having FINRA Office of Dispute Resolution arbitration panels sign subpoenas directing the production of documents and information from the FINRA Enforcement. In this process, however, you can surely anticipate that counsel for Respondents may well fight such subpoenas arguing confidentiality, privilege and/or the impermissible disclosure of personal identifying information such as dates of birth, Social Security numbers, account numbers and the like.

Just as Claimant's counsel might prevail in seeking to have FINRA Enforcement produce transcripts, documents and information from FINRA Enforcement proceedings, you can be sure that Respondent's counsel will likewise seek these discovery remedies, particularly in cases where a claimant has participated in prosecution initiated by FINRA Enforcement. Many Claimants' practitioners representing Claimants advise that the best avenue here is to avoid any meaningful cooperation by way of providing testimony or producing documents or other information until your client's case has been completed and finally decided.

FINRA's Stated Enforcement's Mission

One of FINRA's top priorities is to advance investor confidence in the securities markets through vigorous, fair and effective enforcement of FINRA and MSRB rules and federal securities laws and rules. The Enforcement Department is tasked with investigating potential securities violations and, when warranted, bringing formal disciplinary action against firms and their associated persons with the authority to fine, suspend or bar brokers from the industry. The primary goal of claimant's counsel is seeking an award of monetary losses or the equitable restoration of portfolio losses in separate FINRA arbitration proceedings. Some claimants have been known to go off on their own and make a full-time job of pursuing every criminal, regulatory and prosecutorial avenue to assure that others do not suffer the same fate they have suffered at the hands of broker wrongdoing. It is also important for claimants to understand that retention agreements in securities arbitration proceedings largely limits counsel's work efforts to their involvement with FINRA Office of Dispute Resolution customer claims, as opposed to separate Enforcement Proceedings. Claimant's counsel should also expect that Respondent's counsel will surely contend that the mere act of cooperation with FINRA Enforcement in an investigative matter initiated wholly at the instance of FINRA Enforcement is nonetheless merely an example a claimant seeking to utilize the FINRA's regulatory arm for their own personal gain. Some experienced practitioners in the Claimant's arena contend that any Claimant's attorney who plans on some benefit to an existing claimant's case is on a fool's errand and is merely wasting his or her time. The Jury may well still be out on this issue and all PIABA members are encouraged to participate in this break-out session.

CONCLUSION

The laminated, business-card sized mission statement circulated by FINRA indicates that “Our mission is investor protection and market integrity”, further indicating that “every day, we work in our offices across the country to:

- deter misconduct by enforcing the rules
- detect and prevent wrongdoing in the US stock markets
- discipline those who break the rules

In closing, it is submitted that there are surely some common ground given the separate, respective efforts of FINRA Enforcement and FINRA venued disciplinary proceedings on the one side and Claimant’s proceedings venued with the FINRA Office of Dispute Resolution on the other side when their respective case issues overlap. The main purpose of this article and the accompanying break-out session is to encourage a dialogue in this arena, as well as to work to promote more well-defined procedures and protocols when there is such an interface in the same or similar nucleus of common fact.