

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

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

--- Edmund Burke (1727 – 1797)

- I. Comments on Many Issues
- II. Hot Issue of Explanations of Arbitration Awards
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The following are some of the email comments received from arbitrators (**A**) and some of my replies (**LG**). Both 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 (**LG [Idea]**) and reply.

#### **I. Comments on Many Issues**

**A:** I have been a NASD arbitrator since ... and have almost always convinced my fellow arbitrators that we should have a reasoned award. I think it should be required so the parties understand and can perhaps learn from the decision. The \$200 stipend is meaningless and a token. There is already much uncompensated time in NASD cases, especially as they become more litigious and complicated. The compensation is woefully inadequate and I have harped on that for years with the NASD, as well as their draconian attitude toward out-of-pocket expenses. The time for Solomon-like neighbors to do quasi-pro bono work virtually for free for NASD contestants is long over. In addition to the lack of training on the law and other things, even though I am a full-time arbitrator and mediator for ... years and have practiced law for almost ... years, with something like 50 or 60 NASD awards, I currently get only a few cases a year from NASD so I get rusty on NASD stuff, especially with no training. However, I do find the NASD newsletter and e-mail on new rules occasionally helpful. But there has not been a new arbitrator's handbook in years, and they don't send out copies of the revised NASD Code of Arbitration Procedure when it changes. I heard they have something like 9000 arbitrators after an inexplicable campaign to expand their roster. If they get 8000 cases with 3 arbitrators a piece, that's a little over 2 cases a year on average and many do not go to hearing.

**LG:** The SRO Arbitrator’s Manual (8/04) is available in pdf format on the NASD’s website. Much useful information can be found by clicking on the links at: [http://www.nasd.com/web/idcplg?IdcService=SS\\_GET\\_PAGE&ssDocName=NASDW\\_009640&ssSourceNodeId=1108](http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_009640&ssSourceNodeId=1108) and [http://www.nasd.com/web/idcplg?IdcService=SS\\_GET\\_PAGE&ssDocName=NASDW\\_009566&ssSourceNodeId=12](http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_009566&ssSourceNodeId=12).

**LG (Supplement):** The statistical analysis is very interesting. Awhile back, I ran the numbers with respect to whether NASD mediator training and, thus, eligibility for assignments would be productive. It appeared to me that, if mediator assignments were issued on a random basis, I would receive less than 1 assignment per year.

**A:** I am pleased to be on your e-mailing list and hope the list continues. You have been raising many essential questions that the NASD needs to answer. While I don't always agree with your solutions, the process of review in a changing field is important. I especially agree that NASD ought to be offering continuing education to arbitrators -- including lay arbitrators -- in substantive areas of securities law and practice, not just mechanics and "civility." And there ought to be a better way to evaluate arbitrator competence. I accept that the incompetents are probably a tiny minority, but we don't know who they are or how to find out!

## **II. Hot Issue of Explanations of Arbitration Awards**

**A:** For about ... years I have been on the NASD and NYSE panels, serving as both chair and public member. ... In the ... field, it is the usual practice to prepare and submit reasoned opinions. ... These decisions are not binding on other arbitrators but they are used as guides and as showing relevant thinking in the field. Without question the preparation of such decisions is time consuming. It is not uncommon for arbitrators to spend two days writing a decision following a single day of hearing. On occasion hearing run for several days, briefs, often lengthy, are filed by both parties, and the arbitrators feel it necessary to comment extensively on the issues raised by the briefs. Analysis of the testimony is set forth in the Awards. Seldom is a well reasoned opinion appealed to the Courts. When a decision is appealed the courts generally reject the appeal, based, I believe, on the appreciation of the written decision. The contending parties in ... cases feel that they have had their respective positions considered if the decision is well reasoned. Lawyers in selecting arbitrators from panels ... carefully review the arbitrators' prior decisions, indeed there are private agencies which report the positions arbitrators have taken as a guide to litigants in making selections. I understand that the NASD believes that there is less likelihood for litigants to prevail in appeals to the Courts, if no specific discussion of the issues presented is included in the arbitration awards. ... The issue of whether the current "no discussion" rule with respect to the reasons for the arbitrator's decision should be continued and how detailed an explanation should be made is a tough one. While it is possible for a non-lawyer to write an articulate decision, it takes a while for anyone to learn the method. I trained young attorneys in the ... office to learn to write decisions as well as briefs to Administrative Law Judges and US District Court judges. It isn't something you learn by sitting in on a "course" or seminar for one day. Hopefully NASD arbitrators come from professions, which taught them to be literate and to be able to express their thoughts. Most of the arbitrators are very mature persons; many of them are retired persons who participate in arbitration proceedings because of a genuine interest in the subject matter. If these people don't have the skill to write, it is unlikely that a short program would teach that skill. I know that there is a constant criticism in the business world of the inability of many persons with advanced degrees who cannot express themselves in writing. Some companies have

staffs who rewrite the work of scientific and engineering personnel so that it will be understood by others. It is not an easy problem to solve.

