APPROVED JUNE 13, 2003

Minutes of the
January 13, 2003 Meeting of the
Securities Industry Conference on Arbitration
Fordham Law School, New York, NY

Members Present
Amal Aly, SIA
Robert S. Clemente, NYSE
Ted Eppenstein, Public Member
Linda Fienberg, NASD
Jim Flynn, CBOE (by phone)
George Friedman, NASD
Betsy James – Deputy General Counsel and Director of Arbitration, Pacific Exchange (phone)
Constantine Katsoris, Public Member and Chair
Steve Sneeringer, SIA
Tom Stipanowich, Public Member and Secretary

Invitees Present
Jim Buck, Formerly NYSE Secretary
Pam Chapiga, Fordham Law School Clinic
Mary Anne Gadziala – SEC
India Johnson, AAA
Robert Love – SEC
Lewis Maltby
Helene McGee – SEC (phone)
Prof. Mike Perino – St. John's Law School

The Securities Industry Conference on Arbitration ("Conference" or "SICA") convened on January 13, 2003 at 9:00 a.m., Professor Katsoris, presiding. Agenda items are presented in the order in which they were discussed.

1. Approval of Minutes

Upon a motion duly made and seconded, the Conference unanimously approved the October 2, 2002 minutes with minor revisions. (Attachment A)

8. Perino Report (Tab 8)

Mike Perino, a Professor at St. John's Law School, briefly reported on the background of the report prepared for the SEC on the California Ethics Code for Arbitrators. Professor Perino noted that the subsequent suits by the NASD and NYSE, and SEC's amicus in support of the latter, were in the background of the SEC's request that he study the current SRO rules on arbitrator disclosure. The first question was, are the current standards for disclosure adequate? Second, what are the relative costs and benefits of the California standards?

Working under severe time constraints, Prof. Perino tried to read as much as he could on the issue. He looked at academic and empirical research, conducted interviews. He summarized the Executive Summary of the Report, to wit:

1. The current rules appear adequate; minor changes (on pages 4 and 5 of the report) may be in order.
2. It would be advantageous to review the current classifications of public and non-public arbitrators.
3. Additional studies are in order.
4. The California Standards ("Standards") are likely to yield very few additional benefits for investors. A new set of conflicts standards does not really address the problem, if any. Moreover, there is considerable overlap. They are obviously based on very different philosophy. The Uniform Code is based on standards; California's approach with a list of disclosure is also covered to a great extent by UCA standards. Some of the additional requirements of California are very burdensome, and may disqualify arbitrators with expertise.
5. California's Standards do not mesh well with the SRO arbitrator disclosure and disqualification rules. Under the Standards, a party could easily disqualify arbitrators and providers based on disclosure standards that don't make sense for securities arbitrators who have no financial interest in the SRO. Also, read literally, a party could under the Standards effectively challenge an SRO from administering an arbitration.

Mr. Clemente indicated that SICA has taken action on 3 of 4 recommendations by Mr. Perino. He indicated that it would be valuable to have a study of the operation of existing standards, but noted that funding is a problem.

Mr. Perino indicated that the GAO studies only deal with arbitration outcomes. That, however, does not address the particular issue here. The other study is the Tidwell study that surveyed forum users' perceptions of the arbitration process.

The problem with that study is that someone under the auspices of NASD developed it. An independent approach is needed. He would like to see a broader, randomized survey of participants. Depending on the data that are available from the SROs, we may be able to do additional empirical studies on arbitration outcomes, or how challenges are handled.

Mr. Maltby was surprised that Mr. Perino's report did not reflect greater concern with possible liability of arbitrators under the new California standard. Mr. Perino said there are real concerns about imposing the California Standards.

Mr. Eppenstein asked whether the SEC requested the report before or after the filing of its amicus brief. Mr. Perino said that his report was to be issued by mid-November, after the amicus brief was filed. He noted that the brief focused on preemption issues, while his report was on the bona fides of different disclosure approaches.

