

Securities Law Daily™

October 19, 2016

Arbitration

FINRA Still Struggling to Diversify Arbitrator Pool

BNA Snapshot

- FINRA's arbitrator pool said in need of more diversity
- In-depth analysis of complainant pool, loosening stringent arbitrator requirements and releasing list of organizations recruited from are starting points, observers say



By Antoinette Gartrell

Oct. 18 — Michigan attorney Tracy Allen has been a FINRA arbitrator for nearly 30 years and none of the dozens of panels on which she's served has included anyone who wasn't Caucasian.

Allen's experience exemplifies the challenges the self-regulatory organization faces two years after a study found that older white males dominated the arbitrator pool (195 SLD, 10/8/14).

The Financial Industry Regulatory Authority told Bloomberg BNA that it has dramatically expanded resources to tackle recruitment and diversity concerns, while admitting there's more work to be done in what's likely to be a "long slow process with incremental progress."

That's not fast enough for attorneys who represent investors, such as Jacob H. Zamansky of Zamansky LLC, New York. "It's very important to investors that arbitrators have diverse backgrounds like jury pools in court cases in most cities," Zamansky told Bloomberg BNA.

Persistent Problem

The Public Investors Arbitration Bar Association, which conducted the 2014 study highlighting FINRA's diversity challenges, also says the organization needs to do more to make the pool more diverse. PIABA's study of 5,375 arbitrators found that 80 percent were male and that the average age was 69.

An industry spokesperson told Bloomberg BNA that FINRA's arbitrator pool is representative of the securities industry, although attorneys who represent investors say it doesn't necessarily reflect those who bring grievances to the arbitration panels.

Akshay Rao, a University of Minnesota professor whose expert opinion PIABA solicited in the study, told Bloomberg BNA that the composition of the arbitrator pool should be reflective of the historical pool of complainants in the forum. This will allow the panels to empathize with the parties' experiences, he said.

That can be important to individuals, whose definition of "fair" includes people who look like, act like or are from the same culture as they are, said Allen, who has heard cases throughout the Midwest and as far away as New York.

Last year, a 13-member FINRA task force created shortly before the report was released recommended recruiting aggressively in order to increase "the depth and diversity" of the pool (242 SLD, 12/17/15). A Sept. 30 status report highlighted FINRA efforts to recruit more arbitrators, including hiring additional staff, enlisting consultant Aon Hewitt and using social media and direct marketing.

FINRA's arbitration chief Richard Berry told Bloomberg BNA that FINRA currently recruits from a list of more than 100

organizations nationwide, some of which are aimed at specific ethnic groups and women.

FINRA also has surveyed its arbitrators to determine the makeup of the pool in terms of race, age, gender and other categories since the 2014 study, he said. It expects to have the results of the survey in January, Berry said.

Suitable Suggestions

PIABA's president-elect, Marnie Lambert, said FINRA should also consider loosening the "stringent" arbitrator requirements. "It's a long, daunting process with a lot of paperwork to fill out," she said. "There needs to be a balance between making it so difficult that only a certain type of person is willing to serve," and properly vetting the candidates, Lambert said.

Rao suggested using a straightforward statistical technique whereby FINRA examines the pool of complainants historically and compares that data to the current make-up of the arbitrator pool. That shouldn't take a lot of time and effort, he said.

Lambert also proposed that FINRA release a list of the organizations it recruits from. In 2014, it reached out to "almost all lawyer associations," she said. "More diversity means you're likely to get more fair results," Lambert said.

Ronald Filler, director of the Financial Services Law Institute at New York Law School, said FINRA should go a step further and require that each panel consist of "at least one woman and/or one minority arbitrator." The task shouldn't be that difficult to tackle, as the majority of law school graduates for the past 35 years have been women, he said.

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