

June 2004

The Neutral Corner

WHAT'S INSIDE

Messages from the Editor	2
Expedited Proceedings for Elderly or Seriously Ill Parties	7
Arbitrator Removal from the NASD Roster	8
The Latest in Arbitrator Training	9
SEC Approval of Arbitrator Classification Changes	10
Question and Answer on Expediting Hearings	11
Comments and Feedback	11

What the New Customer Arbitration Code Will Mean to Arbitrators

By David E. Robbins

Get ready for critical changes to the way you arbitrate NASD cases. When the Securities and Exchange Commission approves pending rule proposals, the NASD *Code of Arbitration Procedure* that you have worked with for years will be replaced with a Customer Code, an Industry Code and a Mediation Code. This article describes the most significant changes for arbitrators under the proposed NASD Customer Code. View this rule filing on the NASD's Web site - www.nasdadr.com - by clicking on these links: "Rules & Procedures; Rule Filings and Guidance; Rule Filings; 2003 Dispute Resolution Rule Filings."

Keep in mind that the revised Code is subject to further amendment and will not become final until the Securities and Exchange Commission (SEC) approves it.

Sanctions Against Parties and Their Representatives – Rule 12211

Your arsenal of sanctions against a party or the party's representative has been enhanced for their failure to comply with any provision of the Code or any of your Orders, as long as the sanctions are not "prohibited by applicable law". They include assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against that party; assessing postponement and/or forum fees; and, assessing attorney's fees, costs and expenses.

"Your arsenal of sanctions against a party or the party's representative has been enhanced..."

Messages from the Director of Neutral Management

Thomas F. Wynn has departed from NASD.

Former Associate Director of Neutral Management and Editor-in-Chief of this newsletter, Tom Wynn, has departed from NASD after 34 years with NASD's Arbitration Department. Mr. Wynn created *The Neutral Corner* and was its editor and primary author. Mr. Wynn is a graduate of Fordham undergraduate and law schools. Since Tom started with NASD in 1970 as a staff attorney, the Dispute Resolution section has grown from two attorneys to a staff that today exceeds 200. In recent years, his activities focused on arbitrator training, where he assisted in the development and maintenance of the forum's arbitrator training programs. We wish Tom all the best in his future endeavors.

Lisa Angelson is appointed Associate Director of Neutral Management and Editor-in-Chief of The Neutral Corner. Ms. Angelson joined NASD Dispute Resolution in December 1997 as a Staff Attorney, and was promoted to Senior Attorney in 2001. She has demonstrated outstanding abilities in her role as the arbitrator trainer for the Northeast Region, conducting training programs based on the region's recruitment needs. Arbitrators nationwide who have taken the online Chairperson training program will recognize her name as the NASD contact person for content-related questions and support. In her new position, Ms. Angelson will be responsible for developing new and innovative methods to deliver basic, advanced, and continuing training for Dispute Resolution's Roster of Arbitrators, including the creation, development and implementation of new online training courses and modules. Additionally, she will govern the Editorial Board for this newsletter. Ms. Angelson is a graduate of Emory University and Seton Hall University School of Law.

Dispute Resolution News

Case Filings

Case filings from January 1, 2004 to April 30, 2004 reflect a 4% decrease compared to the same time last year. We experienced a decrease from 3,116 in 2003 to 2,988 in 2004. However, we processed 922 new case filings in April 2004 compared to 836 case filings in April 2003. Of the 2,988 cases filed through April of this year, 326 were analyst cases.

New Hearing Locations

NASD Dispute Resolution opened a new hearing location in Hartford, Connecticut on March 31, 2004. The addition of Hartford brings the number of hearing locations to 52. In September 2004, the forum will add new hearing locations in Columbia, South Carolina; Wichita, Kansas; Des Moines, Iowa; and Birmingham, Alabama. We are in the process of recruiting arbitrators for those locations. If you know of anyone in those locations who would be an asset to the Roster, please encourage them to apply through our Web site (www.nasdadr.com). To call for an application, please contact our Neutral Management Department at 212-858-4339.

