From: LoveR
Sent: Tuesday, March 26, 1996 5:12 PM
To: McGuireC; SmithNM; KingE; McGeeH; CoreyE
Cc: McConathyL
Subject: Summary of today's SICA meeting

Here's where I think we left things at the end of today's telephone SICA meeting:

There is a consensus among the group to raise small claims cases to $20,000 from $10,000 (the proposal going in was $30,000), and to have as an option for the $20,001 to $50,000 cases the use of a single public arbitrator (with an oral hearing); either party could request a full panel. As a related component of such an action, the group will rethink the public/industry arbitrator categories (a topic raised by the Ruder report). Also, the group will look at making some conforming changes to the rules to deal with variances in describing the threshold amounts (some rules just refer to a dollar amount, others note "excluding costs or interest", etc. The affected costs would be identified too. The group will also reconsider the honoraria for handling paper cases. At the April meeting we should be certain that we have a clear sense of the volume of cases that will be affected by these changes (i.e. confirm the statistics read out today, which I did not write down).

The resolution of the eligibity discussion is that there is an apparent consensus to walk away from the Ruder recommendation that the rule be suspended in favor of returning to the redrafting efforts of a few years ago to clarify who decides eligibilty issues, and to deal with the election of remedies problem. [redacted] Litigators for both sides preferred this approach. They also explained why the Ruder approach would switch the current pre-merits collateral litigation to the post-merits hearing phase, and why such litigation could be effective. The Ruder approach both required arbitrators to state their reasons and to follow the law. [redacted] We asked that the resolution aim for the resolution of these issues by the arbitrators alone; unclear whether we will get that in the next draft.

Paul Dubow will send out an abbreviated agenda this Monday. Deborah Masucci plans to mail on April 4 materials on a revised eligibility rule, punitive damages, selection process for arbitrators, the threshold for small claims/regular claims, and on the classification of arbitrators.

The SICA meeting will start at 8:00 am in April 11th (11:00 for those participating by telephone from D.C.). Robert.

From: LoveR
Sent: Tuesday, May 21, 1996 12:29 PM
To: McGuireC; McConathyL
Subject: Case thresholds in arbitration

At the last SICA meeting, the conference agreed to new thresholds for administering cases:

up to $20,000 would be handled under the simplified rules (on the papers unless the investor calls for a hearing)

$20,001 to $50,000 would have an oral hearing with one arbitrator unless either party requested a full panel (this concept of the one arbitrator has been unique to the NASD until now)

above $50,000 regular way

Robert Clemente advised me this morning that Deborah Masucci advised him that her committee wants to go back to its original proposal of having $30,000 be the cut-off for the simplified procedure. [redacted]
Jim Buck thinks that is too high and and would like to know our views. [redacted]

I personally think that [redacted]

Thanks. Robert

From: LoveR
Sent: Tuesday, May 21, 1996 3:48 PM
To: McConathyL
Subject: Re[2]: Case thresholds in arbitration

Thanks, LOM. [redacted] (Masucci tells me that alot of claimants already at the lower thresholds demand oral hearings.)

Robert --

See my initial reaction below.

LOM

p.s. Thanks for the heads up on Fehn's participation on the panel. I ran into Sy Lorne in the hallway, who was talking about it, and I was glad I was able to say I knew about it.

_____ Reply Separator _____
Subject: Case thresholds in arbitration
Author: LoveR at MR1
Date: 5/21/96 12:29 PM

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I personally think [redacted]

DUPLICATIVE OF SEC 20001

[redacted]

DUPLICATIVE OF SEC 20001

[redacted]

It's hard to say [redacted]. I do think [redacted]

I guess your other point is [redacted], I think, [redacted]

[redacted]

DUPLICATIVE OF SEC 20001

[redacted]

Thanks. Robert

From: ChanJ
Sent: Monday, July 08, 1996 9:43 AM
To: LoveR
Cc: McGuireC
Subject: Re: NASD training

I am going over the minutes from the last SICA meeting and remember that the NASD provided training materials for self-training by arbitrators, and that the NASD was holding training for arbitrator instructors in Denver in May. Jamie mentioned that he was going to the May training. Do you have anything that would be appropriate for me to mention in the SICA context if this issue comes up at the July 12th meeting?
Robert

No, not really. The training was for instructors. More on how to teach than on substance. It was an excellent program however. If you want to get a chuckle, you can watch me on two tapes, giving hypothetical traing courses. I told the NASD I would be interested in attending acutual traing courses held in DC if the opportunity arises. Jamie

From: LoveR
Sent: Wednesday, July 10, 1996 6:43 PM
To: McGuireC; KingE; CoreyE; AndrewsP; JensonP; PullanoR
Subject: Bleak House - Draft Discovery Rule

The NASD has submitted for discussion at this Friday's SICA meeting a draft rule revising the approach to discovery in arbitration. Some salient points are noted below. (Tabs 4 & 5 of the materials binder.)

[redacted] It defines terms such as "documents", "information", and "relating to". [redacted]

The rule includes the presumption that parties to simplified cases on the papers have no access to documents or information through discovery -- this eliminates even cooperative document exchange between the parties. The parties would have to have an arbitrator order production under the new standard in the rule, that the information be "relevant and important to the resolution of the dispute and whether the benefits to the requesting party outweigh the burdens of providing the documents or information on the producing party." [redacted]

About 40% of the NASD's cases are under $50,000. The simplified caseload is now $10,000, and there is dispute over whether to raise it to $20,000 or $30,000. [redacted]

The rule deems responses to have been made under oath without an oath; [redacted]

The rule has at least four sequential phases of discovery that will require months to conclude. There is automatic production pursuant to specified categories of claims, without party request, then requests for other documents, then requests for information not in documents, and then requests to the arbitrators. [redacted]

I would think [redacted]

From: LoveR
Sent: Thursday, July 11, 1996 3:42 PM
To: McGuireC; KingE; CoreyE; PullanoR; AndrewsP; McGeeH; SmithNM
Subject: List selection method for arbitrators

Coming out of the Ruder Report and recent SICA meetings a consensus has developed to move to the list selection of arbitrators. There is no consensus on how to achieve that.

The NYSE prefers the adoption of the AAA method, which is buried in Tab 1 of the materials as part of what was discussed last time. It is short, and relatively easy to follow.

The NASD has proposed a lengthy version that answers the questions people ask when they want to know how the AAA version works. It also appears to include provisions from other parts of the code on conflicts, replacement of arbitrators, and arbitrator classification.

[redacted] I recommend that you read both the descriptive section and the rule in Tab 6 (behind Gus Katsoris' alternatives, which are mark-ups of the existing rule [redacted].

A couple of points to notice: (b)(1) groups as the current rule does all claimants and respondents for striking and preferencing purposes. [redacted] (b)(4) acknowledges this, but the description says the ability to strike/preference separately will be rare. [redacted]. See descriptive paragraphs 5 & 9.

