

# Time to shut down Finra's arbitration panels

*Those with a grievance should be able to make their case in a real court of law*

By William D. Cohan

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Black spot' letters in the spotlight

“Sunlight is said to be the best of disinfectants,” the future Supreme Court Justice Louis Brandeis famously wrote in a 1913 article for *Harpers' Weekly*, and now, almost 100 years later, there is evidence that Brandeis was right.

On July 9, I wrote a column describing how the Financial Industry Regulatory Authority, Wall Street's self-policing organization, seemingly out of nowhere fired three arbitrators in the months after a May 2011 case in which they awarded \$520,000 to the estate of the late Robert Postell. The finding was against Postell's former broker, Merrill Lynch, a subsidiary of Bank of America Corp.

One after another over a period of about a year, the arbitrators -- Ilene Gormly, Daniel Kolber and Fred Pinckney -- received what are known as “black spot” letters from Finra, removing them from the roster of those empowered to adjudicate the thousands of lawsuits brought each year by Wall Street employees and customers against financial firms.

The black spot letters described how Finra periodically examines the list of arbitrators and culls people from it. Finra officials have said that Gormly, Kolber and Pinckney weren't removed because Merrill's lawyer and executives complained to the authority about the sizable award granted to Postell, who died after filing the claim, and his wife, Joan. Was it truly a coincidence? Finra derives the vast majority of its more than \$1 billion in annual revenue from securities firms, and executives in the industry serve on Finra's board of governors.

My column on the matter caused a bit of a stir around Finra -- as well as at the Public Investors Arbitration Bar Association, a group of about 500 or so lawyers who represent claimants in Finra arbitrations. Letters started flying between a Finra executive and a Piaba executive explaining the steps Finra takes when it removes an arbitrator. Finra's goal was to show that its actions in the firing of Gormly, Kolber and Pinckney were for good, albeit unstated, reasons.

Finra's justifications rang hollow, and on July 25 the organization took the remarkable step of reinstating all three arbitrators to the Finra roster. In a letter to the arbitrators, Linda Fienberg, the president of Finra's dispute resolution and its chief hearing officer, explained that “after reading the commentary” from Bloomberg View she and her fellow Finra executives “re-opened the matter.” They listened to tapes of the

Postell arbitration proceedings and “reached a different conclusion regarding the alleged inappropriate conduct from the conclusion previously reached.” (Finra provided me with a copy of the letter.)

Still, Fienberg alleged unspecified “inaccuracies” in my reporting and disputed the causal relationship between the firing of the three arbitrators and the complaints from Merrill and its attorney about the Postell award. “There is no validity to this assertion,” Fienberg wrote. “Finra simply does not remove arbitrators from the roster based upon their awards, and never has.”

Maybe. Andrew Stoltmann, a lawyer in Chicago who sues Wall Street firms, contacted me after seeing my column to say he has never heard of three arbitrators being removed in the way that Gormly, Kolber and Pinckney were. “I've handled close to 1,000 Finra arbitrations over the years,” he wrote in an e-mail. “To think Finra removes arbitrators and but for news coverage like this those arbitrators would have stayed out is extraordinary troubling. Finra's major credibility problem is directly related to issues like these.”

One would like to think the reinstatement of the three arbitrators ends the matter in a very satisfying way. But, alas, it doesn't. Merrill Lynch, through its attorney, Terry Weiss of Greenberg Traurig, has asked a federal judge in Atlanta to throw out the \$520,000 award to the Postells. Weiss argued in his motion to vacate that the arbitrators “exhibited evident partiality,” “misbehaved such that Merrill Lynch's rights were prejudiced,” “exceeded their powers by taking over the arbitration, conducting hostile cross examination of Merrill Lynch's witnesses on irrelevant topics” and “refusing Merrill Lynch's request that the biased arbitrators recuse themselves.”

Weiss attached a copy of my column to a motion he filed with the federal court to supplement the record. Weiss had the chutzpah to argue that the dismissal of the arbitrators was a smoking gun showing that the panel had done something egregiously wrong in the Postell arbitration. Now, with Finra having cleared the arbitrators of wrongdoing, Weiss has boxed himself into a corner in the legal argument department.

My previous column also brought complaints that because, almost 10 years ago, I pursued my own arbitration against JPMorgan Chase Co. (JPM) -- and lost -- I am biased against Wall Street arbitration. No. What I am against is the sham that so often passes for justice on Wall Street these days. The millions of people who either work there or who have brokerage accounts sign away, upfront, their legal right to resolve financial disputes in a court of law. They are forced into Finra arbitration and most don't have a clue they have relinquished their ability to resolve it any other way.

Finra's treatment of Gormly, Kolber and Pinckney -- despite their reinstatements -- illustrates just how shoddy the system is. It needs to be scrapped, and those with a grievance against Wall Street should get their day in a real court.

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