

Re: Has NASD Dispute Resolution, which is **NOT** a sponsor of this email, informed you that....? (Part XX)

"Nobody makes a greater mistake than he who did nothing because he could only do a little."

--- Edmund Burke (1727 – 1797)

Topic Index

I. SICA "Survey"

NASD Dispute Resolution has requested that I inform you that my Email Newsletters "are not authorized to speak on behalf of NASD or NASD Dispute Resolution."

A summary of prior publications, other materials, e.g., annotated "studies" or "reports," and associated links are located at: http://www.LGEsquire.com/LG_Links.html.

The following are some of the email comments received from arbitrators (**A**) and some of my replies (**LG**). Both may have been edited. From time to time, I have had some afterthoughts on the subject (**LG [Supplement]**). On other occasions, ideas, which are not in direct response to an arbitrator's comment, are presented for your consideration, use and/or comment (**LG [Idea]**).

I. SICA "Survey"

LG (Idea): The 13th Annual Report of the Securities Industry Conference on Arbitration ("SICA Report"), an excerpted and annotated copy is attached, states, in part:

Survey

In 2002, the SEC engaged Professor Michael Perino to review the SRO arbitration process. In his November 2002 report, Professor Perino recommended that there be an independent survey on the perception of fairness of the arbitration process. In response to that suggestion, SICA has commissioned an independent survey on the perception of fairness between SRO arbitration and litigation. This survey will be administered by Professors Barbara Black and Jill Gross of Pace University School of Law Investor Rights Project and it is anticipated that this survey will be completed next year.

Have you been asked for your opinion? Several arbitrators have commented to us. Some of the comments are set forth below. The SICA Report sets forth the history of the SICA and the email addresses of the current "public" and industry members. You might wish to express your opinions directly to them.

A: I have not heard anything about the survey referred to in the SICA Report.

A: I don't think any of us would be asked. Contracts that accompany the generous payments to the persons who conduct the surveys or research for the securities industry (and, pharmaceutical industry, tobacco industry, etc.) give the sponsors total control over the project including discretion to publish the results.

Thank you. I skimmed the document. I already caught two errors. ...

Perino did not "review the SRO arbitration process." He looked at that part of it which is related to arbitrator disclosure. Perino's own description of the scope of his review: "To evaluate current conflict disclosure rules and the potential impact of adopting the California Ethics Standards."

And Perino did not "recommended that there be an independent survey on the perception of fairness of the arbitration process." He recommended "it is crucial that the SROs resolve any lingering concerns about pro-industry bias." More fully he wrote:

Recommendation Four

Sponsor Independent Research to Evaluate Fairness of SRO Arbitrations. Given the unquestioned significance of securities arbitrations, it is crucial that the SROs resolve any lingering concerns about pro-industry bias. To date, available empirical evidence, particularly with respect to investor perceptions of the arbitration process, is fairly limited and only suggests that there are no substantial systemic problems in SRO arbitrations. As a result, this Report recommends that the SROs sponsor additional independent studies to further evaluate the impartiality of the SRO arbitration process.

I believe Professors Black and Gross are part of those academic institutes that help very, very small investors. They have both submitted letters to the SEC in support of investors. On the other hand, I don't recall either of them being nearly as critical as any of us. It is a red flag that they would even agree to participate in (and therefore lend credibility to) a survey on "the perception of fairness."

Wasn't that the point of books like "1984" that all that mattered was "perceptions?"

A: Regarding the accuracy of "perceptions," from today's NY Times: A few days ago the Harris Poll reported that 50 percent of Americans now believe that Iraq had weapons of mass destruction when we invaded, up from 36 percent in February 2005.

A: I also have not been contacted for any surveys. As I recall, you put together quite a massive database of the various plaintiff-lawyer players in this system. Since I assume

you sent one of these emails to everyone on your list, you are essentially taking your own "survey." Your "survey," showing that the vast majority of plaintiff-oriented players have not been surveyed by SIA, should be sent to as many media sources as possible, to embarrass these fakers, and to prove, for the record, that they are, in fact, contacting only persons who will give them answers they want to hear. You may want to coordinate with PIABA, which might also be interested in proving that. I think the so-called "survey" will be designed to show that people this corrupt industry-controlled system as "fair."

In truth, as we all know, an honest survey would show that this is far from the truth. The majority of opinion, within the plaintiffs' bar, is that the system is unfair and pro-industry/anti-claimant biased. That does not mean that every case is lost by claimants, but merely that, generally speaking, the verdict ends up much lower than a jury would, otherwise, be likely to award, and, also, the "unofficial" burden of proof is much higher than the preponderance of the evidence standard. Most arbitrators, from my experience as both an arbitrator and claimant's lawyer, demand proof to be made on the basis of "clear and convincing" evidence, at minimum. Others are looking for the claimant to prove his case on the criminal standard of "beyond any reasonable doubt." There is no judge to remind them of the proper standards to apply. Unless there is a trial lawyer on the panel, experienced with the standards used in the civil courts, and thoroughly knowledgeable of the rules of evidence and procedure, panelist-lawyers also fall into this pattern of incorrect behavior. Most of the time they do not intentionally wish to violate the law, but do so, anyway, simply because they do not fully understand the standards upon which civil cases are supposed to be decided.

Another big problem, that you have emphasized in the past, is the industry panelist substituting his/her opinions for those of the party's experts. Since his/her opinion cannot be cross examined, tend to have a much stronger influence on other panelists than the opinion of the expert witnesses, and since his/her opinions (assuming that he/she is or was either a line broker or manager) will almost always be colored by "there by the grace of God go I..." type thinking. Therefore, it will almost always be an opinion favoring either a lower verdict or no verdict at all.

A: Regarding the scholarship of the survey, the first such survey (Tidwell Report) disclosed its method. At least one author of the survey worked for the NASD. The survey questions were disclosed. They gave the surveys to (I recall) the investors (not their counsels and not securities firms) immediately after conclusion of the hearing but before the decision. The responses were collected before the decisions. A small number responded. There were obvious flaws with this survey.

In any case, there was disclosure. I was least comfortable that at least one author worked for the NASD and the point of even studying "perceptions." Data should be made available to study facts before perceptions. And the opinion of an experienced lawyer would be much more valuable than that of an investor with a one-time experience with only the hearing portion of the process.

By the way, Solin's study is due out very soon.)

I confirmed that Barbara Black is Director of Research and Jill Gross is Director of Advocacy - both of PACE INVESTOR RIGHTS PROJECT at Pace University School of Law. It appears unconscionable that they would get mixed up with this scam survey.

And why does the SICA apparently have access to a list of potential persons to be surveyed but we don't? Did NASD and NYSE give them a list?

I am going to volunteer my perceptions to the two professors.

LG: Please note that the purported survey deals with "the perception of fairness between SRO arbitration and litigation" --- whatever that means --- as opposed to the perception as to whether securities arbitration is fair (to one side and/or the other). How is that to be measured when the same cases will never be both tried in a court of law and heard before an arbitration panel? Further, one might wonder as to the expertise, if any, of Professors Black and Gross in conducting and determining the "fairness" of surveys? Annotated critiques of the Perino Report, the Tidwell Report and the Ruder Report may be found through links at: http://www.LGEsquire.com/LG_Links.html.

My continuing thanks to those who have contributed to Parts I through XX and/or shared their ideas/information. Please continue to forward these emails to your colleagues and associates and share your arbitration ideas and experiences with your fellow readers.

Les Greenberg, Esquire
Culver City, CA 90230
(310) 838-8105
LGGreenberg@LGEsquire.com
<http://www.LGEsquire.com>