**III. Ruder Commission Report**

**LG (Idea):** Approximately ten (10) years ago, the NASD expended much effort to form a Task Force that produced seventy (70) suggested reforms to the NASD arbitration process. The Ruder Commission Report evidences those efforts and the suggested reforms. A copy is not available at the NASD website. However, thanks to a reader of Part III, a copy of the Table of Contents of the Ruder Commission Report is now available at: <http://www.LGESquire.com/NASDRuderCommReport.pdf>. The entire Ruder Commission Report will be placed on the website as time permits to scan it.

Some of the reforms suggested in the Ruder Commission Report have been implemented. Some material comments seem to have been ignored. The “principal author of the report” has been the President of NASD Dispute Regulation for many years. “I am Linda D. Fienberg, Executive Vice President for Dispute Resolution and Chief Hearing Officer of NASD Regulation. ... In September 1994 the NASD formed the Arbitration Policy Task Force to Study NASD arbitration policy generally and to suggest reforms. The Task Force, chaired by former SEC Chairman David S. Ruder, delivered its report to the NASD Board of Governors in January 1996. ... I served as a member of the Task Force and as its reporter. In that capacity, I was the principal author of the report.” (Prepared Testimony of Ms. Linda D. Fienberg, Executive Vice President, National Association of Securities Dealers, 7/31/98, Senate Banking, Housing and Urban Affairs Committee)

A few excerpts from the Ruder Commission Report are as follows:

Pages	Findings	Recommendations
99 to 101	“At the end of every arbitration, the NASD asks all parties and their counsel to fill out evaluations of the arbitrators and the arbitration process generally. Unfortunately, very few parties or their counsel complete these evaluations. ... The NASD also asks arbitrators to evaluate the other arbitrators on their panel. Again, the rate of return is very low. When members of the NASD arbitration staff attend a hearing session, which they do in less than 50 percent of all hearing sessions, they submit evaluations of arbitrators. Overall, the information garnered from these	“[T]he NASD has been stymied in the past in obtaining evaluations. Thus, we reluctantly recommend that arbitrators should be required to evaluate their co-panelists before they are asked to serve again and before they receive their honoraria for their participation in the case.”

	various evaluations is very limited.”	
107 to 110	<p>“The Task Force received many comments about the performance and training of NASD arbitrators. The most frequently expressed concern was that the skills and training of NASD arbitrators are not always adequate to meet the challenges of contemporary securities arbitration. ... [I]t is clear that the overall performance of NASD arbitrators is not as high as it could be. ... The two characteristics for which arbitrators received the lowest ratings in both 1993 and 1994 surveys were ‘ability to cope with complex material’ and ‘ability to analyze problems and identify key issues.’”</p>	<p>“[W]e believe that there should be a continuing education requirement beyond the introductory session presently required of new arbitrators. Appropriate programs should be available for all level of experience, emphasizing ... relevant areas of substantive law. ... The training requirements should be applied flexibly based upon an arbitrator’s demonstrated knowledge of relevant substantive law.... The requirements should be structured, however, to ensure that arbitrators remain current with new developments in the ... relevant law.”</p>

**IV. Prime Candidate for “Civility” Training**

**A:** From: Xxxxxx Xxxxxxxx  
 Sent: Wednesday, March 02, 2005 7:38 PM  
 To: LGreenberg@lgesquire.com  
 Cc: Yyyyyy Yyyyyy  
 Subject: Dumb e-mails

Listen, you self-indulgent twit. Why don't you crawl back under the rock where you came from and go back chasing slip and dive and DWI cases. Why the great need for attention. Didn't mommy give you enough attention?

**LG:** Thanks you for reply. It is respectfully suggested that you reread your comments when you cool down. You’ll realize that they reflect more on your mental state than on other issues. By the way, Mom sends her regards. Ciao.

**V. Freedom of Information Act Request**

**LG (Idea):** The Securities and Exchange Commission (SEC) is charged with oversight of securities regulation organization (SRO) arbitration. How well is the SEC performing that function? One way to gather information is by making a formal request for that information pursuant to the provisions of the Freedom of Information Act (FOIA). A copy of recent FOIA request to the SEC concerning SRO arbitration is located at: [http://www.LGEsquire.com/050309\\_FOIA\\_SEC.pfd](http://www.LGEsquire.com/050309_FOIA_SEC.pfd). The section entitled, “Reasons for Request” should be of interest to all concerned arbitrators.

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