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

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

I. "NASD Needs Arbitrators"?
II. "Does one and one equal two?"
III. NASD-DR Claims Email Statements Are "Misleading"
IV. Multiple Topics and Suggestions

The following are some of the email comments received from arbitrators (**A**) and some of my replies (**LG**). Both may 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, use and/or comment (**LG [Idea]**).

I. "NASD Needs Arbitrators"?

A #1: You hit it square on the button. The number of cases settled without reaching a hearing is almost 8:2 and, overall, it seems that the number of cases has diminished. During 2003, I had 10 cases opened and 1 actual hearing. During 2004, I had 7 cases and 1 hearing. So far, in 2005, I had no new cases, and the ones pending will most likely get settled without a hearing. I am a public arbitrator but with … substantial experience in Law, Accounting and Securities.

A #2: It would be interesting to learn how old the "7000" number is. Did it predate the announcement that they were "downsizing" the pool and kicking many of us out off the panels?
LG: Interesting questions. How do you know that the pool has been or is being "downsized" and/or that many of us are being kicked off the panels? An arbitrator mentioned that he received a pink slip because his adult child, who does not live in his home, is employed by a broker-dealer. Others only stated that it has been a long time since they have been called to serve, but do not have any information that they have been removed from the panel.

A #3: I resigned as an arbitrator because I was reserving about 40 to 50 days a year for arbitrations - 90% of which settled a few days before they were to take place. I'm retired and like to travel. I enjoyed the few arbitrations that I did participate in over the last seven years, but NASD has to do more to respect the time of its arbitrators.

II. "Does one plus one equal two?"

A: Wow. I just have to comment on the "does one plus one equal two" guy. Well, I guess it could be a woman. You were extremely respectful of him/her, but I think those comments go beyond just a different or layperson's view that could be explained by differing experiences serving on cases. I think he actually proves the validity of your concerns about arbitrator competence and bias: what do you make of the fact that he has served on so many panels? The number he cites sounds like a lot to me, and I base that on my own experience as an arbitrator and as an attorney choosing panels--the arbitrator profile report lists publicly available awards and I don't think I have ever seen a profile containing more than 10 or 20 cases. Why has he served on so many? How did he get to be on the list sent around to parties for selection in so many cases?

The comment about his "does one plus one equal two" standard really scares me. I've heard other arbitrators tell me about general guidelines that they rely upon, usually things that their judge or lawyer friends tell them, such as, "just try to decide who is lying." I have always understood these to be basically standards for weighing evidence and applying the law. This comment, however, seems to state quite boldly that this very experienced arbitrator substitutes his own standard for the law. Isn't disregard for the law--particularly if it has been carefully briefed and presented by counsel--grounds for overturning an award? I would certainly call that arbitrator misconduct. Moreover, what's to stop any other arbitrator from coming up with his own standard to use in place of the law? How about, "do I like the claimant's lawyer's tie?" Much easier to decide than all those tricky issues of securities law and fraud. And no annoying reading of briefs required.

LG (Supplement): Your comments raise many interesting issues. What are the NASD's policies with respect to the application of the law in the decision-making process? Where are those policies, if any, specified in publicly available literature? What efforts, if any, does the NASD make to determine an arbitrator's continuing competence to serve? What criteria, if any, does the NASD employ in making that determination? What assurance is there that the NASD's random selection of arbitrators is truly random? What oversight, if any, does the SEC employ as to the above questions? In view of the answers to the preceding questions, are the arbitration disclosures in broker-dealer customer and employment agreements adequate?

A: **In regard to your last issue where the arbitrator that made the comment something like "he doesn't need the law"…I found that to be <u>outrageous!</u> As an Arbitrator myself, I can't fathom having that kind of attitude towards the law. In my Arbitrator training two years ago, one of the first things we learned in our training was that arbitration awards could be overturned on the grounds of MANIFEST DISREGARD OF THE LAW (although I do not recall if any specific examples of Manifest Disregard of the Law were used).**

I would like to ask that arbitrator how he can reconcile his statement with the NASD's view in their training materials as to this issue or even with his "common sense" approach. NASD also explains in their training that an arbitrator functions somewhat similar to the combined role of a judge and jury. How can any system survive (or be "equitable") with such a hostile attitude toward the underlying law?