[redacted]

Note 3 on arbitrator disqualification deals with pre-oath only; the other issues section acknowledges this.

arbitrator classification has changed, they incorrectly note that they newly are removing commodities industry personnel, they already are out; claimants' lawyers are out as public arbitrators [redacted]

[redacted]

[redacted]

[redacted]

Robert.

From: LoveR
Sent: Friday, July 11, 1997 2:30 PM
To: SmithNM
Cc: AndrewsP; McGuireC; PullanoR
Subject: Plain English in the Uniform Code of Arbitration

Nancy, at yesterday's SICA meeting there was some discussion of the second person "you" in rule drafting. At immediate issue was the SICA version of the list selection rule.

There was a strong resistance to the use of the second person, and ultimately it was dropped. The Conference adopted the new rule "in principal". That means the basic concepts were agreed to. My office and Robert Clemente will have to work through the details. I anticipate [redacted]. Once we sort out the basics we'll seek out your help on Plain English edits.

The bigger issue concerns Gus Katsoris's revision efforts. He thinks about the Plain English idea in a very rigid way. He is confused that we didn't insist on second person for the new list selection rule proposal, or the NASDR's eligibility and punitive damages rule proposals. I explained to him that the Plain English tools were there to make the documents clearer and more accessible, and that they are flexible. I said that in those cases where "you" didn't make things clearer, or where it could raise litigation risks, it shouldn't be used. He is looking for guidance. I told him not to abandon the use of "you" up front. I told him that just because the drafters of the first couple of rules couldn't use it successfully did not mean that his students shouldn't give it a try. If it works, great. If it doesn't, that is fine too. I noted that in the NASD filings the NASD has found ways to help the reader understand who particular provisions apply to, without the "you", and that his students should review those. He would like a meeting. I told him we could set up a call with you, our office, his students, and you, at your convenience.

By the way, both the eligibility and punitive damages rule proposals are much improved as a result of the Plain English concepts. Thanks. Do you have copies? If not let me know and I'll get you some.

Robert

From: LoveR
Sent: Thursday, October 16, 1997 4:13 PM
To: McGuireC; AndrewsP
Cc: SmithNM
Subject: List Selection rule timing

[redacted]

[redacted] Again, the SICA drafting committee has a tentative date of October 30th to discuss the changes.

[redacted]

Robert

From: LoveR
Sent: Wednesday, October 29, 1997 4:16 PM
To: McGuireC; AndrewsP; JensonP
Cc: EnglandK; SeidelH
Subject: SICA list selection rule

I worked with Nancy Smith today to address the substantive issues that persist in the latest draft of SICA's list selection rule. [redacted]

The relevant [sic] SICA committee is meeting on this tomorrow. [redacted]. Tom Grady was disappointed to learn on Thursday that something he thought he had won in SICA he hadn't (as far as I knew) -- that is use of investment advisers and former securities industry employees with substantial industry experience out more than 3 years [redacted]

RAL

From: LoveR
Sent: Tuesday, May 18, 1999 5:35 PM
To: McGuireC; JensonP
Cc: SchwartzJ
Subject: NON-SRO arbitration pilot

You will notice on the calendar for next Tuesday a telephone conference with the SICA subcommittee on non-SRO options.

Tom Stipanowich called me twice today about this. He advised me first that Steve Sneeringer told him that some of the securities firms that plan to participate in the pilot would like the flexibility to include cases under $100,000 within the pilot. You recall that at the May 11th meeting the dollar threshold was added to address the AAA's concerns about having to use a three person panel for cases under $100,000.

The current intent, within SICA, is not to change the arrangement with the AAA, but instead to change the Guidelines for the pilot to allow firms to choose multiple fora that can handle different cases at different thresholds: the cases that go to other than AAA could be for any amount, while the cases at the AAA would be $100,000 or above.

[redacted]. Steve Gallagher of the AAA isn't thrilled with this result. He thinks all the non-SROs should use the same guidelines. He has not suggested lowering the threshold for a three person panel at the AAA. During the day, Stipanowich has changed from thinking that this isn't a significant hurdle to thinking it may be. Gallagher is concerned that after participating in this, the result will be that somehow firms will steer a lot of under $100,000 cases into the other forums if there are forums that offer three arbitrators for under $100,000 (I think [redacted]. He is also concerned that AAA's name will be mentioned in connection with the pilot but without any cases to show for it. And he is concerned that the AAA name will be at issue when the other fora use the old AAA securities rules without AAA administration. [redacted].

Gallagher is also upset with Stipanowich's reaction to other informaiton Gallagher provided to him. Gallagher's wife is a broker for A.G.Edwards. [redacted] Stipanowich asked that AAA find someone else to do the administering.

I also asked Stipanowich, who kept referring to what he expected Jams/Endispute to do, if anyone actually knew any of that. Uhm, not really is the reply. I suggested that he might want to learn whether any realistic arrangement with it is possible before assuming it to be the fallback from AAA.

Stipanowich also wondered aloud at what point this project was worth continuing to the end -- and I told him to wipe those thoughts from his mind and keep truckin'. Tuesday May 25th at 11:00; told him that I'd be there and that you might. Robert.

From: LoveR
Sent: Tuesday, October 26, 1999 1:06 PM
To: McGeeH; PruittL; SchwartzJ; McGuireC; JensonP; ZambrowiczK; CorcoranJ; EnglandK
Subject: SICA summary

October 21, 1999 SICA Meeting in Palm Desert, California.

For those of you (just forward this to anyone I have inadvertantly missed in the address list) who either had poor telephone connections, or who were cut off early (I tried to have them get you back but that didn't work) here's a summary of the October 21, 1999 SICA meeting:

* Beginning Discussion. Began with a discussion by Paul Dubow of California arbitration related law. One pending bill would pretty much eliminate all consumer predispute adhesion contracts (and since arbitration would be treated the same as other contracts the bill wouldn't conflict with the FAA), [redacted]. Paul also noted the the 9th Circuit differs from the others, and reads the FAA as not applying to employment contracts (because that's what the statute says) while the other circuits limit the exclusion to the railroad or seamen workers (I forget which) listed in the statute.

* Minutes. The minutes were approved as printed in the meeting materials with only a few typos corrected.

