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March 12, 2015

Delivered via Email

Prof. Barbara Black, Chair
Dispute Resolution Task Force
c/o Financial Industry Regulatory Authority
One Liberty Plaza, 165 Broadway, 27th Floor
New York, NY 10006

Dear Professor Black:

On behalf of the Board of Directors of the Securities Experts Roundtable (SER), I am pleased to send to you along with this email a position paper critical of "phantom retentions" in FINRA arbitrations. The paper considers a phantom retention to occur when one party lists an expert witness during the 20-day exchange, without the knowledge or consent of the listed expert and without actually retaining the expert.

Stuart Ober, SER's immediate past President and a current SER director, is the author of the paper. SER is grateful to Stuart Ober for an excellent report that so effectively spotlights the unethical practice of phantom retentions and also suggests several possible solutions that SER hopes FINRA will consider.

SER's Board of Directors has reviewed and approved Mr. Ober's position paper and instructed me, as the current SER President, to provide the position paper to the Dispute Resolution Task Force on behalf of the SER Board.

SER thanks you and your colleagues on the Task Force in advance for your consideration.

As noted in the position paper, Mr. Ober is available to answer any of the Task Force's questions. Mr. Ober's contact information is included in the position paper.

Respectfully submitted
By order of the Board of Directors,

President
Securities Experts Roundtable

cc: Richard W. Berry
richard.berry@finra.org
Margo A. Hassan
Margo.Hassan@finra.org

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March 10, 2015

DELIVERED BY E-MAIL
Professor Barbara Black, Chair
Dispute Resolution Task Force
c/o Financial Industry Regulatory Authority
One Liberty Plaza, 165 Broadway, 27th Floor
New York, NY 10006

Dear Professor Black:

Unauthorized Listing of Experts or "Phantom Retentions" on FINRA Witness Lists

This position paper has been prepared by Stuart Ober, the immediate past President and a member of the Board of Directors of the Securities Experts' Roundtable, Inc. ("SER"). I have prepared this paper with the participation of SER members, Richard P. Ryder, and George H. Friedman, whose contributions I acknowledge and appreciate.

The comments expressed in this letter have been reviewed and approved by the SER Board of Directors.

Introduction

This paper is being submitted to the FINRA Dispute Resolution Task Force regarding a concern that SER members have regarding the unauthorized listing of experts or "phantom retentions" on FINRA Witness Lists. This practice occurs when an expert has been named on FINRA's 20-day prehearing exchange of witness lists, without the expert's knowledge, consent, or retention.

Issues

There are a number of potentially adverse consequences to the expert as a result of this practice. For example, this may cost an expert future business if an attorney sees an expert on the opposing side or in an opposing position, or it may be harmful to the reputation of the expert when he or she does not appear at the hearing. Further, this deceptive and dishonest tactic may create lost revenues to the expert (as some experts charge for being listed as an expert witness), and it may unethically enhance the value of the attorney's case who listed the expert.

The naming of an expert or experts by one side may exert pressure to settle by the other. This is an unfair and deceptive tactic by the attorney who names an expert that he or she has not actually retained.

Another consequence of this activity is that a FINRA arbitrator may needlessly withdraw from the hearing, citing a conflict-of-interest with the alleged expert that the arbitrator, in his or her capacity as an attorney, had used extensively in the past.

Further, the expert may also, unwittingly, develop an undeserved reputation for appearing frequently on the claimant's or the respondent's side of an issue.

Accordingly, the unauthorized listing of experts in FINRA arbitrations compromises the integrity of the arbitration process, and should be addressed.

Survey of Experts

Based upon verbal responses and a written questionnaire submitted to SER members, the practice of phantom retentions is prevalent in the arbitration process.

An informal survey was sent to approximately 80 SER members in early 2014. While many members did not respond, it is conceivable that members (both those who responded and those who did not) were unaware of instances in which they were inappropriately named on a FINRA Witness List as an expert. In the survey, 100% of those responding stated that this was a serious problem, and phantom retentions were identified in dozens of instances.

