

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

"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 "Independent Survey" and Minutes of SICA Meetings Obtained Through a Freedom of Information Act Request

You might recall that in Issue XX, we discussed whether a “survey” being considered by the Securities Industry Conference on Arbitration (“SICA”), which some consider a securities industry dominated advisory committee to the SEC, could be “independent.”

Since Issue XX, we did some investigative work on the matter. Part of that was to obtain some of SICA’s Meeting Minutes pursuant to a Freedom of Information Act request.

The following consists of excerpts of SICA Meeting Minutes. How professional/competent/independent is a professional surveyor when he/she allows the client to micromanage the questionnaire? Are the results of the survey preordained? In contacting the media, will SICA describe the results as an “independent” survey or emphasize that it was “administered” by an “independent” surveyor while de-emphasizing or not revealing its roll in the process? Where is the SEC when we need it? Were you invited to attend the SICA meetings in order to express your views? Do you think that such meetings should be noticed and open to the public?

Minutes of the January 16, 2004 Meeting of the Securities Industry Conference on Arbitration Washington, DC

Members Present

Arnal Aly, SIA
David Carey, NYSE
Heather Cook - NFA
Linda Fienberg, NASD
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Jean Feeney, NASD

Members Participating by Phone

Daniel Beyda, NYSE

Patrick DeMoon, Chicago Stock Exchange
Ted Eppenstein, Public Member
Steve Sneeringer, SIA
Tom Stipanowich, Public Member

Invitees Participating in Person or Bv Phone

India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC
Mary Ann Gadziala,(sp),SEC

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Independent Research on Fairness of SRO Arbitrations - Update



George Friedman stated that it would not be appropriate for SROs to drive the process of collecting information on the fairness of SRO arbitrations. Given the personnel changes at the NYSE, there has been a hiatus in the project, but the NASD is prepared to move forward. Tom Stipanowich explained that he would be touching base with Bob Barrett of CDRI regarding Bob's plans for California and joint efforts for nationally based surveys, and would be glad to arrange a conference call with Dan Beyda, David Carey, George Friedman, TJS, and Bob Barrett of CDRI. (Emphasis added.)

**Minutes of the
March 22, 2004 Meeting of the
Securities Industry Conference on Arbitration
Scottsdale, Arizona**

Members Present

Amal Aly, SIA
David Carey, NYSE
Ted Eppenstein, Public Member
Linda Fienberg, NASD
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Steve Sneeringer, SIA
Tom Stipanowich, Public Member
By Phone:
Dan Beyda, NYSE
Peter DeMoon, 111

Invitees Present:

India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC (phone)

Guests: SIA Guests: Donald Cohen (GCO Services, LLC), Thomas Hommel (Lehrnan), Peter Byer (Quick & Reilly), Ed Turan (CitiGroup), Andrew Melnick (UBS Financial), George Sullivan (MorganStanley), Daniel Greenstone (CIBC), Deborah Heilizer (DB Alex Brown), Andrew Weinberg (CSFB), Linda Drucker (Schwab), and Kenneth Meister (Prudential Equity Group), Robert Clemente.

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Research on Fairness of SRO Arbitrations

David Carey summarized the report of the subcommittee. A subcommittee was appointed to help evaluate bidders: George Friedman, David Carey and Professor Katsoris will be on the subcommittee. Steve Sneeringer said that SIA representatives should not be on the committee. Tom Stipanowich said that CPR would not be involved as a bidder, so he was added to the subcommittee.

Minutes of the June 8, 2004 Meeting of the Securities Industry Conference on Arbitration NASD Dispute Resolution, New York, New York

Members Present

Daniel Beyda, NYSE
Theodore Eppenstein, Public Member
Linda Fienberg, NASD
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Thomas Stipanowich, Public Member

Members Participating by Phone

Jim Flynn, CBOE
Jim Yong, National Stock Exchange
Invitees Participating in Person or by Phone
Peter Cella, Law Offices of Peter Cella
Paula Jenson, SEC
India Johnson, AAA
Robert Love, SEC
Helene McGee, SEC

Guests:

