

# The Neutral Corner

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## Keep Arbitration On Track

A frequently cited source of arbitrator frustration is party postponements of scheduled arbitration hearings. However, this coin has two sides. Since parties often express frustration to the staff about postponements caused by arbitrators, we believe it makes sense to examine the arbitrator's duty of keeping the process moving.

The *Code of Ethics for Arbitrators in Commercial Disputes (Code of Ethics)* provides standards of ethical conduct for the guidance of arbitrators. Although the *Code of Ethics* is not part of the *NASD Code of Arbitration Procedure*, NASD Dispute Resolution adopted the *Code of Ethics* and expects arbitrators to abide by its standards and principles. The *Code of Ethics* is available on the NASD Dispute Resolution Web Site at [www.nasdadr.com/ethics\\_code.asp](http://www.nasdadr.com/ethics_code.asp).

*Canon I* of the *Code of Ethics* provides that neutral arbitrators are ethically obligated to preserve the integrity and fairness of the arbitration

process. This duty begins when arbitrators accept appointment to a panel and continues throughout all stages of the proceeding, and in some instances, even after the arbitration ends.

One of the ethical duties contained in *Canon I* is that arbitrators should accept case appointments only if they are available to conduct the arbitration promptly. Another is that arbitrators should make reasonable efforts to prevent abuse or disruption of the arbitration process.

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***Arbitrators, who conduct  
prompt proceedings  
and participate to their  
conclusion, demonstrate  
ethical responsibility  
to the parties and  
the process.***

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### The Neutral Corner Available As Interactive Web Document

The *Neutral Corner* is now available on the NASD Dispute Resolution Web Site ([www.nasdadr.com](http://www.nasdadr.com)) as an interactive HTML document. This means you can easily link to references within the publication, as well as throughout the Site to find a multitude of other resources. Please make sure you take a look.

## ***Messages From The Editor***

### **New Vice President**

In January 2001, Kenneth Andrichik was promoted to Vice President. Ken earned this promotion because of his continued dedication and outstanding contributions to dispute resolution at the NASD. His career in dispute resolution spans over 15 years.

In the 1980s, he established and supervised the NASD Dispute Resolution Office in Chicago. In 1990, he became the Deputy Director of Arbitration in the New York Office, where he assumed oversight responsibilities for all dispute resolution offices. In 1995, as Director of Mediation, he established and supervised what is now the most successful and largest securities mediation program nationwide. His more recent responsibilities, in addition to mediation, include the development of new business ventures and strategies, and the development and oversight of the NASD Dispute Resolution Web Site. Please join us in extending best wishes to Ken.

### **New Chief Counsel**

In April of this year, Jean Feeney assumed the new title of Chief Counsel at NASD Dispute Resolution. Jean was given this title in recognition of her responsibilities and accomplishments as Special Advisor to NASD Dispute Resolution President Linda D. Fienberg.

Jean will continue to manage the Dispute Resolution rule development and approval process. In addition, she will continue to advise President Fienberg, Dispute Resolution staff, and forum constituents on the interpretation and application of the Code of Arbitration Procedure. Please join us in extending best wishes to Jean.

### **Thank You**

We extend our genuine appreciation to all of you for your continued support of *The Neutral Corner (TNC)*. We also thank the 2,558 readers who participated in the *TNC Reader Survey* that accompanied the November 2000 edition. A summary of the survey results are included in this edition.

**Editor's Note:** In future issues of *The Neutral Corner*, your letters to the editor will be featured here. We welcome and encourage your comments on the material presented in this publication. NASD Dispute Resolution reserves the right to publish or not publish the letters received.

*Keep Arbitration On Track, from page 1*

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*Canon IV* of the *Code of Ethics* provides that arbitrators are obligated to conduct fair and diligent proceedings and conclude cases as promptly as the circumstances reasonably permit. Arbitrators who agree to serve should not cancel their service commitments at the last minute or cause postponements, unless the reason for such cancellation or postponement is outside of their control (e.g., emergency).

NASD Dispute Resolution arbitrators should be prepared and punctual for all hearings. They should also be available to serve promptly and to the end of all assigned matters. Please review

the NASD Dispute Resolution Arbitrator's Briefing Sheet intended as a reminder of the duties and obligations of NASD arbitrators. This document is located on the NASD Dispute Resolution Web Site at [www.nasdaq.com/arb\\_brief.asp](http://www.nasdaq.com/arb_brief.asp).