What the New Customer Arbitration Code Will Mean to Arbitrators continued

Online Claim Filing System

On March 1, 2004, NASD Dispute Resolution made Arbitration Online Claim Filing available on its Web site. Any party may voluntarily use the online system to:

- ▶ Complete an online Claim Information Sheet;
- ▶ Generate a printable receipt of filing;
- ▶ Print instructions for completing filing; and
- ▶ Submit a Statement of Claim via e-mail.

The Online Arbitration Claim Filing system is expected to be finalized in the second quarter of 2004. Once completed, several enhancements will be added, including:

- ▶ The ability to save claims as "templates" to be used as the basis for subsequent claims;
- ▶ The ability to save multiple partially completed claims and return to them later (currently you can save only one in-progress claim at a time); and
- ▶ Enhanced shortcuts for selecting parties.

Online arbitration claim filing is part of a comprehensive, multi-phased migration of NASD Dispute Resolution's computer systems to a Web-based, fully interactive claim filing and tracking system, to be deployed in phases over the next few years.

The Rules Have Changed With Respect to Your Selection and Appointment—Rules 12400 – 12407

Neutral List Selection - The Neutral List Selection System (NLSS) will now select arbitrator names on a random rather than a rotational basis. Parties may no longer unilaterally request arbitrators with particular expertise. There will be three arbitrator rosters: non-public, public and chairperson. Chairpersons must be public arbitrators who have 1) either completed NASD chairperson training or have substantially equivalent training or experience; and 2) either have a law degree and are a member of a bar association and have served as an arbitrator through the issuance of at least two SRO Awards, or have served as an arbitrator through at least three Awards.

Number of Arbitrators and Panel Composition – One public arbitrator for claims of up to \$25,000, from the chairperson roster; one public arbitrator from the chairperson roster for claims more than \$25,000 to \$50,000 (unless any party requests a panel of three, two of whom will be public); and, two public arbitrators and one non-public arbitrator for all other cases. In all instances, the parties can agree to modify these rules.

Reducing the Chance of a Strike Out - If a panel consists of only one arbitrator, NLSS will generate a list of 7 public arbitrators from the chairperson roster. If a panel consists of three arbitrators, it will generate three separate lists of 7 arbitrators each – of non-public arbitrators, public arbitrators and chairpersons. Within approximately 30 calendar days after the last

answer is due, the Director will send the lists generated by NLSS to all the parties at the same time (along with 10 years of employment history and other background information about each arbitrator). If a party requests "additional information about an arbitrator", the Director will ask the arbitrator to supply that additional information and then will forward it to all the parties at the same time. Each separately represented party may strike up to 5 of the arbitrators from each list for any reason.

Procedural and Dispositive Motions - Rules 12503 and 12504

The NASD's all-inclusive, single Code did not provide for motion practice. That will change.

Procedural Motions – Every such motion must include a description of the efforts made to resolve the matter and must be served at least 20 calendar days before a scheduled hearing. Parties have 10 calendar days to respond to the motion, unless the moving party agrees to an extension of time or the Director or you decide otherwise. You decide the following procedural motions: combining or separating claims or arbitrations or changing the hearing location – while the Director decides these motions until a panel is appointed, you decide them if they are made after you are appointed; discovery related motions – generally the chairperson decides them; recusal motions - requesting a sitting arbitrator to withdraw from service - are decided by the arbitrator who is the subject of the request; and, eligibility and dispositive motions are decided by the full panel.

Dispositive Motions Before a Hearing on the Merits - This is probably the most controversial new rule. It states "motions to decide a claim before a hearing are discouraged and may only be granted in extraordinary circumstances." Please understand two things: (1) state laws usually require that in court, the party "moving to dismiss" a claim (or the whole case) must prove that there are no material issues of fact presented by the "non-moving party" on that particular claim or claims; and (2) if the motion is granted, there will be no substantive hearing on the merits of the dismissed claims. Under the new rule, dispositive motions must be in writing and must usually be served at least 60 days before a scheduled hearing. Parties have 45 days to respond. Motions to dismiss cannot be granted unless a prehearing conference is held (unless the parties waive it, which is unlikely). To discourage the unbridled use of such motions, you may issue sanctions if you determine that a party filed the motion in bad faith. In its rule filing with the SEC, the NASD said that it "believes parties have the right to a hearing in arbitration. However, NASD also acknowledges that in certain extraordinary circumstances, it would be unfair to require a party to proceed to a hearing."

