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

I. In California, "Esquire" and "Esq." May Mean Potential Legal Problems for Other Than "Active" Attorneys

In California, it is illegal for other than "active" attorneys to designate themselves as either "Esquire" or "Esq." Please see B&PC §§ 6125, 6126, 6127(b). In addition to the performance of legal work, the unauthorized practice of law includes the express or implied representation of one's ability to practice law. In the Matter of Wyrick (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83. Additional information may be obtained by telephoning the State of California Ethics Hotline (1-800-238-4427).

If you are an "inactive" attorney or an out-of-state attorney serving as an NASD arbitrator in California, you might review your Arbitrator Disclosure Report and/or the Awards you sign for the words "Esquire" or Esq."

A cross-check of some NASD Arbitration Awards (http://scan.cch.com/NASD/nasd_sac_start.asp), rendered in California during January and February 2005, with the State Bar's public list of attorneys (http://members.calbar.ca.gov/search/member.aspx) revealed that: several "inactive" attorneys designated were as "Esq."; several arbitrators, who were never licensed to practice law in California, were designated as "Esq."; and, one "inactive" attorney was designated as "J.D."

The California State Bar has proposed a rule change whereby "inactive" attorneys may not serve as arbitrators. Details of the proposal may be obtained at: http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/February2005&sCatHtmlPath=cbj/2005-02_TH_05_Mediators-active.html&sCatHtmlTitle=Top%20Headlines. The State Bar is currently seeking comments on the proposal.

II. Sample of Responses to My Prior Email

The following are some of the email comments received from arbitrators (**A**) and some of my replies (**R**) with respect to my email dated 2/18/05. Both have been edited.

The comments are divided by topic.

A. Arbitrators Learn of Opportunity to Comment on NASD Arbitration Proposals

A: I appreciate your heads-up as to the rights of arbitrators to comment on proposed changes.

A: Thank you for the information. I agree that arbitrators' comments would be useful to the SEC. I'll consider adding my own.

A: Thank you for the enclosed information. I appreciate your efforts. Please add my email address to any further mailings. Many thanks….

A: Thanks for sending the email. I'll take a look at the info. By the way, do you work for the NASD?
R: No, I'm just an attorney who has represented claimants and respondents and served as an arbitrator since what seems like the beginning of time. …
A: I like your website. Great info!

A: Thanks for the email on the recent NASD news release. As an industry arbitrator, expert witness and branch manager, it is important for me to stay on top of all the latest developments. Please send future information to.…

A: Thank you for your reminder on these proposals. I intend to offer my 2 cents worth of commentary. Or as Harry Golden used to put it, "for two cents plain"!

R: One can view the actual comments received by the SEC on SR-NASD-2004-164 at: http://www.sec.gov/rules/sro/nasd/nasd2004164.shtml.

B. Hot Issue of Explanations of Arbitration Awards

A: Thanks for the heads up. … Re the written explanation of the award. If they want to pay me $200 to tell why I thought the way I did, I think I'll co-operate.

A: I am very much against having to explain arbitration decisions. I believe that requiring an explanation is openning a part of the arbitration that should remain unexplainable and unauthored.

A: I also believe that the new ruling where the panel must disclose why they decide one way or another will make for a more activist panel. I was a … in one case, years ago,

where churning was obvious and blatant. It resulted in a tie; one for, one against, and one abstained. Why? I don't know and there was no way to learn why. … I think that experience made me want to get into the arbitration business if for no other reason than to find out how the decisions were made. … I always felt I was trying to be fair based on the claim at hand and not on the quality of the legal representation.

A: As an arbiter who has served the NASD and other SRO forums for more than 25 years, I am very much opposed to requiring any form of written opinion regarding decisions:
1. This further "legalizes" what was originally intended to be a business person's forum.
2. Decisions are frequently the result of a careful and considered deliberative process that results in a reasoned compromise which brings together the disparate views of the panel members. These compromises would be difficult and very time consuming to reduce to writing.
3. Requiring written decisions would further increase the burden on arbitrators, who are already compensated on little more that a volunteer basis. This burden as already reduced the pool of industry representatives willing to serve.
R: 1. What is the source of your information that customer-securities broker arbitration was "originally intended to be a business person's forum"? By whom was it so intended? The current watch word of Securities Industry Arbitration is: "Arbitrators should realize that they are viewed by parties in an arbitration proceeding much as a judge would be viewed in a court of law." (The Arbitrator's Manual [8/04], p. 3.) Thus, it appears that a rule that further "legalizes" the procedure is consistent with the parties' expectations.
2. Arbitration panels are like juries without approved jury instructions. A jury verdict, based upon compromise, i.e., a compromise between liability and damages --- "We're not really sure on the liability issue, so we'll award something, but less than full recovery." --- where some jurors vote against their beliefs to break a deadlock, would be overturned. Informing parties of the true nature of the arbitration decision making process would permit them to compare the quality of justice in arbitration forums to that available in the courts.
3. An arbitrator's willingness to serve should be based upon other than economic concerns, e.g., using his/her knowledge to render fair and impartial awards between disputing parties. Those who cannot afford to "volunteer" their time and effort may decline to serve. What data is there that the "burden has already reduced the pool of industry representatives willing to serve"? If there has been such a reduction, what impact has it had on the quality of justice available in SRO arbitration proceedings?

