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

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

I. Petition for Rulemaking - Arbitration Procedure, Training, Evaluation and Oversight
II. Securities Industry Arbitrators and "Arbitrator's Judicial Notice"
III. Arbitrator Familiarity
IV. Arbitrators and the Law
V. Last Minute Settlements

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]**).

NASD Dispute Resolution has requested that I inform you that my Email Newsletters "are not authorized to speak on behalf of NASD or NASD Dispute Resolution." NASD Dispute Resolution states that it provides arbitrators, who register at http://apps.nasd.com/contact_us/email.asp, with email updates.

A summary of prior publications, others materials and associated links are located at: http://www.LGEsquire.com/LG_Links.html .

I. Petition for Rulemaking - Arbitration Procedure, Training, Evaluation and Oversight

LG (Idea): SEC Rule 192(a) enables any person to file a Petition for Rulemaking to amend or to enact rules, e.g. rules pertaining to NASD arbitration, with the SEC. Anyone wishing to comment on the Petitions may email their comments to the SEC at: Rule-Comments@SEC.gov. All Petitions and comments are publicly available at: http://www.sec.gov/rules/petitions.shtml and by clicking through the appropriate Petition or comment link.

I have recently filed a Petition with the SEC. You may view the Petition at: http://www.sec.gov/rules/petitions/petn4-502.pdf. Your comments, in favor or against, are invited. The subject line of your mail should include "Petition for Rulemaking (SEC File No. 4-502)."

The Petition requests the creation of rules designed to:

(1) specifically permit arbitration panel members, should they elect to do so, to conduct legal research, or, in the alternative, forbid Self-Regulatory Organization ("SRO") sponsored arbitration forums from restricting arbitrators from conducting legal research;

(2) abolish the requirement that a securities industry arbitrator be assigned to each three person panel hearing customer disputes or, in the alternative, require that information presented to a panel of arbitrators by a securities industry arbitrator be revealed to the parties during open hearing;

(3) require SROs to conduct continuing evaluations of the ability of every arbitrator on their panels to perform his/her duties, including, but not limited to mandatory peer evaluations;

(4) require SROs to train arbitrators in applicable law;

(5) require SROs to reveal in pre-dispute arbitration agreements whether their arbitrators are required to follow the law in their decision-making process, the training of their arbitrators in the law, and their process, if any, to evaluate their arbitrators on a continuing basis; and,

(6) require the SEC's Division of Market Regulation to specifically oversee SROs to determine whether they are in compliance with rules adopted pursuant to items (1) through (5), inclusive.

II. Securities Industry Arbitrators and "Arbitrator's Judicial Notice"

A: My only comment is on your section on Securities Industry Arbitrators. Some are not helpful at all---and some are very helpful--in evaluating situations. When it comes to industry practices the testimony of some expert witnesses is helpful---and the testimony of others is not. It all depends on the level of expertise and experience of the individuals. If I had my druthers, every panel I'm on would have the one of the two or three industry arbitrators I would like to choose. That's not practical, so we have to do the best we can. On balance it is a positive to have an industry arbitrator on every panel, and in my view it would be a mistake to eliminate that requirement.

LG: What about the aspect that a securities industry arbitrator, "in evaluating situations," may actually be testifying to the panel without providing the parties or their counsel with an opportunity to rebut the information?

A: I can't disagree that it's a problem. Perfection is difficult. …

A: Thank you for these pieces.

I don't normally comment but lately I have been having concerns. One impression I keep getting is that you feel that non-lawyers shouldn't be arbitrators and that an Industry arbitrator has no real value. I am an industry arbitrator, non-lawyer and I have been on a couple of cases where my panelists (lawyers) would ask me to explain certain information presented by the claimant. Certain terminology used within our industry is not widely known and I feel that I offer a valuable service based on my years in the industry. There have been times when my knowledge has helped the claimants and other times when it helped the respondents - I try to be neutral and objective on each case and believe that only after reading all the documents provided (statement of claim,

response, etc) and listening to both parties with an open mind may a decision be made. I value the input that my fellow panelists offer and would hope that others value mine.