The *Discovery Guide* Becomes a Rule—Rules 12505 - 12511

In 1999, the NASD issued *Notice to Members 99-90 "The Discovery Guide"* and while parties and arbitrators have largely followed it, it remained just that - a guide. The new Code codifies the discovery procedures outlined in the Guide; extends deadlines for compliance with and objections to discovery requests; and, provides for motions to compel discovery, depositions and heightened sanctions for non-compliance.

The *Discovery Guide's* Document Production Lists 1 and 2 describe the documents that are *presumed to be discoverable* in all customer arbitrations and the other Document Production Lists may apply in a particular case, depending on the specific causes of action or claims alleged. Under the new Code, unless the parties agree otherwise, they must either: produce to all parties all documents in their possession or control from Lists 1 and 2 and documents from any other applicable list; identify and explain the reason that specific documents in those lists cannot be produced within the required time and state when the documents will be produced; or, object to producing the documents. Production, explanation or objection must be made within 60 calendar days of the date that the Answer to the Statement of Claim is due. When a party seeks additional documents or information not in *The Discovery Guide*, such requests must be "specific and relate to the matter in controversy."

The new rules set forth the manner in which a party may object to document or information production requests. The objecting party must identify which document or requested information it is objecting to and why. Objections should not be filed with the Director and the parties must produce all applicable listed documents and other requested documents or information as to which they have not objected. Any objection not made within the 60 day required time period is waived, unless you determine that the party had substantial justification for failing to make the objection within the required time.

Motions to request the chairperson to compel the opposing party to produce documents or information may be made when that party has failed to comply with the production rule or has objected to the production of documents or information in accordance with the new rule. Motions to compel discovery must include the disputed document request or list, a copy of any objection, and a description of the efforts of the moving party to resolve the issue before making the motion.

Depositions are strongly discouraged but, upon the motion of a party, may be permitted by you "only under very limited circumstances", such as preserving the testimony of ill or dying witnesses; accommodating essential witnesses unable or unwilling to travel long distances for a hearing; expediting large or complex cases; or, if you determine that "extraordinary circumstances exist."

You may issue sanctions against any party for failing to comply with the discovery provisions of the Code (unless you determine that there is substantial justification for the failure to comply) or for frivolously objecting to the production of requested documents or information.

Postponements Get Even Tougher, But... Rule 12601

A hearing may now only be postponed if: all the parties agree; the Director postpones it "in extraordinary circumstances" (a national or regional emergency); or you choose to postpone on your own initiative or upon motion of a party. A party's motion to postpone must now be made 10 or more calendar days before the scheduled hearing. However, if it is made within 10 days of the hearing, you may still grant the adjournment if you believe good cause exists.

Conclusion

At the conclusion of every hearing, the chairperson asks the parties; "Has each of you had a full and fair opportunity to be heard?" Your goal is to help ensure that the response will be "Yes." By converting The *Discovery Guide* to Discovery Rules; by providing you with more meaningful and far-ranging sanction authority; and, by formalizing a dispositive motion practice, the new Customer Code should facilitate the accomplishment of this goal because it will streamline the process, contribute to consistent rulings and provide more effective guidance to you and to the parties.

Mr. Robbins is a partner in the New York City law firm of Kaufmann, Feiner, Yamin, Gildin & Robbins LLP, where he specializes in securities arbitration, mediation, litigation and disciplinary proceedings before regulatory authorities. He represents customers, brokers and firms. He has been a mediator and arbitrator of commercial disputes at NASD, NYSE, and the AAA for almost 20 years. He served as Special Deputy Attorney General of New York, responsible for the civil and criminal prosecution of securities fraud cases, and was later with the American Stock Exchange as Director of the Compliance Department, Director of Arbitration and Director of Disciplinary Hearings. He is the author of Securities Arbitration Procedure Manual (5th Ed. 2003 Matthew Bender, a division of Lexis Publishing). This annually updated two-volume treatise presents pragmatic, balanced guides to the nationwide practice of securities arbitration and mediation. Mr. Robbins is also a member of the Association of the Bar of the City of New York, the New York County Lawyers' Association, the New York City Road Runners Club and is on the Board of Editors of the Securities Arbitration Commentator.

