The Financial Industry Regulatory Authority's ("FINRA's") Acceptance, Waiver, and Consent ("AWC") appears to be the most common outcome for that self-regulatory organization's ("SRO's") investigations; however, the mechanics and consequences of the AWC settlement are rarely understood by many registered representatives acting as their own counsel, and often not properly explained by lawyers to their industry clients. Join veteran Wall Street regulatory lawyer Bill Singer as he guides you through the nuts-and-bolts of *FINRA Rule 9216* [citations to the *Rule* are indented below].

RULE 9216: No Dispute and No Appeal

> FINRA Rule 9216: Acceptance, Waiver, and Consent; Plan Pursuant to SEA Rule 19d-1(c)(2)
>
> (a) Acceptance, Waiver, and Consent Procedures
>
> > (1) Notwithstanding Rule 9211, if the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and the member or associated person does not dispute the violation, the Department of Enforcement or the Department of Market Regulation may prepare and request that the member or associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the National Adjudicatory Council, the SEC, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed. Unless the letter states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by FINRA staff.

ACW???

The *AWC Letter* contains boilerplate admonitions whereby you agree, in the following order, to:

- ACCEPT FINRA's finding of violation;
- CONSENT to the sanctions imposed upon you; and
- WAIVE your right to a hearing.

Why didn't they call it an Acceptance, Consent, and Waiver (an ACW)? I dunno and they didn't ask my opinion. The key takeaway here is one of finality: You waive the right to a

hearing and your right to appeal to FINRA's NAC, to the Securities Exchange Commission, and to the courts. It's game, set, and match.

In The Beginning

As with so many rules and regulations, FINRA Rule 9216 begins with a reference to yet another rule: *FINRA Rule 9211: Authorization of Complaint*, which, in pertinent part at *Rule 9211(b): Commencement of Disciplinary Proceeding*, states that a "disciplinary proceeding shall begin when the complaint is served and filed."

When we reach that point in time when the brains of FINRA staffers have achieved a state of mind prompting them to recommend charges against you, Staff may halt their countdown to serving you with a *Complaint* and give you a choice between two doors:

- **Door #1**: If you are prepared to throw in the towel and settle the allegations, you can settle via an AWC with the SRO **before** a formal *Complaint* is issued but you will have to agree not to dispute FINRA's allegation of the violation(s).

- **Door #2:** If you are incensed, outraged, and prepared to fight all the way down to the mat, then you are likely headed for a contested hearing. After the issuance of a *Complaint*, however, if you have a change of heart, you may still be able to settle via an *Offer of Settlement*.

The Pros of Settlement

Why might you want to bite your tongue and swallow your pride and settle with FINRA? *Ahhhh* . . . now that's the key question so many of my clients ask me.

If you pursue your "day in court" through a contested disciplinary hearing, you lose control of your fate because a hearing panel could impose crushing fines and suspensions (including a *Bar*). If you settle, you retain some ability to negotiate the amount of any fine and the length of any suspension.

Another factor to consider is the so-called "settlement premium," which should come into play when negotiating the sanctions attendant to an AWC. FINRA often tosses respondents a bone in the form of a "discount" on fines and/or suspension if you go down quietly via an AWC. If you opt to settle after the issuance of the *Complaint* via an *Offer of Settlement* (in contradistinction to an AWC), you may find that Staff demands a more onerous fine and/or suspension than what was on the table during the AWC discussions.

In simpler terms, perhaps the most compelling reason to settle is summed up by the expression: *It's the Devil you know versus the Devil you don't know.*

When trying to figure out what's a fair dollar amount or a reasonable number of weeks/months suspension, make sure to consult the appropriate section of *FINRA's "Sanction Guidelines."* Similarly, research some of the settled cases presented in the *BrokerAndBroker.com Blog AWC Database*; and also research *FINRA's online "Disciplinary Actions" database.*

The Cons of Settlement

Why might you want to tell FINRA "HELL NO!" when it comes to settling via the AWC ? For one thing, there is often a chasm between Enforcement/Market Reg *believing* that you committed a violation and *proving* that conjecture by a preponderance of the evidence. For another thing, if you to enter into an AWC, denying the SRO's allegations after settlement could constitute a violation of FINRA's rules and land you in hot water. If you think that FINRA's bluffing or that you can refute the regulator's allegations, then you might want to pass on the AWC. Who knows . . . if you demand your right to a hearing, you might successfully defend yourself and win exoneration. For some industry respondents, it often boils down to little more than a matter of principle and a sincere belief that they did nothing wrong and are not going to roll over and play dead just to placate FINRA.