* SICA Chairperson. Tom Stipanowich is the new "chairperson" of SICA. Nancy Nielson will continue as recording secretary. The chairperson's role is to manage the meetings and the agenda, and to have materials distributed for the meetings. NASD wanted an SRO chair, with Robert Clemente and George Friedman to split the chore. (It was RC who nominated TS.) NASD objections include the facts that TS didn't have the staff to gather, print, prepare, copy and distribute the materials on time for the meetings (and that the NASD and NYSE would get stuck with that part of the work anyway, only it would be more cumbersome with this structure); [redacted] Tom is on the board of the AAA, which NASD perceives as raising possible conflict issues. [redacted]

* Non-SRO Pilot. We reviewed the pilot status. It apparently remains on course for a mid-January 2000 debut. Seven firms committing to 100 cases to award. Five firms elected JAMS and two elected a choice of JAMS or AAA as non-SRO provider. At the meeting we modified the press release to remove both a negative tilt and statements promoting unreasonable expectations. The guidelines have been cleaned up and looked cleaner. They dicussed the evaluations and how mechanically they will keep a SICA master list to keep track of the cases, where they stand, whether evaluations were turned in, whether the SROs received the awards; since these tasks are still assigned to a mythical "they", [redacted]. George Friedman will prepare a "fact sheet" for users on how all this might work; I think the idea is to put the information in the packets for parties. I asked that someone "lawyer" the JAMS rules; I've read them and found a few places where I can't figure out what the words mean; I'll call TS with my comments. Let me know if you had any when you read them. There also was a discussion of whether to hand out a questionnaire to the PIABA audience regarding possible use of the pilot. After angst about whether this data would ever have to

be shown to anyone, and whether they should ask for suggestions when they didn't intend to change anything, they opted to ask instead for a show of hands about possible pilot use. The general sense is that the pilot might be useful and welcome for a certain subset of high dollar cases, as well as for cases of any dollar amount for those parties who simply loathe the SROs.

Report on PIABA meeting discussion of the non-SRO pilot. One item for discussion late in the day at the PIABA meeting was the non-SRO pilot. I'm including my notes here for continuity. The basics were repeated; unfortunately, the PIABA materials included drafts of the press release, etc. [redacted] The presenters included in addition to a SICA contingent, Catherine Zinn of JAMS. [redacted] New for me (or at least I forgot) is how JAMS gets its money. The rules show that it gets an administrative fee of the greater of $200 or 4% of the professional fees (arbitrator payment). But JAMS also gets about half of the arbitrators' hourly fee ($250 to $400); JAMS would not disclose to PIABA the contracts regarding this split. [redacted]. One PIABA questioner criticised the backgrounds of JAMS arbitrators, stating that the pool is mediator, not arbitrator based, and that it is defense bar dominated; Zinn replied that whatever the attributes of its pool at-large, the subset selected for the pilot would be appropriate. She also promised training; [redacted]. Some PIABA questioners also wondered how they would know about arbitrator histories; past JAMS awards of course are non-public; one guy even asked that JAMS go back to past parties and arbitrators to seek releases for the awards. [redacted]

* NFA report. Somehow, after the agenda was set, Ted Eppenstein hijacked the agenda and had Cindy Cain of the NFA come in and take 45 minutes of an already tight schedule to give an arbitration 101 at the NFA, highlighting some differences between NFA and securities SRO arbitration. I think [redacted]. There was some anecdotal subtext regarding the challenge to an arbitrator by the firm/respondent deep into the process. [redacted] I have collected for whoever might be interested a copy of the handouts NFA provides to arbitrators and parties. The brochures are very attractive, and might be useful when assessing the SRO data. Let me know by Friday if you want these; otherwise I am not keeping them. [redacted]

* Removal of arbitrators after the beginning of a hearing. The NASD presented its paper on going forward with a proposed rule change that would enable it, and other SROs, to remove an arbitrator after the hearing stage of a case has begun. The reactions were mixed, and the conference actually discussed the benefits (removing arbitrators who taint the process) from the risks (litigation over whether an arbitrator should have been removed, and whether the SROs were biased in the process). [redacted] Some wondered whether the issue arises frequently enough to warrant going forward on this.

The public participants/members were mixed, although they seemed mildy to side in favor of the rule. (Note that while the NASD's examples

have included cases where an investor wanted the removal, Ted Eppenstein's one example was of where the firm wanted the removal, and the investor didn't.) Tom Grady (PIABA) seemed to be still leary of the idea, as was Paul Dubow (SIA). The discussion helped to focus on a distinction between challenges based upon disclosures or facts learned about an arbitrator and challenges based upon arbitrators' performance during a case. The removal proposal is directed at the former not the latter. Stipanowich phrased these as passive (disclosures) and active (conduct of the hearings). The NASD's next draft will address that distinction. When we met earlier with the NASD to discuss this, we had encouraged them to use a slightly higher standard for removal after a case has begun than beforehand; the idea was to retain the flexibility they use before parties are too invested in the progress of the case to remove a questionable arbitrator, and to avoid having arbitrators removed too easily after a case had begun. [redacted]

* Service of the comlaint. Seth Lipner of PIABA joined the meeting. He added PIABA's concerns about service. There apparently are concerns about the methods for serving the fly-by-night firms and reps. Linda Fienberg noted they use the CRD address of record. She stated that under NASD disciplinary process, that is good service even if the respondent doesn't receive the complaint. Professor Lipner noted that in some jurisdictions that won't do unless at first the NASD obtains a consent to service of process at the state secretary of state. They discussed briefly whether the U-4 needed to be amended to include this. Some proposal will be developed for consideration at the next SICA.

* What to do about high fees. Seth Lipner also addressed the NASD's high fees. He first questioned the high fees for some tasks, like 15 minute telephone conferences (LF defended these by pointing out the time arbitrators need to prepare). But the basic thrust of Lipner's remarks was to note that three arbitrators are too expensive for small cases. Traditionally, the industry has resisted a single arbitrator for larger cases, because they would be singly public arbitrators. Lipner would sell the idea by asserting that the single arbitrator couldn't award punitive damages. Lipner asked (rhetorically?) whether the fees had a chilling effect of claimants from even bringing a case. They also noted that the NASD has its pilot on single arbitrator use, which the staff is now reviewing.

* ABA Ethics Code revision. Just a reminder that the ethics code isn't a done deal. It is now being sent to about 20 ABA committees. If you have concerns, there still is time to flag them. I intend to discuss a few items with George Friedman to understand better, but don't think I have any we need to press strongly.

* Class actions. No action on the information item. In theory the SICA subcommittee meet (it hasn't yet) in order to articulate better where it thinks the existing rule may need amendment.

* Extensions of time for answers under the NASD rules. Notwithstanding the inflammatory letter Tom Grady submitted, there doesn't seem to be anything behind it. He had no examples to provide (although he said he'd bring a better package next time); my sense is that he might have had one case where an extension was provided. LF and GF were astounded at the item because they have routine reports on extensions, and believe they've granted only a handful. [redacted]

* Exchange of exhibits and assertions of privilege. Ted Eppensteins'