Expedited Proceedings for Elderly or Seriously Ill Parties

By Todd Saltzman

On June 12, 2003, the National Arbitration and Mediation Committee (NAMC) approved a pilot program in NASD's Southeast Regional Office for expediting cases in which a party is elderly and/or seriously ill. Due to the success of the pilot program, NASD will expand the program to each of the five NASD Dispute Resolution regional offices effective June 7, 2004.

According to the most recent data from the Southeast Regional Office, there were 86 requests for expedited proceedings since the start of the pilot program. Of that number, 82 requests were approved and 4 were denied.

Upon request, NASD Dispute Resolution staff will expedite the administration of arbitration proceedings in matters involving elderly or seriously ill parties. In such situations, staff will begin the arbitrator selection process, schedule the Initial Prehearing Conference, and serve the final award as quickly as possible.

Arbitrators will be expected to work with the parties to accommodate the needs of elderly or seriously ill parties in scheduling hearing dates, resolving discovery disputes, and determining the reasonableness of postponements. At the Initial Prehearing Conference, counsel for an elderly or seriously ill party may advise the arbitration panel of his/her desire for expedited hearings. When such a request is made, the arbitration panel is expected to strive for hearing dates and discovery deadlines that will expedite the process, while providing a reasonable amount of time for case preparation.

NASD staff cannot administratively circumvent the time requirements set forth in the *Code of Arbitration Procedure*, such as the time to answer a claim. However, the parties are free to change these time requirements by mutual agreement.

Todd Saltzman is the Associate Director of Case Administration for NASD Dispute Resolution. Prior to assuming his present position, Mr. Saltzman worked as a Staff Attorney in the Midwest Regional Dispute Resolution office from 1995-1999. From 1999-2002, Mr. Saltzman worked as a consultant. Mr. Saltzman re-joined the NASD in December 2002. He is a graduate of the University of Wisconsin - Madison and the University of Kansas School of Law. He is a member of the Illinois Bar.

Arbitrator Removal from the NASD Roster

In the June 2002 issue of this newsletter, we answered the question “under what circumstances would an arbitrator be removed from the roster?” Since this continues to be a matter of concern for arbitrators, we are revisiting the question in this article.

Arbitrators may be removed from the NASD Roster of Arbitrators for a variety of reasons. An arbitrator may be temporarily or permanently removed for any of the reasons articulated in the Criteria for Temporary and Permanent Removal, a copy of which is sent to every arbitrator upon appointment to a case. For example, given the criteria, an arbitrator may be temporarily removed for being “the subject of, or a party to, a pending investment civil action or arbitration claim initiated by a customer.” One of the several reasons for permanent removal under the criteria includes “misstatement or failure to disclose material information in the arbitrator profile.”

In addition to removal pursuant to the Criteria for Temporary and Permanent Removal, arbitrators also may be removed for displaying a demeanor or temperament unsuitable for members of our roster. Since their peers, the parties, and the staff evaluate arbitrators, reports of inappropriate behavior are provided in a variety of ways, and undergo careful scrutiny.

Examples of inappropriate behavior that might result in an arbitrator’s removal from the roster include, but are not limited to:

- ▶ Failing to be impartial, both in appearance and in fact;
- ▶ Being rude to parties, counsel, and/or staff;
- ▶ Perceived inability to follow or grasp the issues in dispute;
- ▶ Being inflexible, especially with regard to mutual requests from parties;
- ▶ Causing repeated and routine scheduling problems;
- ▶ Not being prepared for conferences and hearings;
- ▶ An unwillingness to abide by the *Code of Arbitration Procedure*; and
- ▶ Infraction of the *Code of Ethics for Arbitrators in Commercial Disputes*.

NASD also removes inactive arbitrators from its roster for failing to attend its mandatory basic training program within a “reasonable” period of time. “Reasonable” is currently defined as within five years from the date the arbitrator was accepted to the roster.

