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

> "Nobody makes a greater mistake than he who did nothing because he could only do a little."
>
> --- Edmund Burke (1727 – 1797)

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

I. Hot Issue of Explanations of Arbitration Awards

A: Reasoned awards are not insurmountable, and one does not have to be a lawyer to write a valid one. Other forums, such as AAA provide training on reasoned award writing. Many of their neutrals are architects, engineers, etc., who are perfectly capable of logic, reason and commanding the English Language. In the AAA scheme of things, reasoned awards are only provided upon request prior to the hearing. Yes, they are more work, however parties pay for them.

A: I … find that the proposal regarding written reports of the basis of the decisions would cause some problems, particularly in view of the fact that a lot of the non-industry people are not legally trained and could leave lots of room for appeals. I will make my thoughts known.

A: As an arbitrator [and arbitration attorney] I have occasionally thrown in a short sentence finding churning or unsuitable trade recommendations. Short opinions will not be too much hardship and will probably not lead to many successful motions to vacate. The arbitration system has already become very legalistic and that genie will not go back into the bottle.

LG (Supplement): After being required to pay $600 for an explanation, how satisfied would a party feel upon receipt of a "short sentence"?

A: … I believe that it is important to give litigants a clear understanding of why they won or lost cases, and for that information to serve as guidance in future cases so that folks either improve their pleadings or come better prepared to argue the salient facts. I believe written opinions serve three important purposes. One, they provide lawyers a basis upon which to fashion appeals. Two, they educate future litigants arguing similar issues as to how to better frame their cases. No, I'm not suggesting there is any *stare decisis* among arbitration cases, but if I search for all recent decisions involving issue X, and in reading the last 20 decisions I note that panels ruled favorably in cases where they found A, B, and C but ruled unfavorably where they found D, E, and F, I think that information will either prompt more settlements given that the issues are being more clearly defined, or will encourage better preparation. Three, written decisions will hopefully disclose the incompetence of far too many arbitrators and serve the critical function of cleansing the lists of those folks who don't belong. … I respect your sincere efforts and encourage you to continue. Ultimately, robust debate is far better than the paternalistic approach that NASD has in place. You are right about the plantation mentality of the process. It is not healthy for participants and demeans the integrity of this serious business.

LG: … I do not understand why the NASD used a trial balloon announcement rather than filing its proposal with the SEC. My suspicion is that the NASD will never file the proposal.

II. Hoof in Mouth?

A: I find the discussion over arbitrators "rocking the boat" to be quite interesting. I frequently ask difficult questions, but do so in a neutral manner. On only one occasion in … years of arbitrating did a party complain because the questions I asked the other party did not seem to be as probing to the complaining attorney. I took that as an important lesson.

III. Layman Ponders the Law

A: I … have been on dozens of panels, including chairing many. I personally don't have any problem with a requirement for some sort of written explanation of awards (or denials) and don't feel a need to comment to the SEC. My greatest concern is the steady drift of arbitration cases toward the equivalent of full blown court cases, with voluminous exhibits and citations, etc., etc., etc. It used to be the objective to arrive at a fair and equitable outcome in a streamlined way to save time and money. … Lastly, your response to one of the arbitrators that if he/she is concerned about compensation he/she shouldn't ask to be in the program, is a good one. I've been very impressed with the willingness of competent active lawyers to set aside times for hearings that often are settled at the last minute and even when hearings take place to give up the differential in income.

LG: You're right. Arbitration is looking more like the court system. … The real question is setting those "fair and equitable" standards. What is "fair and equitable" to one arbitrator may not be to another. There need to be guidelines so that parties have some idea what their risks are in not settling an arbitration cases. To me, the law

represents publicly known principles that the courts or legislatures have spent much time trying to set forth as to what is "fair and equitable" in specified situations. Those guidelines demonstrate what facts are relevant and what are not. The law is the best guideline of which I am aware. At least, it is the best starting point. Since, arbitration is tending to be like civil courts, the NASD needs to train all arbitrators to handle it and have an effective evaluation system. A friend of mine served on a panel, which was chaired by an "inactive" Esq. The Chairperson was ready to rule that numerous claimants should be excluded from the hearing as they might hear each other's testimony. (NASD rules permit all parties to be present at their respective hearings.) … The moral of the story --- the NASD needs to train everyone in a lot more than just being civil to one another and needs an effective means to weed out incompetents.

A: Re "fair and equitable": you give me food for thought on the need to hold to strict legal standards on arbitration cases. Do we have to come completely to that? Hopefully, we do not. … As for arbitrator evaluations --- I completely agree and was going to mention it in my earlier e-mail. I can think of one … arbitrator who should have been weeded out long ago.

IV. Discovery

LG: You didn't mention discovery disputes. I try to handle discovery disputes directly with the parties using the relatively new email procedure. Attorneys seem more civil when they know that they cannot stall for months as they might when the paperwork passes through the NASD. Also, I have no problem with assessing monetary sanctions against attorneys. Attorneys seem to "understand" that much more than when sanctions are assessed against their clients.