On the other hand, if you're guilty as Hell and there's little likelihood of salvation at the end of the disciplinary process, entering into an AWC may end your career sooner rather than later. If the goal is to delay the imposition of inevitable Bar as long as you can, then demanding your right to a hearing and exhausting your appeals may buy you more time. Cynical as that sounds (and it is), it's a common strategy in all forms of litigation.

Overplaying Your Hand

FINRA is not above playing games and its Staff may try to bluff you into settlement. The allegations, assertions, and threatened charges raised by Staff during settlement negotiations may be significantly diluted or even absent in the filed Complaint. As such, the Complaint may be far more benign than what Staff claimed would be in that document if you didn't settle on their terms. On the other hand, what shows up in the *Complaint* may look as bad or worse than what Staff threatened.

It often takes on the dimensions of a high-stakes poker game in which you fold but may have to pay to see the other player's hand -- or that hand may not be shown for any price. If you don't fold and go "all in," you have to deal with the fact that *Lady Luck* is often fickle. Sometimes, both FINRA and a Respondent are certain that they have a can't-lose hand. Just remember, *Pocket Aces* are not always enough.

The Letter

At the heart of the AWC process is what the rule characterizes as a "letter," which you will be required to execute. When the ink of your signature (and that of your lawyer) has dried on the AWC Letter, a bit of magic occurs because FINRA characterizes that "letter" as something that you submitted and asked be accepted as setting forth the terms of your settlement. I say it's a bit of magic because, in reality, you don't actually draft the letter -- it's drafted by the Staff, and should you attempt to propose revisions to the Staff's draft, that often sets off a round of contentious negotiations. The majority of AWCs contain this boilerplate introductory sentence:

> Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below.

What FINRA portrays as a submission of a settlement proposal, many respondents portray as the byproduct of FINRA's twisting of their arms and forcing them to accept. To hear such respondents tell their version, they would cite to the crippling costs of defending against charges in a threatened *Complaint* and the Staff's admonition that the failure to accept a largely pre-packaged settlement could expose the respondents to a nuclear option of an *Office of Hearing Officers*' *Hearing Panel* imposing astronomical fines and career-ending suspensions after a plenary hearing.

Lawyered Up Versus Pro Se

In the case of a respondent represented by a seasoned, industry lawyer, you should benefit from objective counsel about the merits of FINRA's likely case against you and of your probable defenses. Similarly, your lawyer should be able to navigate you through what would constitute a fair settlement or whether your situation truly suggests that you should go to the mat and demand a hearing. Of course, all that wonderful conversation and advice comes with a hefty cost, and for many respondents, the dollars involved in paying a law firm's Retainer plus hourly fees, costs, and expenses is out of reach. The reality for many pro se respondents is that they enter into AWCs that extract negatively disproportionate fines and/or suspensions when compared to recent settlements or to recent *Decisions* following contested hearings.

Effective Date of Sanctions

As noted in Rule 9216, the effective sanction date is determined by Staff. In theory, you have some limited ability to ask the Staff to agree to a date on which the agreed-to sanctions would be imposed. There is even a mechanism for scheduling a payment plan for fines. Some folks prefer to get things moving immediately; others need time to get their affairs in order; and some just want to serve the 30-day suspension in August or

during a holiday season. In practice, the Staff frequently plays what amounts to a silly shell-game and will insist that they can't actually set the date on which sanctions will be imposed as a condition of your executing the AWC because . . . and then you get a flood of explanations: *we have to get clearance from our boss, we have to get clearance from Washington, our policy is not to negotiate a specific date on which your suspension will begin, we can't agree to a date because we don't know if the proposed AWC will be accepted*, and it goes on and on and on. There's the rule. Then there's the bureaucracy's interpretation of the rule. Then there's the way things actually get done.