However, his attitude has appeared on other arbitration panels that I have served. One panel member (who was a retired lawyer) surprisingly told me "we don't have to follow the law". I was shocked to hear this especially coming from the Chairperson. My opinion is that I want to hear about the law on the underlying issue EVERY TIME…I want to see the legal authority supporting claimant & respondents theory(s) EVERY TIME…I want to see how the other side responds to the legal arguments…I want to ask questions to both counsel if there seems to be a contradiction. One panel that I served on (which was NOT an investor dispute but between industry participants) counsel for one party cited legal authority in his brief, but just gave passing mention to it in closing arguments, as if he really didn't think it was very important. For me, I thought it was the strongest part of their case and the opposing party never addressed, opposed, challenged, or distinguished any of those legal arguments.

I'm sure this could expand into the differences and competing views between "law" and "equity". Personally I can see how the NASD wants to be careful and not supply the arbitrators with "the law" on a variety of claims. However, counsel for both parties have an ethical duty to not misappropriate legal authority and each side should have the opportunity to rebut if this happened. Arbitrators can also ask questions too. (All emphasis and color in original.)

LG: I have just a few minor comments. You mention "training materials" as a source of authority for your statements. Arbitrators, who have served for several years, are not required to take the courses and, thus, do not have access to that information. Further, the public does not have access to that information. If the NASD has promulgated policies concerning the use of the law in the decision-making process, those policies should be set forth in publicly available material, e.g. The Arbitrator's Manual, the Arbitration Code, hearing Scripts and/or Handbooks. One could argue that the newbies are being taught something with which more experienced arbitrators would disagree if they were aware, but impact of more experienced arbitrators is being diluted through continued arbitrator recruitment.

Currently in California and other states, manifest disregard of the law is not a ground to over turn an arbitration award. However, officers of the court should <u>not</u> use that as an excuse to ignore the law. Some retired non-securities, non-litigation attorneys have said that they are not being paid enough by the NASD to invest the time and effort into learning the law applicable to the case under consideration.

The NASD need not supply the law. However, the Ruder Task Force Report recommended that the NASD should better educate arbitrators in the applicable law. It could be done at public forums sponsored by the NASD where attorneys representing differing points of view could set forth their positions and members of the audience could question them. That was done in Los Angeles until about 1993.

LG (Supplement): Several diverse sources have confirmed that the "training materials" encourage arbitrators to dumb-down concerning their knowledge of the law.

III. <u>NASD-DR Claims Email Statements Are "Misleading"</u>

NASD-DR: This is in response to your … mass emails of February 17, February 23, and March 23, and perhaps additional dates (many of which were forwarded to me). … [Y]ou

have been … expressing your views on various subjects. … [Y]our emails are misleading…

LG: You made various erroneous allegations. … "[E]xpressing your views on various subjects" is constitutionally protected free speech… You vaguely state, "[Y]our emails are misleading as well." I am honored that you have studied each and every one of the emails. Please be so kind as to inform me of which statements are allegedly "misleading" and the facts upon which you base the allegations. If you desire, I will publish, verbatim, your statement and respond to it. Further, it would be my pleasure to add your name to the mailing list and expedite any response you wish to have published with regard to future publications.

IV. Multiple Topics and Suggestions

A: Thank you again for the very valuable dialogue you have initiated on NASD Dispute Resolution arbitration. Part of my frustration with some elements of the NASD arbitration program comes from the fact that not only am I a lawyer, but also because I work exclusively as a neutral arbitrator and mediator. Although I recognize the *pro bono* element involved, there are many problems with the program from my perspective which make work as an NASD arbitrator much less appealing as time goes on. I started as an NASD arbitrator in about 1989, and have handled well over 100 cases…. Here is a list of problems:

1. The disputes have become much more litigious and complex, including motion practice, extensive discovery practice and disputes, voluminous submissions, prehearing briefs, and in the few cases which don't settle at the last minute, multi-day hearings. Counsel for the parties now bring extensive legal argument, case law, and regulations into their presentations. This is as it should be, but as you point out, arbitrators now get no legal training on the issues, but yet must consider and evaluate the factual and legal presentations. Judges at least have law clerks. Private arbitrators don't, but as least they get paid for reading the cases and writing well thought out arbitration decisions. Not to consider the law, as well as the facts, as an NASD arbitrator, would be not to live up to the professional and ethical obligations of an arbitrator. But yet NASD arbitrators are not paid to do it, nor are they often trained in law applicable to securities disputes. The small stipend to be offered for a reasoned award is at least a start, but not anywhere near adequate. Assuming my fellow panelists agree I always prepare a reasoned award with an explanation of the basis for the decision, as I feel the parties deserve it and may benefit from it. That is usually a day or two of work, at least, for which there is no pay. ….

