

Audio Tapes From Arbitrator Skills Programs Now Available

The following audio tapes from the Northeast Arbitrator Skills Program held February 2, 1996, in New York are now available for ordering:

- NASD29601 Introductory Remarks and Closing Remarks
- NASD29602 Employment Law I
- NASD29603 Understanding Brokerage Firm Records
- NASD29604 Suitability/Mark Ups/Mark Downs
- NASD29605 Motion and Discovery in Arbitration
- NASD29606 Employment Law II
- NASD29607 Arbitrator Conduct and Duty to Disclose
- NASD29608 Luncheon Address: Kenneth L. Andrichik, NASD Regulation Director of Mediation

The following audio tapes from the Arbitrator Skills Training Program held in conjunction with the Spring Securities Conference May 15, 1996, in Chicago are now available for ordering:

- NASD596A1 Welcome and Session Wrap-Up
- NASD596A2 Calculation of Damages and Drafting Decisions
- NASD596A3 Injunctive Relief in Arbitration
- NASD596A4 Large and Complex Case Administration
- NASD596A5 Dispositive Motions and the Statute of Limitations

- NASD596A6 Pre-Hearing Process: Managing the Arbitration
- NASD596A7 Elements of Claims and Defenses in Securities Arbitration
- NASD596A8 Luncheon: Employment Law: John Bender, Esq.

Fees

Northeast Arbitrator Skills Program,
Complete Set: \$79

Arbitrator Skills Training Program, (Spring Securities Conference), Complete Set: \$88

Single Tape: \$12 for each tape

Discount Packages (Includes Storage Album): 5% discount when six or more sessions purchased; 10% discount when 12 or more sessions purchased

Shipping: \$1.75 for the first tape; \$0.95 for each additional tape

To order any of these audio tapes, send credit card information or a check to:

A.V.E.R. Associates
6974 Ducketts Lane
Elkridge, MD 21227
(410) 796-8940
Fax: (410) 796-8962

(Make checks payable to A.V.E.R. Associates.)

When ordering specific tapes, please be sure to reference the accompanying NASD order number as shown above.



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NASD REGULATION The Neutral Corner

NASD Regulation Board Approves Dispute Resolution Initiatives

On July 19, 1996, the NASD RegulationSM Board demonstrated its support for various Arbitration Policy Task Force recommendations made in January of this year. The Board approved early appointment of arbitrators, renewed emphasis on arbitrator training and recruitment, expansion of the mediation program, and improvements in case management. The Board authorized additional staff resources for each of these initiatives. The Board will consider other Task Force recommendations in the fall.

Increases in staff dedicated to arbitrator recruitment and training will assist the Office of Dispute Resolution in attracting and maintaining sufficient numbers of quality arbitrators. These actions and additions to case management staff will pave the way for two other Task Force initiatives approved by the Board: early appointment of arbitrators to conduct pre-hearing conferences for purposes of scheduling hearings, resolving discovery requests, and deciding motions and other preliminary matters; and the introduction of an arbitration rule that will allow parties to appoint arbitrators through a method of list selection.

Finally, the Board approved additions to the NASD Regulation mediation staff in order to expand the services offered by all four of our regions.

Department Gets New Name And New Executive Vice President

In order to more accurately reflect the broad range of services NASD Regulation, Inc., provides in the areas of arbitration and mediation, we have changed our name. We are now known as the Office of Dispute Resolution. Also, please join us in welcoming Linda D. Fienberg, NASD Regulation Executive Vice President for Dispute Resolution and Chief Hearing Officer. See the article on page 3 to find out more about Fienberg.

August 1996 What's Inside

<i>A Message From The Editor</i>	2
<i>Fienberg To Lead Dispute Resolution Efforts</i>	3
<i>Handling Key Procedural Issues</i>	3
<i>Arbitrator Application Form Updated</i>	5
<i>Large and Complex Case Rule Extended</i>	5
<i>Mediator Skills Training</i>	6
<i>New Rule Numbers</i>	6
<i>Selected Arbitration Statistics</i>	7
<i>Audio Tapes Now Available</i>	8

Mediation Program Celebrates Its First Anniversary

This month marks the first-year anniversary of NASD Regulation's Mediation Program. Within the first year, more than 85 percent of the claims submitted to mediation settled.