9. Changes to UCA Sections 18, 19

Mr. Love noted that the proposed changes to the arbitrator disclosure are to the newer version of the UCA, the Plain English version. He noted that the UCA has not actually been used by anyone in the new version; this does not address the existing rules. Mr. Perino responded that his recommendations were based on the current NASD and NYSE rules.

Mr. Friedman indicated that what the SROs seek is a signal from SICA that it does not allow permissive language – i.e., that establishes a guidepost for changes to the current SRO rules. Mr. Love concurred.

Mr. Friedman moved that SICA make a specific statement that the SROs should adopt language along the lines of the Perino report on disclosure, and that this is consistent with the spirit of the current language of Section 19 of the UCA. Specifically, the proposal to change Section 19 "must" references to "shall" was withdrawn as moot, since the Uniform Code already uses such language.

Mr. Clemente moved that the proposed language to change Section 18(b) be amended to delete the final portion of the proposal (referencing to examples of circumstances). Mr. Friedman seconded. With this amendment, the proposal to change 18(b) was adopted to add the language beginning "A challenge for cause . . ." and ending ". . . remote or speculative."

6. Lewis Maltby (re Public Citizen Report on the Cost of Arbitration and Need for Further Empirical Research)

Mr. Friedman introduced Lewis Maltby, Director of the Workplace Rights Institute. The organization filed comments on the proposed California standards. He indicated that Mr. Maltby was one of the early proponents of looking closely at the facts of outcomes in employment arbitration.

Mr. Maltby explained the role of his "civil rights organization that believes in employment arbitration." It espouses a different view from much of the trial bar, which tends to disfavor arbitration of employment disputes. In view of the fact that 95% of civil litigations are settled, it is important to study the effectiveness of arbitration. This led him to do empirical research on outcomes, which showed that outcomes for employees were actually better in arbitration than in litigation. He also noted that previous studies showing employee "win" rates in arbitration compared to litigation did not include the effect of summary judgment in litigation (about 60% of the cases); the reviewers only included the outcomes in court cases resulting in a jury verdict. His position is that voluntary and fair arbitration is the best approach for resolving employment disputes, and works best for the employee.

Mr. Maltby said that when you read the press on arbitration, it is always abysmal, unfair. He indicated that the press tends to be biased, because they have not heard an independent and credible approach. He noted, his organization submitted comments that were highly critical of proposed standards. He said that no arbitrator will ever meet these standards, and that it will hurt, not help, the typical employee and consumer. He said his group is working on an amicus brief for the SROs' appeal to the 9th Circuit of its declaratory relief action against the California Standards. They do not to improve on what the SROs' outside counsel prepare, but will try to make the case to the court that SRO arbitration is not about "the big guys sticking it to the little guys."

Turning to the rather negative report on arbitration issued by Public Citizen, Mr. Maltby said he fears that the report, which is conclusory and based on sloppy research, will be cited as empirical evidence in future post-*Greentree* litigation. He said his group is writing a report about this. He stated that there is a need to look at total costs for employee or consumer, that in reality are "astronomically lower" in arbitration. He noted his group would like to do more work on public education. In Mr. Maltby's view, NELA is trying to destroy consumer and employment arbitration.

Mr. Maltby acknowledged limits of AAA data, but researchers do not have much other data to work with. He did not look at NASD, NYSE cases. Mr. Friedman indicated that SRO statutory employment case filings are now dwindling. Mr. Maltby also noted that settlements were not tracked. Mr. Eppenstein wondered how that would affect data. Also, he wondered about win/loss ratios. Mr. Maltby indicated that arbitration clearly is better for employees in terms of win/loss ratios, especially when one factors in dismissals and summary judgments. Mr. Maltby noted that Ted Ericson at Cornell is doing sophisticated work to come to similar conclusions. Sam Estreicher has also done an empirical study, with similar results. Mr. Stipanowich mentioned Chris Drahozal's work. Mr. Maltby says that much more work needs to be done to convey information about this approach.

Ms. Fienberg observed that SICA and SROs are moving toward resolving the last of the fairness issues regarding securities arbitration – classification of industry vs. non-industry arbitrators. Mr. Friedman queried whether Mr. Maltby's group could do empirical research on fairness of securities arbitration (one of the suggestions in the "Perino Report"). Mr. Maltby indicated that someone should do it, on an independent basis.

