

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

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

--- Edmund Burke (1727 – 1797)

- I. PLI Seminar Summary
- II. Award Analysis
- III. Discovery Arbitrators
- IV. NASD Retaliation

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.”

A summary of prior publications, other materials, e.g., annotated “studies” or “reports,” and associated links are located at: http://www.LGEsquire.com/LG_Links.html.

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 have 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. PLI Seminar Summary

A: A summary of a recent PLI Seminar can be found at: http://www.mondaq.com/i_article.asp_Q_articleid_E_34466. From beginning to end the NASD has devised a system that allows it total control over the process without any outside scrutiny. (The website requires a free registration to view the article.)

II. Award Analysis

A: I was wondering whether anyone had ideas on how I may obtain (government) funding to study NASD arbitration decisions. The biggest job would be getting the data and entering it into a database. I have already given the study a lot of thought.

Even decisions without any explanation (explanation is almost irrelevant for my purposes) are a gold mine of information: Claimant, Respondent, arbitrators, chairperson, legal claim, damage claim amount, award amount,

There are numerous questions that could be answered: (1) Experience of

arbitrators? (2) Frequency arbitrator is called? (3) Do some arbitrators rule against individuals more than others? (4) What happens to arbitrator AFTER he makes an award to individual? (5) Award as a percentage of damages? (6) Award correlated with whether (7) Claimant is individual or securities firm? (8) Investor or employee? (9) Award percentage correlated with damage claim amount? ... and dozens more.
LG (Supplement): In the early 1990s, in an attempt to learn whether some arbitrators serve much more than others, I suggested to the NASD that it publish each arbitrator's number and the annual monetary payment received from the NASD.

III. Discovery Arbitrators

A: Keep up the good work, because it looks like it's starting to pay off. These comments are getting more and more focused. Or, to put it more cynically, NASD keeps doing the same evasive stuff in response to suggestions for change.

I still can't believe this plan about discovery arbitrators. I was involved in a hearing that showed yet again that NASD staff does not understand discovery and pre-hearing motions. In this case, they tried to prevent the panel from setting a date for a hearing on a motion to dismiss that one party stated they planned to file. The chairperson (of course) was trying to efficiently use time in the IPHC to set up all the hearings needed, with their attached discovery deadlines. After the hearing, the NASD staff person kept insisting that you can't set a hearing date until you have a motion. I know from many prior cases that if you leave it at that, you wind up with a motion that doesn't get served properly, and gets sent at the last minute to the panel with a cover letter saying, "please inform us of your decision". There would be no way to get paid for deciding it, and the panel eats all the administrative costs (phone, postage, fax) involved as well. After I pointed that out to the staff person, they allowed the hearing to be calendared--I think. What a system.

LG (Supplement): This sounds more like a problem with an inexperienced staff person. In fact, the IPHC Order has a section dealing with potential hearing dates.

IV. NASD Retaliation

LG: The Registered Representative (9/1/05) carried an article entitled, "The Real Arbitration Nightmare," which can be viewed at: http://registeredrep.com/mag/finance_real_arbitration_nightmare/index.html. Former arbitrator, Greg Bailey, tells of how he was unceremoniously removed from the NASD's roster of arbitrators. The reform efforts of this email newsletter were mentioned in the article. (We mentioned the subject of NASD retaliation in Part XIV, including subtle ways in which it could be accomplished.)

A: I wonder if there is a procedure for NASD arbitrators to appeal dismissal from the NASD roster. Probably not, as appointment and dismissal of arbitrators could be regarded as a discretionary administrative function, and the service as an arbitrator a "privilege" rather than a right. But it seems that arbitrators, having applied, gone through training, served as neutrals in what is a quasi-pro-bono capacity, and been held out as credentialed by the NASD, should at least be entitled to know the reasons for dismissal

from the roster. If reasons are not given, then the perception may arise that decisions regarding neutral appointment, service and dismissal are made in secret for inappropriate reasons, and the integrity of the arbitration program in general could be thrown into question. See CPR-Georgetown Commission on Ethics and Standards of Practice in ADR's *Principles for ADR Provider Organizations*, (May 1, 2002), available at www.cpradr.org/pdfs/finalProvider.pdf. In particular, I note Principle II on Information Regarding Services and Operations, including in particular II.b on relationships between the ADR Provider organization and its affiliated neutrals.

