

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

“Nobody makes a greater mistake than he who did nothing because he could only do a little.”

--- Edmund Burke (1727 – 1797)

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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. Petitions for Rulemaking

Any person may file a Petition for Rulemaking with the SEC. Once filed, the SEC seeks comments. You may email comments to: Rule-Comments@sec.gov. The Petition number must be set forth in the subject line of your email.

A. Arbitration Procedure, Training, Evaluation and Oversight

I have filed Petition for Rulemaking (SEC File No. 4-502) --- <http://www.sec.gov/rules/petitions/petn4-502.pdf> with the SEC. Parts of the proposal might seem controversial. You are invited to email comments to the SEC. For those not wishing to publicly commit to a position, you might, at the least, state that the Petition

contains requests that are worthy of the SEC's consideration and contains serious allegations that should be thoroughly investigated.

The Petition requests the creation of rules designed to:

(1) 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 the securities industry arbitrator be revealed to the parties during open hearing;

(2) require each Self-Regulatory Organization ("SRO") to train its arbitrators in applicable law;

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

(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.

B. Discovery Motion Compensation

The NASD has filed SR-NASD-2005-052 --- <http://www.sec.gov/rules/sro/nasd/34-51693.pdf> --- dealing with arbitrator compensation and discovery motions. The SEC is receiving comments until June 9, 2005. I have submitted critical comments, e.g., NASD's claimed need for change is suspect, alleged discovery motion problem could be solved by more effective means. A copy may be viewed at: http://www.LGESquire.com/LG_SEC_SR-NASD-2005-052.pdf.

II. Last Minute Postponements

A: I'm finishing up the few cases that have been postponed a million times and then I'm out.... NASD is the most disorganized group I've met.... I didn't expect a professional group to waste so much of my time.... I can't afford to constantly prepare and then get no advance notice of postponements even after I contacted the staff attorney for confirmation! ... They grudgingly send you \$50, if you ask for it, when it's their fault.... My time & skill is worth more than \$5/hour...

III. Canned by the NASD Due to Lack of Pigeon Hole

A: Hi, Your work is great and much appreciated. Unfortunately, the NASD canned me last year because I am an investment adviser. I can't serve because I'm not industry and/or not really public. Therefore, after my last case settled a few days ago, I'm history....

IV. Dealing with Parties Who "Represent" Themselves

A: I told you about the arbitration I was doing which had parties with no attorneys.... It was not that bad, except I had to "teach" the parties what law required them to bring, show us, etc. for something to be considered. ... As for remuneration for the arbitrators - that, too, is extremely sad and ridiculous. We had ... sessions, won't get paid for meeting & rendering a judgment, I was the one who had to drive (several hundred) miles.... There has to be a better way to help unrepresented parties in these types of claims. Any ideas, suggestions, etc.?

LG: Dealing with pro se parties is always difficult. Let's assume that both the parties start out that way and it is not a matter of attorneys withdrawing from the case. During the IPHC, you could ask whether the parties have read and fully understand the NASD rules for arbitration and discovery. You could explain that cases are handled much more smoothly when parties are represented by counsel and that each should contact the local bar association referral service to locate counsel. If only one is represented by legal counsel, from a practical standpoint, you will probably end up doing some of what an attorney for that party would have done. Each arbitrator has to determine the amount of effort.

V. Chairpersons Who Act Unilaterally

A: I did recently experience another chair, who ... did again what he is famous for in this area - he agreed to continue the case which all of us had blocked off ... WITHOUT CONSULTING WITH EITHER OF US OTHER ARBITRATORS ON THE PANEL!! And he did this act at least a week prior to us other two being informed!! That now means that I have ... free, with a very short period of time to make other arrangements for some income, etc. I was amazed when NASD pointed out to ME that they knew the Chair had made an error, but were not going to tell him to never do such a thing. Now, whether NASD doing so would have done anything to persuade this person to stop acting as if he were the only person on the panel is seriously doubtful, but at least he would have heard something that corrected an error committed by him, for the likely first time, too.

