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

> "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 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]**).

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.

I. Media Coverage

The July 31, 2005 edition of the San Diego Union-Tribune carried an article entitled, "Stockbroker losses bring no trials, lots of tribulations." It can be found at: http://www.signonsandiego.com/uniontrib/20050731/news_m1b31lynn.html**.**

II. "Explained Decisions" – Comment and Rebuttal

The NASD filed its proposed rule SR-NASD-2005-032 ("explained decisions") with the SEC. Comment letters may be viewed at: http://www.sec.gov/rules/sro/nasd/nasd2005032.shtml and clicking through the various links.

On July 29, 2005, A.G. Edwards & Sons, Inc. submitted a comment letter. The arguments therein were substantially based upon purported findings in *Securities*

Arbitration: How Investors Fair, Rep. No. GAO/GGD – 92 – 74 (May 1992), *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*, Rep. No. GAO/GGD – 00 – 115 (June 2000), *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrators* (1999), *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (November 4, 2002), and SICA *Final Report Securities Industry Conference on Arbitration Pilot Program for Non-SRO Sponsored Arbitration Alternative* (2002).

After reviewing my copy of *How to Lie with Statistics* (1954) by Darrell Huff, I submitted rebuttal comments. Those comments may be viewed at: http://www.LGEsquire.com/LG_SEC_SR-NASD-2005-032-AGE.pdf.

III. Third-Party Subpoena NASD Proposal Comments

LG (Idea): The NASD filed a proposed rule change to provide for a 10-day notice requirement before a party may issue a subpoena to a non-party for pre-hearing discovery. The comments and suggestions of several very experienced persons may be found at: http://www.sec.gov/rules/sro/nasd/nasd2005079.shtml. After reading those comments to the SEC, one might wonder why the NASD does not seek comments directly from its arbitrators before formally submitting proposals to the SEC.

IV. NASD Discovery Arbitrators

LG (Idea): On August 1, 2005, the NASD launched "a voluntary, two-year discovery arbitrator pilot to address concerns about the discovery process in arbitration. A single Discovery Arbitrator will be appointed to resolve all discovery disputes prior to the hearing. These Discovery Arbitrators will not be a part of the panel to hear the merits of the case; they are appointed solely to resolve the parties' discovery disputes. … The Discovery Arbitrators are pre-selected public arbitrators currently on Dispute Resolution's roster who are lawyers with experience in resolving discovery-related disputes. … The Director of Arbitration will appoint an arbitrator from the roster of Discovery Arbitrators… Once the hearing commences … the panel appointed to hear the merits of the case will decide any new discovery issues. … [T]he panel may only review the Discovery Arbitrator's prior rulings on the basis of new facts or circumstances that arose after the commencement of the hearings."

The existence of such a project appears to be an admission by the NASD that its arbitrator selection process is in need of serious repair. Why would a Chairperson, who is required to make evidentiary decisions and discovery decisions during the hearing, not be capable of competently making pre-hearing discovery decisions? Won't parties be reluctant to involve the services of a Discovery Arbitrator out of fear of offending the assigned Chairperson? Why would anyone opt for a pig-in-a-poke Discovery Arbitrator? How could an attorney justify such a decision to his/her client if subsequent discovery ruling were off-the-wall and seriously detrimental to the client's case?

How were arbitrators' names placed on the "roster of Discovery Arbitrators"? How is one selected for service, e.g. "random," "rotational," arbitrator lobbying of NASD personnel? What is the scheduled compensation? Who pays?

How difficult would it be for panels to reverse prior discovery orders by determining that the discovery issue is "new" or "new facts or circumstances … arose after the commencement of the hearing"? By what authority is the NASD restricting an arbitrator from correcting/reversing an incorrect pre-hearing discovery ruling?

Will Discovery Arbitrators have too much power? Some discovery orders, e.g., bars to evidence, issue determination, can decide cases.

After the two-year test period, when few participants opt to use Discovery Arbitrators, will the NASD declare the project a success as it would have demonstrated that participants feel that Chairpersons are very knowledgeable in discovery matters? It might also demonstrate other matters, e.g., parties could not agree to use a Discovery Arbitrator.