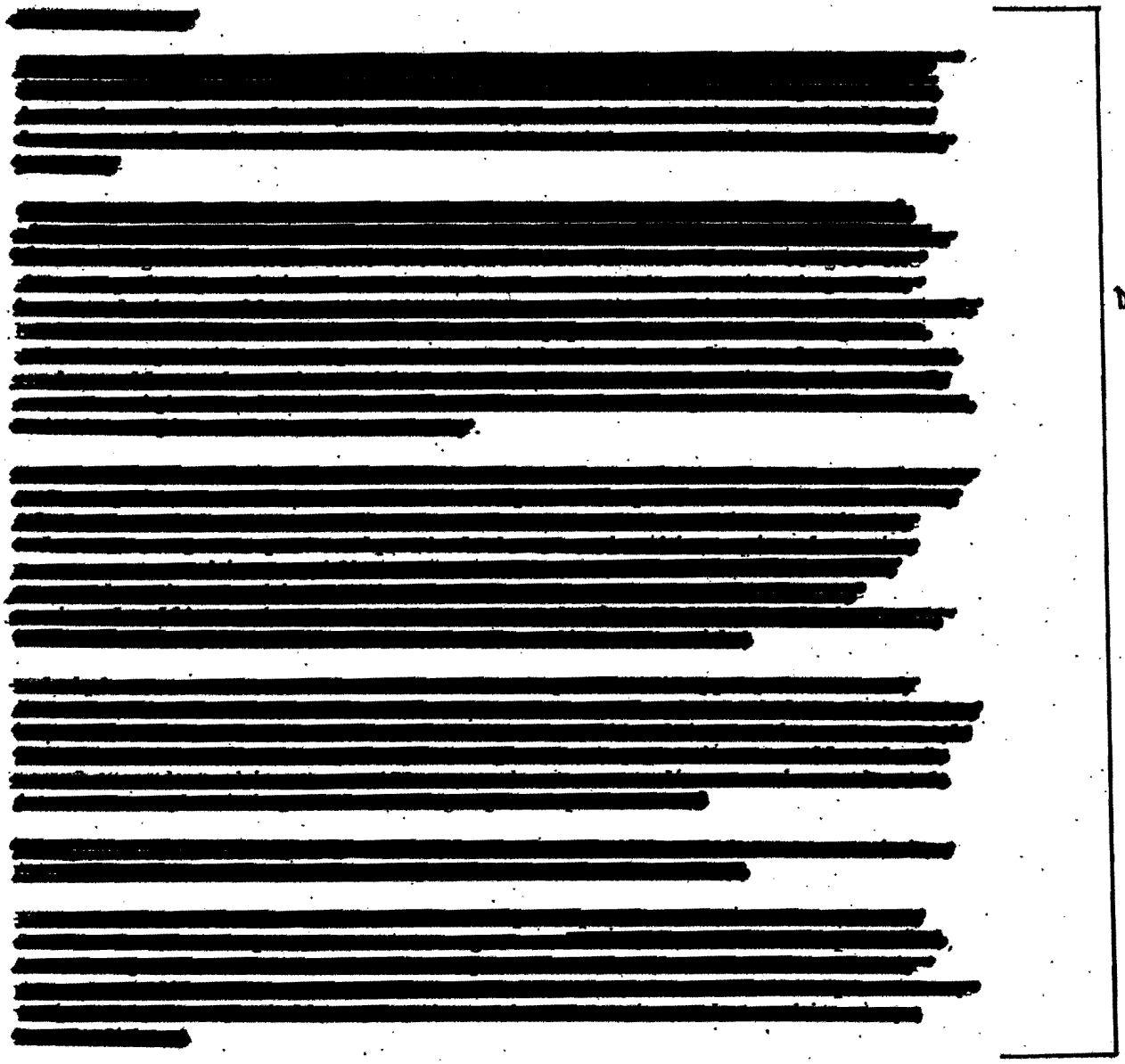
letter also didn't have any factual support. Despite our best efforts, we didn't have much luck disentangling the separate issues of (1) whether too many documents were held back for rebuttal or that the process somehow was tainted and (2) that privileges were being asserted groundlessly. I pointed out the treatment of privileges in the Commission's approval order of the discovery guide. Ted nonetheless proposed removal of the rebuttal provision. LF stated that new chairperson training would (continue) to address these issues. Grady insisted that this was an arbitrator enforcement issue, not a rule language issue. Eppenstein says he'll bring a clearer presentation of his issues to the next meeting. (We discussed the discovery guide briefly. I pointed out the Federal Register's typo. Fienberg militantly mischaracterized the effective date issue, stating that because the guide was a rule she had to file it, and because it wasn't a rule she couldn't have an effective date. [redacted]

Fastforward [sic] to PIABA sessions. A highlight of the PIABA meeting concerned arbitrator sanctions. Coming quickly on the heels of Tom Grady's assertions that arbitrators never enforce their discovery orders or sanction parties or counsel for withholding documents or other bad behavior, the first PIABA session I attended had Samantha Rabin of the Securities Arbitration Commentator spend more than a half hour discussing SAC's review of a three and a half year time period of cases for arbitrator sanctions. She noted that in her sample two of three requests for sanctions were granted. She read from awards in case after case where parties or counsel (questionable authority) were sanctioned for these abuses. Sanctions included money fines, barring evidence, barring witnesses, etc. These were from both investor and member cases. She stated that explanations were much better in the NASD awards than in the NYSE awards -- and begged that the NASD not crack down on useful awards as she feared they might.

* NASD intent to ban paid non-attorney representatives. The NASD tried to enlist the conference in its plan to ban paid non-attorney representatives. Clemente wanted to know what prompts the move. The NYSE doesn't have many NARs, it believes in part due to its insistence that they obtain powers of attorney, which scares off the claimants. LF attributes that to the different client/case mix. RC wanted to know how the NASD planned to police compliance with an assertion that one isn't being paid; would there be some sort of administrative process; or use of affidavits? Wondered whether untruths (i.e. the NAR was paid) would affect the validity of an award? NASD doesn't plan to police. A counter party could police (i.e. a firm could show the arbitrators the NARs advertisement of fee for service); the firms are leery of this role; they don't want to be perceived as impeding the client's access to a representative of its choice. It was also noted that a NAR misrepresentation could be violation of law (i.e. misrepresentation as an attorney). LF wants to avoid the use of any kind of formal affirmations of compliance to avoid burdens on family representatives [redacted]

Stipanowich made a helpful contribution. He suggested that the conference work to distinguish among arbitration fora, that they are not all the same. He stated that this type of arbitration does need counsel, and they should avoid any appearance of trying to impose this concept on other forms of arbitration. Grady and Stipanowich supported the NASD. The conference will consider a SICA rule at the next meeting (subcomm. of G.Friedman, Grady and Stipanowich.)

* Next SICA meetings. January 18, 2000 at the NASD's office in Boca Raton, Florida. March 13, 2000 back at the Marriott Desert Springs Resort in California to coincide with the SIA's law and compliance meeting.



NON-RESPONSIVE AND DELIBERATIVE PROCESS

\RAL.

From: LoveR
Sent: Friday, April 28, 2000 11:57 AM
To: Nancy Nielsen <nielsenn@cboe.com>
Cc: McGeeH; McGuireC
Subject: Re: Draft SICA Minutes of 3/14/00 Meeting

Attachments: RFC822.TXT

RFC822.TXT (2 KB)

Nancy -- just one note on the minutes. The description of access to SICA minutes is just a bit off. Not only may the SEC obtain draft minutes, the SEC may also have the completed ones -- so that item should be clarified. We don't need a set right now. Robert

_____ Reply Separator _____
Subject: Draft SICA Minutes of 3/14/00 Meeting
Author: Nancy Nielsen <nielsenn@cboe.com> at Internet
Date: 04/10/2000 6:39 PM

For your review and comments, attached are draft minutes for the March 14, 2000 SICA meeting. When you have the opportunity to review the minutes, please submit changes to me by fax (312-786-7919) or e-mail (nielsenn@cboe.com) for incorporation in the draft that will be included in the Agenda for the next meeting. I will distribute redacted paragraphs to Toni Griffin and Catherine Zinn, and request that Fredda distribute the appropriate paragraphs (which I will email) to the SIA Arbitration Committee.