… [T]here are times when cases are brought that are frivolous and have no real bases because many lawyers feel that the case will just get settled (deep pockets) rather than going to the expense of trying to defend this type of claim. While I admit, it doesn't pay much. That is not why I joined. I joined because I want to ensure fairness to all parties.

LG: … I realized that my comments might stir some controversy, but could open a discussion as to whether the information provided by securities industry panelists to their co-panelists should be revealed to the parties. Also, there is the issue of why the NASD considers attorneys who present legal authority (not presented by the parties when all are assumed to know the law) to be biased, but securities industry arbitrators who present information (not presented by the parties) to be helpful and necessary.

You stated that co-panelists asked for explanation certain information presented. … Why did they not get the same information by inquiring from the parties, the parties' counsel or their expert witnesses and, thereby, allow the parties to present their own explanations? The problem, as I see it, is that securities industry arbitrators are presenting information to co-panelists of which the parties are not aware and may disagree, but have no opportunity to rebut. I have seen instances where the securities industry arbitrator claims a witness was not telling the truth based upon what occurred at that securities industry arbitrator's firm. A party might have been able, if he/she knew what was being told the co-panelists and given the opportunity, to present evidence that the arbitrator's firm operated in a unique manner.

I feel that some frivolous cases could be prevented if a prospective claimant's attorney knew that panels were committed to and would follow the law. Using the standard of the law, which is publicly available information, would give parties a better expectation of the results they could or could not achieve in arbitration. A rational attorney on a contingency fee should not be interested in wasting his/her time.

A: … Another case was when a claimant mentioned a specific conversation they had with their broker (respondent) - based on the language the client used… My fellow panelists hadn't picked up on the term and thanked me for clarifying it for them….

I wasn't hiding anything - there are times when even the brokerage firm's lawyers are not as well versed in the terminology as some industry arbitrators or can't explain it in layman terms so that all can understand. I have worked in this industry for … years and have held many positions. I try to make my decisions on just the facts.

…

I respect lawyers for their knowledge and expertise and expect them to respect me for mine - only in this way can we keep the arbitration procedure as objective as possible.

LG: … Your second example, also, shows that putting your cards on the table provided a level playing field for the parties and your co-panelists. … There is no doubt that a securities industry arbitrator can be very effective when providing information and/or asking questions during the proceedings.

"I try to make my decisions on just the facts." Where does the law enter into your decision-making process?

"I respect lawyers for their knowledge and expertise and expect them to respect me for mine - only in this way can we keep the arbitration procedure as objective as

possible." Again, the issue is the full and fair disclosure of that knowledge and expertise with an opportunity to the parties to contest it. However, this does not seem to be the NASD's policy. Persons familiar with the law, who attempt to inform their co-panelists and the parties of applicable case law of which they are aware, but was not presented by the parties, are asked to disregard that law and, if the refuse, they are accused of doing "legal research" and asked to invite and grant a motion for recusal based upon alleged bias. Further, the NASD has declined to define "legal research," state which, if any, rules restrict panelists from doing it or explain why the public has not been informed of such a policy. …

A: I have no problem allowing everyone to hear me and if they want to rebuff - then I am open to that if it is to clarify the points in question. I only want fair and impartial findings….

Juries listen to the evidence supplied and then render a decision - they are not lawyers and even if there is a lawyer on the jury, he is not acting in that capacity for the duration of the trial.

I let the lawyers of both parties present their facts, I listen to my co-panelists and if a question of law comes up that I nor my co-panelists don't understand - there is always the NASD staff lawyer to assist. I have also served on cases where none of the panelists were lawyers and feel that both parties received a fair and impartial hearing which they attested too.

I have also served on cases where the public arbitrator was a lawyer and hindered the case - going all over the place and never getting to the point - sometimes they made assumptions without fact to back it up or read more into a case then was necessary.

I do question why the panelists should have to do legal research - that is not what the Arbitration forum was set up for. The claimants and respondents have the legal representation and they should present the facts. If there was unauthorized trading or unsuitable trading - what law needs to be quoted to know that this is wrong is the evidence presented proves the claimants case - on the other hand, if the respondents prove that either the trades were suitable at the time they were recommended based on the information supplied by the claimants on the new account applications or that the trades were not unauthorized - little harder to prove since as I said before, this is one person's word against another especially when the client decides to play the market and only after losing decides to complain, again - what law covers this - Only the facts as presented should be considered.