LG: You mentioned the Chairperson who unilaterally granted a continuance. NASD Arbitration Rule 10325 states, "All rulings and determinations of the panel shall be by a majority of the arbitrators." To me, the granting of an order permitting a continuance is a "ruling" or "determination." Personally, I make the parties jump through hoops before granting a continuance. This is especially so if the motion is made near the hearing date. If there is a claim that a witness would not be available, I want a signed statement as to how "key" the witness's evidence will be and to know what efforts were made to secure the witness's presence at the hearing and when those efforts were made. If someone claims to be sick, I want a note from their doctor. If an attorney claims that he/she has a

scheduling conflict, I want to know whether the statement is true, how the conflict arose and when, what efforts were made to get out of the other commitment and when and why another attorney cannot handle the matter. If an attorney is at fault, he/she and not the parties would pay for the inconvenience.

I learned of an instance where the Chairperson unilaterally ordered the exclusion of parties when they were not testifying. NASD Rule 10317 states, in part, “[A]ll parties to the arbitration and their counsel shall be entitled to attend all hearings.” Another arbitrator asked for an executive session to discuss that unilateral decision. After the Chairperson finished his temper tantrum, the decision was reversed. The arbitrator reported the Chairperson’s conduct to the NASD Regional Director and submitted the information on a Peer Evaluation form. At the meeting of the arbitrators and the NASD, where the Chairperson admitted that the events occurred, the Regional Director’s attitude was, in substance, “Boys will be boys.” No response was received with respect to the Peer Evaluation.

VI. Written Statements of Decision

A: If they start requiring the panel to do legal research, as they expect us to give our reasons for our orders - if asked, they better pay for my time in doing so, or that's that !!

LG: I doubt that the NASD would require “legal research” in writing a statement of decision. The current draft of the proposed rule states that it is not necessary to set forth legal authority. Further, as has been covered elsewhere and as incredible as it might seem, the NASD would consider anyone doing “legal research” to be biased and would request the arbitrator to invite and grant a motion for recusal.

VII. Criticism of NASD

A: Here is my impression of NASD arbitration and efforts to fix it.

I have studied NASD arbitration and I have spoken to various lawyers like yourself who are experts in NASD arbitration. Many say that the SEC exists to protect the NASD - not the investor. (Obviously the NASD is an industry organization that exists to protect its industry from scrutiny, regulation, and punishment.) The current administration is very unsympathetic to fixing it. (Did you read the comments and testimony to the House Finance sub-Committee "A Review of the Securities Arbitration System"?)

<http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=362>)

My impression is that NASD arbitration is a total scam. Everything good about court that protects the individual is gone. The industry gets secrecy and small awards. Panels go out of their way to hold the individual to impossibly high standards. They look for technicalities by which to excuse unconscionably immoral and illegal behavior. The entire culture is contemptuous to investors and employees.

The individual should get panels that bend the law in their favor when the broker behaved immorally. But he gets nothing.

Only the formality remains. The arbitrators are trained to label evidence sequentially, break for lunch on time, etc., that is, everything to give the appearance of a legitimate forum.

But they are basically incompetent and prejudiced. They lack common sense. They don't know the difference between primary and secondary evidence, first-hand observation and hearsay, testimony and argument, fact and innuendo....

But the NASD creates the appearance of progress by making new rules and extending their authority. The NASD doesn't even punish members and arbitrators for obvious violations of their securities rules and arbitration rules. (For example, for at least five years the NASD has allowed brokers to ignore discovery rules. Morgan Stanley had been doing it, but just got punished for pulling the same thing in a Florida court. Now there is a class-action suit by people who came up against them in arbitration.) Both the NASD and the SEC ignore complaints. ... The NASD is converging on a system that is a small fraction as fair as a court system.

I hate to make more rules that would only lend more credibility to a hopelessly broken system. So do they need more rules? I think not. They need to make it voluntary for the individual; make it open; and give written decisions. That is, do everything to make the NASD accountable.

.... I had always thought that the panel was conducting research to find some technicality by which to rule in favor of the broker. Wouldn't written decisions solve that? ... Is anyone watching the NASD?

... I wish they would just throw out all of NASD arbitration.

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