LG (Supplement): “Improving the Quality of Arbitration ... *Removal of Arbitrators from the Roster* NASD also has procedures in place that govern the removal of an arbitrator from the roster. Triggering events for arbitrator removal include party, counsel, and peer complaints, and staff observations. For an arbitrator to be removed permanently from our roster, four senior Dispute Resolution staff, including the President of NASD Dispute Resolution, must all agree on the removal. At no time during this process do any of the decision makers review the arbitrator's awards to see whether the awards favor the investor or the industry. As of January 2005, after the Dispute Resolution management signs a removal request form, two public members of the NAMC must approve the request. The two-member review team is comprised of the NAMC's Chairperson and the Chairperson of the roster subcommittee (both of whom are public). In the event that one of them has a conflict or is otherwise unavailable, another public member of the roster subcommittee reviews it. An arbitrator is permanently removed only if the vote of the NAMC review team is unanimous.” (Testimony of Linda D. Fienberg, President, NASD Dispute Resolution, Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises Committee on Financial Services United States House of Representatives, March 17, 2005)

Several questions arise. Based upon what authority has the NASD implemented such “procedures”? Who are the three “senior Dispute Resolution staff” members? How are they selected? May the President remove/replace the persons until they all agree on the arbitrator’s removal? Is there a hearing on the charges? What purported evidence is presented? Who presents it? Is the arbitrator informed of the accusations and provided with an opportunity to respond?

Then, we come to the question of the involvement of two “public” members of the National Arbitration and Mediation Committee. NAMC consists of 13 members who advise the Board of Directors of the NASD. Each is “appointed” by NASD Board vis-à-vis elected by their fellow arbitrators. (NASD Arbitration Code, Section 10102) Each would have to weigh the supposed prestige of remaining a NAMC member and going with the flow to remove some distant and faceless poor *schlep* who the President wants removed versus risking removal or non-reappointment.

Why are the remaining arbitrators on the NASD roster not informed that an arbitrator has been removed and the purported grounds for removal?

An arbitrator registered oral and formal written complaints with the NASD against a co-panelist due to the co-panelist’s emotional outbursts and attempts to intimate whenever there was disagreement over issues. The co-panelist orally admitted the emotional repeated outbursts to the NASD. The obstreperous arbitrator was still signing

arbitration awards five months after the events. Without any feedback, arbitrators could justifiably imagine that NASD Peer Evaluation forms end up in the circular filing cabinet.

A: I found Greg Bailey's article in Registered Rep to be fascinating and important. I will use it in my federal court case seeking rescission of the arbitration contract....

An arbitrator who has been summarily dismissed by NASD should sue, regardless of whether NASD has discretion to dismiss him. Under certain circumstance, NASD can be held to have abused its discretion by violating its own rules. Obviously, dismissal of arbitrators for reason that they awarded a high judgment is highly improper and a violation of the duty of good faith and fair dealing that is inherent in any contract, including the contract by which arbitrators work for the NASD.

It seems to me, also, that an unfairly dismissed arbitrator can also allege the same issues that a person, suffering in a case from the unjustified use of preemptory strikes in a jury trial, to remove Black persons or women, can lead to liability for the defense. The issue can be framed, not necessarily as harm to the arbitrator's own interests, but harm to the potential litigants, where NASD has removed arbitrators for reason that they award significant judgments. He may not be able to get money damages, on this basis, but he should be able to collect substantial attorney's fees under federal section 1984. Clearly, where NASD is colluding with broker-dealers to reduce verdicts, they are acting "under color of law" (by virtue of acting under authority of the SEC) to violate the civil rights of litigants who bring cases before NASD. Even a potential litigant may use the arbitrator's wrongful dismissal as a means of invalidating the arbitration contract by rescission, claiming that, as a result of this unlawful NASD practice, in dismissing arbitrators who award big judgments, the fundamental expectation of a fair trial is violated, justifying rescission of the arbitration contract, and returning the parties to a jury trial.

LG (Supplement): To what "contract by which arbitrators work for the NASD" is reference made?

My continuing thanks to those who have contributed to Parts I through XIX 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.

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