Richard Berry, NASD

Barbara Brady, NASD
Kenneth Meister, Prudential Equity Group
Rose Seeman, NASD (Acting Recording Secretary)

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Independent Research on Fairness of SRO Arbitrations

Mr. Friedman updated the Conference on the work of the subcommittee, consisting of Mr. Friedman, Chairman Katsoris, Ms. Kupersmith, and Kenneth Andrichik. They are currently working on picking a vendor to administer the survey on the perceptions of fairness between SRO arbitration and litigation. They hope to have a vendor selected by September 1, 2004. The subcommittee asked for delegated authority to select a vendor, which was approved unanimously. Mr. Friedman will report back at the October SICA meeting.

Minutes of the January 12, 2005 Meeting of the Securities Industry Conference on Arbitration New York, New York

Members Present:

Arnal Aly, SIA
Theodore Eppenstein, Public Member
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Pat Sadler
Jim Yong, National Stock Exchange

Members Participating by Phone:

Linda Fienberg, NASD
Jim Flynn, CBOE
Invitees Participating in Person or by Phone:
Peter Cella, Law Offices of Peter Cella
Lourdes Gonzalez, SEC
Paula Jenson, SEC
India Johnson, AAA
Helene McGee, SEC

Guests:

Ken Andrichik, NASD
Richard Beny, NASD
Barbara Brady, NASD
George Kramer, SIA
Kenneth Meister, Prudential Equity Group

Rose Seeman, NASD (Recording Secretary, pro-tem)

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Independent Research on Fairness of SRO Arbitrations

 Mr. Andrichik updated the Conference on the status of the SICA survey on the perceptions of fairness of SRO arbitration. He reported that the Subcommittee has chosen Professors Barbara Black and Jill Gross of Pace University School of Law to administer the survey. The Subcommittee will meet again shortly to design the questionnaire.

Result: Mr. Andrichik will update SICA on the survey's progress at its March meeting.

Minutes of the March 15, 2005 Meeting of the Securities Industry Conference on Arbitration New York, New York

Members Present

Theodore Eppenstein, Public Member
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
George Kramer, SIA
Karen Kupersmith, NYSE
Pat Sadler, Public Member
Steven Sneeringer, A. G. Edwards & Sons, Inc.
Jim Yong, National Stock Exchange

Members Participating by Phone

Linda Fienberg, NASD
Jim Flynn, CBOE
Matt Mennes, Pacific Exchange
Invitees Participating in Person or by Phone
David Blass, SEC
Heather Cook, National Futures Association
Lourdes Gonzalez, SEC
Paula Jenson, SEC
Gena Lai, SEC
Helene McGee, SEC
Kenneth Meister, Prudential Equity Group

SIA Invitees Present

Michael Alford, Raymond James
Clay Grunke, A. G. Edwards & Sons, Inc.
Edward Turan, Citigroup

Andrew Weinberg, CSFB

Guests

Richard Beny, NASD
Barbara Brady, NASD
Rose Seeman, NASD

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Update on Independent Survey

Mr. Friedman updated the Conference on the work of the Subcommittee, consisting of himself, Kenneth Andrichik (Senior Vice President and Director of Mediation - NASD), Chairman Katsoris, and Ms. Kupersmith.

Mr. Friedman informed the Conference that the Subcommittee has chosen Professors Barbara Black and Jill Gross of Pace University School of Law Investor Rights Project to administer the survey on the perceptions of fairness between SRO arbitration and litigation. They hope to have this survey completed by the end of the year. He said that the Subcommittee is currently working on designing the questionnaire for the study. (Emphasis added.)

Result: The Subcommittee will report progress on this initiative at the June meeting.