Failure to act in this manner not only violates the ethical responsibilities of arbitrators to the parties and the arbitration process as set forth above, but also can cause severe procedural delays that are often costly.

We urge arbitrators to take seriously their obligation to keep cases moving, and to avoid unnecessary postponements.

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## **What's New On Our Web Site—[www.nasdaq.com](http://www.nasdaq.com)**

NASD Dispute Resolution continues to update its Web Site. We have provided Internet addresses to get you to these items. In addition, we have enclosed with this edition the two *NASD Notices to Members* referenced below.

**Arbitrator's Manual:** The *Arbitrator's Manual*, compiled by the members of the Securities Industry Conference on Arbitration (SICA) as a guide for arbitrators, has been updated. ([www.nasdaq.com/sica\\_manual.asp](http://www.nasdaq.com/sica_manual.asp))

**NASD Notice to Members 01-22:** In this *Notice*, NASD Regulation reminds NASD member firms of their "Best Execution" obligations in regard

to customer orders. It also provides guidance to members about their compliance with these obligations. ([www.nasdaq.com/pdf-text/0122ntm.pdf](http://www.nasdaq.com/pdf-text/0122ntm.pdf))

**NASD Notice to Members 01-23:** In this *Notice*, NASD Regulation issues a policy statement to NASD member firms and their associated persons about the application of the NASD customer suitability rule to online communications. The *Notice* also provides guidance to members and associated persons in terms of their compliance with these suitability obligations in today's electronic environment. (<http://www.nasdaq.com/pdf-text/0123ntm.pdf>)

**We encourage you to visit our Web Site to see these educational materials. We also encourage you to subscribe to our e-mail notifications so you can obtain regular updates and alerts designed to enhance your securities industry and dispute resolution knowledge. The address to access the online subscription form is [www.nasdaq.com/email.asp](http://www.nasdaq.com/email.asp). See the E-mail Subscription Notice enclosed with this edition.**

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## Rule Updates

### Required Submission

On April 6, 2001, the Securities and Exchange Commission (SEC) approved an NASD Dispute Resolution proposal to amend NASD Rule 10301. The proposal prohibits any terminated, suspended, barred, or otherwise defunct NASD member firm from enforcing predispute arbitration agreements with their customers to arbitrate at the NASD. Such members will *not* be able to require their customers to arbitrate at this forum, *unless* the customers agree in writing to do so after the claim has arisen. The amended rule will apply to all claims served on or after June 11, 2000.

Underlying this change is the belief that it is inappropriate to permit such members to require customers to arbitrate claims here since arbitration awards against such members have a much higher incidence of non-payment than those against active members. View the approval order on the NASD Dispute Resolution Web Site at [http://www.nasdaq.com/app\\_orders\\_index.asp#01-08](http://www.nasdaq.com/app_orders_index.asp#01-08).

As a result of this change, NASD Dispute Resolution will also advise customers of the status of such members when they file claims against them at this forum. This will allow the customers to decide whether to go directly to court and avail themselves of any judicial remedies, including those that might prevent the dissipation of member assets.

The preceding is the latest in a series of actions taken by NASD Dispute Resolution in response to the June 15, 2000 United States General Accounting Office Report (GAO Report) entitled "*Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*". This report

can be found on the GAO Web Site at [www.gao.gov/new.items/gg00115.pdf](http://www.gao.gov/new.items/gg00115.pdf).

To allow the NASD to begin appropriate, prompt suspension proceedings when members or associated persons fail to honor awards, NASD Dispute Resolution implemented a new system of monitoring NASD member and associated person compliance with awards.

Since September 2000, member firms have been *required* to notify NASD Dispute Resolution in writing within 30 days of receipt of an award that they or their associated persons have complied with the award, or have a valid basis for not complying. NASD Dispute Resolution also has been *asking* claimants to notify it if a member firm or associated person has not paid an award within 30 days. See *NASD Notice to Members 00-55* for more details at [www.nasdaq.com/pdf-text/0055ntm.pdf](http://www.nasdaq.com/pdf-text/0055ntm.pdf).

### Fee Provisions

In March 2001, NASD Dispute Resolution filed with the SEC a proposal that simplifies or clarifies for the staff, parties, and arbitrators the fee-related provisions of NASD Rules 10306, 10319, and 10328. To view information about this rule proposal, visit the NASD Dispute Resolution Web Site at [www.nasdaq.com/rule\\_filings\\_index.asp#01-21](http://www.nasdaq.com/rule_filings_index.asp#01-21).