One wonders whether the NASD has the legal authority to implement such a program without specific authorization from the SEC. Outside legal research on that subject may be *verboten*.

V. Arbitrators and the Law

A: I have followed your commentaries with interest, and I think you have provided a great deal of useful information. Most importantly, you have created an independent forum where arbitrators can discuss things without censorship from NASD staffers.

You have often mentioned that there have been instances where NASD staffers told arbitrators that they are not allowed to do legal research, and have claimed that arbitrators who have done legal research are biased, and must recuse themselves. … I serve as a public in cases where my actions as a lawyer don't disqualify me. To date, no one has ever told me not to do legal research. But, then, I have never had to do legal research. Most of the cases simply involved application of basic legal principles I learned in law school, as applied to the facts.

That having been said, I think that the NASD arbitration forum can be arbitrary and capricious. As an arbitrator, I have always followed the law, no matter where it led me. I have never allowed sympathy or a desire to curry favor with one party or another to cloud my decisions. I have also never allowed my personal feelings to cloud a decision. Following the law may lead to a decision for someone I don't care for, whether it is a claimant or a respondent, but that doesn't matter, so long as the law, or a reasoned interpretation of it, is followed. I find it astonishing that NASD would prevent a lawyer from researching the law, in order to make a sound decision.

…

Obviously, federal judges have clerks who research the law. Many judges, at the state level, yearn for this privilege, because it would allow them to make better decisions when swamped with cases, and lacking time to do the research themselves. The idea that NASD is preventing arbitrators, who are willing to put in the extra time and effort to research the applicable law, from doing so, is astounding.

…

LG: In *Neutral Corner* (April 2005), the NASD specifically stated, "Arbitrators are reminded that they are not to engage in any outside legal research…" Please see Part XIII (http://www.lgesquire.com/NASDArbEmail_Part_XIII.pdf) for a lengthy analysis of those comments. Employing "basic legal principles," under the NASD's broad admonition, may qualify as doing "outside legal research." What may be "basic" to you may not be to others.

A: I want you to know that I, for one, as an NASD arbitrator, refuse to ignore the law. I read the cases cited by counsel for the parties and their pre-hearing briefs. … I find it helpful to have an industry person on the panel. …
LG: … Part of the Petition relates a situation where a NASD Regional Director instructed an arbitrator (with extensive securities litigation experience) to promise to ignore the law or invite and grant a motion for recusal based upon grounds of bias. The arbitrator was aware of case law, specifically on point, which was not cited by the parties or known to her fellow panelists. She wanted to provide a copy of the case to fellow arbitrators and counsel and request counsel to comment upon its applicability. The NASD equated legal competence with bias. …
A: Your raising of important questions provides a valuable service. As far as what goes into reaching a decision no one is going to tell me what I put over my signature or how I reach the decision. If the NASD wants to kick me off the panel for being a contentious lawyer/arbitrator, it is welcome to do so. …
LG: … Parties suffer when the best and the brightest walk. Hang in there.

VI. Arbitrator Superstars?

A: The group exists. One has only to go to the NASD-DR website and look up guidelines for expense reimbursement. These uber-arbitrators are Category 4. That means the NASD selects them (you can not volunteer) and you are give expense account travel opportunities all over the country. The only question is the selection criteria for this exalted status. Selected by the SIA, perhaps?
LG: The Guidelines for Arbitrator Reimbursement can be found at: http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009518.pdf. It states, in part, "Category Four: Arbitrators who are asked by NASD Dispute Resolution to serve in a hearing location in which they did not previously volunteer to serve." (Emphasis in original.)
A: I would be interested in knowing why the A-team arbitrators program was started and who is chosen for membership. XXX has a long list of arbitrators, so I don't understand bringing someone in from YYY or ZZZ. If it's because the A-team is particularly good, then that contradicts the NASD's comment … that they're proud of the community-based program of arbitrators drawn from all walks of life with little knowledge or experience in securities or securities law.
LG (Supplement): It is interesting that one would be "proud (to select) … arbitrators … with little knowledge or experience in securities or securities law" to resolve matters dealing with those subjects.

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