**Minutes of the June 23, 2005 Meeting of the
Securities Industry Conference on Arbitration
New York, New York**

Members Present

Theodore Eppenstein, Public Member
Linda Fienberg, NASD
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Pat Sadler, Public Member

Members Participating by Phone

Jim Flynn, CBOE
George Kramer, SIA
Invitees Participating in Person or by Phone
David Blass, SEC
Lourdes Gonzalez, SEC
Paula Jenson, SEC
Gena Lai, SEC
Helene McGee, SEC

Guests:

Richard Berry, NASD
Barbara Brady, NASD
Kenneth Meister, Prudential Equity Group
Rose Seeman, NASD

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Report from Independent Research Subgroup

Mr. Sadler distributed a memo updating the Conference on the status of the survey on the perceptions of fairness of SRO arbitration that is being administered by Professors Barbara Black and Jill Gross of Pace University School of Law. Mr. Sadler said that Professors Black and Gross have sent him a first draft of the survey. He will distribute the draft to the Conference members to return to him with their comments.

Result: The Subcommittee was authorized to resolve any conflicts with Professors Black and Gross in crafting the final survey. Mr. Sadler will give an update at SICA's October meeting

**Minutes of the October 11, 2005 Meeting of the
Securities Industry Conference on Arbitration
Chicago Board Options Exchange, Inc.**

Members Present

Heather Cook, NFA
Theodore Eppenstein, Public Member
Jim Flynn, CBOE
George Friedman, NASD
Constantine Katsoris, Public Member and Chair
George Kramer, SIA
Karen Kupersmith, NYSE
Matthew Mennes, Pacific Exchange
Joanne Moffic-Silver, CBOE
Pat Sadler, Public Member
Steve Sneeringer, SIA
James Yong, NSX

Members Participating by Phone

Linda Fienberg, NASD
Invitees Participating in Person or by Phone
David Blass, SEC
Lourdes Gonzalez, SEC
Mary Ann Gadziala, SEC
Paula Jenson, SEC

India Johnson, AAA
Gena Lai, SEC
Helene McGee, SEC
Catherine McGuire, SEC

Guests:

Robert Banks, PIABA
Richard Beny, NASD
Barbara Brady, NASD
Jean Feeny, NASD
Kenneth Meister, Prudential Equity Group
Lawrence Schultz, PIABA
Tanya Solov, NASAA
Patricia Struck, NASAA

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Report from Independent Survey Subgroup: Fairness Survey

Pat Sadler distributed various proposed changes (from NASD, SIA, PIABA, Chairman Katsoris) to the draft survey prepared by the outside vendor (Professors Black and Gross of the Pace Law School Investor Rights Clinic). There was a prolonged discussion, with several suggested amendments.

- Linda Fienberg pointed out that the revised draft did not seem to reflect NASD's changes; Pat replied that he intended to accept NASD's proposed changes.
- Some members suggested separate surveys geared toward individuals, firms, and attorneys, with different instructions (especially for those who participate often in SRO arbitrations). George Friedman pointed out that the vendor might view this change as significant, and outside the scope of the current contract (which called for a single survey).
- Linda Fienberg observed that some of PIABA's suggested questions (e.g., eliminating mandatory arbitration and getting rid of the industry arbitrator) were somewhat inflammatory, and beyond the scope of the original suggestions in the "Perino Report" that gave rise to the survey project. She reserved the right to reconsider NASD's participation if the final survey contained such questions.
- Ted Eppenstein supported the PIABA suggestions and noted that this is a good opportunity to receive input from the public. Mr. Eppenstein also suggested that the Conference not attempt to adhere strictly to the original suggestions made in the Perino Report in developing the survey.

Result: 1) Pat Sadler will synthesize the various suggestions and prepare a single revised draft survey. He will distribute it to the membership within two weeks (by October 25,



2006). He might schedule a separate SICA conference call to resolve this issue in advance of our January meeting, so work can begin on the survey.

**Minutes of the January 12, 2006 Meeting of the
Securities Industry Conference on Arbitration
New York, New York**

Members Present

Peter Cella, Public Member .
Theodore Eppenstein, Public Member
Jim Flynn, CBOE
Linda D. Fienberg, NASD
George Friedman, NASD
George Kramer, SIA
Constantine Katsoris, Public Member and Chair
Karen Kupersmith, NYSE
Kenneth Meister, Prudential Securities