A: The e-mail discovery routine sounds great---what a pain it is sometimes. As far as I know it isn't in place in the … District at this point. It seems like both sides are harassing each other more and more and the approach you describe seems like an excellent moderating step.

LG: Please see NASD Arbitration Rule 10334 http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_013098.pdf. Also, please see Items K and L on the most recent IPHC Arbitrator's Script.

V. Criticisms of NASD Dispute Resolution

A: Thanks for this information. You are providing more impartial information in the space of two weeks than I have gotten from the self-serving NASD in the … years I have been a non-attorney arbitrator with them. … [A]n arbitrator for the NASD was informed by the NASD that he had been removed as an arbitrator. When he asked why, they said "you failed to disclose material facts." Oh, he said, "could you tell me what I failed to disclose so I can properly correct my file and make sure it doesn't happen again?" "No," was the reply, "we don't have to." And these are the folks who are supposed to be impartial and … yet they won't even grant someone due process and the common courtesy of being informed about what they allegedly did wrong. Sheesh.

LG (Supplement): The NASD maintains an Office of the Ombudsman. (See, http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_

009872&ssSourceNodeId=1108.) I have been informed by the Office of the Ombudsman that it has jurisdiction over matters concerning an arbitrator's dealings with NASD Staff. (Perhaps, those who have had experience dealing with the NASD Ombudsman would share that experience with us by submitting their comments.) There are others at the NASD Dispute Resolution to whom you might wish to express your concerns: Ms. Linda Fienberg, President at: Linda.Fienberg@NASD.com ; Ms. Jean I. Feeney, Vice President and Chief Counsel at: Jean.Feeney@NASD.com .

VI. Comments on Many Issues

A: I would say that I have been in those trenches. ... [O]ver the years, I have come to believe that many counsel (both sides) do not wish an arbitrator with industry expertise; they wish an arbitrator that they can manipulate. Nothing in what you sent to me seems to make that point. ... I was removed from that panel after the ... Supreme Court passed a rule that no one not holding himself (or herself) as an active lawyer could serve as an arbitrator; as I was in "retired" (but dues-paying) status, my name was stricken from the roll of eligible arbitrators. (The questionable wisdom of the ... Supreme Court, in this regard, is obvious: The most experienced arbitrators in their system vanished.) ... Back to the NASD - From inception, I have thought that their administration of cases has been inept. These days, if one gets the documents from its ... office on a timely basis, one can count their receipt as a miracle. The Case Administrators can provide advice only on the most basic issues of administration, and the advice is, often, inconsistent, depending on to which Case Administrator you are speaking. They seem to be unable to use e-mail. Messages left for them are, frequently, never returned. Their individual case loads appear to me to be in numbers far beyond reason. Their superiors are unknown to me, and they seem committed to organizing and conducting training sessions that are so basic that I would be embarrassed to call them training. (I, myself, have taught a significant amount of CLE on business and nonprofit law subjects and believe that I know whereof I speak.) When I handle a case, I try to get the parties to agree to conduct all possible Pre-Hearing matters by e-mail (with copies to all opposing counsel and to the local NASD office). ... I feel an obligation to bring all of my experience into the Hearing room - meaning that, if I have expertise on a subject under consideration, I expect to use it, and I would be intolerant of anyone who says that I should not. I try to disclose, on the record, that prior expertise.... I expect to continue to arbitrate cases until my hearing or my eyesight fails. I enjoy the role. As for "reasoned awards", I have quite mixed feelings. If I am the sole arbitrator, and the parties are willing to pay me for my time, I would provide a "reasoned award", and, for the AAA, I have, and I expect to continue so to do, notwithstanding the fact that the AAA discourages them. If I am a member of a panel, it can be terribly hard work, to draft a "reasoned Award" that is acceptable to one's fellow arbitrators. It is hard enough to draft an Award, without providing reasons. I look upon the principle functions of the Chair of a panel as (1) ruling, promptly, on all objections and, in so doing, being sensitive to the feelings of one's fellow arbitrators; and (2) mediating the Award finding function into a place where there will be no dissent. One learns that there are many ways to get to the same number. I care, most, that the number is agreed upon, no matter how it is arrived at. This is not compromise; this is not the cutting of the baby; this is

negotiation to a result agreed upon by the arbitrators - damn the parties and their counsel. Respectfully submitted....

