

I write today to express my support for proposed rule amendment SR-FINRA-2010-053, and opposition to the mandatory inclusion of the so-called “non-public” arbitrator or industry arbitrator on FINRA arbitration panels for disputes involving public customers and members or associated persons.

Having practiced securities law for about 40 years in various capacities, including SEC senior trial attorney, Special Counsel to the NYSE Enforcement Division, Securities Director for the Commonwealth of Kentucky, Special Attorney General for the Commonwealth of Kentucky in charge of securities crimes, and private practice in a two-man firm in Lexington, Kentucky, Charles C. Mihalek, P.S.C., as well as being a FINRA arbitrator, I have had a lengthy experience with industry arbitrators. I am also a long-time member of the Public Investors Arbitration Bar Association and had the pleasure of serving on its Board of Directors for three years.

Prior to the late 1980’s, there was virtually no customer/member/associated person arbitration because there was no mandatory arbitration clause enforced by the courts. Plaintiff lawyers preferred to file in federal court where they had all the protections of the United States legal system, including the Constitution and American jurisprudence. There was no public outcry for mandatory arbitration; only the securities industry, notably in the persona of Philip J. Hoblin, Jr., Esq., a fine lawyer, and the then General Counsel of Shearson Hayden Stone, who championed the idea by leaving the arbitration clause in its customer agreement.

The Shearson/McMahon case holding has been a boon to the investing public only in the sense that it made them and their attorneys familiar with a process that was heretofore seldom used. One of the reasons for its non-use by consumers and their counsel was the perception and fear of industry bias occasioned by the fact that the industry owned, trained and operated, and set

the rules for it, and for some obtuse reason, required a securities industry representative on every panel.

Now that every retail securities broker-dealer requires mandatory arbitration with FINRA as a precondition to doing business with the investing public, it is easy to conclude that the industry supports mandatory securities arbitration and conversely fears the Article III courts that are supposedly open for all people to adjudicate private property rights.

There are many reasons to oppose mandatory securities arbitration between individuals and members, and the required inclusion on each panel of an industry arbitrator is only one reason. This is not a personal attack on any particular industry arbitrator, or indeed, all industry arbitrators. It is an attack on the reasons why the dispute must be brought before the industry in the first place. The arbitration hearing room has claimants and their lawyer; the broker-dealer has its representative; the financial advisor and its lawyers. Surely, the industry witnesses and lawyers are enough representation and advocacy without adding an industry arbitrator to the fray.

Prior to the mid-1990's, there used to be an arbitrator forum with rules governing securities disputes with no industry arbitrator - only three public (neutral) arbitrators. As soon as the volume of arbitrations picked up in the 1990's, the industry changed its standard arbitration clause and dropped the American Arbitration Association from the contractual choices.

These cases are very difficult for investors to win. When they do win, they do not win a full measure of damages. Costs are usually shared, even if the investor "wins". Most "wins" are hollow victories. Since there is no rationale in the award, investors are left wondering why they lost if the industry's own expert admitted his client did wrong, or why we were awarded a number that makes no sense.

In conclusion, the industry arbitrator adds nothing to the decision-making capacity of the arbitration panel except to interject his or her salesperson point of view into the dispute. The industry arbitrator can take over the deliberations by asserting his superior knowledge (experience) of the subject matter and disproportionately affect the outcome. Perhaps that was the original purpose. We do not need that or see its purpose any more than requiring industry-paid volunteers to help decide other disputes.