The proposal amends NASD Rule 10306 to provide that when parties settle their dispute, any outstanding fees will be assessed equally among all of the parties, unless the parties agree on a different allocation. It also amends NASD Rule 10319 to provide that an adjournment fee is required only if and when the arbitrators grant a requested adjournment. In addition, the amendment

conforms adjournment fee amounts to the fee schedule that became effective in March 1999. Lastly, the proposal changes NASD Rule 10328 to provide that if a new or amended pleading increases the amount in dispute, all filing fees,

hearing session deposits, member surcharges, and member process fees will be recalculated according to the amended or new amount in dispute.

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## ***Duty To Disclose/Update***

### **As an arbitrator, *always* remember:**

- You have an ongoing obligation to update your arbitrator information. You should provide these updates to NASD Dispute Resolution as quickly as possible, even if you are not currently serving on a case.
- You must disclose changes in employment, job functions, or clients. Even if these changes are not connected to the parties, representatives, witnesses, or subject matter of a specific case to which you are appointed, they may result in a change in your classification as a “public” or “non-public” arbitrator. If you serve without disclosing these changes, you may violate party rights to a properly classified panel under NASD rules. View NASD Rule 10308 of the Code of Arbitration Procedure for more information on our Web Site at [www.nasdaq.com/arb\\_code/arb\\_code1.asp#10308](http://www.nasdaq.com/arb_code/arb_code1.asp#10308).
- *When in doubt...you should always disclose.* When making disclosures, describe them fully and make them as early as possible. This allows the process to operate neutrally and without any appearance of bias.
- Whenever possible, you should provide disclosures or updates in writing. This helps

to eliminate confusion over the content or meaning of the disclosures or updates.

- You should immediately consult with the staff whenever you have any question or concern in regard to disclosure.

**Before serving on a case, you are obligated to take the Oath of Arbitrator. View NASD Rule 10327 of the Code of Arbitration Procedure for more information on our Web Site at [www.nasdaq.com/arb\\_code/arb\\_code2.asp#10327](http://www.nasdaq.com/arb_code/arb_code2.asp#10327).**

- The Oath references the *Temporary & Permanent Arbitrator Disqualification Criteria*, the *Arbitrator Disclosure Checklist*, and the *Arbitrator Disclosure Report*. You must review the Disqualification Criteria and sign the Oath; complete the Checklist and explain any affirmative response; and review and update your Disclosure Report.
- For more on arbitrator disclosure and updates, see the November 2000 edition of *TNC*. To see past issues of *TNC* online, please link to [www.nasdaq.com/nc\\_index.asp](http://www.nasdaq.com/nc_index.asp).

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**At the outset of a hearing, you are encouraged to make new disclosures and to state previously made disclosures on the record.**

- When you repeat on the hearing record disclosures *previously made* to the parties, you help to ensure that all parties and representatives know and understand these disclosures.
- When you make *new* disclosures, you comply with your continuous duty to disclose to all parties at any stage of the proceeding any direct or indirect, past or present interest, relationship, or circumstance that might be reasonably perceived as biased by any party. View NASD Rule 10312 of the Code of Arbitration Procedure for more information at [www.nasdadr.com/arb\\_code/arb\\_code2.asp#10312](http://www.nasdadr.com/arb_code/arb_code2.asp#10312).
- When you make disclosures at hearings, you demonstrate your neutrality, enhance forum integrity, and help alleviate later court complaints of arbitrator bias based on nondisclosure.

**You are encouraged to update your arbitrator information by visiting the NASD Dispute Resolution Web Site and clicking on the Home Page button titled “Update Your Arbitrator Profile.”**

Our Web Site contains a self-explanatory online form that allows you to update or change your arbitrator record at any time, day or night, seven days a week. The updates may include:

- Business, electronic, or home addresses.
- Phone or facsimile numbers.
- Employment.
- Professional practice, or client base.
- Securities accounts (open or closed), new conflicts, or other disclosures.
- Securities industry employment of a spouse or other immediate family members.
- Dispute resolution training sponsored by non-NASD Dispute Resolution entities.
- Involvement as a party in any investor arbitration or lawsuit.

Please fill in all “yes” or “no” questions, as appropriate, and provide clear and concise updates/changes.