But that is just my opinion and I appreciate you giving me the opportunity to express them. I just felt that lately the pieces were trying to downplay the role of the non-lawyer and most importantly the industry arbitrator.

LG: … There is much more to "Juries listen to the evidence supplied and then render a decision…. " It's somewhat more complex. Each side submits proposed written jury instructions to the Judge. Some proposed instructions are accepted. Some are rejected. Others are modified. Jurors are specifically instructed as to the applicable law, that they are sworn to follow it, and what their duties, as fact finders, involve. Jurors decide the facts, not the law. Special jury verdict forms might be used to ask Jurors to specifically set forth the exact facts found to have occurred. I have often said that arbitration panels act more like groups of uninstructed and unsworn Jurors than Judges. It appears to me

that it has been a long time since the NASD was truly concerned whether its arbitrators know or manifestly disregarded the law.

NASD Staff Attorney do not assist with legal issues. .... SRO "The Arbitrator's Manual" states, at page 28, "The responsibility of the staff is to advise the panel concerning arbitration procedures. The staff members are not advocates, nor do they research legal issues. Staff members are on call and may be present to see that the sessions run smoothly and all rules are properly observed."

"I have also served on cases where none of the panelists were lawyers and feel that both parties received a fair and impartial hearing which they attested too." Part of the NASD arbitration script requires that the parties be asked whether they received a fair hearing. It is very unlikely that a party would say, "No." There is a danger of not knowing an applicable law when no attorney (assumed knowledgeable in securities matters) is on the panel.

Not all attorneys are alike. Some run tighter ships than others. Some are more knowledgeable in securities matters than others. The problem is that the NASD has no effective means to evaluate arbitrators and, thus, some who "hinder" cases remain on the panel. Did you send in a Peer Evaluation on the attorney? If so, what resulted?

"I do question why the panelists should have to do legal research…." Some want to do so in order to achieve a fair and legally correct result. No NASD rule forbids doing "legal research."

"Only the facts as presented should be considered." The question is how they are to be considered. We could look at *Duffy,* with respect to a broker's fiduciary duty with an allegedly sophisticated trustee, who wanted to rock and roll in a pension fund account. We could look at *Blankenheim,* where an allegedly sophisticated businessman signed a disclosure statement that contained disclosures that were inconsistent with the salesperson's oral representations. Fact finding is very important, but it is only part of the job.

A: … Why would we need to do further "legal research"? Isn't it the burden of the parties on the case to present the facts. Just as in court cases, the prosecutor is not going to do the defense's job nor is the defense going to do the prosecutor's job. Yes, juries are instructed as to the specific laws, but we as arbitrators also must follow specific guidelines. In other words, we can't just award a claimant because we like they looks or they seem needy - the facts must support their case and the same holds true for the recipients.

…

I was on a case once where one of my co-panelists wanted to…. At that point …. I would never serve with the panelist again - results of the evaluation, I don't know.

LG: "Why would we need to do further 'legal research'? Isn't it the burden of the parties on the case to present the facts. … we as arbitrators also must follow specific guidelines. … the facts must support their case…" You seem to be interchanging facts and the law. The law informs you of the rules by which to use the facts that you decide occurred. A situation may arise where the facts presented by a party are found to exist, but the law says that those facts do not support a reason to grant recovery. The problem is that the NASD does not teach the "specific guidelines." In a court, in addition to the recitation of the law by the parties, judges are permitted to do and many do their own legal research to make sure that the attorneys are correct and that their analysis is

complete. Why should it be otherwise in arbitration? Non-lawyer arbitrators are not required to do legal research, but the NASD should not attempt to restrict lawyers from doing so or consider them as biased if they use their knowledge of the law. It does not involve independently investigating the facts, but looking at information (the law), which is deemed to be known to and is available to all.

…

A: If you mean law and following the rules that govern us, then I agree and that is what I use. … Also, trying to decide the legal definition of the law or the rules that govern us has a different meaning than the intent of the rule….

