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***FINRA Amends Rules to Allow the Attorney of a Non-Party Witness  
to Attend the Arbitration Hearing While the Witness Testifies***

Effective October 14, 2010, the attorney of a non-party witness is expressly permitted to attend the arbitration hearing while that witness is testifying. This change to both the FINRA Customer and Industry Codes of Arbitration Procedure will apply to all FINRA hearings taking place on or after October 14, 2010.

While the amendments mark a major change to the express language of the Customer and Industry Codes, they will likely change very little about the actual practice of permitting non-party witnesses to bring their attorneys to the hearing while they are testifying. This article will provide a brief overview of the current practice compared to the amended rules that are about to take effect.

**I. When Non-Party Witnesses Testify**

At a FINRA arbitration hearing, a non-party witness may testify at a hearing (1) voluntarily, (2) pursuant to a subpoena, or (3) in compliance with an arbitrator's order for an associated person to appear and give testimony.

A common example of when a non-party witness will testify at an arbitration hearing occurs in cases where the customer does not name the individual broker as a respondent (i.e. defendant) in the case. Rather, in those cases, the customer only names the brokerage firm as a respondent. Nevertheless, the individual broker is likely to be called to testify at the FINRA arbitration hearing, even though he or she was not named as a respondent. If called to testify, the chances are high that the broker will want his or her attorney to attend the hearing while he or she testifies.

**II. Current Rule: Attendance Determined by the Arbitrators**

Under the circumstances described above, the Codes provide that the arbitrators will determine if the broker's attorney may attend the hearing while the broker testifies. This is so because, as the Codes are currently drafted, Rules 12602 and 13602 provide only that *parties and their representatives* are entitled to attend all hearings and that, absent persuasive reasons to the contrary, *expert witnesses* should also be permitted to attend. The panel is then left to determine *who else* may attend hearings. Non-party brokers called to testify as witnesses (and their attorneys) fall into this "who else" category, and thus the panel of arbitrators makes the determination of whether they may attend.

Generally speaking, FINRA arbitrators usually permit non-party witnesses to bring their attorneys to the hearing while they are testifying. During the hearing, the attorney's participation usually involves the attorney making objections based on generally recognized privileges, such as the attorney-client privilege, work-product privileges, and the privilege against self-incrimination.

Consequently, in practice under the existing Codes, the attorney of a non-party witness is typically permitted to attend the arbitration hearing while that witness is testifying. However, such attendance has not been *expressly* permitted under the Codes. Until now.

### **III. Amended Rule: Attendance Expressly Permitted by FINRA Codes**

FINRA is now amending Rule 12602 of the Code of Arbitration Procedure for Customer Disputes and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes to provide expressly that a non-party witness' attorney may attend a hearing while the witness is testifying.

The amendments further provide that, unless otherwise authorized by the panel, the attorney's role will be limited to the assertion of recognized privileges, such as the attorney-client privilege, work-product privileges, and the privilege against self-incrimination.

Also, in order to attend the hearing, the attorney must be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

### **IV. Enhancing the Appearance of Fairness**

FINRA's official position is that the amendments have been made to enhance the appearance of fairness in the arbitration process. Certainly anything that FINRA can do to enhance fairness for customers going through the arbitration process would seem to be a step in the right direction, considering that many other aspects of FINRA arbitration appear to be tilted in favor of brokers. But in practice, these particular amendments are more likely to enhance fairness for brokers rather than customers. That should come as no surprise though since FINRA is a securities-industry-funded organization, and it does not wish to bite the hand that feeds it.

The most positive conclusion to make here is that, on the surface at least, FINRA is making a diligent effort to enhance the overall perception of fairness associated with the arbitration process. Indeed, part of FINRA's recent effort has been to review and amend the Codes where necessary to enhance the appearance of fairness. But ultimately what FINRA needs to be concerned about is achieving the result of *actual* fairness, not just enhancing the *perception* of fairness. What the public truly needs from FINRA are meaningful reforms to the investment arbitration process that result in actual fairness for the benefit of the investing public.

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