2. Proposal to Amend UCA Section 16(c) Arbitrator Classification

Mr. Sneeringer moved to table the proposal to amend Section 16. Mr. Eppenstein indicated his willingness to table this item. It will be addressed at the April SICA meeting.

3. Subpoena of Third Parties

Mr. Friedman indicated that the NASD's National Arbitration and Mediation Committee (NAMC) had referred the subpoena rule back to a subcommittee. The NAMC is working on notice requirements related to discovery subpoenas to non-parties, and also on arbitrator resolution objections filed by the other side. The NAMC subcommittee will also look at exceptions to an advance notice period. Hopefully, these will be addressed at the February NAMC meeting. Mr. Friedman will provide a status update at the April SICA meeting.

Mr. Eppenstein wondered whether or not there had been consideration of an attempt to table such discovery until a preliminary hearing. Mr. Friedman indicated not.

Questions were raised regarding the source of the document at Tab 3. Mr. Love raised a questions about subparagraph g(1) in the proposal at Tab 3, asking about various perspectives on the additional time that might be involved.

He also raised a question about subparagraph g(2): will there always be an arbitrator to deal with unresolved subpoena issues? Mr. Friedman indicated that there would be scenarios where there would be no arbitrator in place at the time the issue arises. Current NASD practice is to refer such issues to the arbitrators (to be resolved when they are appointed).

Finally, Mr. Love asked for clarification about subparagraph g(3), regarding what is "a court of competent jurisdiction." Mr. Stipanowich made reference to current provisions in federal and state law for limited judicial authority to enforce subpoenas or "summonses." Mr. Eppenstein noted that challenges to subpoenas are a common problem.

In light of the fact that no SICA representative is sponsoring the document at Tab 3, and in light of NAMC action to date, the discussion was concluded. Mr. Friedman offered to report back to the group on the NAMC's effort. Mr. Eppenstein agreed to follow up with Mr. Lipner on the proposal at Tab 3.

(No Tab Number): Securities Arbitration Commentator – Letter from Mr. Ryder

Professor Katsoris distributed a letter from Rick Ryder, Publisher of the SAC, regarding public awards. He suggested that it should be addressed at the next meeting.

11. Law School Securities Arbitration Clinics

Prof. Katsoris introduced Pam Chepiga, director of the Fordham Clinic on Securities Arbitration.
Ms. Chepiga indicated that the securities arbitration clinics serve a population of people with limited means, limited experience in markets, and limited educational backgrounds. She reported that the Fordham Clinic's clients are people who tend to have no comprehension of the system. She noted that there are six operating clinics, all in New York: Pace, Brooklyn, Buffalo, Fordham, and, pending, at Hofstra.) There are clinics opening in other law schools as well. Fordham takes cases from the New York City Bar, which places a ceiling of $50,000 on matters referred. Fordham does not charge a fee to clients; Buffalo does.

Fordham hosted a roundtable meeting recently for the clinic directors. The focus was the common problems. All clinics are inundated with requests for representation, often by people from outside New York. The students here are permitted to work on matters under court order. There is a need to open clinics in other states to give people an opportunity to learn about arbitration. The Fordham group gets many calls from Florida, Colorado, California, etc. Generally speaking, unless a case involves at least $200,000, parties find it difficult to retain counsel.

Ms. Chepiga indicated that the Fordham Clinic represented clients in about 15 arbitration matters.

4. Proposal to Ban Secret Settlements

Mr. Eppenstein once again drew attention to the report at Tab 4, and the action of South Carolina federal judges and the courts of Michigan forbidding secret settlements. He proposed perhaps SICA should take action forbidding secret settlements in the arbitration context. He suggested that regulatory referrals might be an appropriate approach.

Ms. Fienberg explained that an NASD expungement rule was filed with the SEC but has not yet gone out for comment. The notice to members captures what will be proposed (it is on the NASD website): a court must approve expungement orders, and NASD Regulation must oversee to determine whether they will oppose them. PIABA filed extensive comments to the proposal, along with about 30 others.

