

# **FINRA Expungement Expert Witness: A Primer on Expungements Through FINRA Arbitration**

By: **J Daniel Mattei**

*Learn how and why FINRA expungement expert witnesses can assist in investor expungement proceedings in front of an arbitration panel.*

## **I. Introduction: The CRD and BrokerCheck**

The Central Registration Depository (“CRD”), is a database maintained by the Financial Industry Regulatory Authority (“FINRA”). The CRD contains information about securities firms and individual broker’s licenses, employment history and mandatory disclosures.

Securities firms must report certain events to the FINRA via the CRD. These events include: consumer disputes, arbitrations, court actions, criminal matters, employee terminations, investigations, financial matters, and regulatory actions. These disclosure events are accessible to the public via the [BrokerCheck tool](#).

According to FINRA, BrokerCheck is a, “... free tool from FINRA that can help you research the professional backgrounds of brokers and brokerage firms, as well as investment adviser firms and advisers”.<sup>1</sup>

BrokerCheck has become a powerful tool for consumer protection. Specifically, the disclosure mechanisms set forth by FINRA have provided consumers/potential clients with increased transparency and better resources to research and select securities firms and financial advisors.

There are times, however, that brokers may wish to expunge or remove disclosure events from the CRD records through an arbitration process.

## **II. The Expungement Process**

Expungement is the process of permanently removing disclosure events from a broker’s CRD report. From a practical perspective, expungement removes the disclosure event from the BrokerCheck tool and therefore the event becomes invisible to consumers. Brokers may seek to expunge disclosure events related to consumer dispute information and intra-industry dispute information. FINRA expungement expert witnesses are often utilized to assist in determining whether expungement is appropriate.

### **a. Consumer Disputes**

Information related to customer disputes include:

- disclosures concerning allegations of misconduct
- other general complaints
- any arbitration proceedings

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<sup>1</sup> <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck>

Arbitration can result in the expungement of records concerning allegations of misconduct or other complaints. Arbitration requires court confirmation in which FINRA is named as a party in the proceedings, unless a waiver is granted.

According to FINRA [Rules 2080](#) and [2081](#), an arbitrator should recommend expungement only when information to be expunged has no meaningful regulatory value. According to the rules, expungement must be based on one of the following grounds:

1. The claim, allegation or information is factually impossible or clearly erroneous;
2. The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; **or**
3. The claim, allegation or information is false.

Before ruling on an expungement request, the arbitration panel must do the following:

1. Hold a recorded hearing session (by phone or in person) about the appropriateness of expungement. This applies to simplified arbitration cases, even if the claimant did not request a hearing.<sup>2</sup>
2. In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of the settlement.
3. Articulate which FINRA Rule 2080 grounds for expungement serves as basis for the expungement recommendation and supply a written explanation of the reasons for the panel's finding.
4. Assess forum fees for hearing sessions in which the sole topic is the determination of appropriateness of expungement against the parties requesting the relief.

i. *Expungement Only Cases*

Brokers may also seek arbitration for the sole purpose of expungement. In such cases, the broker files a claim against a member firm (current or former employer of the broker) without naming the consumer as a respondent. FINRA regulations indicate that the arbitrator should order the claimant to provide a copy of the statement of claim to the consumer.<sup>3</sup> This is to ensure that the consumer is aware of the expungement request and has the opportunity to express their position to the panel.

ii. *Settled Cases*

An expungement request can be stipulated to in a settlement agreement, however, FINRA Rule 2081 prohibits the conditioning of a settlement to the customer's consent to (or not oppose) the request for expungement. Members that violate this rule expose themselves to disciplinary referrals.

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<sup>2</sup> Expert witness testimony may be utilized at this stage.