Finally, the form allows you to request and update your narrative summary in electronic format. This summary is included in your *Arbitrator Disclosure Report* which is provided to the parties to help them choose arbitrators.



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## **SEC Approves NASD Margin Disclosure Statement Proposal**

On April 26, 2001, the SEC approved NASD Rule 2341 requiring members to deliver to non-institutional customers a specified disclosure statement that discusses the operation of margin accounts and the risks associated with trading on margin.

As described in more detail in *Notice to Members 01-31* (May 2001), the rule becomes effective on June 4, 2001. Members must provide new margin customers the initial disclosure

statement prior to or at the opening of a margin account beginning June 4, 2001. For existing margin customers as of June 4, 2001, members are required to provide the initial disclosure statement to these margin customers at the time of the next annual statement to the customer, but no later than January 31, 2002.

To view *NASD Notice to Members 01-31*, please use this Internet address:  
[http://www.nasdr.com/2610\\_2001.asp#01-31](http://www.nasdr.com/2610_2001.asp#01-31).

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## **The Neutral Corner—Summary of Reader Survey Results<sup>1</sup> February 2001**

### **Question 1**

<i>Are you an NASD Arbitrator?</i>	*2,492	(97%)
<i>Are you an NASD Mediator?</i>	*268	(11%)

(\*202 responses were both arbitrators and mediators)

### **Question 2**

<i>Are you an attorney?</i>	1,149	(45%)
<i>Are you an non-attorney?</i>	1,400	(55%)

### **Question 3**

<i>Are you classified as a public arbitrator?</i>	1,519	(59%)
<i>Are you classified as an industry arbitrator?</i>	983	(38%)

### **Question 4**

<i>How often do you read The Neutral Corner?</i>		
Every issue:	2,042	(80%)
Occasionally:	449	(18%)
Never:	35	(1%)

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<sup>1</sup>The answers to some of the questions do not total 100% because not all of the questions were answered by everyone.

**Question 5**

Overall, do you like our newsletter?

Yes:	2,285	(89%)
No:	32	(1%)
No opinion:	217	(8%)

**Question 6**

Overall, how would you rate the usefulness of The Neutral Corner?

Excellent:	601	(24%)
Good:	1,587	(62%)
Fair:	303	(12%)
Poor:	17	(1%)

**Question 7**

Do you believe that The Neutral Corner achieves its primary goal of informing NASD Dispute Resolution neutrals about new initiatives, proposed rule filings, and important procedures and guidelines?

Yes:	2,413	(94%)
No:	62	(2%)

**Question 8**

How would you rate the general content of The Neutral Corner?

Excellent:	660	(26%)
Good:	1,634	(64%)
Fair:	197	(8%)
Poor:	8	(1%)

**Question 9**

How would you rate the clarity of the language in The Neutral Corner?

Excellent:	945	(37%)
Good:	1,417	(55%)
Fair:	134	(5%)
Poor:	10	(1%)

**Question 10**

The Neutral Corner is currently published three times a year. How often would you like to see it published?

4x yr.:	855	(33%)
3x yr.:	1,494	(58%)
2x yr.:	104	(4%)
1x yr.:	29	(1%)

**Question 11**

Would you be willing to read our newsletter if it were only available online, meaning available on an Internet Web Site? (If you answer "no" to this question, please explain why in the comments section below.)\*

Yes:	1,223	(48%)
No:	1,227	(48%)

\* Although 48% indicated that they would not want to read the newsletter online, a significant number of neutrals said that they would feel differently if we notified them—by e-mail—that the newsletter had been posted. Many were concerned that they would forget to access the newsletter on our Web Site without a reminder from us.



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## Arbitrator Questions

In conjunction with the May NASD Regulation Spring Securities Conference, NASD Dispute Resolution conducted Panel Member and Chairperson Training Programs. Following are some of the questions that were asked by session participants.

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### **Q: I want to become a mediator— what do I have to do?**

A: To qualify as an NASD mediator, individuals must file an application with four letters of reference from parties who have observed the applicant's mediation technique. A combination of formal mediator training and experience as a mediator is required.

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### **Q: Why don't arbitrators get copies of the witness lists prior to the hearing?**

A: Staff ordinarily provides arbitrators with the witness lists for all parties. If you do not receive such lists, contact the staff person assigned to your case.