Mr. Eppenstein indicated that current reporting requirements leads to watered-down disclosures, without much detail. Ms. Fienberg noted that in court, the complaint would be a public document even if settlement is not. In arbitration, that is not the case; and many cases settle for a variety of reasons. She expressed the view that if settlements are public documents, it might undermine the ability to settle, to the detriment of investors.

Mr. Eppenstein suggested that there should be not only early review, but also later regulatory review in big cases.

Mr. Sneeringer said the reality is that a client cannot be prevented from speaking with a regulator, settlements must be reported where the broker is released, and in substantial matters regulators tend to make inquiries. For all these reasons, it is

unlikely that there will be a large settlement that escapes regulatory scrutiny.

Ms. Fienberg indicated that the NASD has assumed a huge burden of oversight, and is uncertain that there is more that can be done beyond what is already being done. Regulators look not just arbitration awards, but at any evidence of misconduct and irregularity.

The matter was tabled for further observation.

5. Fitzpatrick/Beckley Workshop

Mr. Clemente reported that the arbitrator training video is being edited, and will shortly be duplicated and distributed to all participants. The NYSE plans to use it in interactive training.

7. California Arbitration Ethics Standards

Mr. Clemente reported that the California Standards were amended as of January 1st (the Judicial Counsel originally issued them in July 2002). Meanwhile, the litigation challenging the Standards continues. NASD and NYSE are only proceeding with arbitration in cases in that state where the parties have waived the Standards (firms must agree to waive the Standards when the customer does so).

The *Mayo* case, in which NYSE and NASD are intervening, is addressing the issue of preemption under a motion to vacate an order compelling arbitration. The case is scheduled to be heard in February. Mr. Clemente agreed to provide a status update at the April meeting.

10. Proposal to Conduct Independent Research to Evaluate Fairness of SRO Arbitrations

Professor Katsoris initiated a further discussion of the possibility of sponsoring independent research on SRO arbitrations. Mr. Friedman said the issue was trying to assess attitudes without looking at specific cases. Various options were discussed, including the Consumer Federation of America, the ABA Litigation Section (planning a survey), RAND, and the group working with Kaiser on current perceptions of their ADR system. Pros and cons of different groups, the problem of funding, and the possible structuring of a survey, were discussed.

Mr. Friedman and Mr. Clemente agreed to look at options. Perhaps SICA could

commission the survey, and SROs could fund it. Messrs. Clemente and Friedman agreed to provide a status report at the April SICA meeting.

12. NASD Rule Filings

Mr. Friedman noted that NASD has a rule taking effect today to give refunds of the member surcharge where the arbitrator completely denies the claim *and* also allocates *all* forum fees against the customer.

An NASD rule took effect in October requiring the specificity of the answer to meet the specificity of the claim.

There was a proposed change to the eligibility rule that was withdrawn in December in light of the Supreme Court's decision in *Howsam v. DeanWitter*. A new rule will be proposed shortly, expressly giving arbitrators the power to rule on eligibility disputes.

Mr. Clemente suggested that SICA should address the question of the effect of the six-year rule. Mr. Clemente will prepare a proposal for review at the next meeting. Ms. Fienberg indicated that NASD would probably support a rule making clear that the six-year provision does not amount to an election of remedies.

13. NYSE Rule Filings

Mr. Clemente noted an amendment of the small claims rule, bringing the ceiling up to $25,000, and an extension of the mediation pilot (making the mediation program a permanent part of the NYSE rules).

New Business

14. Items Raised by Public Members

Item 2. Payment of Awards; Bonding. Mr. Eppenstein recapped the issues associated with the problem of non-payment pending appeal of an award. Mr. Eppenstein noted that in some cases the payment of award is delayed by as much as a year. He proposes that the Uniform Code require payment, or bonding of an award, within 30 days.