<sup>3</sup> While it is important to notify investors about an expungement-only hearing, they are not required to be named as respondents in the claim.

iii. *When the Panel Recommends Expungement*

If the arbitration panel recommends the expungement, the party seeking relief must obtain a court order confirming the arbitration award granting the expungement and naming FINRA as a party. Upon request, FINRA may waive the obligation to name itself as a party, if they determine that the expungement relief is supported and follows FINRA Rule 2080.

If the waiver is not granted, FINRA must be named as a party in a court proceeding. FINRA will evaluate whether to oppose the confirmation, based on the reasons for requesting the expungement and supporting evidentiary material. The foregoing aside, FINRA will take part in the court confirmation proceeding and oppose confirmation of the recommendation for expungement if it does not meet at least one of the specified standards under Rule 2080 and satisfy the procedural requirements.

b. Intra-Industry Disputes

Expungement of intra-industry dispute disclosures is generally less complex, quicker, and more affordable than expungement of consumer disputes. Intra-industry disclosures include reasons for employment termination or breach of contract. When cases involve non-consumer dispute information and arbitrators determine that the information was defamatory in nature, it is likely that FINRA will expunge the information without the need for a court order.

c. Certain Disclosures are Not Eligible for Expungement

Disclosures of civil judicial actions, criminal matters, bankruptcy, and regulatory actions are not eligible for expungement by FINRA. In addition, FINRA will not grant expungement for requests previously denied in arbitration.

### **III. Criticism and Scrutiny**

The expungement process is currently subject to scrutiny by FINRA and other interested parties. The Public Investors Arbitration Bar Association (“PIABA”) foundation, a non-profit organization that focuses on investor education, published a study in 2019<sup>4</sup> denouncing the expungement process as “broken” and susceptible to manipulation. The PIABA report highlights inefficiencies and technical loopholes which have led to a sharp increase in expungement-only cases.

In February 2020 FINRA announced a proposed rule changes<sup>5</sup> to establish minimum filing fees for expungement requests, in an effort to reduce and prevent abuse.

### **IV. Conclusion & Recommendations**

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<sup>4</sup> <https://piabafoundation.org/wp-content/uploads/2019/10/Expungement-Study-101519-FINAL-VERSION.pdf>

<sup>5</sup> <https://www.finra.org/sites/default/files/2020-02/SR-FINRA-2020-005.pdf>

Brokers should carefully evaluate the viability of pursuing expungement. It can be a lengthy and complex process in which a FINRA expungement expert witness may be utilized. Here are some considerations that can affect the complexity and cost of an expungement request:

- Viability – Before starting the process you should consult with an experienced lawyer or a qualified FINRA expungement expert to see if your case is workable. Remember that this is an extraordinary procedure, and relief is granted only under specific circumstances. Note that, the fact that an arbitration was decided in favor of the broker is not necessarily grounds for expungement.
- Monetary damages – A request for monetary damages will influence the cost and complexity of the process.<sup>6</sup>
- Expungement-only claims – A claim for expungement can either be included as part of the original consumer dispute or taken as a stand-alone claim. The later may be less complex and more cost-effective.

#### **About the Author:**



**J. Daniel Mattei, CFA** is the Founder and Principal of [Rockelis Partners](#), a consulting firm that specializes in financial services operations, transaction services, expert witness, and litigation support. He is available to serve as an expert witness in FINRA expungement cases and has over \$25 billion in transactional experience including advising the Government of Puerto Rico on the largest ever municipal debt restructuring in U.S. history. Mr. Mattei has also been portfolio manager for over 15 mutual funds and separate managed accounts with an aggregate of more than \$3.5 billion in assets under management, and fund leverage programs with over \$4 billion in aggregate repo and commercial paper lines. He is a CFA Charterholder, approved as a FINRA Dispute Resolution Arbitrator, and previously held FINRA Series 7 and Series 66 licenses. He can be reached at (787) 310-0297 or [jdanielmattei@rockelis.com](mailto:jdanielmattei@rockelis.com).

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<sup>6</sup> This may change if certain rule changes proposed by FINRA are adopted.