

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

“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 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. Petitions for Rulemaking, NASD Proposal and the News Media

A. Media Coverage

The July 17, 2005 issue of the Pittsburgh Post Gazette carried an interesting article entitled, “Heard Off the Street: System for resolving disputes may need an overhaul.” The article deals, in part, with Petition for Rulemaking (SEC File No. 4-502). It may be viewed at: <http://www.post-gazette.com/pg/05198/538840.stm>.

The July/August 2005 issue of *Alternatives – ADR Brief*, published by the International Institute For Conflict Prevention & Resolution and John Wiley & Sons, Inc. contained a multi-page article entitled “Seeking Rules: A Critic Asks The SEC for Arbitration Reform,” which deals with the Petition for Rulemaking (SEC File No. 4-502).

Alternatives articles are available in full text from Wiley Interscience (www.wileyinterscience.com), Lexis® (www.lexis.com), and Westlaw (www.westlaw.com).

B. Petitions and NASD Proposal

An attorney/arbitrator recently filed Petition for Rulemaking (SEC File No. 4-506), which deals with deficiencies in the arbitrator selection process and the need for an Administrative Judge procedure to obviate conflicts of interest at the NASD. The Petition may be viewed at: <http://www.SEC.gov/petitions/4-506.shtml>. My supportive comments may be viewed at: http://www.LGEsquire.com/LG_SEC_4-506.pdf.

Comments may be emailed to the SEC at: Rule-Comments@SEC.gov. The subject line of the email must contain the number of the Petition to which the comment is directed.

Public comments on the Petition for Rulemaking (SEC File No. 4-502) may be viewed at: <http://www.sec.gov/rules/petitions/4-502.shtml>.

It would be most appreciated if you would comment to the SEC on the Petition(s) and inform others of the opportunity to comment to the SEC. For those not wishing to publicly commit to a position, one might, at the least, state that the Petition contains requests that are worthy of consideration and contains serious allegations that should be thoroughly investigated.

The SEC has previously accepted comments signed by “Anonymous.” Further, the SEC no longer posts the email address from which the comment was received.

The NASD recently filed its final version of proposed rule SR-NASD-2005-032 (“explained decisions”) with the SEC. A copy may be viewed at: <http://www.sec.gov/rules/sro/nasd/34-52009.pdf>. The filings and amendments (as of this publication) may be viewed at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013542. You have less than 21 days to comment to the SEC. Time is of the essence. A copy the comment letter that I submitted to the SEC may be viewed at: http://www.LGEsquire.com/LG_SEC_SR-NASD-2005-032.pdf.

C. Comments Have an Impact

Your comments to the SEC can make a difference. On August 1, 2002, the Committee of Concerned Shareholders (<http://www.concernedshareholders.com>), a grassroots group of individual shareholders that formed via an internet financial message board and engaged in a formal proxy fight against a NYSE listed company, filed Petition for Rulemaking (SEC File No. 4-461). The Petition sought the right of individual shareholders to be able to nominate corporate director candidates and the requirement

that the names of those nominees appear on the corporate ballot. Many filed comments of support with the SEC. The issue received national media attention. On March 10, 2004, the SEC held a Roundtable on the issues raised in that Petition in Washington, DC. The Roundtable was attended by captains of industry and the five SEC Commissions, among others.

II. 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, qualifies 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.

III. NASD Telephone Conference Questions

A: I thought you might be amused to see that these two questions were ignored by the NASD yet again. From some of Ms. Fienberg's comments, it appeared that she had a group pre-submitted questions that she was passing over. I was also amused by Ms. Feinberg's closing comment encouraging arbitrators to ask questions at any time, and they will be answered. I'm still waiting on answers to these two.

Dear Ms. Fienberg:

... I have a couple of related questions that I have asked but never had answered. I hope this workshop is an opportunity to get them answered.

I have been told and also read that the NASD takes the position that arbitrators are forbidden to research the law. The NASD is the only arbitration organization I have encountered that takes this position. What is the legal basis for this position?

I have been on two panels that issued orders and had the NASD staff respond that they were rejecting the orders and not sending them to the parties. Both rejections were for alleged legal errors by the panel. I think parties and parties' lawyers would be surprised that the NASD staff is acting as a silent court of appeals to review, reverse, and remand panel orders. What is the NASD's authority to have its staff do this?

Thank you for considering my questions.

LG Supplement: The NASD has the ability to create a web page, which contains all of the questions for which there was not time to answer and answers, and inform persons attending the telephonic conference of its existence.

IV. NASD Retaliation?

A: Many arbitrators I've talked to and read about have been scared of being removed from the panel because of insubordination if they criticize the NASD. Have you encountered any problems because of your emails?

LG: Not that I am aware of. However, I do not think that I'll be assigned to the 4-5 cases per year as in the prior years. None have been assigned since last February. As per an arbitrator's prior published comment, the NASD might have a way to control the "random" selection of arbitrators. In his case, all arbitrators listed were rejected and the NASD continually selected the same person.

Are there any details that you can provide that I can publish?

LG (Supplement): I used to do computer programming for a living. In doing random number generation, one could easily program the computer to ignore certain numbers even if the random number generator selected them. One would be to have access to thousands of line of code and be able to read and understand it in order to determine whether such was done. Unless such audit is periodically conducted, one never knows whether a "black box" selection method is gamed.

One wonders whether the current "random" selection process could be gamed by "industry" counsel, e.g. strike all "public" arbitrators so that the NASD, in its discretion, selects two "public" arbitrators. Statistical information on how often this occurs might be very revealing. Where is NASD transparency or SEC oversight?

A: No, I've heard rumors and fears but nothing first hand. I had one case where there was a sharp and ugly disagreement between the chairman and staff. The chairman said he'd likely gotten his last case, but I ran his name through Lexis not long ago and he was on later cases. I would be interested in knowing the whole story about people who think they were wrongly removed, but I think the staff will never give their side of it.

LG Supplement: The chairman might have been assigned to the cases before the disagreement occurred.

A: I have considered your request that I comment on your petition. ... I do not believe arbitrators should be required to follow the law. Nor do I think NASD should train arbitrators in the substantive law (they'll screw it up). These, of course, are sensitive points on subjects that I do not wish to commit in public writing – lest it be used against my client later when I take an advocacy position. ...

LG: ... The Petition does not seek to require arbitrators to follow the law, but to restrict the NASD from: (1) ordering arbitrators to ignore the law; (2) forbidding "outside legal research" (even if the results are fully disclosed to the parties for comment upon applicability); and, (3) recusing arbitrators for bias if they wish to employ their legal knowledge.

LG Supplement: The SEC has previously accepted comments signed by "Anonymous." Further, the SEC no longer posts the email address from which the comment was received.

V. Arbitrator Superstars?

A: I read or heard about a push by the NASD to identify a nationwide cadre of superstar arbitrators to be paid to travel long distances to be on panels. For example, I've

had ... arbitrators on ... panels a couple of times. I've never understood that.... It seems like the NASD is trying to have it both ways: either all is right with the world or they need superstars to travel the country plugging holes and putting out fires, but they can't have it both ways. It's not as if ... is short of panelists.

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