Ms. Fienberg raised the issue of whether or not the bonding arrangement might be

similar to that issued upon appeals of court judgments. Although major firms can obtain bonds quite regularly, it may be onerous for small firms. There may be an issue respecting the availability of such bonds. There is a need to know how this will work and how much it might cost.

Mr. Sneeringer also stated that there is an interest requirement on awards not paid within 30 days; moreover, the cost of a bond would be unrecoverable. He questions whether it will accomplish its primary objective, which is how to get those who routinely don't pay awards to pay. All the bond is doing is making sure the money is there to pay – not get payment made earlier.

It was agreed that Mr. Eppenstein would prepare a proposal, and touch base with Mr. Banks and Mr. Mason of PIABA to solicit their assistance. Ms. Aly agreed to put the matter before an appropriate SIA committee before the next SICA meeting if Mr. Eppenstein can pass along a proposal.

Item 3. Pre-hearing motion practice.

Mr. Eppenstein raised the question whether dispositive motions should be allowed in arbitration. Professor Katsoris noted that in his experience dispositive motions are rarely if ever granted.

Mr. Sneeringer indicated that such motions have been more successful in recent years. There may be a special arbitration hearing on 6-year rule issues. Ms. Aly noted that some claimants' counsel bring in "everyone under the sun," and a pre-hearing procedure to dismiss those parties who have nothing to do with the case is critical.

Ms. Fienberg said that the NASD is examining this issue, and will report during the June meeting. She indicated that the result may be some form of guidance for arbitrators' discretion.

Item 4. Classification of Arbitrators: Reviewing the Pool

Mr. Eppenstein proposed that there be a committee made up to look at the public arbitrator biographies.

Ms. Fienberg responded that the GAO, SEC and the NAMC all look at the NASD pool, and the NASD is unwilling to submit to another review process. They have about 6,000 arbitrators. Mr. Sneeringer indicated that being on that NAMC

subcommittee, he looks at 200-300 bios a quarter. The NAMC committee for arbitrator selection consists primarily of public members.

Mr. Stipanowich seconded Mr. Eppenstein's motion. By a 3-3 vote, the motion was not carried.

Item 5. Arbitrator Bios

Mr. Eppenstein queried whether it is possible to make the bio form clearer, and to update the disseminated information more frequently. One issue has to do with the nature of the form – that is, does it show how recently it has been updated.

Ms. Fienberg indicated that under NASD's new computer system, arbitrators will be able to update their own forms. Many already do this. The NASD representatives will report at the next meeting on their updating procedure.

Item 6. Arbitrator Appointment or Replacement

Mr. Eppenstein proposed that administrative appointments or replacements be reviewed to see if they can be accomplished more quickly. Mr. Clemente said he would have to see specific examples of problems;. Ms. Fienberg said the same on behalf of NASD. Both SROs were interested in being aware of problems with slow appointment of arbitrators. Mr. Love indicated the SEC would also be interested in specific instances of this kind. Ms. McGee encouraged Mr. Eppenstein to copy her on letters referring to specific examples.

Item 7. Timing of Arbitrator Disclosures

See Item 5 above.

Item 8. Lack of Responsiveness by Arbitrators

Mr. Eppenstein pointed out a continuing problem with lack of responsiveness to questions by proposed panelists. He queried whether the NASD would be willing to toll the time to permit responsiveness to questions. Ms. Fienberg indicated that NASD would not toll time limits without mutual agreement (as provided in current NASD Code of Arbitration Procedure).

It was explained that responses are not mandatory under the current rules. Ms. Fienberg said NASD encourages its arbitrators to answer questions. Mr. Friedman

indicated that if an arbitrator fails to respond to questions, that fact might serve as a basis for a challenge for cause.

Ms. Aly raised a question about what kinds of information might be requested over and above the disclosures required by the Uniform Code. Mr. Eppenstein will bring a form with examples of questions for the next meeting. The NASD will bring in information on current training information on responses to questions.

Item 9. Preliminary Review of SRO Proposals Before Filing.

