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

> "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. "Random" vs. "Rotational" Selection

A: I was impressed by your letter of February 10, 2005 to the SEC…. You are absolutely right that NASD has much bigger problems to address before tweaking its selection system. … I was surprised that the SEC would accept such a significant and burdensome change without requiring that the NASD explicitly prepare a cost-benefit analysis. Indeed, the NASD's proposal was no more than unsubstantiated claims. More generally, my impression is that the NASD pretty much does whatever it likes. As for NASD arbitration, the outcome depends more on the competence and integrity of the panel than it does on the facts and law.

II. Writing A Statement of Reasons

A: Thanks for keeping us in the loop. I have no formal legal training but do find myself in the chairman's seat quite often, probably because I have extensive experience in running meetings as a neutral. My first choice always is to explain in writing the reasoning behind a decision. The difficulty I keep running into is that although my two panel members - even though far apart in their opinions - can compromise and agree on the award itself they are far apart in their opinions, with me usually in the middle. The choice, then, becomes one of writing a firm decision with only two arbitrators agreeing and risking a dissenting opinion, or writing a watered-down wishy-washy decision that pays homage to both camps but can be signed by all three arbitrators. In such situations my fellow panelists invariably prefer a decision without any comment that all can sign off

on. It's a tough choice. I have tried both approaches and each time I was less than happy with the results.

LG: Your underlying assumption seems to be that all panel members must agree on all of the wording of the statement of reasons. The NASD's proposal, if and when presented to the SEC, may deal with that issue. Black's Law Dictionary states, "[A] 'concurring opinion' is one filed by one of the judges or justices, in which he agrees with the conclusions or the result of another opinion filed in the case (which may be either the opinion of the court or a dissenting opinion) though he states separately his views of the case or his reasons for so concurring." If all panelists agree as to a result, but not their reasons, they could sign an award with concurring opinions. Such a situation might arise in a case involving allegations of misrepresentation where the award was in favor of the respondent. One panelist might reason that there was no proof that the representation was false when made. Another panelist may reason that there was no reasonable reliance. The third may reason that the claimant failed to mitigate his/her purported damages. There would be no dissent if all the panelists agree as to the final result, but their reasoning processes differ. What is the problem if one arbitrator does dissent? During a review of January-February 2005 awards, I saw one that included the words, "I dissent" with the arbitrator's signature. I served on a panel where a dissenting arbitrator signed the majority award so that the award would be unanimous. He was not required to do so and it would not have bothered me if he had gone on record with his true belief. On one other occasion, I filed a dissenting opinion.

III. Communication with NASD

A: Thanks for constructively raising important issues for some NASD arbitrators and personally for raising my own awareness of some problems. … Has anyone at the NASD contacted you?

LG: On 2/20/05, I wrote to the President and General Counsel of the NASD seeking guidance as to NASD policy on use of the law in deciding arbitrated disputes. I suggested to the NASD that I do not expect the NASD to make policy, but only inform me of existing NASD policy on certain stated issues and, if there is no policy, to so state. … It is my feeling that the NASD would prefer that the issues discussed in the emails remain dormant, e.g., Ruder Commission Report stating that the NASD should conduct training in substantive (as opposed to procedural) securities law.

A: … [A]t least some folks in positions of authority at NASD would rather not confront some of the issues you and others raise on your site. Nonetheless, there almost certainly would be value to arbitrators AND to NASD staff if such issues were openly discussed on an official and perhaps non-moderated or "censored" listserv.

IV. Comments on Many Issues

A: In the early 90s they were big on the training on the law, including customer and brokerage legal perspectives on all the major types of customer claims. …. was a staff attorney with whom I worked a lot and she perceived that claims were getting more complex, bigger and with more legal issues and litigiousness. She thought having well-trained and experienced lawyers heading up panels was a good idea. And she was playing

a role in those early law-based trainings. … [A]round 1993 or so, the training started to be procedural (Chairperson training on how to run a hearing and so forth), and a big mediation push started. I thought the latter was a good idea and I attended training and qualified as a mediator, signed up for settlement weeks and so forth. But in … years I have not gotten one mediation. Of course, I am in ….. But I hear they have their favorite few mediators who get most of the cases. That is anecdotal and I have no data to back it up. Keep up the good work.
LG: I'm getting the same (lack of opportunity to serve) information from mediators in LA and parts of Florida.