A: I am frankly disturbed by the "written explanation" rule change. I have been on several cases in the past year where attorneys have attempted to use other arbitration panel decisions as precedent. Is the demand for written decisions coming from investors or from the claimants' bar?
R: I do not know the source. However, the lack of a written opinion was mentioned by the Supreme Court in both Wilko (denying a petition to compel arbitration) and in Shearson (granting a petition to compel arbitration), which overturned Wilko. The GAO Report (1992) on SRO arbitration also mentioned lack of written opinions. … What were the arguments on each side with respect to trying to use arbitration award opinions

as precedent? Please be sure to submit your comments, including your experiences, to the SEC when the opportunity arises.
A: In one case, which was one of a series of cases involving the same brokerage firm and broker but different claimants, each side tried to get decisions favoring them from earlier decided cases in, over objections. We refused to allow the decisions into evidence, but of course the gist of the holdings did get unofficially noticed. More recently, a decision was attached to a motion to dismiss! While the motion was rejected, we have now all seen the prior decision.

A: I agree with both proposals.

A: I'm an industry arbitrator and retired. The proposal to open up the panel decisions via written explanations is a bad one to say the least. Not to offend you as a lawyer, but this would be chaotic in the long run with appeals by disgruntled parties shopping for better results. It stinks!
R: No offense taken. There are many viewpoints on the issue. My idea is to get arbitrators to express their points of view to the SEC if and when the NASD formally puts forth its proposal. The NASD and SEC need to hear from (and listen to) those of us in the trenches.

A: The NASD really needs to make a careful choice as to its policy regarding opinions if it's going to continue offering a credible arbitration program. … As a lawyer, I have on occasion wished I could be able to lay out the reasons for my decision in some sort of logical, if brief, form. … I have far more often been *grateful* for the no-opinions policy for a couple of reasons: … If you add in written opinions -- with time spent writing, exchanging drafts among panel members, rewriting and perhaps further rewriting -- the financial side of the NASD arbitrator's personal ledger falls ludicrously short. … [I]n the typical case, that rule also serves to limit arbitrators' individual legal exposure. … And, in closing, please note that I have predicated the foregoing comments on my status, training and experience as a lawyer. Not every NASD panel includes a lawyer and, for one reason or another, not every NASD panel that does include a lawyer has a lawyer for its chairman. I simply can't imagine what such a panel could do as a practical matter when faced with the obligation to produce a reasoned written opinion.
R: [S]o much depends upon the actual content of the proposed rule that it is impossible to say yeah or nay at this time. (Your) comments go to the heart of the matter, which I see from a slightly different prospective. Substantially all arbitrators lack the ability to write proper opinions, which I see as a symptom of the problem --- that NASD does not properly train its arbitrators in the law and has no effective means to evaluate an arbitrator's competence (or lack thereof). ... I believe that, with proper training by the NASD, arbitrators would be able to write opinions that demonstrate that justice was served. On the other hand, if an opinion writing requirement were implemented, the likely embarrassment to the NASD would cause it to conduct legal training and implement effective evaluation methods, which it should have already been doing. So, it may be a question of the ultimate objective --- have no opinion and conceal the true status of internal affairs or require opinions and educate and evaluate arbitrators.

C. Layman Efforts to Follow the Law

A: I have been concerned about how to apply relevant law and regulation to various issues. Since I do not have access to a law library or even Westlaw/Lexus etc., I have relied on the parties to brief us and to respond to opposing counsel's interpretations. … I requested parties to append complete reports of certain cases that they cited. In addition I have asked the staff attorney for some general assistance. Of course, my main and perhaps only interest is to render a fair and unbiased decision. … NOT a lawyer but considerable legal and financial experience… [M]y general opinion (is) that training/information about application of legal/regulatory principles and common law should be offered or even required of active arbitrators. … I presently rely on oral argument and briefing by counsel, on the expertise of other panel members and staff attorneys for such information.