> (2)(A) If a member or person associated with a member submits an executed letter of acceptance, waiver, and consent, by the submission such member or person associated with a member also waives:
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> > (i) any right of such member or person associated with a member to claim bias or prejudgment of the General Counsel, the National Adjudicatory Council, or any member of the National Adjudicatory Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent; and
> >
> > (ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

Waive Bye Bye

The act of submitting your AWC for approval includes your agreement to waive any claim of bias or prejudgment by FINRA's General Counsel, the NAC, and any NAC member concerning the discussions involving the terms and conditions of your AWC. Moreover, you know how you really, really believe that during the AWC negotiations that Staff had some improper private chat about you with someone on the NAC or that the separation you were promised between the Staff and the NAC was winked at? Well, kiss that claim goodbye because waived it when you submitted the settlement proposal.

> (B) If a letter of acceptance, waiver, and consent is rejected, the member or associated person shall be bound by the waivers made under paragraphs (a)(1) and (a)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the letter of acceptance, waiver, and consent was executed and submitted and ending upon the rejection of the letter of acceptance, waiver, and consent.

FINRA's Insurance Policy

During the period between when you submit the AWC for acceptance and its rejection (yes, there are times when the proposed fine and/or suspension may not be deemed sufficient), you are bound by all the waivers you made in submitting the now-rejected AWC. All of which renders this aspect of the AWC a FINRA insurance policy along the line of a heads-I-win-tails-you-lose proposition. In fairness, this is how it goes with virtually all such settlements (even those involving court cases) -- it's the grease that allows most settlement processes to spin its wheels. Consequently, if you think the fix was in or the settlement process was rigged against you, you're not going to have much recourse if your offer is rejected.

> (3) If the member or associated person executes the letter of acceptance, waiver, and consent, it shall be submitted to the National Adjudicatory Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such letter or refer it to the National Adjudicatory Council for acceptance or rejection by the National Adjudicatory Council. The Review Subcommittee may reject such letter or refer it to the National Adjudicatory Council for acceptance or rejection by the National Adjudicatory Council.
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> (4) If the letter is accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter. If the letter is rejected by the Review Subcommittee or the National Adjudicatory Council, FINRA may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the letter of acceptance, waiver, and consent under paragraph (a)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding. . .

Kafka and Alice In Wonderland

When it comes to accepting or rejecting an AWC, Rule 9216 seems to have cut-and-pasted passages from Kafka's *The Trial* or Lewis Carroll's *Alice in Wonderland*:

> ***Journey Of A Thousand Miles:*** According to the FINRA Rule 9216(a)(3), you submit the AWC to the NAC.
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> ***The Power To Accept***: Although 9216(a)(3) very clearly states that the AWC is to be submitted to the NAC, in the very next sentence and without so much as an explanation or clarification, we are told that the AWC may be accepted by the *Review Subcommittee* or the *Office of Disciplinary Affairs* ("ODA"). If a respondent "shall submit" an AWC to the NAC, how the hell does that same AWC wind up before the *Review Subcommittee* or *ODA*? Leaving that threshold question hanging on some tree branch like a grinning but vanishing *Cheshire Cat*, we then learn that the *Review Subcommittee* or the *ODA* can accept an AWC.
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> ***The Power to Reject:*** The *Review Subcommittee* can reject an AWC but the *ODA* lacks such power.
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> ***Unrejected But Not Accepted***: Both the *Review Subcommittee* and the *ODA* may "refer" an ***unrejected*** AWC that they don't accept to the *NAC* for further consideration but only *the Review Subcommittee* may "reject" an AWC. An ***unrejected*** AWC that they don't accept -- you really can't make up such gobbledygook like that without being a talented wordsmith.
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> ***The Plenary Power of the NAC***: The *NAC* can accept or reject whatever the hell it wants.
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> ***Three For The Price Of One:*** If the *Review Subcommittee*, the *ODA*, or the *NAC* accepts your AWC, that document magically is transformed into a trinity of a FINRA *Complaint*, your *Answer*, and FINRA's *Decision*.
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> ***Tabula Rasa***: If the *Review Subcommittee* or the *NAC* rejects your AWC, the good news is that the slate is wiped clean by FINRA and the SRO promises not to use your proposed AWC as evidence in connection with a determination concerning the issues set forth in any *Complaint* or in a proceeding. A word of caution from an old hand at dealing with FINRA: Be careful about what you disclose to Staff during the AWC negotiations. Yeah, sure, all well and fine that FINRA promises not to introduce any of your damaging admissions into evidence or to incorporate them into the *Complaint*. On the other hand, have you ever tried to un-ring a bell?

