

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

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

--- Edmund Burke (1727 – 1797)

- I. Arbitrators and the Law
- II. NASD Notice of Website Update
- III. Comments on Petition for Rulemaking (SEC File No. 4-502)

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, others materials and associated links are located at: http://www.LGEsquire.com/LG_Links.html .

I. Arbitrators and the Law

A: I must begin by saying that I disagree with most of the things in your series of emails. I am writing, however, because "Arbitrators and the Law" struck a chord with me.

By way of background, I am a ... (15+) year business litigator in.... I got into securities arbitrations ... when one of the administrative lawyers in my firm asked me to defend a client of his in an arbitration in.... I was so appalled by the poor quality of the three NASD arbitrators that I decided to do my public service by joining the NASD's panel. This was the ... year after the elimination of the good old boy system of adding new names to the list. I obtained the necessary recommendations and went to ... for the indoctrination and training. I knew I had entered a brave new world when I was the only candidate who thought entering an award against a party who had gotten no notice of the arbitration was not o.k. Even the NASD training staff, lawyers all, had no problem with it. When I turned to them and asked why they hadn't intervened, they said it wasn't up to them to correct anyone's feelings. We had to take a test at the end. It was so easy that all the lawyers got perfect scores. ... (50%+) of the candidates failed, however. It reminded me of my reason for being there when I realized that under the good old boy system in place up until ... years before that, those ... (50%+) who could not be trained in basic securities law, procedures, and the concept of due process would have become arbitrators deciding multi-million dollar cases.

On to my career as an NASD arbitrator. ... A motion to dismiss was filed and briefed by both sides. I read all the cases and found that both parties had missed the key issue. I did my own research and found no cases directly on point, but did find one case that spoke to the relevant issue. I prepared an order spelling out the key issue, asking the parties to re-brief it, and asking them to consider the case I had found.

The NASD staffer said that my order would not be sent to the parties because arbitrators are not allowed to do research. I asked the staffer to give me the basis for this rule. As often happens when anything out of the ordinary occurs, I got no response. I did my own research on my ability to do research. I found nothing on point, but I found authorities whose commentary implicitly assumed that arbitrators could do their own research. I forwarded these authorities to the staffer. All I got back was an email quoting the FAA saying that arbitrators could get reversed for misapplying the law. I responded by asking, again, for the law that said I could not do research. Again, no response. I mailed in the signed original order that I had originally faxed. After a while I got a call from the staffer asking me to send in another copy of my order because it had been lost. I said that it was in the mail, and that was the end of the discussion.

I related this incident to esteemed trial lawyers with much more experience than my ... (15+) years and lawyers representing industry and customers. They have all either been left speechless or sputtering. Under what authority does the NASD or its individual staffers act as a silent court of appeals engaging in a review, reverse, and remand process that the parties never know about? How many arbitrators would be willing to stand up to the NASD and say, "Thank you but I'm not rewriting my order."? (I must add that I think the parties must be allowed to respond to the arbitrators' research as was done in my case. I agree that it would be improper for the arbitrator so say, "I found the case that all of you missed, you don't get to comment, and here's my decision based on it.")

This is not the only time this has happened to me. In I believe the first panel I was on, we got a joint motion for continuance, which we met on and denied. We got an email back from the head of the ... office saying that the motion had been submitted to us in error, we did not have the authority to deny the motion under the rule granting continuances if the parties agree to mediate, the continuance had already been granted by the staff, and our order would never be sent to the parties. A heated email exchange ... (with) the NASD staffer ensued. I found it amusing because the NASD is always willing to cite the rule allowing arbitrators to interpret the rules when it doesn't want to take a stand, but that rule is ignored when the NASD wants to take a stand.

LG: I think that we share much common ground on one of the most important issues discussed in the emails. You became an arbitrator because you wanted to improve the quality of the process. Hopefully, you will email your information on arbitrators and the law to the SEC (Rule-Comments@sec.gov with subject line including "Petition for Rulemaking # 4-502). Without a change in the present NASD process, persons like you will become so frustrate that they will resign from the arbitration panel, arbitrators uneducated in the law (due to lack of NASD training and evaluation) will dominate the panels and, worst of all, justice will not be served.

You mentioned that the 50%+ "who could not be trained" might have been accepted onto the panel of arbitrators under the "good old boy" system. However, even if they might have been accepted, they might not have lasted too long. Competent and diligent NASD Staffers used to attend each hearing and go to lunch with arbitrators. It

was part of their job to cull out those who should not be there. Today, there is no effective post-admittance arbitrator evaluation system.

You stated, "I disagree with most of the things in your series of emails." I invite you to provide more detail.

A: I actually wrote a letter to the big NASD in Washington (not NASD-DR). I had a case with a big issue over the NASD's jurisdiction over a non-Member.... The panel was obviously bewildered and said they'd let the jurisdiction issue wait until the end. ... I wrote my letter asking for the NASD to issue guidance ... because this was way over the head of ... (the panelists). The NASD wrote back a ... letter saying the NASD had great confidence in the arbitrators and that the NASD thought it was important to have a cross section of the community (with no legal training) decide these issues, the NASD wasn't bound by panel decisions anyway, and the NASD had no intention of issuing any guidance on the rules. ... Shortly thereafter the risk of resort to a federal judge got the issue resolved among the parties.