D. Go with the Flow

A: Dear Counselor… While the issues you speak of are integral to the effective management of the arbitration process, do you have a purpose in suggesting that I involve myself more intensively than not. Please get back to me when you can.
R: Arbitrators who have ideas on how to improve the process should contribute their views. The prior email provided information on an effective means to do so.

E. Criticisms of NASD and Suggestions for Improvement

A: Isn't it interesting that the NASD has my e-mail address from various sources within their organization, yet they failed to notify me of this information!

A: Thanks for the heads-up! Like you, I love my arbitration avocation but resent being treated like the downstairs help.

A: I read with interest your comments on Random Selection of Arbitrators. I agree with your comments. The system needs upgrading. I would even support going to a hearing officer type order, with internal appeals on the record, where the final order, in selected cases, is supported by findings of fact, legal authorities and explanations…..provided adequate pay is provided for the efforts involved. On another level, do you have any insights on why the NASD has cut arbitrators from various venues and are using only local arbitrators? …

A: I think I know too much (based on preliminary material) and I'm afraid the claimant's lawyer knows too little. It's not my job to educate and I have been swatted by a chairman (in private) for asking tough questions of both sides. If an argument is stupid or not based on the facts in the case, and I say so as a panel member, does that make me biased?
R: Appearances are very important to the NASD. The tough questions sound great. You're not there to be a potted plant. My guess is that the NASD probably wanted you to keep your conclusions to yourself until deliberations.

A: Thanks for the info. Yes, stonewalling is definitely what I get also. Dispute Resolution seems to want us just to be there, be quiet, and not ask for anything --- sort of a necessary, but annoying, adjunct to daily business. There are frequently huge sums of money involved, [and Dispute Resolution doesn't appear to be starving to death], but a small portion of the fees/costs gets paid over to the arbitrators. My sense is that the process is dominated/controlled by the bar/securities dealers/members/SEC, who want to keep the process cheap. Attorneys [and I am one!] never want anyone setting deadlines, controlling the calendar, etc. Case management is much easier when you control it. But, maybe, there is nothing to be done, since Dispute Resolution seems to have decided that it is easier to just keep rolling through arbitrators --- shutting out anyone to create problems. Is that an accurate assessment, from your perspective?

A: The treatment of that arbitrator by the NASD, that he invited a motion to recuse himself, sounds like a terrible administrator at the NASD. I myself being a woman of great principle have felt the muscle of the NASD administration leveled at me.

F. Curmudgeon

A: As a retired trial lawyer in private practice and as the general counsel of … company I then became an arbitrator for the NASD, the NYSE and the AAA. I have handled well over 100 arbitration cases with only the usual problems that arise in preliminary matters and the hearing, itself. … Notwithstanding the general rule that arbitrators (whether securities or commercial) should rely only on that which is presented, under oath, in the hearing room or in formally submitted briefs, you seem to go so far as to not only allow but seemingly require that a panel substitute its own 'education' for that which is presented at the hearing. To begin with, how will this extensive education be provided for a securities and commercial world that is so dynamic that it changes every hour? … Where and how will this education be provided? Who will bear the costs of this education? … Please come back to planet Earth, Mr. Greenberg, and just do the job the way it is and was intended. That way, it will be less upsetting to you and you can, again, smell the roses. Respectfully submitted,

R: Thank you for your reply. Hearing differing points of view is not upsetting. … The comments were directed at other problems facing the NASD, e.g., lack of competence of NASD arbitrators, no effective means to assess arbitrator competence. These are issues which you did not address. Please advise me where you have been informed that arbitrators may only rely on law (as opposed to facts), which has been cited in the proceeding by the parties. My comments dealt with a recent matter where the NASD asked an arbitrator not to consider applicable law of which the arbitrator was aware, but fellow panelists and counsel for the parties were not. In that situation, is it your understanding that the arbitrator should ignore the law? Have you had occasion to do so? The dynamic in customer-securities broker disputes does not change by the hour as most matters have been handed for years in arbitration. The NASD can bear the cost of educating its arbitrators in the law or implementing a better selection process. The NASD requires arbitrators well educated in the law for intra-industry disputes. The NASD now has to provide 2 hours of training in “civility” due to the quality of arbitrators

it selects, but provides no training in the law. … You state, "do the job the way it is and was intended." What way is that? By whom was it so intended? How do you know that? If you disagree with my comments to the SEC, it is respectfully submitted that you provide the SEC with your opinions and observations. Very truly yours,

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