LG: Counsel for the parties may desire neutral and industry panelists who have little or no expertise in the industry or in law. … Without expertise in the law, the parties are dealing with a jury that receives no instruction on the law from a judge or approved jury instructions. However, the parties may/should present expert witnesses who testify as to industry practices. Those familiar with the industry practices and disagree with what the expert is stating should question the expert in the areas of disagreement for the benefit of their co-panelists. I feel that revealing conflicting information only in deliberations deprives the parties and co-panelists of valuable information. I always appreciated arbitrators or judges who stated their skepticism before ruling and gave my client an opportunity to present evidence to allay their concerns. In California, an "inactive" attorney can stay "active" by paying higher bar dues and taking continuing education courses. Before the mid-1990s, arbitrators had much personal contact with NASD administrators --- they attended all hearing sessions and went to lunch with us. Now, there is minimal contact and, thus, little opportunity for the NASD to evaluate an arbitrator's competence. In my opinion, it is ludicrous and an economic waste to have courses on "civility." A person, who has been shown to be "uncivil," should promptly receive a strong oral and written warning. The victim of such "uncivil" activity should be advised of the NASD's action on the matter. The second time, the perpetrator should become history. NASD arbitration is not kindergarten.

LG (Supplement): Would you want your (your parents', your spouse's, your children's) claims tried before a jury that had not been instructed on the law? It may be useful to provide a short explanation as to one aspect of how the law is implemented in court. In a jury trial, each attorney submits proposed jury instructions (support by legal authority) to the judge. The judge may accept, reject or modify proposed instructions or, on his/her own, provide others. Sometimes, appeals are based on whether the judge gave proper jury instructions. In a non-jury trial, each attorney submits a brief on the law and how it applies to the facts. When rendering judgment, the judge writes an opinion. The law set forth in the judge's written opinion is derived from the attorneys' briefs and/or the judge's and his/her law clerk's legal research. In both jury and non-jury trials, the judge determines applicable law and is not bound by what the attorneys suggest.

An "uncivil" person should not be placed in a position of responsibility. An arbitrator's decisions have substantial financial and non-financial consequences to all parties to an arbitration proceeding. If the NASD had a "zero tolerance" policy on "uncivility," "uncivility" would cease, but quick. Why does the NASD arbitration panel contain so many "uncivil" persons that "civility" training is necessary? It is a symptom of a bigger problem --- the NASD does not have an effective means to evaluate the quality of its arbitrators. The NASD needs to re-evaluate its selection and evaluation methods and not nip at symptoms.

VII. Advocate of Professional Association Seeks Comment

A: As an SRO arbitrator, do you wish there were a professional association composed solely of Securities Arbitrators for you to join? Do you feel the SROs do not listen to you, but, possibly, would listen to a professional association of arbitrators like yourself?

… When key regulatory matters affecting SRO arbitrations are pending, do you even know about them? … Do you want to professionally interact with, and have a network of SRO arbitrators? … [D]o you sometimes feel it would be helpful … if you could discuss arbitration matters with someone not employed full-time by the SRO? … Do you think having … arbitrator-generated continuing education would be beneficial? …
LG (Supplement): I will forward, initially on an anonymous basis, any comments received to the arbitrator/author and, if requested, try to work out an agreed upon means to identify the parties to one another for direct communication.

VIII. NASD Seminar Topic Ideas

LG (Idea): I have expressed the opinion that the NASD should offer seminars on the law to arbitrators. Attorneys representing claimants and respondents could be invited to express their views on topics of current interest. Until about 1993, we had town hall meetings at hotels where ballrooms were filled with attendees. Attendees, with views that differed from those presented from the podium, had an opportunity to publicly question the speakers. The following legal topics, among others, should be interesting to all arbitrators. (1) It is generally conceded that clearing firms have no fiduciary duty to customers of introducing firms. What is the law, if any, on whether a clearing firm could be held liable to a customer of an introducing firm where the introducing firm breaches its fiduciary duty to the customer and the clearing firm aids and abets? (2) Customers, when purchasing limited partnerships, sign "Subscription Agreements," which generally disclose risks, etc. Many customers claim that they signed the documents without reading them and that they did not know of the risks, etc. What is the law, if any, on whether and under what circumstances such disclosures constitute a valid defense to allegations of misrepresentation and/or omission? The NASD could conduct seminars on industry topics where all points of view are presented. The following industry topics might be of interest. (1) How does a Compliance Department function in the real world? (2) What are the financial benefits and drawbacks and for whom of variable annuities? I am sure that our readers could suggest numerous other legal and industry topics.

IX. Ruder Commission Report

LG (Idea): In 1992, the NASD conducted informal meetings with arbitrators and attorneys, who represented parties to NASD arbitration proceedings, in order to improve the arbitration process. In or about late 1994, the NASD tasked David Ruder, former SEC Chairman, to form a group of persons representing diverse arbitration interests, conduct hearings and suggest ways in which NASD arbitration could be improved. In early 1996, the Ruder Commission issued a report with 70 recommendations. (A copy of the NASD's announcement can be found at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_010550&ssSourceNodeId=1108) Would someone please advise me as to where a copy of the actual report is publicly available? I have not been able to locate a copy.

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