Mr. Eppenstein proposed that SICA be permitted to review all SRO proposals prior to SEC filing so that there will be an opportunity to comment. Ms. Fienberg indicated that SICA usually sees NASD rule proposals during the development process – sometimes even before the NAMC does. NASD typically vets proposals with SICA, PIABA, the SIA Arbitration Committee, and of course the NAMC.

Mr. Clemente indicated that the NYSE routinely vets proposals with SICA.

Item 10. Agenda Books to Invitees.

Mr. Eppenstein expressed concern that invitees get agenda books. Mr. Love pointed out that fewer people get the agenda books than are listed in the minutes. Mr. Clemente noted that representatives from organizations such as NFA and AAA do not receive meeting books.

16. Future Meetings

Spring meeting: The next meeting of SICA will be conducted on the morning of April 9. Members of the SIA arbitration committee will join SICA.

Summer meeting: Messrs. Eppenstein and Stipanowich are unavailable for the late June dates. The meeting ultimately was rescheduled for Friday, June 13 in New York at the NASD offices at One Liberty Plaza.

Fall meeting: The fall meeting will be held in conjunction with the PIABA meeting in late October in Palm Springs. Based on past experience, we are likely to meet on the day before the official start of the conference (Oct. 21 or 22), but this needs

to be resolved.

The meeting adjourned at 3:05 p.m.

Respectfully submitted,

Thomas J. Stipanowich
Secretary

From: Love, Robert A.
Sent: Thursday, January 23, 2003 5:34 PM
To: McGuire, Catherine
Cc: Love, Robert A.; Jenson, Paula R.; Corcoran, Joseph P.; McGowan, Thomas K.; Harmon, Florence E.; Pennington, Mark R.
Subject: notes from SICA

Summary of key issues, including those that may need follow-up, from Monday January 13 SICA meeting. (Tom, a portion of item D is for your attention.)

[redacted]

A. Perino Report. Mike Perino attended SICA to discuss his report stemming from the California ethics standards. His report included four recommendations. SICA discussed moving forward on these.
(1) Amend arbitration rules to clarify that all conflict disclosures are mandatory. All agreed with Perino this should be done. On the agenda was a proposal to amend the Uniform Code to effect the change. But the Uniform Code is now the Plain English version, and I pointed out that the proposed change weakened the obligations (switching "must" to "shall" instead of Perino's requested change in SRO rules from "should" to "shall") - (I was also concerned that the Uniform Code not become inconsistent with a unique use of 'shall' when a different norm had been chosen).

All SROs now have rules based on the non-PE format (whose eventual adoption is not imminent). The result of the discussion is that no change is to be made to the Uniform Code, and there instead is a resulting "sense of SICA" for the SRO members to report to their respective boards so that the individual SROs will make the necessary change (of "should" to "shall") to their rules.

(2) Public and Non-Public arbitrator definitions. Perino thought any bias perceptions stemmed from arbitrator classifications, not from the disclosure provisions, and recommended that SROs consider broadening the industry category. SICA had been scheduled to conclude a revision to the arbitrator classification provisions at the meeting, but the item was withdrawn by the SIA. No discussion on this was held at the meeting -[redacted]

(3) Challenges for cause. Perino recommended that the challenge for cause standard in the Arbitrators Manual be incorporated into the rules. This was done by SICA. The proposal in the manual would have included both the standard, and a page of examples accompanying the standard in the Manual, going. Once it became clear what the recommendation was, SICA adopted the standard - the full text remains in the manual.

(4) Independent research to evaluate fairness of the SRO arbitrations. While there was a general agreement that this would be fine, there was no consensus on how to achieve it. There are both funding issues (SROs assume they'll have to pay) and independence issues - what formulation would avoid taint by connection to the SROs? Stipanowich'sCPR Institute for Dispute Resolution, Barbara Roper's Consumer Federation, Gallup, National Work Rights Institute all discussed. This is one where they are looking for ideas/guidance. If we have any, now would be the time to mention them - this has been delegated to Fienberg and Clemente. (The work Perino had liked best was that done by Gary Tidwell for the NASD, and that was not independent.)