The number of cases entering mediation as an alternative to arbitration in the last six months is triple the number for the first six months of operation. Claims in the initial year have ranged

continued on page 2

The Newsletter for NASD Regulation Arbitrators and Other Neutrals

A Message From The Editor

Tom Wynn
Editor-In-Chief

The Neutral Corner Wins Award

We are very pleased to announce that *The Neutral Corner* has won a 1996 APEX Award of Excellence in the category of New Newsletters. APEX—the Awards for Publication EXcellence—is a national competition sponsored by Communication Con-



cepts. Publications less than one year old may enter the new newsletters category, and are judged on overall excellence—writing, editing, design, content, etc.

Please write to us about the articles appearing in *The Neutral Corner*. We welcome and encourage your comments on the materials presented in this newsletter, as well as suggestions for future articles.

Editor's Note: In future issues of The Neutral Corner, your letters to the editor will be featured here. NASD Regulation reserves the right to publish or not publish the letters received.

Mediation Program Celebrates Its First Anniversary *From page 1*

from \$10,000 to \$3 million. Also, 211 matters have completed mediation, and parties in over 100 more cases have agreed to mediate. On average, cases are concluding within about two months of the parties' agreement to mediate.

The figures point to a growing trend toward the use of mediation to resolve securities disputes. Though mediation still accounts for a small portion of the more than 5,000 cases per year resolved through arbitration, it has increased significantly since its

inception. "Initially, cases came into mediation from arbitration. Now we are seeing more cases come directly into mediation," said Kenneth Andrichik, Director of Mediation for NASD Regulation. The 400 cases expected to be closed in 1996 will exceed the total caseload of all but two of the securities arbitration forums.

The NASD Mediation Rules were approved by the Securities and Exchange Commission (SEC) on August 1, 1995.

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Linda D. Fienberg Selected To Lead Dispute Resolution Efforts

In June, Linda D. Fienberg joined NASD Regulation, Inc., as Executive Vice President of Dispute Resolution and Chief Hearing Officer. In this role, Fienberg has responsibility for NASD Regulation's dispute resolution program, including arbitration and mediation, and the new disciplinary hearing program.

Prior to joining NASD Regulation, Fienberg was a partner at the Washington, D.C. law firm of Covington & Burling. From 1979 to 1990, she was on the staff of the SEC where she held several senior staff positions including Executive Assistant to two Chairmen and Associate General Counsel in the General Counsel's Office, first for the Litigation section and then for the Counseling and Legislation section.

She was a member of the specially convened NASD® Task Force on Arbitration Policy for which she also served as Reporter; the NASD Legal Advisory Board; and its National Arbitration and Mediation Committee.

Fienberg has outlined several challenges that lie ahead as she takes on this new position, including operating a superior dispute resolution forum in an efficient manner both in terms of time and cost while meeting the needs of the investing public, member firms, and employees of member firms. "I want all who use the system to feel that it is absolutely fair

and unbiased for all parties," Fienberg said.

Fienberg also plans to expand or develop other forms of dispute resolution, such as mediation, early neutral evaluation, and other alternatives being used by the courts.

She also wants to make certain that NASD Regulation's dispute resolution "staff is appreciated for the work that it does," particularly given the staff's large workload and extensive responsibilities.

Fienberg and her staff are already focusing on various issues that stem primarily from the report of the Task Force on Arbitration Policy. These include, but are not limited to:

- improving arbitrator training, recruitment, and compensation;
- adopting a list selection method to provide parties with a larger role in the selection of arbitrators;
- appointing arbitrators earlier in the process;
- enhancing the maintenance and disclosure of arbitrator information, including automation of information;
- increasing the roster of arbitrators and mediators;
- expanding the use of mediation; and
- expanding the number of staff to maintain efficient processing of claims.

Handling Key Procedural Issues—The Chairperson's Role

by Tom Wynn, Editor-In-Chief

If final awards are going to stand up to court challenges by unhappy participants, today's Chairperson must lead his or her co-panelists in the resolution of important procedural issues on the road to those awards. These issues run the gamut and include whether the panel has jurisdiction over a claim and

defending party; whether the panel should order a party to produce documents and witnesses; whether any prior panel order has been complied with and, if not, what appropriate action should be taken to obtain compliance; whether the panel should allow an amendment to filed Claims and Answers at the hear-

ing; whether the panel should grant a party's request to postpone a hearing; whether the panel should exclude a party's presentation of evidence or bar a party's defenses at the hearing, etc. This article will suggest guidelines that will assist Chairpersons facilitate informed and fair panel decisions on these important issues and help preserve their finality.