The following are examples of comments made by SER members:

> "This practice became known to me personally when I was asked by a client why I was involved in a case against them. I had no idea what they were talking about. Without this 'head's-up,' I would never have known, as is the case of many experts who remain unaware of this practice."
>
> "In one case, I was listed by both sides: claimant's and respondent's."
>
> "Happened to me on numerous occasions. It has happened three to five times during the past year, and probably three times those amounts over the period in which I have served as an expert."
>
> "A number of years ago I was named by a claimant attorney without my approval for a XXX case. The defense counsel who I had known for 20 years, called and asked why I was testifying v. XXX. I knew nothing about what he was talking…."
>
> "This has happened between 6 to 10 times. In one instance, I later learned that I was one of ten experts to testify to bludgeon the other party to settle. I was never notified or retained."
>
> "I was named an expert at least once by two non-attorneys from Brooklyn who got my resume. Their *modus operandi* was to settle, often just before the hearings. I was informed by a friend who was the chair of the arbitration who was kidding me about finally seeing me in action. I got the details and informed him that I had never

> heard of this case, knew nothing about it and would not appear. I also wrote to FINRA telling them the same and demanded my letter be transmitted to all the parties, including the arbitrators. The case went forward with a new attorney acting for the claimant and received a zero award. I hired an attorney to interface with the two unscrupulous scum. It came to naught as they stretched out the settlement terms: no money just a prohibition of ever doing it again, and they never provided any list of cases where I had been named."
>
> "I have not been the subject of such action which under my legal canons of ethics would be unethical behavior."

Suggestions/Recommendations

The following concrete suggestions/recommendations are offered:

- In Section Q of the script on the Witness List – stress that if an attorney lists experts, he or she should have communicated with, and retained, the experts. A suggestion is to have verification of experts named and retained, such that any exchange of witness lists that includes listing an expert be accompanied by a written consent signed by the expert to be a witness in the matter (e-mail consent might be acceptable).

- An alternative might be, after exchange of lists, for the opposing party independently to send to the other side's listed expert a communication (or even a FINRA-approved form) solely for the purpose of asking the expert to confirm that he or she has been retained by the other party and plans to be a witness in the proceeding.

- A Regulatory Notice or Notice to Parties would also work. FINRA did one a few years ago about unsigned Submission Agreements.

- An amendment to the IPHC: Script<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009470.pdf> is also suggested. This part would be the place:

  > Q. Witness Lists: The Codes of Arbitration Procedure provide for, among other things, the parties' obligation to exchange witness lists at least twenty (20) calendar days prior to the first scheduled hearing date. The panel requests that, concurrently with the parties' timely exchange of the witness lists, the parties send copies of the witness lists to FINRA for forwarding to the panel. The panel's timely receipt of the witness list will enable the arbitrators to review the witness list in advance of the hearing to determine if the appearance of a witness identified in the witness list may create a potential conflict with an arbitrator or otherwise trigger additional disclosures by an arbitrator. To assist the arbitrators in making these conflict checks, the parties should list the business affiliation of each witness, or other descriptive information.

- A proposed amendment to the IPHC:
  Order <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p016833.pdf> would also make sense.

- An article in *Neutral Corner* discouraging this practice.

- Engaging PIABA and SIFMA on this issue to get the word out to attorneys that this is a serious ethical issue.

In closing, this is an important issue for experts, claimants, respondents, and the arbitration process. I would be pleased to discuss this further with the Task Force or to respond to requests for additional information. Thank you for your consideration.

Respectfully submitted,

Stuart Ober, CFE, AIFA®
On Behalf of the Board of Directors of SER

Stuart Ober, CFE, AIFA®
Securities Investigations, Inc.
2626 Route 212
Post Office Box 888
Woodstock, New York 12498
Telephone: 845 679 2300
E-Mail: ober@stuartober.com