B. National Workrights Institute. Lewis Maltby of the NWI has a very different take on arbitration than the National Employment Lawyers Association, (NELA), and its leader, Cliff Palefsky. Much more in favor of arbitration. Group spun off of ACLU. Says that Palefsky and NELA get the 5% of cases that are big money cases, and want court. Maltby is more interested in 95% of cases that need access to arbitration. He views outcomes in arbitration as favoring employees (note, not securities specific research), because he says other studies didn't account for those cases dismissed on summary judgment. Recovery he found was 18% in favor of plaintiffs in arbitration versus 10% in court. His group commented critically on CA standards. He commented briefly on the Public Citizen report on the costs of arbitration, and asserted that it had been requested by Palefsky, with a foretold result. (Note, the study compares forum fees, but discounts the transaction costs of litigation such as discovery and legal fees. He is working on further public education. Represents that NELA is focussed on destroying consumer arbitration. Asserted that some other academic work supports his (at NYU and Cornell I think). Note, while he speaks well, NWI has a staff of three including Maltby. I have their 'promotional" literature.

C. Subpeonas on 3rd parties. This discussion followed an issue raised first by former SICA member Tom Grady, and then PIABA. The issue concerns an industry party sending a subpoena by express post to a non-party, with a delayed

regular mail copy to a party. There would then be no way to stop compliance if that was necessary. No public member was capable of explaining the proposal. No one owned to have written it. There was surprising agreement that a rule amendment could address this. I deferred to them, but was a little surprised that they (including NASD) thought the routine 10-day period built into the rule to allow for challenges and a referral to an arbitrator was acceptable. (NASD said its NAC was considering a version of this, with some discussion of whether allowing a non-party firm to supply certain responsive data without waiting for the arbitrator would be perceived as fair. I told them that as drafted, the proposal would not be acceptable here because it the time frames do not match the existing rules (it assumes that a panel of arbitrators has been appointed to hear an objection which is not accurate under the sequence of events in the rule). I said no assumptions - if an arbitrator would then be appointed, or the 10 day period extended, the rule must say it. Also, the rule makes another vague reference to a court of competent jurisdiction. I told them no more unclear references to court. [redacted]

D. Law school arbitration clinics. Pam Chepiga of Fordham's law school reported on the clinic. She is very high on the clinics' usefulness, which at Fordham is always oversubscribed. Her 3 issues are (1) need for more clinics nationwide (they field hundreds of inquiries from out of state, (2) more generous and objective fee waiver guidelines so that parties don't decline going forward because of the risk of fees being assessed against them; and (3) unnecessary litigation tactics by firms trying to avoid payment. Even joint and several awards aren't paid (but the sole solvent respondent.) The tactics including post-award settlement discussions demanding low settlement, or that the parties join them in court to obtain expungement, at the risk of multiple delaying appeals and bankruptcy threats. Because the firms at issue file motions to vacate within the rule timeframes, they are not enforcement candidates, and settlement discussions can't be used outside the discussions in proceedings. [redacted] Chepiga noted that the various clinic organizers meet periodically, and would like to renew contact with SEC staff. I have since briefed Joe more fully on the discussion, and linked him up with Chepiga.

Note, a related discussion later in the meeting concerned a PIABA proposal. The idea would be that losing respondents should be required, as now, to pay within 30 days, or if they elect to pursue a motion to vacate, must post a bond to assure that money is there if the motion fails or the firm goes under in the ensuing delay. Some thought this would only hasten the demise of firms that are likely to fold (but that this could stop them sooner from hurting others). Some thought the larger firms could obtain bonds pretty inexpensively, while the smaller firms could not. [redacted] [It seems that under the current NASD rule approach, a member now has to show that it either has paid, or filed a motion to vacate within 30 days; under this proposal, the member showing it had filed a motion to vacate would also have to show that it had obtained a bond.] Eppenstein, who brought this forward as an idea, stubbornly refused to do any work related to it— are such bonds obtainable? by whom, from whom, and at what cost? apparently there is no similar current bond/product anyone knew of. Buck noted that even for some large firms this could be relevant - Drexel had $800 million in excess net capital shortly before it went out of business. Fienberg said NASD thinking a little along these lines, but perhaps trying to find a way to direct the burden to firms that are more of a problem (limited capital or extensive disciplinary problems). [redacted]

E. Case volume, analysts. NASD reported that it expects a number of analyst-related cases against Smith Barney and Merrill Lynch. Reports as of the time of the meeting suggested 1000s of cases immediately. The numbers so far are smaller, more controlled. NASD's Friedman advises that:

A Florida attorney named Weiss filed 71 small claim cases against Smith Barney and Grubman, with 100s more coming.