Demeanor

The seriousness of these issues to disputants will be evident often from the intensity of their oral arguments. Because this intensity can be highly infectious, the panel must be careful to neither imitate party fervor by knee-jerk behavior, nor rush to judgment, particularly where one side appears initially to be in the right.

The Chairperson should demonstrate genuine interest, but always be above the fray, no matter the time of day or length of hearing. He or she should be certain that all disputants are heard fully and that panel members remain calmly attentive to their divergent views. This should be the Chairperson's conduct—conduct that is worthy of imitation by copanelists, parties, and representatives. It is, at the same time, conduct that helps to lessen any appearance of arbitrator partiality or bias and possible vacation or undoing of the final award on this ground by a court of law.

As the *Arbitrator Manual* advises, arbitrators must always conduct the entire hearing in a neutral fashion and appear unbiased at all times, avoiding comments, body language, grimaces, frowns, hand signals, or gestures that might indicate disbelief or a preference for one side or another.

Executive Sessions

When the disputants have concluded their respective arguments, the Chairperson should call a "time-out," go off the record, and take a private executive session

with the entire panel. In executive session the Chair should not only solicit and discuss the feelings of other panelists, but also utilize all appropriate resources prior to a panel determination. These resources include: pertinent arbitration rules; legal authority presented by the participants; the *Arbitrator's Manual*; the American Bar Association (ABA) American Arbitration Association (AAA) Code of Ethics For Arbitrators in

Commercial Disputes; administrative assistance by assigned or other dispute resolution staff; and further inquiry of the parties and their representatives. The Chairperson may suggest that further clarification by the parties could lead to stipulation or agreement and the substantial resolution of the issue. If

additional executive sessions might be helpful to panel understanding and, therefore, to more competent decisions on these important issues, the Chair should initiate them.

Make a Record

When the hearing reconvenes, the Chairperson usually announces the panel's decision, but does not state the decision's rationale. However, when a panel reaches a determination on these procedural issues, the Chairperson should announce it on the tape recording or other designated hearing record and, in addition, provide the basis of the panel's ruling for several reasons.

First, these decisions are critical because they involve arbitrator prerogatives and party rights. Hanging in the balance is the finality of a panel's award. Federal and State arbitration laws assure award finality unless a party seeking to have a court vacate or overturn an award shows serious panel misconduct or conduct that has prejudiced or interfered substantially with the party's right to be fully and fairly heard.

Second, when a party contends that panel decisions relating to important issues of jurisdiction, the

Arbitrators who provide the basis of their *important procedural decisions* on the record and in the award empower a reviewing court to uphold their awards.

presentation of evidence, postponements, etc., constitute serious arbitrator misbehavior and legal grounds to set aside an otherwise final award, remember, the second place a reviewing court may look after reading the written award is the record of the hearing itself. By clearly stating on the record not only what it has ruled, but also why, the panel permits and empowers a court, even a skeptical or hostile one, to uphold these *difficult* decisions *reasonably* made.

The Award

Arbitrators should also provide a complete explanation of these important procedural decisions in their award for the reasons supporting specificity on the hearing record. In addition, doing so will be consistent with the underlying purpose of NASD Regulation Arbitration Rule 10330(e) [formerly section 41(e)], which requires that all awards contain a statement of

Large and Complex Case Rule Extended

Rule 10334 of the *Code of Arbitration Procedure* (formerly Section 46) has been extended temporarily by the SEC through August 1, 1997. This Rule, which became effective May 2, 1995, contains procedures for cases involving claims of \$1 million or more. In addition, disputes involving smaller dollar amounts may proceed under the Rule by agreement of all parties. Rule 10334 mandates an administrative conference in order to ascertain if the parties can reach a voluntary and written agreement to continue processing eligible matters under its provisions. If all disputants fail to agree, the cases are administered under other NASD Regulation arbitration rules.

Since its adoption, 578 arbitrations have come within its ambit. However, parties have agreed to the disposition of their cases pursuant to this Rule in only 27 of these matters.

In view of its infrequent use, NASD Regulation did not request that the Rule be extended permanently. Rather NASD Regulation requested that its effectiveness be extended temporarily for the reasons

other issues resolved by the arbitrators. Finally, these more informative awards will give valuable guidance to all forum users by virtue of their public availability.

