DOBINLAW

Marc S. Dobin
MDobin@DobinLaw.com

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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.

500 University Boulevard ◊ Suite 205 ◊ Jupiter, Florida 33458
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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

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