Today, a $30 million claim against Merrill was filed by a NJ couple ($10 Million compensatory).

Boyd Page in coming weeks/months intends to file 1-5 thousand small claim cases against both Merrill and Smith Barney (not naming Blodgett and Grubmann). [Some of these to be filed at NYSE.]

All known cases so far involve customers with accounts at these firms, not investors who reacted to the analysts reports and executed at e-trade, etc.

NASD arb will try to work with the parties to coordinate the cases in conferences to expedite. They will keep us posted in order to assure conformance with rules, and Rule 19b-4.

F. Secret Settlements. Eppenstein would like SICA to weigh in on secret settlements, showing bans now in place in

some courts. Fienberg noted that expungement rule is now being considered by SEC (PIABA and SIA both filed comments.) LF noted settlements have to be reported, Eppenstein says they are watered down – disagree as to whether there are "secret settlements" above the threshold. Fienberg noted 70% cases settle, and that if public documents, the number would go down, with the public hurt. Noted that all statements of claim reviewed by regulation staff when filed (before, when resolved, but that approach considered to be too late). TE thinks all larger settlements should be reviewed closely - NASD says what he asks already done.

G. Training Tape. The be nice tape is being edited, and should soon be added to the training protocol.

H. California arbitration. NASD noted that it had appealed. NASD noted that it and NYSE took a different approach to the CA than the Pacific exchange because it believed the true California legislature's intent is that it doesn't apply to them, as reflected in the bill vetoed by the Governor. NASD/NYSE are different on requiring the signing of waivers by associated persons - NASD requires, NYSE thinks it happens by rule, even without a signature.

I. NASD noted it filed a rule on January 13th effective immediately that would refund the non-refundable filing fees to members who prevailed in arbitration on all counts (a rule requested by small firms.)

NASD noted that on 12.17 it withdrew its proposed change to the eligibility rule giving the decision to the director of arbitration, in light of Howsam.

Discussed other various NASD/NYSE rule amendments, not written out here.

J. Public Member proposals. In addition to the bonds for award payments, written out above, SICA discussed: Dispositive motions. NASD thinks a black & white rule would be too harsh (but that statute of limitations issues should not be resolved by dispositive motions). NASD is working on guidance in this area, with the discretion remaining with the arbitrators - therefore leaning to education, not strict rule. Eppenstein requested to review the whole public pool – it wants all the arbitrators with disclosure information to review. NASD said it would not turn over its files to PIABA. Eppenstein could not explain why his and other plaintiffs lawyers review of the same information over time was not useful in the SICA task of assuring that classification rules drew the line correctly. He didn't accept Fienberg's observation that SEC and GAO inspectors regularly looked at their files (SEC staff in fact checking proper classification). His motion for this failed, with a 3-3 vote. Eppenstein complained that disclosure reports were 'misleading', raising an issue of whether the date on the forms was as of the date printed or some other date. SROs will check - at most a computer programming issue, [redacted] SROs will make sure it is clear to parties. Brief discussion of whether administrative appointments (when the lists fail) occur soon enough, or too soon to the hearings - no clear data for us to react to. Discussion of how to address follow-up questions by parties that are not responded to by the arbitrators – it seems they may move to education. Reasonable that arbitrators should either reply, or state that they won't reply because intrusive. Or if particular issues can be identified, perhaps standard disclosures could be expanded. Asked that all SRO filings be vetted first with SICA – without promises, SROs [correctly] stated that all substantive matters have been discussed in SICA (although final versions approved by Boards are not then brought to SICA before filing).

RAL