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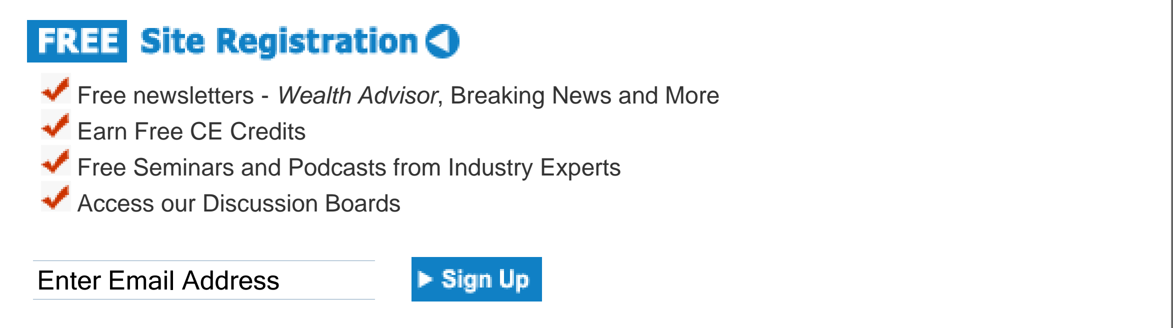

Five Questions with Brian Smiley

By Editorial Staff

October 1, 2009

Smiley, a partner in the Atlanta law firm Smiley Bishop & Porter LLP, also serves as the president of the PIABA, which promotes the interests of investors involved in arbitration disputes against brokerage firms. He spoke to Judith Schoolman about his group's goals and why he's been so busy.

1. Where is the industry headed in terms of arbitrations between customers and securities industry members?

The Supreme Court in 1987 decided that the standard arbitration agreements were binding on the customer. The pending Arbitration Fairness Act could change that. At PIABA we hold the position that customers want the ability to choose to go to court [rather than arbitration]. They want and deserve the choice to decide if there is an industry arbitrator included in their arbitration panel. The financial industry will fight to try to keep arbitration in the FINRA forum and to maintain the industry representative because it serves the industry's best interest.

Because of the market correction of the last few years there has been a huge shake-out and an unusual number of challenging, exciting arbitration cases. I personally haven't been this busy in all my career.

2. Why does PIABA feel that the presence of an industry representative at an arbitration is a detriment?

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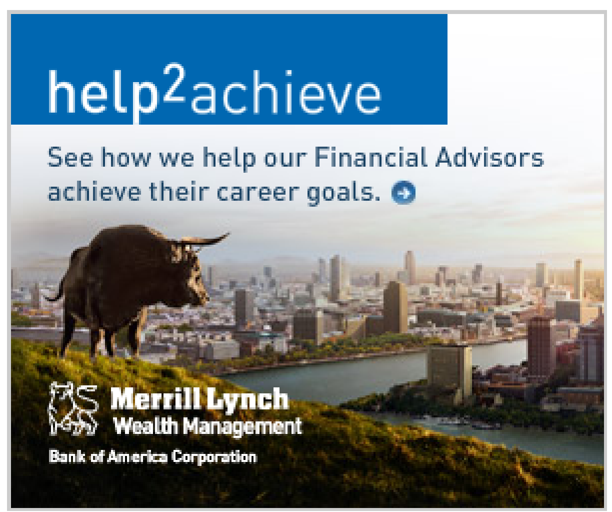
Let's look at it this way. If it was a medical malpractice case and one-third of the jurors were doctors, it would intuitively strike you as unfair. There is a concern that some industry arbitrators—and I emphasize that some are very decent and capable—tend to favor the industry.



The issue is that there is so much consolidation of big brokerages that any industry arbitrator sitting in judgment could be employed in the future by a firm involved in the arbitration. It's awkward. An alternative isn't asking for the elimination of an industry representative, but eliminating the requirement that an industry representative be on the panel. Give the parties the [choice] to include or not to include an industry arbitrator, and give them the choice on a case-by-case basis.

3. Will investors gain if the industry representative is eliminated? And if so, how much?

Investors will gain if they can decide. They lose if they look at a list of potential arbitrators and say, "Wow, there's no one here I can count on to be impartial." There's always the suspicion that industry arbitrators put the brakes on awards. How much will they gain? We don't know. But this will provide a fairer forum and eliminate suspicion that someone on the panel is pitching for the industry.

4. What steps can be taken by financial advisors so their clients can avoid the need for mandatory arbitration?

We need to go back to the old days when a broker or advisor was considered to have only the customer's best interests in mind. His or her duty was to the customer, period. They need lots of communication, candor and, obviously, the need to avoid the temptation to choose products that carry high commissions, which are good for the advisor but bad for the customer. Advisors need to be responsive to clients when their investments are in trouble and they need help. It gives customers a very bitter taste if they are only offered "sell or ride it out" types of advice.

5. What is the strongest way for investors and their advisors to protect themselves against fraud and other misconduct?

Everyone needs to remember, if it sounds too good to be true, it isn't true. Also, the more expenses inherent in the investment, the less the return. And the greater the return, the greater the risk.

Good advisors need to scrutinize their own firm's stand on a particular investment. Advisors need to be skeptical, particularly of their own firm. For the customer, they have to be more active. They need to keep documents and go over statements. If [the client] says to himself, "Did I authorize this trade? I don't remember," shoot the advisor an email. And keep a copy.

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