Robert Clemente also requested that I distribute the most recent SICA address list with the draft minutes:

****
****
The preceding message and any attachments may contain confidential information protected by the attorney-client or other privilege. If you believe that it has been sent to you in error, please reply to the sender that you received the message in error. Then delete the message and any attachments. Thank you.
****
****

Nancy Nielsen
Director of Arbitration and
Assistant Corporate Secretary
Chicago Board Options Exchange
Phone: 312-786-7466
Fax: 312-786-7919
Email: nielsenn@cboe.com

From: LoveR
Sent: Wednesday, January 24, 2001 7:13 PM
To: McGuireC; JensonP; BusseyB; WyderkoS
Cc: CorcoranJ
Subject: SICA results -- important to read (after UK ok)

Here's a summary of the significant SICA items in chronological, not importance order.

SICA Pilot: SICA's questionnaire to counsel/parties asking why they determined not to use the pilot asserts that it is confidential. The information is compiled by Professor Katsoris. I asked what the confidentiality meant, and what information gleaned from the questionnaires I could use in response to any further inquiries from the Hill. Similarly, SICA is weighing what reference to this data (as opposed to the identity of the responders in those cases where that person is identified) it should make in the next SICA report (there are some responses indicating satisfaction with the SROs). After tedious debate on how to characterize the replies (with the SROs wanting them to be a proxy for widespread joy with the process, and public member Ted Eppenstein asserting that he was privy to secret information indicating great woe with the process), I suggested that someone draft a short, flat report that doesn't say too much, and give others an opportunity to edit. They are even now circulating by e-mail revised versions of the confidentiality sentence. As for the pilot itself, there are rumoured citings of a couple of cases, with unclear status or case stage. There also may be a glitch in statistics -- the SROs think they've had x number of cases that qualified for the pilot, while the SIA's Amal Aly said that the data provided to her by the SIA suggests that 2x cases qualify. They intend to sort that out.

New Procedures Pamphlet and Arbitrators' Manual: The revised documents were approved, and will be printed by the NASD. I've asked that the NYSE or NASD contact Susan Wyderko in order to provide her with an appropriate electronic format or paper supply of the updated procedures pamphlet which OIEA distributes to investors.

Plain English Code: SICA adopted the Plain English version of its Uniform Code of Arbitration as its own, replacing the former code. In its next public report, SICA will publish both versions side by side, allowing readers to compare, and if they want, to comment. But any comments would only provoke possible revisions to the new code. The new one is not out for comment before adoption.

[redacted] The NYSE intends to adopt the Plain English version. It has sent the code to its legal advisory committee; then it will go to its public policy committee. Jim Buck thinks that after a four to six months cycle, they should be close to preparing a rule filing. [redacted] I told them our little office has lost 6 attorneys in 4 months in addition to others over a longer time frame, and that there has been no one to assign this to who realistically could do it. I asked Jim to have patience with us, and more important, to work with as he gets closer so that we are well coordiated.

Subpoena: There was a very productive discussion of issued raised by the draft subpoena rule that was before the conference. In very short hand, it concerns who can issue subpoenas, to whom, when, with approval by whom, and when is it returnable [redacted]

[redacted]). There is an issue of the interplay with state law; I think [redacted] Steve Sneeringer reminded the group that he thought concerns about state law were holding up another filing [redacted]. Cella asked for training. Stipano called for real state law examples to help shape this. I've asked to be included in the notices for working group meetings (with the proviso that the likelihood of my being able to participate is very low).

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Digitizing: The NYSE and NASD are moving forward to collect and digitize the minutes.

Interest on Award payments: Henry Minnerop of Brown Wood asked of the interest on award provision applied to awards of attorneys fees. The NASD made it clear that it unambiguously did. Dubow advised the group that Minnerop had the question in his role as an arbitrator, not counsel, and that he, Dubow, had been asked the question and that he had advised Minnerop to write.

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Dubow noted that there was yet another non attorney representative battle flaring up in California. [redacted]

Note: Dubow has retired from Morgan Stanley Dean Witter and is a consultant to the SIA.

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Next meetings are: Weds. March 21 (last day of Orlando SIA meeting); Monday June 18th (San Francisco); Tuesday October 16 (Amelia Island, to correspond with PIABA). . RAL

From: LoveR
Sent: Thursday, January 25, 2001 10:01 AM
To: WyderkoS
Cc: WalshG; JensonP; McGuireC
Subject: Re[2]: SICA results -- important to read (after UK ok)

Thank you for the offer. I expect it would make sense for you two to meet with Caite, Paula and me to figure out how we could work together on this. I will be out of the country on travel the next two weeks, and Caite is on travel this week, and other than Monday in also on business in Europe next week (different locale). Why don't we pick up the week of February 12th. If you are interested in the interim, either stop by by tomorrow to copy my code (sorry, I've no support staff that would actually help accomplish this) or ask Robert Clemente to send it to you (he wants congratulations, not reality about how much remains to do). Thanks again. Robert

_____ Reply Separator _____
Subject: RE: SICA results -- important to read (after UK ok)
Author: WyderkoS at EST
Date: 01/25/2001 8:19 AM

Robert --

Thanks for the updates. We'll distribute the new pamphlets. Re: the plain English staffing issue, can OIEA help by providing staff?

Susan

-----Original Message-----
From: LoveR
Sent: Wednesday, January 24, 2001 7:12 PM
To: WyderkoS; McGuireC; JensonP; BusseyB
Cc: CorcoranJ
Subject: SICA results -- important to read (after UK ok)

Here's a summary of the significant SICA items in chronological, not importance order.

SICA Pilot: SICA's questionnaire to counsel/parties asking why they determined not to use the pilot asserts that it is confidential. The information is compiled by Professor Katsoris. I asked what the confidentiality meant, and what information gleaned from the questionnaires I could use in response to any further inquiries from the Hill. Similarly, SICA is weighing what reference to this data (as opposed to the identity of the responders in those cases where that person is identified) it should make in the next SICA report (there are some responses indicating satisfaction with the SROs). After tedious debate on how to characterize the replies (with the SROs wanting them to be a proxy for widespread joy with the process, and public member Ted Eppenstein asserting that he was privy to secret information indicating great woe with the process), I suggested that someone draft a short, flat report that doesn't say too much, and give others an opportunity to edit. They are even now circulating by e-mail revised versions of the confidentiality sentence. As for the pilot itself, there are rumoured citings of a couple of cases, with unclear status or case stage. There also may be a glitch in statistics -- the SROs think they've had x number of cases that qualified for the pilot, while the SIA's Amal Aly said that the data

provided to her by the SIA suggests that 2x cases qualify. They intend to sort that out.