Not to over simplify it but I think both industry arbitrators and public arbitrators whether lawyers or not can bring much to an arbitration and the non-lawyer or industry arbitrator shouldn't be dismissed as having nothing to offer.

A: I enjoy these discussions a lot, and find them stimulating, although not helpful in a particular case. Just a few comments.

1. I assume you are primarily a claimant's attorney, as taken from your discomfort with industry members on the panel. However it has often been my experience that they are more critical, and harder on the respondent than the public members, feeling that a bad apple gives the industry a bad name, and for the sake of the good brokers and firms, bad ones should be treated harshly.

2. I am an attorney, and I am troubled by briefs that merely cite cases. Many times, when I have read the cases, I find they do not strongly, if at all, support the point being made. For example, many of the cases cited to show a broker with no discretion is nonetheless in a fiduciary relationship, are dealing with misappropriation of funds, and not bad trading decisions.

LG: The discussions may alert arbitrators to recognize and deal with situations that they have not previously encountered and provides an opportunity to share insights. Years ago, the NASD sponsored educational forums that served that purpose.

…

It is not a matter of discomfort as to the presence of securities industry panelists, but that the information provided by securities industry panelists to their co-panelists might not be revealed to the parties, i.e. providing secret evidence to the co-panelists.

Further, the policies of the NASD, which provide different treatment to securities industry panelists and persons knowledgeable in securities law, give me discomfort. The NASD considers securities industry arbitrators who present information (not presented by the parties) to be helpful and necessary. However, persons familiar with the law, who attempt to inform their co-panelists and the parties of applicable case law of which they are aware, but was not presented by the parties, are asked to disregard that law and, if they refuse, are accused of doing "legal research" and asked to invite and grant a motion for recusal based upon alleged bias. Further, after request to do so, the NASD has declined to define "legal research," state which, if any, alleged rules restrict panelists from doing "legal research" or explain why the public has not been informed of such a policy.

Unfortunately, some attorneys feel that they are so busy that they must resort to canned briefs. They fail to put in sufficient time to tailor their briefs to the facts under

consideration. If they are not informed of the unhelpfulness of their work-product, they won't improve it. On the other hand, the NASD might tell you that you appear to be biased if you comment, even tangentially, upon the attorney's work-product. Perhaps, allowing attorneys to slide-by with such work-product gives them the impression that no one is reading it. You might ask, "Counsel, is X v. Y applicable to the situation before us and, if so, how?"

III. Arbitrator Familiarity

A: What are your thoughts on limiting panels to those who do not ever represent parties or appear as expert witness? That way, you don't have counsel appearing before you in 1 proceeding, representing a party and sitting next to you as a panel member.

LG: I have mixed emotions on that subject, but basically, I do not have any problem with the present system (not imposing the mentioned limitations). One writer suggested an administrative judge type system with, in effect, professional full-time arbitrators. However, under the present system, an arbitrator should disclose contacts and counsel for a party could seek more information and, possibly, challenge an arbitrator. Also, an attorney, who represents parties gains some prospective when serving as an arbitrator, e.g. understands what an arbitrator feels when listening to irrelevant matter. He/she should learn how to better represent his/her clients. On the other hand, an arbitrator, who has represented parties, is aware of the tricks in which some attorneys engage and would not be snowed by them.

Are there specific situations/problems that caused you to ask?

A: I'm now on a panel with a lawyer who represented a party in … (in the prior proceeding whether I served as an arbitrator). I feel uneasy because of the openness I have experienced with panel members.

I cannot imagine professional arbitrators for NASD. Who could live on the fees paid?

I understand a problem with limiting the panel is that NASDR is forever looking for new arbitrators--never enough--so not reducing the potential panel might be preferable to NASDR.

I just think a professional should be on 1 side bench or the other. I have learned an enormous amount as an arbitrator but this is what I use in the courtroom.

IV. Arbitrators and the Law

A: Gadzooks, your last e mail had more questions than my bar exam!