No one has the “right” to be an arbitrator and NASD strives to maintain a roster of arbitrators of the highest quality and integrity. Accordingly, reports citing any one of the above examples may result in our confidentially dismissing an arbitrator from our roster without notice or appeal. In doing so, we preserve the integrity of our entire roster, which benefits the parties and the many other outstanding arbitrators who remain.

The Latest in Arbitrator Training

Discovery Workshop

On March 17, 2004, NASD Dispute Resolution President Linda Fienberg hosted a call-in program for members of the Roster of Arbitrators. The subject was the discovery process, abuse of that process, and available sanctions. A total of 1,255 arbitrators participated in the workshop, and we received very positive feedback from them. A recording of the workshop was available through MCI between March 18 and 24, 2004 for those who could not participate live on March 17, 2004. Thereafter, the recording was available directly on the NASD's Web site. In total, over 2,000 arbitrators listened to the live or recorded program. A list of the questions and answers from the call-in program will be posted on the "Ask NASD" section of our Web site. We anticipate two additional Workshops before the end of 2004. These workshops will continue to be free of charge for arbitrators on the NASD roster.

The Availability of Online, Subject-Specific Mini-Courses

On May 1, 2004, NASD Dispute Resolution released the first in a series of online mini-courses developed as part of its comprehensive Arbitrator Training Program. The courses are referred to as "mini-courses" because they are subject specific, can be completed in 60 – 90 minutes, and are inexpensive. The first mini-course is titled "Your Duty to Disclose" and, upon successful completion, arbitrators participating in the mini-course will be able to:

- ▶ Better understand arbitrator disclosure requirements.
- ▶ Explain the necessity for complete disclosure, and its importance to the neutrality of the process.
- ▶ Correctly follow the steps for making a disclosure.
- ▶ Ensure that you meet your continuing disclosure obligations.

In June 2004, NASD Dispute Resolution expects to release the second in its series of online mini-courses, this one titled "Discovery, Abuse and Sanctions." Upon successful completion of the course, arbitrators will be able to:

- ▶ Describe the purpose of NASD's Discovery Guide.
- ▶ Explain the respective duties of the parties and the arbitrator with regard to the discovery process.
- ▶ Describe why a party might request an Order of Confidentiality.
- ▶ Address requests for Orders of Confidentiality.
- ▶ Recognize and address discovery abuses.
- ▶ Choose from possible sanctions for discovery abuses.

NASD Dispute Resolution is committed to the further education and training of its Roster of Arbitrators. Accordingly, the forum will continue to release online training courses, as they become available.

NASD will include successful completion of mini-courses on the arbitrator biographical information that is provided to parties. The cost of an online mini-course—which is available to members of NASD's Roster of Arbitrators 24 hours a day, seven days a week—is \$25. For access to a course, go to NASD Dispute Resolution's Web site (www.nasdr.com), and look for the button on our Home Page that reads "View Information About NASD Dispute Resolution Online Arbitrator Training."

Completion of any online mini-course does not replace NASD Dispute Resolution's mandatory basic training program for arbitrators.

SEC Approval of Arbitrator Classification Changes

On April 16, 2004, the Securities and Exchange Commission (SEC) approved NASD's 2003 proposed rule change to amend certain sections of the NASD Code of Arbitration Procedure (Code) relating to arbitrator classification and disclosure in NASD arbitrations.

After the change, which will go into effect in July 2004, Rules 10308 and 10312 of the Code will be amended to: (1) modify the definitions of public and non-public arbitrators; (2) provide specific standards for deciding challenges to arbitrators for cause; and (3) clarify that compliance with arbitrator disclosure requirements is mandatory. Specifically, the rule change will amend the definition of non-public arbitrator in Rule 10308(a)(4) of the Code to: (1) increase from three years to five years the period for transitioning from a non-public to a public arbitrator; and (2) clarify that the term "retired" from the industry includes anyone who spent a substantial part of his or her career in the industry. The rule change would also prohibit anyone who has been associated with the industry for at least 20 years from ever becoming a public arbitrator, regardless of how many years ago the association ended.

NASD is in the process of surveying its Roster of Arbitrators to make certain that all arbitrators are correctly classified according to the new rule. For further information on the approved rule change, see our Web site at http://www.nasdr.com/pdf-text/rf03_95_app.pdf SEC Approval of Arbitrator Classification Changes.