New Procedures Pamphlet and Arbitrators' Manual: The revised documents were approved, and will be printed by the NASD. I've asked that the NYSE or NASD contact Susan Wyderko in order to provide her with an appropriate electronic format or paper supply of the updated procedures pamphlet which OIEA distributes to investors.

Plain English Code: SICA adopted the Plain English version of its Uniform Code of Arbitration as its own, replacing the former code. In its next public report, SICA will publish both versions side by side, allowing readers to compare, and if they want, to comment. But any comments would only provoke possible revisions to the new code. The new one is not out for comment before adoption.

The Division must decide how to staff this. The NYSE intends to adopt the Plain English version. It has sent the code to its legal advisory committee; then it will go to its public policy committee. Jim Buck thinks that after a four to six months cycle, they should be close to preparing a rule filing. I clearly advised them that I have not read more than a few small portions of the code, and have no view on the success of the composite. I told them our little office has lost 6 attorneys in 4 months in addition to others over a longer time frame, and that there has been no one to assign this to who realistically could do it. I asked Jim to have patience with us, and more important, to work with as he gets closer so that we are well coordiated.

Subpoena: There was a very productive discussion of issued raised by the draft subpoena rule that was before the conference. In very short hand, it concerns who can issue subpoenas, to whom, when, with approval by whom, and when is it returnable (very significant difference in returnable to counsel or to panel at hearing). There is an issue of the interplay with state law; I think the agreements can supplant state law. Steve Sneeringer reminded the group that he thought concerns about state law were holding up another filing (unsaid, punitive damages). There also is an issue of whether revisions could inadvertantly expand attorney issued subpoenas where not now permitted. There are timing issues. Cella asked for training. Stipano called for real state law examples to help shape this. I've asked to be included in the notices for working group meetings (with the proviso that the likelihood of my being able to participate is very low).

Arbitrator classification and disqualification: PIABA came in with a proposal to alter disqualification standards to permanently ban from the pool (for all cases, not just discrimination cases) arbitrators with adverse findings in discrimination cases. It's at about 7 years now at the NASD. Buck noted that corporate officers are often routinely named in matters with no personal involvement; Feinberg noted that agency heads are similarly named (and litigation named after them) also without direct involvement; we noted that those same persons make decisions to litigate the allegations and accordingly may not be attractive to the parties. This hasn't been resolved, and will be considered more fully within SICA's discussion of arbitrator classification that it will take up in the March meeting. PIABA failed to make a timely submission of materials for this past meeting concerning arbitrator classification as it had undertaken to do at teh November meeting in San Antonio. It provided some materials at the last minute, but did not provide the examples of real arbitrators that raised the concerns as they promised to do. They've simply opened the abstract conceptual discussion of who should serve, and with what hat. As you will recall, this ties in to the issue of single arbitrator usage, industry concerns over expertise, and proposals to eliminate classifications and go to "neutrals" (which I suspect PIABA would resist). CM I've sent you separately a proposal raised by the NYSE's

Jim Buck for another way on classification that we should discuss. I've alerted Jim to our respective travel schedules and availablility to discuss the matter.

Digitizing: The NYSE and NASD are moving forward to collect and digitize the minutes.

Interest on Award payments: Henry Minnerop of Brown Wood asked of the interest on award provision applied to awards of attorneys fees. The NASD made it clear that it unambiguously did. Dubow advised the group that Minnerop had the question in his role as an arbitrator, not counsel, and that he, Dubow, had been asked the question and that he had advised Minnerop to write.

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NASD gave only the briefest of presentations of its rule that would allow investors access to court in cases against a defunct broker-dealer. I expanded in order to advised the exchanges of the need to protect themselves. After the meeting, I asked Nancy Nielson, the secretary, to please make certain she looked at and understood the rule and possible implications for the exchanges so that the minutes reflect this, and help them protect themselves with similar filings if they feel exposed.

Stipanowich noted the publication of a new great book (he edited it) that is available through the ABA.

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From: Love, Robert A.
Sent: Monday, March 11, 2002 4:07 PM
To: McGee, Helene K.
Cc: Love, Robert A.; McGuire, Catherine
Subject: follow-up

the sica meeting is suggesting possible NASD errors in arbitrator classification (at least inconsistency)* and separately in pressure due to huge increase in cases - double in some offices over 2000, reliance on temps. complaints due to unreturned phone calls. you've seen in the past that caseload increases caused breakdowns — [redacted]

[redacted]

*the comment here had little specific behind it; don't recall who made it.

R

From: Love, Robert A.
Sent: Friday, March 23, 2001 12:46 PM
To: Love, Robert A.
Cc: McGuire, Catherine; Appel, Nancy; McGee, Helene K.; Harmon, Florence E.; Jenson, Paula R.
Subject: Notes from SICA

The following is a partial record of the March 21st SICA meeting.

Paul Dubow's last meeting will be January 2002. I expect that Steve Sneeringer will then become the official SIA representative.

Single Arbitrator: The NASD clarified that the memorandum in the materials from an ad hoc subgroup of the City bar in NYC does not represent the views of the NASD, which would have been worrisome. L.Fienberg reported that its pilot (allowing for a single arbitrator in cases up to $200,000) has failed: one case out of 279 eligible cases took advantage of the rule. The only vague expected follow-up is for counsel to speak with one another about what set of conditions might make a single arbitrator more likely. [redacted]

Arbitrator disqualification based upon sexual harrassment and other discrimination. The group moved towards consensus in this area -- but we need to schedule a call with the SROs (LF/GF/RC) well before the June SICA meeting to understand clearly where this is heading. Some discrimination events already produce a 7-year exclusion from the arbitrator pool. On the table is making some or all of those permanent. Sneeringer wants to take out certain regulatory determinations -- those early stage administrative determinations that allow one to sue that are not based on full proceedings. [redacted]. There are other nuances also on how close to the conduct one is. General consensus that a blind-eye supervisor isn't much better than the direct wrongdoer. A few of the men were uncomfortable with the scope, but this should sort out ok. Because the conversation wasn't precise with respect to how much of the Marcia Ford/PIABA proposal they were in agreement with, we should get them to be more precise. [redacted]

Arbitrator Classification came up both in the regular meeting and session with the SIA committee. PIABA's Seth Lipner had submitted a proposal to exclude additional persons from the public arbitrator list. The SIA voiced concern over an NYSE industry arbitrator who had been out of the industry for 17 years. [redacted] (Meister of SIA [redacted]) wanted to avoid twelve lists -- i.e. arbs who can be public for the list, but not for the administrative appointments on Thursday, but ok on Saturday; a number of positions move us that way. Meister can live with rules as they are. I'd venture to say [redacted])

Ken Meister of the SIA committee, on telephone lead its discussion of issues, with strong support of Linda Drucker. Issue one was text of rule on responses. SIA view is that the text requires them to assert defenses they may not be aware of at the time the response is due, that it places them in supplicant posture before the arbitrators to get it in later, and that much of the summing up time they have is consumed by objections from the claimants. [redacted]. Certainly we'd have to look at both sides. No examples of where previously unknown defenses were excluded were provided: they asserta dynamics alone hurt their cases. (The one reasonable theoretical example given: claim asserts unsuitable trades some time after 1998. after response is due, respondent learns that some of the trades accurred in 1999, after the applicable one-year statute of limitations has run. Firm wants to assert that they couldn't have known the defense until they knew the date of the real trade.) This will be considered in committee; we should stay abreast of progress.