2. The compensation for all the time involved is woefully inadequate, even taking into account the *pro bono* factor, probably about 5% of what I would make as an arbitrator or lawyer for a comparable private case. The cases are interesting, good experience, good for the resume, and challenging. 50% of normal compensation would probably be about right, assuming one agrees, given the economic circumstances of most of the participants, that this is the type of arbitration program which should be partly *pro bono.*

3. I get very few cases, which may be unique to me, but I suspect not. As you point out in a previous comment, the number of arbitrators as against the number of cases which go to hearing is such that the number of cases heard by any arbitrator on an annual basis will only be one or two in most years. If you are not a professional arbitrator, which most NASD arbitrators are not, how are you supposed to avoid being rusty on these cases, which have now become more and more demanding for the conscientious arbitrator?

4. Even on the cases which do settle, you can spend a lot of time for which you don't get paid - reading pleadings, submissions, briefs, cases and regulations, writing prehearing orders, not to mention keeping up with the NASD Dispute Resolution web site, rules, mandatory trainings, and so forth. The new initiative to have direct communication between the parties and the arbitrators is a good idea, but as I have found … it involves significantly more time for the chair, again with no compensation. Cases almost always settle late, and the recent additional small stipend for cases which settle within 3 days of the scheduled hearing is at least a gesture, but woefully inadequate. I have complained to the NASD … about this, pointing out the inconvenience and cost of making travel arrangements, booking hotels, blocking out hearing days which I cannot reschedule for something else at a late date. In my private dispute resolution practice, I have cancellation fee equal to at least a half day at my full rate if cancellation is within so many days of the hearing or mediation. …

5. There are many things which should be done to restore or put in place an arbitration program with integrity:

a. An independent administrator to administer the program in a professional and commercially reasonable manner - procedures, arbitrator neutrality, commitment and compensation. …

b. Arbitrator control over the manner in which the proceedings are conducted according to rules and after input from the parties. The foregoing would enable the cases to move along and be handled fairly, more expeditiously and in a more efficient and streamlined manner than currently.

c. Fewer, better trained, more neutral, more committed arbitrators who could count on a reasonable amount of work, become more familiar with the issues, and do a better job as arbitrators.

d. Panelist should be chosen by random computer method with no right to challenge except for cause. The current method of striking or ordering priority leads to irrational forum-shopping and wasted time in getting the case moving toward resolution.

e. Lawyers or others who currently represent parties (either customers, reps or broker dealers) in securities matters should not be able to serve as public arbitrators. It continually amazes me that this is allowed by the NASD. No way would those people be chosen, no matter how competent they are, as arbitrators in comparable private arbitration. They will have a very difficult time, whether consciously or unconsciously, being truly neutral. Certainly they cannot rationally be perceived as neutral.

f. Awards should not be publicly available unless all parties agree in each case. Cases are so fact-specific and also lack precedential value, such that they are of little real guidance to anyone. Yet even lawyers, who should know better, try to read them and decide whether certain arbitrators favor investors or brokerage houses. Yes, the

arbitrations involve the securities industry which is publicly regulated, but if a disciplinary referral comes out of the arbitration and leads to regulatory action or sanction, then it will appropriately become public. Other arbitration decisions are not made public and with good reason. They stem from private disputes, just as do NASD cases.

6. In summary, securities disputes are specialized, complex, fact-intensive, and often involve (1) significant relevant periods of time, (2) multiple (more than two) parties, and (3) intricate legal issues. … [T]he current NASD arbitration program, despite what I believe are good intentions, simply is not geared to deal adequately with these kind of disputes in a fair, effective, stream-lined, and efficient manner.

LG: You seem to be advocating an adequately paid and very professional administrative judge system run by other than a securities regulation organization. It makes sense. Is the AAA system as close substitute? The present NASD arbitration system, whether by design or otherwise, is headed in the opposite direction. The people who run the NASD are very intelligent. Thus, it is most likely not "otherwise."

A: A better candidate would be an organization like CPR Institute for Dispute Resolution, which has panels of professional neutrals in different specialties, and helps parties decide upon or select neutrals, who mostly then administer the mediations or arbitrations directly with the parties. I'm not sure CPR would have the staff resources to do something like this. A hybrid with the staff resources of AAA and the model of some of CPR's programs might be best. National Arbitration Forum is also a possibility. Of course, it's hard for me to see the broker-dealer and investment community and regulatory agencies going along with anything like that.

My thanks to those who have contributed to Parts I through VIII and/or shared their ideas/information. Please continue to forward these emails to your colleagues and associates and share your arbitration ideas and experiences with your fellow readers.

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