If Chairpersons model neutral, unbiased behavior at all times; encourage the use of appropriate resources in executive session to improve panel understanding of important procedural issues at the hearing; and express a willingness to deliver panel decisions on these issues clearly and completely both on the hearing record and in their award, courts will honor awards with greater frequency, and, more importantly, this forum's most valuable asset, its reputation for demonstrated integrity, will be enhanced.

below. Parties, even those declining to proceed under the Rule, have informed arbitration staff that the administrative conference has assisted in the scheduling of evidentiary hearings and resolution of discovery and other preliminary motions. The conference has, in addition, allowed staff to introduce NASD Regulation's Mediation Program to disputants.

Finally, extension of this *Code* provision will permit NASD Regulation to gather anecdotal information and statistical data relating to the usefulness of the Rule to participants. When an application is made in 1997 to either extend the Rule or make it a permanent part of the *Code*, this meaningful information and data will be provided to the SEC.

Arbitrator Application Form Updated

Earlier this year, the NASD Regulation Office of Dispute Resolution modified its Arbitrator Application Form. This new, user-friendly form will help NASD Regulation qualify applicants more quickly and get them to the next step—arbitrator training.

To obtain information on how to apply to become an NASD Regulation arbitrator, please contact Margaret Duzant, Arbitrator Relations Supervisor, at (212) 858-4310. To request an application form, call (212) 858-3992.

Mediator Skills Training Set For New York

The third Mediator Skills Training Program sponsored by NASD Regulation is scheduled for New York, September 30 through October 2. This three-day program will be co-sponsored by the U.S. Bankruptcy Court for the Southern District of New York. The sessions will be held at the Bankruptcy Court facilities at One Bowling Green in New York City. The previous programs in Chicago and New York received outstanding evaluations from the participants. Indications of interest for subsequent training sessions began to arrive after each of the first two sessions, so we know that the word got around!

The trainers are experienced as trainers and as mediation practitioners. Jeff Abrams has conducted the last three training programs for the Bankruptcy Court and the NASD Regulation Office of Dispute Resolution. He is the founder and former owner of the Institute for Conflict Management, Inc. (ICM). Abrams incorporates classical and innovative mediation skills to invest parties and counsel in the success of the process. Joining Abrams will be Cecilia Morris, Clerk of the Bankruptcy Court. Morris developed and operates their successful mediation program. She is an experienced mediator herself and has been a

trainer in the prior programs. Together, they promise to convey a powerful commitment to practical business solutions.

This training program covers all of the essential elements of a quality training course. It covers the spectrum of dispute resolution methods, ethical issues confronting mediators, and impasse-breaking techniques, plus significant role-playing opportunities. Participants will come away with a formula for the facilitative, caucus-style format that our mediation program favors.

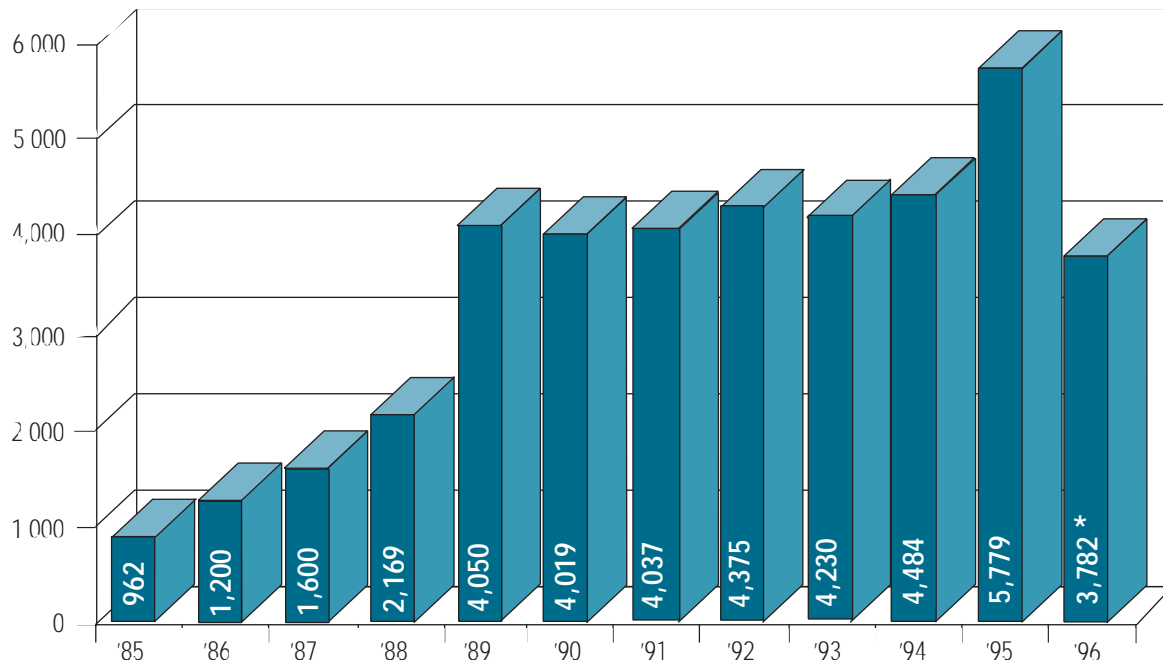
Qualification for our mediator pool goes beyond a comprehensive training course. We also look for demonstrated mediator skills and case experience. However, for those interested in becoming mediators, this program provides an excellent way of fulfilling the training criteria.