Screening arbitrators: Sneeringer wants to know why the SROs don't do background checks of public arbitrators as they do for industry arbitrators (using CRD). The simple answer is that we've not made them do so [redacted]). I think we are up to a system-wide total of three liars. (Sneeringer says, how can we know they are bums without checking.) Sneeringer noted a local commercial data base he uses for all employees; that wouldn't cover all

bases. The SROs will discuss options; even at $100 a head for enrollment only, this would be pretty expensive for 7,000 or so arbitrators. I don't think [redacted]

Note: there will be a meeting following the June SICA meeting in San Francisco to discuss the use of subpoenas (this comes out of the January meeting discussions in NYC). We should determine how to staff this. I have a meeting in Paris the same week, and think that meeting is more important. (I will check whether the call-in is prohibitive from Paris, or whether there is a telephone at the US embassy or OECD US mission I can use.)

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

From: Love, Robert A.
Sent: Wednesday, February 05, 2003 3:21 PM
To: Hwa, E. David
Cc: McGuire, Catherine; Corcoran, Joseph P.; Love, Robert A.
Subject: RE: notes from SICA

If they lose, they pay within 30 days. Unless they've filed a motion to vacate, in which case they don't have to pay - until the motion to vacate process concludes, and they lose again (but they have to pay interest from day 1 if they pay after 30 days). That's in the current arbitration rule 10330. [redacted] The bond itself doesn't relieve any obligation to pay, it would be a safeguard that money is available to pay some months down the line when the review process is concluded. There is no paper yet, and I thought Tom might want to talk it through with Linda before there was paper that was too difficult to pull back. Linda's number is 202[redacted]

-----Original Message-----
From: Hwa, E. David
Sent: Wednesday, February 05, 2003 2:29 PM
To: Love, Robert A.
Subject: FW: notes from SICA

Robert,
[redacted]

Dave x-0147

-----Original Message-----
From: McGowan, Thomas K.
Sent: Tuesday, January 28, 2003 4:51 PM
To: Hwa, E. David
Subject: FW: notes from SICA

Dave

I got your message that you are out sick today. I hope you are feeling better by the time you read this. Can you stop by to discuss this? Does Robert have any material on the proposal? Can you look at the interps regarding posting bonds to pay outstanding awards? Thanks.

Tom

-----Original Message-----
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.
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(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 Flenberg 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 forefold 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

From: Love, Robert A.
Sent: Thursday, April 10, 2003 1:18 PM
To: McGuire, Catherine; Corcoran, Joseph P.; Jenson, Paula R.
Cc: Love, Robert A.
Subject: April 9, 2003 SICA/SIA meeting in Orlando

SICA met in the morning, and was joined by SIA committee at 1:00.

(1) Minutes.

Minutes prepared by Stipanowich (not in attendance) were not in condition to be considered, and were deferred to next meeting. Gave my mark-up to George Friedman who is redrafting.

(2) Arbitrator Classification.

(a) SIA proposal to amend arbitrator classifcations to exclude from securities arbitrator classification those who represent RRs against firms (these are already excluded from public arbitrator roster) failed for lack of second. Under current set-up, plaintiffs lawyers like former PIAABA president Diane Nygaard can be securities arbitrators. Ted Eppenstein opposed. In conversation, SROs suggested this was infrequent or that such arbitrators could be struck from list or by challenge. I asked SIA reps to forward to us real examples of this occurring. Particular concern expressed are (1) where such a person is offered as an administrative appointment - unclear whether a cause challenge would be accepted and (2) fewer real choices on the list. (In afternoon meeting with SIA, Friedman suggested possible solution of the amending 10304(c)(4)(B) (which excludes lawyers and retirees from those who can be appointed administratively when list selection fails). [redacted].

(b) NASD reported that its NAMC will consider on April 11th a proposal to exclude from the public arbitrator pool lawyers and other professionals whose firms earn 20% or more revenue from securities industry clients. SIA fears this move to "true neutrality" will result in complete ignorance - and also that only contacts on industry side rather than investor side will be deemed to be bias. Accordingly, in pique, SIA asked that proposal be amended to exclude also those who earn the revenue from investor clients. (In wake of its defeat in 2(a) stated that rule should be consistent) Motion failed.

(3) Third Party Subpoenas.

No specific proposal addressed. NAMC still working on a draft. Requiring notice to other side, method of providing notice, timing in relation to rest of case, pre-post hearing issues, and fleeing subjects all at issue. While strategic jockeying continued, the litigants have some common interest and were better behaved than in (2) above.

(4) Independent Research on Fairness of Arbitration.

Perino report suggested such work. Estimate for survey of NASD only came in at $136K. Waiting for Lewis Maltby estimate. Consultant questions to be reviewed by SICA. Distance from SRO/industry to be maintained. Scope still to be determined.

(5) Eligibility Rule.

NASD stated that it is working on amendments to confirm Howam (i.e. that arbitrator decides), assures no election of remedies, and alters existing provision that states if sent to arbitration by court, eligibility is waived. The third can be fine if addressing plaintiff attempts to circumvent the eligibilty rule, but not as part of costly respondent games. Just need to read draft and statement of purpose carefully.

(6) Florida out of state attorneys.

Rapoport case fallout being watched. Current Florida proposal would allow out of state counsel to come in up to three appearances a year, paying $250 each time. See below SIA remarks.

(7) SAC letter on award content.

[redacted] Are arbitrator determinations of dispositive motions, interim issues being recorded in awards as a matter of course. When a case goes all the way to the end with an award, it appears this is recorded in the other things decided category. But if a case is settled, the information provided by SROs wasn't so clear. They are to report back at the next meeting.

(8) Bonding.

Ted Eppenstein presented a PIAABA proposal for required bonding. But failed to follow through with any due diligence as to whether such bonds were available. Noted Exchange Act requirements on competition and efficiency. NASD suggested this be deferred to follow-up on GAO report on unpaid awards. TE moved his proposal be adopted. It did not carry. Flenberg suggested this on Corzine agenda.

(9) Arbitrator Biographies.

George Friedman reported that his staff clarified the information on its arbitrator disclosure sheets so that one can discern (1) the date sheet printed and (2) the date information updated.

(10) Whether questions to arbitrators must be responded to, and by when.

The conference continued discussion of what if the arbitrator doesn't reply to question. Current rules allow the questions, but do not toll the time for preparing a list or selecting a pool. Largely for fear of stretching out time frames.