V. Positive Arbitration Changes – Possible? How?

LG: It appears that the amount of opportunities to serve has been diluted due to the large number of people on the entire panel and, thus, so has the interest in making positive changes. …
A: Many NASD-DR Arbitrators are interested in making positive changes, and email me in such regard; it's just they don't know how. For example, if one wished to try to make positive changes, should one write to: NASD-DR Officials? To Members of the MEAC? To NASD? To the SEC? To Congress? To "60 Minutes"? To "Business Week"? To Whom? Etc. Etc. … Also, if one only does one or two arbitrations per year, such arbitrator may not have sufficient experience and/or the requisite knowledge, skills, and/or abilities to know what things, if any, need changing. … [M]ost NASD-DR arbitrators with whom I served tried their darnedest to do justice and equity. … As far as "tak(ing) a few dollars to the bank", I surely agree that it's "a few" - very, very, very few. When I served as Chairperson, I often paid my Secretary more to type up our Panel's or my Ruling on a motion than NASD-DR paid me to rule on such motion. I cannot afford to, and thus, will not financially, underwrite NASD-DR dispute-resolution functions…
LG: The key to NASD arbitration reform is through the supposed oversight function performed by the SEC. … It just takes time, persistence and some luck to cause necessary reform.

VI. Complaints and Lack of NASD Feedback

A: My interest in the NASD arbitration stems from a personal experience. The NASD stonewalled us too. My wife (brought a NASD arbitration claim.) … During arbitration, numerous times the broker/dealer, their counsel, and the Panel broke NASD's own rules. The Panel denied her counsel almost all responsive, discoverable documents and cut off much of his direct examination and cross examination. They … (entered) into a smear campaign against my wife. Even the Panel mocked and ridiculed her. The Panel denied all my wife's claims. … The NASD mostly ignored my wife's subsequent complaints. They didn't discipline the guilty parties and have not taken steps to prevent such egregious conduct from happening in the future. And certainly they don't want to admit that they make mistakes and, unlike court, they do not correct their mistakes. Since that time I have been researching the NASD's arbitration. … The system is closed to independent scrutiny. The arbitrators have infinite power.

LG (Idea): Does the NASD ever respond, e.g. acknowledge receipt, to anyone who has filed a negative Peer Evaluation? In *Ideas Are Free --- How the Idea Revolution Is Liberating People and Transforming Organizations* (2004) by Robinson and Schroeder, the authors demonstrated how lack of feedback would kill any program designed to motivate employees. Lack of feedback leads to "why bother." Ultimately, lack of feedback allows bureaucrats to claim that everything in their realm must be fine as no one ever complains.

VII. Perino Report and Other Writings

LG (Idea): While researching the issue of the quality of SEC oversight of the NASD, I came upon a copy of the "Report to the Securities And Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations" (2002) by Professor Michael A. Perino. The SEC sought the Report after it filed an *amicus curiae* brief in support of a legal action brought by the NASD and NYSE, which opposed application of California Ethics Standards to SROs. Reading the report was reminiscent of reading "More Damned Lies and Statistics --- How Numbers Confuse Public Issues" (2004) by Joel Best. An annotated copy of the Perino Report is available at: http://www.LGEsquire.com/SEC_PerinoReport_Pgs_1-29.pdf and http://www.LGEsquire.com/SEC_PerinoReport_Pgs_30-48.pdf. It is a must read for students of critical analysis.

Prior publications are available through the links below:

1. Part I at: http://www.LGEsquire.com/NASDArbitratorEmail_Part_I.pdf ;
2. Part II at http://www.LGEsquire.com/NASDArbitratorEmail_Part_II.pdf ;
3. Part III at: http://www.LGEsquire.com/NASDArbitratorEmail_Part_III.pdf ;
4. Part IV at: http://www.LGEsquire.com/NASDArbitratorEmail_Part_IV.pdf ;
5. Freedom of Information Act request, concerning the SEC's oversight efforts of NASD arbitration at: http://www.LGEsquire.com/050309_FOIA_SEC.pdf;
6. Comments to the SEC on "random" vs. "rotational" selection methods and arbitrator knowledge and use of the law in decision making process, education and evaluation at: http://www.LGEsquire.com/SEC_SR-NASD-2004-164.pdf ;
7. Table of Contents and many annotated excerpts of "Securities Arbitration Reform --- Report of the Arbitration Policy Task Force" (1996) at: http://www.LGEsquire.com/NASDRuderCommReport.pdf .

My thanks to those who have contributed to Parts I, II, III and/or IV and/or shared their ideas/information with me.

Les Greenberg, Esquire
Culver City, CA 90230
(310) 838-8105
LGreenberg@LGEsquire.com
http://www.LGEsquire.com