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### **Q: As a new arbitrator, when can I expect to get a case?**

A: In November 1998, NASD Dispute Resolution implemented the Neutral List Selection System (NLSS), allowing parties to select arbitrators from lists generated by an automated system. NLSS operates to ensure that all available arbitrators in a particular hearing location are provided an equal opportunity to appear on the lists that are sent to the parties. New arbitrators are initially moved to the "top of the list" for inclusion on such lists. After a new arbitrator appears on a list, he/she will not appear on a second list until all other arbitrators in that hearing location appear on a list.

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### **Q: What information goes out to parties on each arbitrator?**

A: To help parties select arbitrators for their case, NASD Dispute Resolution sends disclosure reports on each arbitrator. *Arbitrator Disclosure Reports* contain an arbitrator's employment history, education, training, disclosure/conflict information, publicly available awards, and a self-narrative description of his/her background. The *Reports* also list an arbitrator's expertise, if any, in various types of securities and controversies.

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### **Q: If I get selected for two or more cases, am I precluded from getting on future lists?**

A: No. NLSS works on a number we call the pool counter. Whenever a neutral appears on a list that is sent to parties in a case, his/her pool counter increases by one. When NLSS generates a list for a case in a specific hearing location, it begins with neutrals in that hearing location with the lowest pool counter numbers.

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### **Q: How will parties know how much arbitrator experience I have?**

A: Parties can review the arbitrator's experience by taking into account any publicly available awards on his/her *Arbitrator Disclosure Report*. The *Report* lists only cases that are concluded by award. It does not list cases that are settled or withdrawn. The arbitrator may elaborate on his/her experience in the background paragraph in his/her *Arbitrator Disclosure Report*.

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**Q: How often do injunctive relief cases settle?**

A: In 2000, approximately 95 percent of the 667 cases that involved a request for injunctive relief settled.

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**Q: What is the percentage of cases handled by a single arbitrator?**

A: In 2000, single arbitrator panels presided at approximately 27 percent of all closed cases.

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**Q: Can I update my arbitrator data online?**

A: Yes. Our Web Site ([www.nasdadr.com](http://www.nasdadr.com)) contains a self-explanatory online form. For more on electronically updating your arbitrator information, see the article titled "Duty To Disclose/Update" in this edition of *The Neutral Corner*.

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**Q: How many arbitrators are on the roster?**

A: At the present time, there are more than 7,000 arbitrators available for selection and service on the NASD Dispute Resolution roster.

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**Q: How many cases should I serve on before taking Chairperson training?**

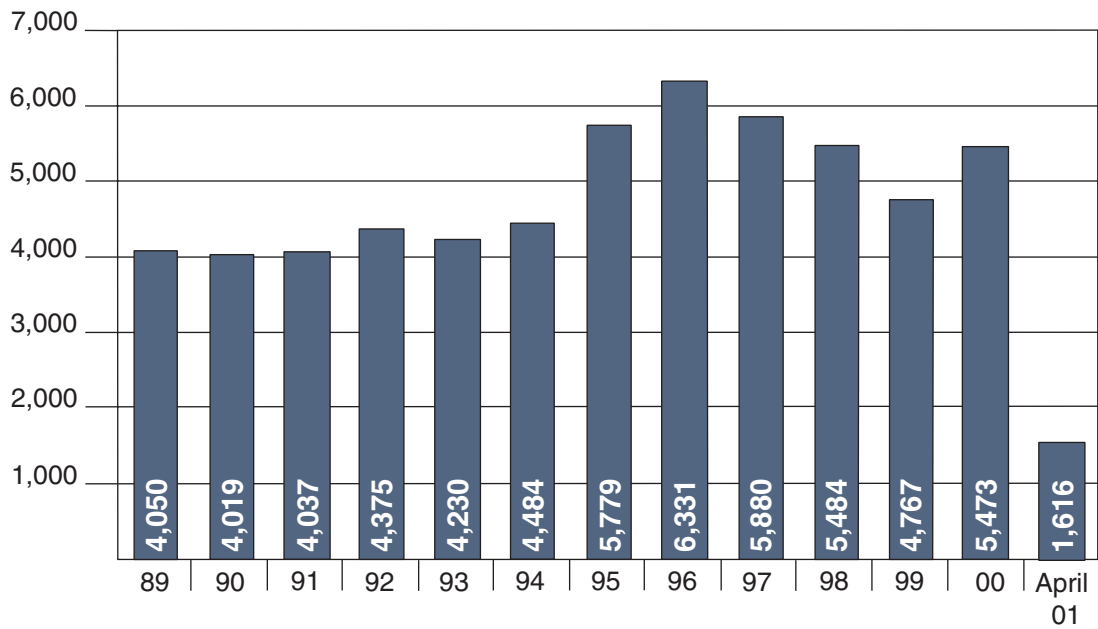
A: Arbitrators must use their best judgment to determine whether they are ready for Chairperson training.