Question and Answer on Expediting Hearings

Question: As an arbitrator who recently served as a Chairperson, I noted in the Initial Prehearing Script language that reads:

“Expeditious resolution of disputes is one of the goals of arbitration. Therefore, the commencement of evidentiary hearings within nine months or less after this conference is the goal of NASD and the arbitrators. It is understood that there may be times when this is not feasible. However, the commencement of hearings more than nine months after this conference should be the exception.”

Is it mandatory that evidentiary hearings commence within nine months or less of the Initial Prehearing Conference?

Answer: No. Nine months is a recommendation, not a requirement. Arbitrators should give strong consideration to this recommendation, while remaining reasonable. For example, it would be reasonable if all parties were to agree that the evidentiary hearing would commence ten months from the Initial Prehearing Conference. If the parties agreed to a 24-month span between the evidentiary hearing and the Initial Prehearing Conference, that could be considered unreasonable. When working with the parties to schedule hearings, arbitrators must use their best judgment and reason, taking into consideration the desire to expedite the process and the parties’ circumstances.

Comments and Feedback

The Neutral Corner welcomes your comments, feedback, or questions on the material presented in this publication or on other arbitration and mediation issues. *The Neutral Corner* also invites readers to submit articles on important issues of law and procedure relating to mediation, arbitration, or other alternative dispute resolution processes.

Please send your article to Lisa Angelson, Associate Director of Neutral Management and Editor of *The Neutral Corner*, Department of Neutral Management, NASD Dispute Resolution, One Liberty Plaza, 165 Broadway, 27th Floor, New York, New York 10006.

Directory

Linda D. Fienberg
President
NASD Dispute Resolution

George H. Friedman
Executive Vice President
NASD Dispute Resolution

Kenneth L. Andrichik
Senior Vice President
Mediation & Business Strategies

Jean I. Feeney
Vice President & Chief Counsel

Dorothy Popp
Associate Vice President,
Director of Operations

Richard W. Berry
Associate Vice President &
Director, Case Administration

Barbara L. Brady
Associate Vice President &
Director, Neutral Management

Elizabeth R. Clancy
Vice President & Regional Director,
Northeast Region

Judith Hale Norris
Vice President & Regional Director,
Western Region

Rose Schindler
Associate Vice President &
Regional Director, Southeast Region

Shari Sturm
Regional Director,
Mid-Atlantic Region

Scott Carfello
Regional Director
Midwest Region

Lisa Angelson
Associate Director of Neutral
Management and Editor of
The Neutral Corner

NASD Dispute Resolution Offices

Northeast Region

One Liberty Plaza
165 Broadway
27th Floor
New York, NY 10006
Phone: (212) 858-4400
Fax: (212) 858-4429

Mid-Atlantic Region

1735 K Street, NW
Washington, DC 20006
Phone: (202) 728-8958
Fax: (202) 728-6952

Western Region

300 S. Grand Avenue
Suite 900
Los Angeles, CA 90071
Phone: (213) 613-2680
Fax: (213) 613-2677

Southeast Region

Boca Center Tower 1
5200 Town Center Circle, Second Floor
Boca Raton, FL 33486
Phone: (561) 416-0277
Fax: (561) 416-2267

Midwest Region

10 S. LaSalle Street, Suite 1110
Chicago, IL 60603-1002
Phone: (312) 899-4440
Fax: (312) 236-9239

© June 2004. NASD.
All rights reserved.

NASD is a registered trademark of National Association of Securities Dealers. MediaSource is a service mark of NASD.

The Neutral Corner is published by NASD Dispute Resolution in conjunction with NASD Corporate Communications. *The Neutral Corner* is published six times each year. Send all correspondence to Lisa Angelson, Associate Director of Neutral Management and Editor of the *Neutral Corner*, NASD Dispute Resolution, One Liberty Plaza, 165 Broadway, 27th Floor, New York, NY 10006, 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 NASD, 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).

No part of this publication may be copied, photocopied, or duplicated in any form or by any means without prior written consent from NASD. Unauthorized copying of this publication is a violation of the federal copyright law.