Irwin G. Stein, Esq.
454 Las Gallinas Avenue. Suite 148
San Rafael, CA. 94903
(415) 515-3408
Profstein18@yahoo.com

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Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
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 That change was denounced by consumer groups as being anti-consumer and withdrawn when the SEC told the NASD that it would not be accepted.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.