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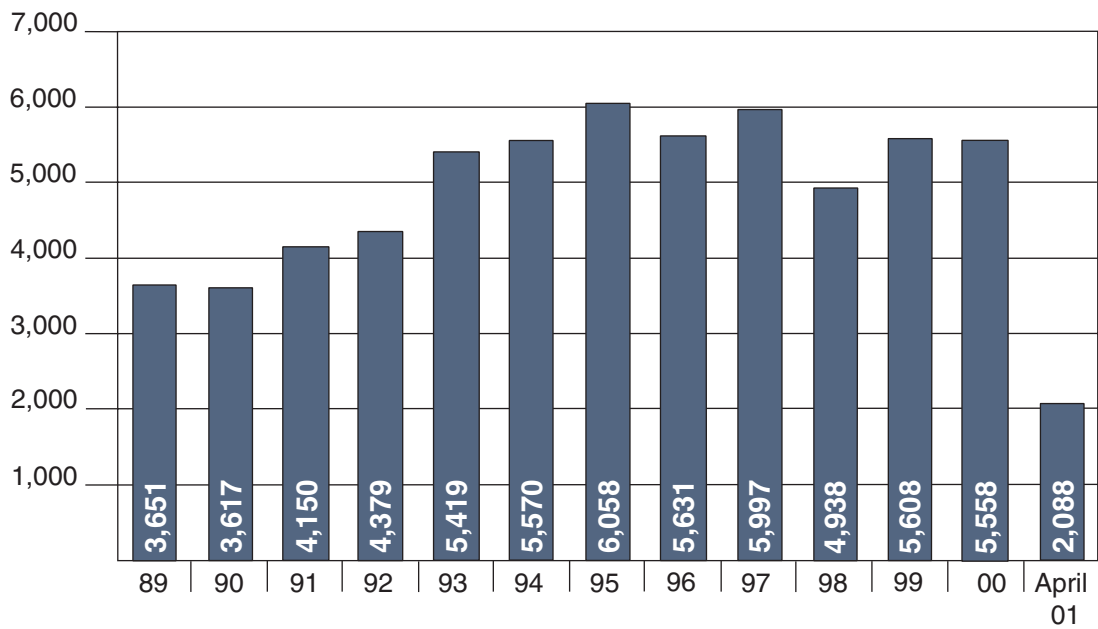
**Q: Can I serve with other arbitrators more than once?**

A: Yes. You can serve with other arbitrators more than once, provided the parties who select you are aware of such prior service. The *Arbitrator Disclosure Checklist*, which is part of your *Oath of Arbitrator*, contains a question that asks whether you had any social or professional relationship with any arbitrator assigned to the case.

### NASD Arbitration Cases Closed Annually



### NASD Arbitration Cases Filed Annually



To view detailed statistics updated quarterly, visit the NASD Dispute Resolution Web Site at [www.nasdaq.com/statistics.asp](http://www.nasdaq.com/statistics.asp).

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*The Neutral Corner* is published by NASD Dispute Resolution in conjunction with NASD Corporate Communications. *The Neutral Corner* is published three times each year. Send all correspondence to Tom Wynn, Editor, NASD Dispute Resolution, 125 Broad Street, 36th Floor, New York, New York 10004, or call (212) 858-4400.

This publication is provided at no cost to all NASD-approved neutrals. To change your mailing address, contact Margaret Duzant, NASD Dispute Resolution, at (212) 858-4310. Annual subscriptions may be purchased for \$25, and single issues may be purchased for \$10 through NASD MediaSource®. Send a check or money order payable to the National Association of Securities Dealers, Inc., to NASD MediaSource, P.O. Box 9403, Gaithersburg, MD 20898-9403, or order using American Express, MasterCard, or Visa, by calling (240) 386-4200, weekdays, 9 a.m. to 5 p.m. (Eastern Time).

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