Regarding research, the NASD arbitrators I've worked with deliberate immediately after the close of hearings, with very few exceptions. Although I am a subscriber to Lexis and take my laptop to hearings, internet is not available at the (very expensive) hotels in which we conduct hearings. Thus, we are in a conference room without a library. I am happy to read law, so I let counsel know that if there are cases or statutes they want us to consider, they should provide copies. With AAA arbitrations, I have 30 days to get my award in, so I can do all the research I think I need. NASD case administrators want the award information the same or the next day, at least in the regional office through which I work.

I read the Rand Institute of Civil Justice article in 1989 or 90 in the library…. A few years ago I tried to track it down on the internet. Although Rand is still in business in Santa Monica CA the Civil Justice program was not mentioned. The institute could have been created for a study or survey as opposed to being an open ended sub organization. … I will tell you what I remember. The study was of 1500 PI cases referred to what was then a pilot program; all had been filed as lawsuits. The arbitrators were all experienced PI attorneys from both the defense and plaintiff bars. Besides the conclusion, that's all I remember, other than thinking about how those results could be achieved. I concluded that arbitrators are not likely to be inflamed as juries may be. Arbitrators have no particular proclivity to extend or create new law, in my experience. Finally, the arbitrators all had subject matter expertise. A judge has to be a generalist in most Jurisdictions, except for California where they seem to have to be a deputy district attorney or deputy attorney general. The result is the same, without the expertise, there is a greater likelihood for error.

Regarding the meaning of "common sense" etc. I am reminded of (which justice, Douglas, Stewart?) definition of pornography: "I know it when I see it." I'm not sure there is much productivity in going beyond Webster's with such terms.

Personally, I don't think my thoughts are worthy of causing any raging debates. ADR has grown precisely because it is an alternative, with alternative rules, greater selection of neutrals, etc. Perhaps NASD rules are more controlling than some others due to parties having less expertise and choice when signing he agreement. A concrete finisher bidding on a freeway knows what an arbitration clause actually is. Unions and management organizations share information about arbitrators regularly. NASD appoints an industry arbitrator so there is subject matter expertise on the panel. Interestingly enough, I have noticed the industry folks are harder on brokers than the public arbitrators, in general.

Keep up the good work,

LG: Thanks for taking the time to respond. Sorry for reminding you of the dreaded bar exam. You provided much information for thought. AAA does not restrict your legal research; however, all my information indicates that the NASD will consider you to be biased if you bring in legal ideas not presented by the parties. The case study that you mentioned involved “arbitrators (who) all had subject matter expertise.” I believe that such is not true of NASD arbitrators; otherwise, the “NASD … (would not appoint) an industry arbitrator so there is subject matter expertise on the panel.” I have seen some securities industry arbitrators who “see no evil.” It’s hard to generalize.

V. <u>Last Minute Settlements</u>

A: I am writing to suggest a fairer basis for arbitrator compensation in those instances where the parties settle prior to a hearing date. At present, my understanding is that no compensation is provided if settlement occurs more than 72 hours prior to a scheduled hearing. Based on my experience (which is limited…), this system unfairly punishes arbitrators who have blocked their calendars to accommodate the parties.

For example, in … I had blocked five days for a hearing (having the dates placed on my calendar … months earlier) only to find it settled just … (a few) days prior to the first hearing date. Recently, I had blocked … days (… months earlier) and received

notice of cancellation two weeks in advance of the hearing date. Naturally, plans are made with these dates in mind. I believe arbitrators deserve payment for having held their dates for months on end on a more equitable basis than is currently practiced.

I would acknowledge that the purpose of scheduling arbitration hearings is to (some extent) encourage parties to reach agreement without the additional time and expense of going through actual hearings. In this regard, arbitrators are required not only to spend time reviewing cases that may not come to hearing but to block time on our calendars - thereby foregoing either business opportunities or other activities that we might pursue. In so doing, we become, in a sense, necessary "pawns" in the "game" the contesting parties may be playing in an effort to resolve their differences. We should be compensated for this role.

Consequently, I would suggest the following sliding scale of compensation: 75% compensation for all days booked but cancelled within three days; 50% compensation for all days booked but cancelled between four and ten days; 25% compensation for all days booked but cancelled between 11 and 20 days.

Perhaps such a schedule would encourage the parties to resolve their issues on a more timely basis.

My continuing thanks to those who have contributed to Parts I through XI 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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