Sometimes questions asked are invasive. Remains under advisement.
(11) Training DVD completed - be civil
(12) California litigation over disclosure. No new reports. Noted NY version of bill doesn't seem to be active. Suggested that AG Spitzer may have active interest in arbitration.
(13) Briefly noted status of SRO rule filings.
(14) Next meetings - Friday June 13 in NY, Weds Oct 22 in La Quinta.

SIA Meeting - Along with SIA Amal Aly and AGEdwards Sneeringer were: Daniel Greenstone (CIBC), Paul Matacki (Raymond James); Ken Meister (Prudential), Linda Drucker (Schwab)

(1) Out of State Practice.

Drucker noted one of her attorneys prepared to litigate 10 cases in Florida. Now can't. Outside counsel will cost them $1 million. Greenstone wonders whether the ban applies to prehearing phase (when things can be settled). Simple hooking up with local counsel as a mail stop for ethics complaints won't fly they report, as we'd heard. Florida 3x $250 to go out for comment. Fienberg suggested they approach Florida's Lori Holcomb with ideas. [redacted]

(2) Conflict Disclosure, etc.

Noted California and NY issues. GF noted the Perino-initiated changes in the works (mandatory disclosure clarification, bounds for challenge for cause, possible 20% on firm work). GF raised the administrative appointment approach to issue discussed above with PIAABA lawyers as securities arbitrators. Briefly discussed bigger cases to be sent to a single public arbitrator. Brief discussion of moving from 2 pools to one. In side bar asked if worth pursuing. Told him to discuss directly with CM whether there would be reason to pursue possibility of such a pool where, even given lists, one industry arbitrator would be appointed.

(3) Dispositive Motions.

NASD reported it is likely to move forward with a rule that will allow but discourage dispositive motions as best compromise it can get.

(4) Pleadings.

NASD rule clarifying answer need only address what is in claim. SICA code not so amended because NYSE opposes. [redacted]

Other - NASD has reported that it is in final stages of complete revamp of its arbitration code. Some plain english. Some reordering of provisions. Presumably will be filed here. In margins, NYSE asked about status of its PE revision of code. NYSE draft not assigned.

SIA's Amal Aly suggested MR-Chief Counsel should be involved in expungement issue. Told her assigned to KEngland, EKing. AA may call McGuire.

-end -

From: Love, Robert A.
Sent: Monday, January 26, 2004 5:15 PM
To: McGuire, Catherine
Cc: Jenson, Paula R.; Love, Robert A.
Subject: SICA notes for review

A few items discussed at the January 16th SICA meeting may come to the staff for informal or formal reaction in the coming months.

(1) Third party subpoenas. There has been signficant discussion regarding how to address the issue of subpoenas to third parties (i.e., non-parties to the case). There is substantial agreement on the idea of sending the subpoenas so that the recipient and parties/parties' counsel all receive the subpoena at the same time. There is less agreement on whether there also should be a 10 day notice to opposing counsel prior to sending the non-party subpoenae. The idea is that the notice would provide a more meaningful opportunity to stop third party production with such notice -- by having a arbitrator (or in indeterminate circumstances, a court) intervene. Within that conversation, the SIA argues that there should be an exemption from notice if the third party is another financial institution at which the investor had an account. They argue that such records would always be relevant. They argue that the type of thing that would be presumptively discoverable from a party under NASD's discovery guide would also be available from another firm. [redacted] NASD staff has stated that it would not recommend the exclusion for financial institutions (stating that it presumes there would be opposition at the SEC). [redacted]

(2) Ted Eppenstein continues to raise two issues regarding prospective arbitrators. He routinely provides lists of questions to arbitrators. First, he wants the time period in which to respond to the list for ranking arbitrators to be tolled pending a reply to questions. Second, he wants arbitration department staff to encourage arbitrators to reply. Third, he wants arbitrators who decline to reply to be removed from that arbitrator pool. While the Uniform Code of Arbitration includes a tolling provision, the Uniform Code isn't much in use. A version of UCA list selection, with such a tolling provision, is available at the NYSE, but only a small minority of its parties elect to use that method. SICA in the guise of Katsoris, asked NASD to raise the issue with the NAC. Tolling would assure that any information provided can be used in ranking, but it also can affect case administration by adding delays. Information after ranking could provide challenges. [redacted]

(3) Perino's recommendation for independent research on the fairness of SRO arbitration. A SICA committee seems to have discussed research with a California group, the California Dispute Resolution Council, (which I think is focused mainly on a project regarding dispute resolution within the State of California), and has received three separate bids for research along the lines Perino suggested. [redacted]

(4) Florida and out of state attorneys. Florida is poised to act formally after the Rappoport decision. The Florida Bar Board of Governors is about to file with the Supreme Court of Florida a rule that would allow out-of-state attorneys to appear in Florida securities arbitrations if: (1) they submit a form attesting to good standing in bar of another state; (2) submit to jurisdiction of Florida bar; (3) pay a $250 fee per "appearance" (which would include any early act in a case, such as signing a pleading, not just participation in a hearing); (4) "appear" no more than three times in a rolling 365-day period; and (5) let opposing counsel know their foreign status.

This action affects both plaintiffs' counsel (e.g. Rappoport) and firm in-house counsel. SIA filed one comment letter (which I have in electronic form, but have not read the 21 pages) , and anticipates filing another in response to the anticipated publication for comment by the Supreme Court. Note that currently, some financial institution in-house counsel are employing local counsel who enter an appearance, actually perform substantial work, and work along side them as second chair. [redacted] NASD has thought about this more seriously than any other, do we want to discuss with Fienberg/Friedman? (Note, California's version of this permits a much more informal affiliation with local counsel (and thus less expensive), and SICA members individually have heard that some

other States (e.g., Texas) are considering similar steps to Florida's, but knew of nothing concrete. [redacted]

(5) California ethics rules. NASD gave an update on the court cases, and noted that most of its California cases are moving, either out of State or with the waiver. My notes reflect that LF state that 300 or so are not moving (which is not insignificant). [redacted]

(6) The materials include an NASD news release advising of a London situs for NASD arbitrations, in affiliation with Chartered Institute of Arbitrators. I recall only a very general discussion of foreign sites, and expect that we/I need to follow up with NASD.

(7) Discovery cooperation. You may recall that in November, NASD issued a very strongly worded reminder to members to comply with discovery rules or face sanctions by arbitrators and NASDR. This SICA packet included an amended version reminding all parties to cooperate. While the first version had a footnote stating "you too" to non-members, [redacted].

(8) One tab includes a case of Ted Eppenstein's. A subsidiary issue concerns what to do about industry parties that do not file Uniform Submission Agreements. Down the road there may be NASD action on that. The piece that caught my was a Wachovia answer including a motion to dismiss based on a assertion that it assumed liability for a Prudential Securities matter. NASD issued a letter requiring TE to reply to the motion in 14 days. LF later rescinded that order. [redacted]

- end -