I don't think the SEC is going to perform any meaningful oversight of the NASD, so I haven't ever sent them anything before. ...

Are your commentaries collected somewhere on your website? I saved your emails and can download them all separately, but if you've organized everything to date, that would be an easier way to do it.

LG: Links to the commentaries and other writings, with an index, are located at: http://www.LGEsquire.com/LG_Links.html . A link to a copy of a letter to SEC Market Regulation (who is supposed to conduct NASD oversight) is there. ...

II. NASD Notice of Website Update

LG (Idea): On June 15, 2005, I received an email stating, "The following items have been added to the Dispute Resolution (DR) section of the NASD Web site. ... **Arbitration Evaluation Form** ... [P]leas remember to complete an online evaluation..." The notice raises some important questions.

A former arbitrator recently informed me that he received a telephone call from the NASD wherein he was informed that he was "off the list," i.e., he was removed from the NASD arbitration panel. That was it. He is history.

What if YOU are the subject of a negative evaluation? What is the due process, if any, in the NASD's evaluation procedure? What are the rules and/or standards by which the alleged conduct is to be measured? Is an accused entitled to learn the charges brought against him/her? How and in what manner does one learn? Is an accused arbitrator entitled to confront his/her accuser(s) or to offer evidence, e.g., documents, oral, in his/her defense or to be represented by legal counsel? Who are the decision-makers? Is there a right to appeal?

III. Comments on Petition for Rulemaking (SEC File No. 4-502)

LG (Idea): Some have already submitted written comments concerning Petition for Rulemaking (SEC File No. 4-502). They may be viewed at: <http://www.sec.gov/rules/petitions/4-502.shtml>. Hopefully, more will express their views. Commenting on the Petition will allow those who labor in the arbitration trenches

to have a real opportunity to inform the SEC of: (1) how arbitration functions in the real world; (2) whether changes should be made; and, if so, (3) what those changes should be.

A: I have spent some time writing a response to your Petition. It is almost complete. I hope I understand your position correctly.

Your petition condemns the NASD's actions surrounding the use of the law all the way to the way they responded to you, but you stop short of saying that this is symptomatic of bigger problems or that the entire thing is rigged in favor of the securities firm. ...

LG: My big points are that: the NASD, in effect, instructs arbitrators to ignore the law and, thus, there is no standard in the decision making process with respect to customer claims; the NASD does not properly educate its arbitrators (who handle customer claims) in the decision making process; the NASD has no effective means to evaluate the competence of its arbitrators; and, the SEC performs no real oversight of the arbitration process.

As to the bigger picture, in many arbitration cases, it is almost a roll of the dice as to whether an arbitration decision will favor the customer or the industry. It depends on who is on the panel. One could criticize the arbitrator selection process, its lack of transparency and lack of ability to audit the means by which the NASD could isolate arbitrators. ... If one claims that the process is rigged in favor of one side or the other, the NASD and SEC will cite a 1992 GAO study that they say states otherwise. (I think the study's methodology leaves much to be desired and provides inaccurate conclusions.) However, if the ball starts rolling on the easily substantiated problems described in the Petition, it could roll elsewhere. ...

A: Thank you. I understood correctly.

I noticed many problems with the GAO study. I don't recall whether it concluded that that NASD arbitration is fair, but its basis for any conclusion certainly at best only showed that some individuals are receiving some amount of awards.

The other part of the problem is that the outcome is "a roll of the dice." That is NOT fair. I don't care how many competent arbitrators are out there. The question is, "How may incompetent and/or biased arbitrators are out there denying people fair arbitrations?"

The NASD swears up and down there is no black list. In any case, the corporate lawyers do background checks, so you would effectively be blacklisted. Right?

Daniel R. Solin testified on arbitration on March 17. He communicated to me many problems with that GAO study. Also he obtained access to NASD decisions and is doing a study. ... I am certain that he will find, among other things, that awards are small in comparison to damages - particularly in large and complex cases. If he proves that arbitration is a sham, that would give individuals leverage to bypass arbitration (break that mandatory arbitration agreement) and go straight to court.

LG: Mr. Solin also has recently filed a Petition for Rulemaking with the SEC. His Petition deals with access to the arbitration awards.

"The NASD swears up and down there is no black list." There may be many ways to define "black list." Another tactic is to enlarge the panel with numerous panelists who are unfamiliar with the law and the securities industry and, then, decline to educate them.

My approach is for the NASD to make credible efforts to educate and evaluate those persons, and, if, after evaluation, they remain uneducatable, their services should be terminated. ...

You raise an interesting point about by-passing the arbitration system. I have written about the NASD arbitrator who was asked by a NASD Regional Director to promise to and to ignore the law and, then, when she refused to do so, was instructed to invite and grant a recusal motion based upon grounds of bias. A Regional Director sets NASD policy. I think that a court petition to keep a matter from NASD arbitration, based upon a sworn declaration from such a person with such personal knowledge and a customer's declaration that he/she was not informed that arbitrators do not follow the law, are not evaluated, etc., would cause the NASD to take notice. If such a petition were granted by a court and sustained on appeal, the NASD arbitration system, as we know it, would probably change for the better.

My continuing thanks to those who have contributed to Parts I through XIV 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>