

Securities Experts' Roundtable, Inc.
<http://www.securitiesexpertsroundtable.com/>
A Professional Business League 501(c)6 organization



September 28, 2012

Linda Fienberg
FINRA Dispute Resolution, Inc.
1735 K Street N.W.
Washington, DC 20006

Dear Ms. Fienberg:

I appreciate the time that we spent discussing the Securities Experts' Roundtable and the issue of electronic eavesdropping in FINRA arbitrations, a topic that we believe to be of high interest to participants in securities arbitration. The Securities Experts' Roundtable is the nation's largest non-profit organization of securities experts. Our membership is comprised of almost 100 securities experts, with retention records that span the Claimant/Respondent spectrum. Due to our size and the dispute resolution experience of our members, we are in a position to offer unique insights and perspectives into the arbitration process. We appreciate your willingness to accept our suggestions in the constructive, collaborative and objective spirit in which they are intended.

At our 20th annual conference, held in Washington D.C. this past August, we discovered during an open forum discussion that several of our members have encountered electronic eavesdropping. In today's arbitrations, it is common to see a wide variety of electronic devices being used by both sides. These tools, including laptop computers and smart phones, commonly enable the user to record or transmit audio and/or video of an arbitration hearing. Unfortunately, it has come to our attention that this has been happening without the knowledge or consent of arbitration panels.

Three types of transmissions were expressed at the conference:

- Immediately prior to cross-examination, opposing counsel aimed the outward-facing camera built into his laptop directly at the expert about to testify, giving the expert the distinct impression that he was being "filmed".
- Immediately prior to expert's testimony, retaining counsel noticed the associate of opposing counsel pushing buttons on his cell phone and then arranging the cell phone on the tabletop. Retaining counsel broached the subject with the panel's Chairman, who asked if the phone was on. Once challenged, opposing counsel admitted that it

was on, and that other attorneys at his law firm were listening in. The Chairman then directed that the phone be turned off, and that no further transmissions be made.

- Opposing counsel hired a court reporter who was found broadcasting live transmissions of the recorded testimony to opposing counsel's law firm.

The act of electronic eavesdropping in arbitration hearings directly contravenes the spirit of the rules, and we view these activities as a proper cause for FINRA to set forth policies. We expect that FINRA's guidance on this issue will be welcomed equally by the Claimants' and Respondents' bar associations, as the issue does not favor one side or the other. Some of the potential problems with electronic eavesdropping include:

- circumvention of the attendance list by giving individuals outside of the hearing room a virtual presence at the hearing;
- giving one side the ability to benefit from the assistance of un-named co-counsel, without the other side's knowledge;
- giving the opportunity for unauthorized recording and publication of a private process;
- giving the opportunity for a sequestered witness to hear testimony that (s)he was not supposed to hear.

Therefore, the Securities Experts Roundtable proposes that FINRA consider the following steps:

- (1) Establish policies for the electronic recording or transmission of FINRA arbitration proceedings;
- (2) Publish these policies in *The Neutral Corner* as notification to the arbitrator pool and include references to the policies in arbitrator training; and
- (3) Amend the opening script used in FINRA arbitrations to include a statement as to FINRA's policies on electronic eavesdropping.

Thank you for your thoughtful consideration of this issue.

Sincerely Yours,

Jeffery E. Schaff, President