Permanent Disciplinary Record

At long last you have decided, for whatever reason, to go along with the whole AWC thing and FINRA gets back to you with the semi-good news that it's now a done deal. Trust me, the pain ain't done yet. If you look at a typical AWC, you will likely find this language in the approved final version:

> C. If accepted:
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> 1. this AWC will become part of their permanent disciplinary records and may be considered in any future actions brought by FINRA or any other regulator against them;

You know the water-cooler lawyer in your branch office who told you to go with the AWC because it's no big deal and it's simply a settlement and no settlement can ever be used against you? Well, next time you see that idiot, maybe you should dump the water jug on his head. In fact, the AWC goes into your *Central Registration Depository* record and in the future, should you slip up, rest assured that your past AWC "history" will be cited to show that you lack remorse, are a recidivist, should be slammed with the most extreme fines, and are the kind of registered person who should be barred.

Going Public

Many folks who settle with FINRA via an AWC fail to understand that there is nothing "secret," "confidential," or "private," about the embarrassing disclosures and allegations that were printed above their signature. As clearly admonished in most AWCs:

> 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about their disciplinary records;
>
> 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and

I beg you -- I plead with you -- read and re-read paragraphs #2 and #3 immediately above. Your AWC will find its way onto FINRA's database, including *BrokerCheck*. Your AWC may well find its way into a press release, which could then be picked up by the media -- including blogs such as *BrokeAndBroker*.com. An AWC is NOT a secret, confidential, private affair between you and FINRA.

It's All Lies

Once the AWC is approved, you have lost the ability to contain the matter and it may well find its way into the public domain. During a job interview, you may be asked about the underlying allegations in the AWC or about your sanctions. The inclination for many

respondents is to spin what happened and present their slant of the case. The thing about spinning and slanting is that you can't directly or indirectly deny any finding in the AWC, and you can't suggest that there was no factual basis for FINRA's actions. Consider this standard boilerplate in most AWCs:

> 4. Respondents may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Respondents may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects their: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

Which brings us to those idiots who post on social media and explain that they only settled with FINRA because the regulator forced them, that FINRA had no basis whatsoever to charge them, that the whole AWC settlement was a sham, and that they simply agreed to settle in order to avoid paying a lawyer. After you have read #4 above, you tell me -- is that a smart thing to do?

Getting It Correct

For those respondents who just can't leave things alone and get on with their lives, FINRA offers you the opportunity to attach to an AWC a Corrective Action Statement. As typically set forth in a boilerplate provision in an AWC:

> D. Respondents may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondents understand that they may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA or its staff . . .

I don't like *Corrective Action Statements*. Some respondents find it cathartic to wring their hands in writing and explain how they're going to make it all better. Some respondents think that this final composition gives them a subtle opportunity to take the edge off FINRA's charges. If you carefully read the limitations attendant to a *Corrective Action Statement*, you should note that FINRA is not going to let you append some statement that denies the charges or offers a cutesy explanation of an alleged fact. If you have any unresolved issues with the AWC, I would likely avoid submitting a *Corrective Action Statement* and, instead, leave the office early, go to the gym, hit the heavy bag, and maybe spend an hour on the treadmill.