Reservations are required for the spaces available. The cost of the program is \$650, including breakfast and lunch each day. For more information about Mediator Skills Training, or to register for the program, please call the NASD Regulation Office of Dispute Resolution at (212) 858-4378. You may also fax your request for a registration form to (212) 509-9041.

New Rule Numbers

Effective July 1, 1996, NASD began using a new numbering system that affects all NASD Rules. Later this month, NASD Regulation will publish an updated version of the Code of Arbitration Procedure applying the new Rule numbering system. In the updated Code we have provided a conversion chart indicating the changes to help with the transition.

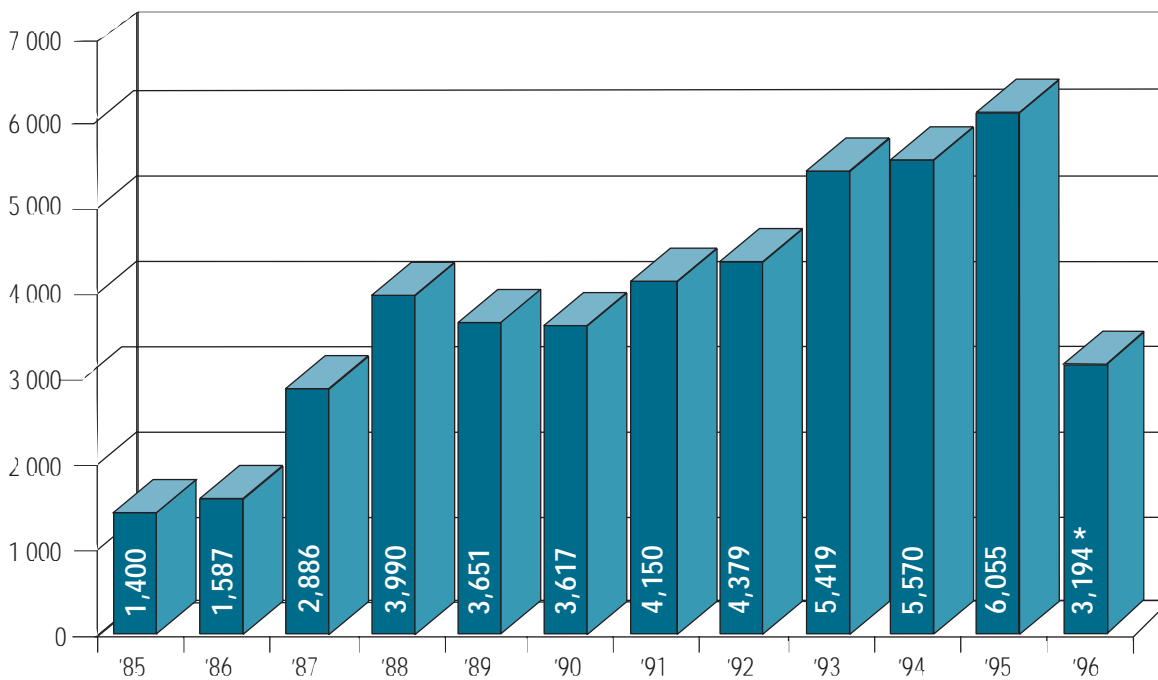
Number Of NASD Regulation Arbitration Cases Closed Annually



***This represents a year-to-date cumulative increase of 25 percent over last year.**

Through July

Arbitration Cases Filed With NASD Regulation Annually



***This represents a year-to-date cumulative decrease of 13 percent over last year.**

Through July