



**Cornell University**  
**Cornell Law School**

**William A. Jacobson, Esq.**  
*Associate Clinical Professor*  
Director, Securities Law Clinic  
G57 Myron Taylor Hall  
Ithaca, New York 14853  
t. 607.254.8270  
f. 607.255.3269  
waj24@cornell.edu

March 16, 2010

**Via Electric Filing**

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE.,  
Washington, DC 20549-1090

**RE: Release No. 34-61517; File No. SR-FINRA-2010-006 (Provide Attorney  
Representation of Non-Party Witnesses in Arbitration)**

Dear Ms. Murphy,

The Cornell Securities Law Clinic (the "Clinic") welcomes the opportunity to comment on the proposed amendment (the "Rule Proposal") to Rule 12602 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code").<sup>1</sup> The Clinic is a Cornell Law School curricular offering, in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see <http://securities.lawschool.cornell.edu>.

The Rule Proposal provides that an attorney may represent a non-party witness at an arbitration hearing while the witness is testifying. Originally, the Customer Code only addressed the right to counsel for a party. The proposed revisions would: (1) apply to all non-party witnesses; (2) eliminate an arbitration panel's discretion to decide when the presence of counsel for a non-party witness was appropriate; and (3) give the arbitration panel the discretion to limit the scope of counsel's participation during non-party witness testimony. The Clinic generally supports the Rule Proposal, subject to modification.

Currently, Rule 12602 does not address a non-party-witness's right to counsel, however, arbitration panels have the discretion to grant counsel permission to attend the

---

<sup>1</sup> Although the Rule Proposal amends Rule 13602 of the Industry Code in the same way, the Clinic takes no position on the Industry Code changes.

testimony by non-party witnesses. In support of the Rule Proposal FINRA asserts that arbitration panels frequently grant such permission, and there is no indication there is any abuse of discretion. Since often times non-parties are compelled to appear by subpoena or arbitrator's order, FINRA believes the Code should expressly give non-parties a right to representation, in order to assure due process in its dispute resolution forum.

The Clinic believes the Rule Proposal may unduly impede the arbitration process, unless there are guidelines incorporated into the proposed Rule. One concern is that counsel will use scheduling conflicts to delay the arbitration process, which can lead to higher costs and can hinder resolution. For example, in *Prudential Securities v. John Does 1 through 10*, a dispute arising out of a deposition, counsel for the non-party witness "pursued strategies of delay and obfuscation" by rescheduling numerous times, and failing to appear at a scheduled hearing.<sup>2</sup>

In addition, the Clinic believes that counsel for non-parties may overstep their role by making excessive or substantive objections, which would be disruptive to the arbitration process. For example in *Thompson v. Mather* non-party's counsel made multiple objections regarding form and relevance during her client's videotaped deposition.<sup>3</sup> Ultimately the parties postponed the video deposition until a court could rule on the objections made.<sup>4</sup>

For these reasons the courts limit the role of counsel for a non-party witness. In some cases courts have restricted counsel for a non-party witness from making any objection regarding form or substance during a deposition.<sup>5</sup> Other courts have limited the role of counsel for non-parties to matters of privilege<sup>6</sup> and conflicts arising under Fifth Amendment protections against self incrimination.<sup>7</sup> In other words, counsel for non-parties does not have the opportunity to participate generally and does not have the opportunity to examine witnesses.<sup>8</sup>

The Rule Proposal, however, does not provide any guidance on the scope of participation by such counsel. The Clinic believes that the Rule Proposal should

---

<sup>2</sup> 1993 WL 158518 (S.D.N.Y).

<sup>3</sup> 2010 WL 462949 (N.Y.S.2d).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also, *Securities and Exchange Commission v. United Brands Co.*, 1975 WL 432 (D. Mass.) ("[T]he non-party witness, like anyone else, are afforded the protection of the Fifth Amendment to the Constitution of the United States.")

<sup>8</sup> See e.g., *Women in the City Government United, et al., Plaintiffs v. The City of New York, et al*, 112 F.R.D. 29 (S.D.N.Y. 1986) ("Counsel is not present to keep the deponent from making a statement against his personal interest...counsel is also not present to participate generally in the deposition by cross-examination or otherwise.")

incorporate language consistent with the following: “Absent a finding of extraordinary circumstances, the role of counsel for a non-party witness is limited to matters concerning privilege and conflicts arising under Fifth Amendment protections against self-incrimination.”

The Clinic supports efforts to consider due process protections for non-party witnesses within arbitration proceedings, while balancing other objectives of arbitration such as efficacy and resolution. By incorporating language that delineates the role of counsel for non-parties, the Rule Proposal will protect non-party rights without undue hardship to parties. In addition, incorporating limiting language into the Rule Proposal will ensure consistency in the application of the Rule Proposal, which would better achieve FINRA’s goal of ensuring fairness in the arbitration process.

The Clinic greatly appreciates the opportunity to comment on this Rule Proposal. While generally supporting the Rule Proposal, the Clinic suggests amending the Rule Proposal to include specific limitations regarding the scope of participation by non-party counsel.

Respectfully Submitted,



---

William A. Jacobson, Esq.  
Associate Clinical Professor  
Director, Cornell Securities Law Clinic



---

Rubina Ali  
Cornell Law School '11