On February 1, 2016, industry practitioners gathered for a rare opportunity to hear directly from six senior FINRA representatives and FINRA Hearing Officers, and an industry panelist, on best practices and strategies for effectively litigating FINRA disciplinary cases. The panelists included:

- Russ Ryan, FINRA Deputy Chief of Enforcement
- Jeff Pariser, FINRA Chief Litigation Counsel, Enforcement
- James Nixon, FINRA Chief Litigation Counsel, Market Regulation
- Andrew Perkins, Chief Hearing Officer
- David Sonnenberg, Hearing Officer
- Joan Caridi, former Managing Director, Credit Suisse and Industry Panelist

A variety of issues relating to litigating a disciplinary proceeding were discussed and this Alert focuses on the important takeaways from the panel discussion.

Russ Ryan, FINRA Deputy Chief of Enforcement, began the program by providing an overview of Enforcement’s investigation of potential violations of securities laws and regulations, filing of a formal complaint, the appointment of the hearing officers, the hearing, and the appeals process.

Between FINRA Enforcement and Market Regulation, roughly 1400-1500 investigations are commenced each year. Approximately 90% of these matters are settled. Of the 125-175 cases that result in the filing of a formal complaint before the FINRA Office of Hearing Officers (“OHO”), most are resolved before an actual hearing. While FINRA has taken a tougher position lately on alleged securities laws and regulatory violations and corresponding discipline/sanctions, the number of litigated cases remains steady between 30-35 cases each year. The current trend of cases that do progress to hearing usually are more complex, have higher stakes, and take a longer amount of time to litigate.

Mr. Ryan stressed that, contrary to the perceptions of some, FINRA does not shy away from litigating cases. In some cases, where the law may be murky, FINRA may litigate to promote clarity. FINRA would prefer to have a hearing panel weigh in on hot issues rather than seek enforcement of uncertain principles.

For those 30-35 sometimes complex, high-stakes cases that do go forward each year, veteran hearing officers and an industry panelist provided tips, advice for counsel, and best practices for effectively trying a FINRA disciplinary case including with respect to pre-trial logistics, exhibit presentation, opening statements, fact witnesses, expert and character witnesses, objections, closing arguments, and general do’s and don’ts. Below are some practice points for each topic and as well as dos and don’ts.
- Make arrangements in advance with FINRA to discuss coordination on matters such as exhibits and pre-hearing access to the hearing room.
- Discuss admission of exhibits during the pre-hearing conference.
- Determine whether the panel would like electronic or hard copy exhibits or both.
- If the former, consider providing thumb drives of exhibits to the Panel.
- Use of timelines and summary exhibits often are helpful.

**Opening Statements**

- The Hearing Officer usually will set the amount of time for opening, generally about 30 minutes.
- Provide a narrative that builds on the pre-hearing brief, focusing on the defense’s themes and key facts of the litigation – "who is going to tell the panelists what and when."
- Do not merely repeat the pre-hearing brief.
- Use of visual aids is helpful (i.e., blow-ups of key pieces of evidence or a timeline).
- Hearings are unitary proceedings so consider whether to address sanctions and mitigating factors.

**Fact Witnesses**

- Although the staff historically has called the FINRA examiner as its first witness, because Panelists generally prefer to hear testimony of witnesses with firsthand knowledge, the staff now typically calls Respondent first.
- Counsel must make a tactical decision whether to cross-examine the Respondent when he or she is called on the staff's case or wait until case-in-chief.
- Customer witnesses are common and consider potential issues concerning whether you have sufficient documents for an effective cross-examination.
- Witness counsel is generally permitted but participation is limited to preserving attorney-client privilege.
- Be prepared for Panelist questions, which may include questions not asked during the Respondent’s on-the-record testimony.
- Federal Rules of Evidence do not apply but are instructive (e.g., hearsay may be admissible if reliable and relevance is the primary successful evidentiary objection).

**Character Witnesses and Experts**

- Must obtain permission from the Hearing Officer to use an expert and expect to prepare an expert report to be admitted into evidence.
- Experts are increasingly used in more complex cases (e.g., in novel product cases, trading cases, fair pricing/mark-up/mark-down cases).
- Experts need substantive current experience.
- Do not seek to use experts to address controlling law (which is the Panel’s function) and/or topics the panel is capable of understanding (expert will not be “helpful” to the Panel).
- Panelists’ views vary as to whether character witnesses are helpful, with some believing that an industry witness like a manager who works closely with Respondent may add value, while others believe such witnesses offer predictable platitudes that are not helpful.

**Objections**

- Do not use speaking objections.
- Technical evidentiary objections generally do not get traction.
Key issues are relevance and a witness’s (lack of) personal knowledge.

Closings

- Be prepared to make the closing immediately after the close of the evidence with no break or a short break.
- Thread the needle through the narrative developed throughout the hearing and the key facts that should drive the Panel’s ultimate decision.
- Address each cause of action and whether the elements were established.
- Discuss credibility and educate the Panel of the reasons to accept your version of the facts.
- Address liability and determine whether to address sanctions. If you do address sanctions, focus on the applicable sanction guidelines and general considerations, rather than case precedents.

Real World Dos and Don’ts

- Exhibit civility, respect, and appropriate demeanor throughout the proceeding.
- Position the case for the forum (equity).
- Show Respondent attempted to follow the rules even if done imperfectly.
- Show remorse, own up to weaknesses in behavior.
- Address mitigating circumstances (lack of prior disciplinary history is not mitigative).
- Treat all witnesses respectfully.
- Own up to what Respondent did, do not deflect and explain as necessary.
- Do not complain about the investigation or waste time with half-hearted “estoppel” type defenses.
- Do not point to precedent with respect to sanctions (each case is unique).

FINRA disciplinary hearings are hybrid proceedings with a number of unique features. Before trying such a case, counsel should educate himself/herself on both the rules and the unwritten practices.