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December 21, 2017

Kenneth L Andrichick
Chief Counsel, Office of Dispute Resolution, FINRA
One Liberty Plaza, 165 Broadway
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Ken,

Following up on our recent telephone conversation, I wanted to submit my comments on the issue of non-attorney representation in FINRA arbitration.

I feel that a compromise may be in order between the current FINRA policy and the absolute ban proposed by Mr. Stoltman and others. Why not require that non-attorneys be required to be held to certain standards and be certified by FINRA?

I have been a FINRA arbitrator for 27 years and have dealt with nearly 200 cases ranging from claims for as little as a few thousand dollars to more than a hundred million. My interest in FINRA arbitration arose from a passion for day-trading and technical analysis of the markets at a time when I was pursuing my former career as a cancer research scientist. My involvement in arbitration led to an interest in becoming a FINRA mediator, which I qualified for in 2007. I subsequently became certified to conduct North Carolina Superior Court, Workers' Comp, Estates & Guardianships and Family Financial cases. I was spending so much time learning the law from bar review materials that I decided to go to law school. I took live online classes from the California School of Law which was approved by the state bar but not the ABA. I graduated with a JD cum laude in 2014, but elected not to take the California state bar exam since at that time passing it would not have entitled me to sit for the North Carolina bar exam. That has since changed, but I've decided not to pursue it. I've recently been certified to represent veterans in federal appeals cases and I state on my website that I will represent parties in FINRA arbitration. I have not to date done so, but feel competent to do so if the opportunity arises.

A few years ago I was arbitrating a North Carolina FINRA case when a month before the hearing I received a motion to disqualify from respondent's attorney based on the fact that claimant's representative was not an attorney. He cited some cases from other states and some cease and desist letters from the NC State Bar, none of which I deemed analogous or pertinent to the instant matter. I wrote the attached opinion and denied the motion. At the hearing the claimant's representative performed more competently than certain attorneys I've dealt with in the past.

While I'm certain there are some non-attorneys currently not suited to represent parties in this forum who are abusing the system, I'm sure there are others like the one I dealt with who are capable of doing a good job.

Therefore, I argue that a wholesale ban on non-attorney representation is unwarranted, but that some regulation may be required to curb what abuses may be in play at present.

Respectfully,

A handwritten signature in blue ink that reads "L. E. Benade". The signature is written in a cursive style with a large initial "L" and "E".

Leonard E. Benade, PhD JD

IN ARBITRATION BEFORE FINRA

TIMOTHY R HULLETT,)
) FINRA DISPUTE RESOLUTION No. 11-01519
)
 CLAIMANT,)
)
 vs.)
)
 TD AMERITRADE, INC,)
)
 RESPONDENT)
)
 _____)

ORDER ON MOTION TO DISQUALIFY

The Chair has considered the written submissions of the parties as well as the oral arguments presented in a telephonic pre-hearing conference on January 5, 2012. The Chair has not considered the aspersions contained therein and cast by each party against the other.

This would appear to be an issue of first impression for FINRA arbitration venued in North Carolina. Both sides point to FINRA Rule 12208 which provides that a party may be represented by a non-attorney *unless state law prohibits*. Respondent cites the North Carolina Revised Uniform Arbitration Act (N.C.G.S. § 1-569.16): "A party to an arbitration process may be represented by an attorney or attorneys," and argues that this would prohibit Claimant's representative, a non-attorney, from appearing on Claimant's behalf in this proceeding. Respondent further argues that Chapter 84 of the North Carolina General Laws regarding the unauthorized practice of law also prohibits that

representation: Chapter 84-4 states that anything construed as the practice of law may only be performed by active members of the Bar of the State of North Carolina. Respondent points out that 84-5(b) provides the exception that permits out-of-state attorneys (such as Respondent's counsel) to serve as in-house counsel for corporations involved in non-legal business (such as Respondent). Claimant counters that FINRA arbitration code itself (Rule 12208) permits his representation and that Respondent has failed to adequately support his contention that North Carolina state law prohibits such representation. Claimant argues (FINRA Regulatory Notice 07-57) that 1) the arbitration panel is not required to verify the non-attorney's compliance with state law, 2) the parties may seek court or regulatory agency relief, and 3) that in the absence of a court order the arbitration proceeding shall not be stayed or otherwise delayed pending the resolution of such issues, and further from Rule 12208: "Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency."

Claimant asks that the motion be denied and stricken as irrelevant, and asks that the costs of opposing the motion be assessed to Respondent. Claimant also counter-moves to disqualify Respondent's counsel.

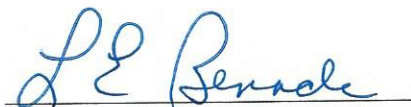
The Chair rules as follows: 1) Respondent's Motion to Disqualify is denied. 2) Claimant's request that the motion be stricken is denied. 3) Claimant's counter-motion to disqualify Respondent's motion is denied. 4) Claimant's

request to assess fees to Respondent is denied. The fees will be shared equally by the parties.

The Chair reached the decision to deny Respondent's Motion to Disqualify notwithstanding a conviction that a competent court or regulatory agency (namely the State Bar of North Carolina), would rule in Respondent's favor. Thus, Respondent's motion is not frivolous. The Chair agrees with Respondent that the Panel has the authority, as in *Sacks* (FINRA No. 09-00846), to disqualify given the appropriate authority. *Sacks*, however, is distinguishable since the disqualification was indicated by the representative's suspension from the securities industry according to FINRA Rule 12208 rather than an interpretation of state law. Respondent would argue that by saying "A party may be represented by an attorney or attorneys," N.C.G.S. § 1-569.16 prohibits by exclusion non-attorney representation. This is most likely the state's intention. Then let the state so say. The Chair notes that while the language of Chapter 84 and the many specific instances of unauthorized practice cited in the Authorized Practice Committee Notes of 12/08/2011 imply that Respondent's view would be that of North Carolina State Bar, each instance is decided on a case by case basis. The Chair also notes with interest an apparent contradiction in the State's position (offered by Respondent) and actual practice before FINRA. Respondent's counsel points out (*supra*) that he is permitted by an exception to represent Respondent as an out-of-state attorney because he is in-house corporate counsel. However, in the vast majority of FINRA cases venued in North Carolina, Respondents are represented by out-of-state attorneys who are not in-house counsel.

In summary, the Chair will not disqualify Claimant's representative absent a court order or Cease and Desist Letter from the State Bar. To do so at this point in the proceeding would appear to offend the "traditional notions of fair play and substantial justice."

So ordered this 29th day of January, 2012

A handwritten signature in blue ink, reading "LE Benade", written over a horizontal line.

Leonard E. Benade
Panel Chairperson