Members Participating by Phone

Matthew Mennes, Pacific Exchange
Invitees Participating in Person or by Phone
Mary Ann Gadziala, SEC
Lourdes Gonzalez, SEC
Paula Jenson, SEC
Gena Lyia, SEC
Helene McGee, SEC
Elizabeth Sheridan, National Futures Association
Patricia Struck, NASAA

Guests:

Kenneth Andrichik, NASD
David Blass, SEC
Richard Berry, NASD
Barbara Brady, NASD
Joe Borg, NASAA
Jean Feeney, NASD
Jill Gross, Pace Law Securities Clinic
Bryan Lantagne, NAS AA
Rose Seeman, NASD

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Independent Survey Subgroup

Professor Jill Gross joined the meeting as a guest to discuss the survey that she and Professor Barbara Black, of Pace Law School, have been commissioned by SICA to administer on the perception of fairness in securities arbitration.

Professor Gross discussed in detail the methodology used in determining the content of the questions. Some Conference members were concerned that the data mined from the survey would be more substantive if the participants were asked to look at a broader range of arbitrations, as opposed to only their last experience in the forum. The Conference reviewed the draft of the survey, and after a lengthy discussion there were some technical amendments made to the draft. The survey appears to be on track to be released by summer 2006.



Result: Professors Black and Gross will incorporate SICA's suggestions and present a new draft of the survey to the Conference before its March meeting. The survey will be presented as a SICA survey, administered by Pace Law School. The Subcommittee will meet before the meeting to resolve any remaining issues. (Emphasis added.)

Minutes of the March 21, 2006 Meeting of the Securities Industry Conference on Arbitration Hollywood, Florida

Members Present

David Blass (SEC),*
Theodore G. Eppenstein
Linda D. Fienberg
George H. Friedman
Greg Hoogasian
Paula Jenson (SEC)
Professor Constantine S. Katsoris (chair)
George Kramer
Karen Kupersmith
Gena Lai (SEC)*
Helene McGee (SEC)"
Matthew Mennes
J. Pat Sadler
Elizabeth Sheridan (National Futures Association)
Tanya Solov (NASAA)*
Patricia D. Struck (NASAA). '

Guests:

Michael Alford (Raymond James),
Linda Drucker (Schwab),
Andy Melnick (UBS),
Andrew Weinberg (Deutsche Bank).

* = phone participation

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INDEPENDENT RESEARCH ON FAIRNESS OF SRO ARBITRATIONS

Pat Sadler presented the final draft. A few technical amendments were offered, including:

- in the introduction, change first sentence so it reads: ". . . made up of representatives of securities regulators, the Securities Industry Association, and investors. . ."

- add somewhere that SICA was "created with the encouragement of the SEC."

- Question 14a becomes: Did you know, prior to the filing of the arbitration, that one arbitrator would be connected in some way with the securities industry (an "industry arbitrator")?

Participants discussed whether to ask Pace to include questions seeking overall impressions about arbitration, in addition to, or in place of, questions about one's last case.

The participants also discussed the following:

- Whether to add at least one "general experience" question (since the survey now asks parties to respond re: their last case)
- Whether and how to disseminate the survey to industry registered representatives
- Possible concerns about Pace's insistence that it be allowed to use the confidential survey data for research and publication purposes.

 Linda Fienberg called participants' attention to an open contractual issue, i.e., a lack of clarity as to **who owns the data.** Pace desires to publish an article based on the results of the survey. While this is not necessarily problematic, several Committee members expressed concerns about maintaining confidentiality of the data. Linda Fienberg agreed provide copies of the contract to interested SICA members.

Results: 1) approved unanimously, as amended. 2) Pat Sadler was authorized to negotiate for a "general experience" question, with the understanding that he can yield if Pace insists on excluding such a question; 3) the Subcommittee [Kastoris, Kupersmith, Eppenstein and Sadler] was given delegated authority to give final approval on the survey's content (Pat Sadler will circulate the language to SICA by email, as an "FYI"); Pat Sadler will consult with Ken Andrichik, and then work out the confidentiality/use Data issue with Jill Gross (including consultation with NYSE and NASD contract counsel).

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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.

My continuing thanks to those who have contributed to Parts I through XXI 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.

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<http://www.LGEsquire.com>