The Neutral Corner

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Task Force Proposal Approved

This article highlights Securities and Exchange Commission (SEC) affirmation of a major National Association of Securities Dealers, Inc. (NASD®) Arbitration Policy Task Force initiative aimed at improving the arbitration process for all forum users: *party selection of arbitrators by a list method*.

List Selection

On October 14, 1998, the SEC approved the NASD Regulation, Inc., rule proposal that implements a list method of selecting arbitrators for all public customers and intra-industry cases. Effective November 17, 1998, the new arbitrator list selection procedures became applicable to NASD Regulation℠ arbitration cases.

NLSS

NASD Rule 10308—Designation of Number of Arbitrators—and conforming rule changes provide parties with a much greater voice in selecting their arbitrator(s) by utilizing a **Neutral List Selection System (NLSS)**.

NLSS is the software that maintains the arbitrator roster and performs various functions relating to the selection of arbitrators. As reported in the September 1998 edition of *The Neutral Corner*, NLSS generates arbitrator lists for parties by sorting and searching for arbitrators according to four primary factors: public or non-public classification, geographic hearing location, rotation, and obvious conflicts of interest with the parties. If a party requests that the lists include arbitrators with subject-matter knowledge, NLSS will add this factor when it searches for arbitrators to be placed on the lists.

Parties receiving the lists may strike any of the arbitrators listed for any reason. Parties may rank, according to preference, any of the arbitrators remaining on the lists. After the parties file the lists with NASD Regulation, the staff once again uses NLSS to consolidate party preferences and to appoint the presiding arbitrators. Parties also may agree to the Chairperson of the panel from among the appointed arbitrators.

Since parties now are empowered to select arbitrators from lists generated by an automated system that relies upon accurate, current, and complete arbitrator information, it is essential that arbitrators provide this information to NASD Regulation. As discussed ahead, the Office of Dispute Resolution has undertaken a nationwide effort to ensure that all arbitrators update their biographical data.

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Message From The Editor

Friedman Leads Dispute Resolution

On December 21, 1998, George Friedman joined the NASD Regulation Office of Dispute Resolution as a Senior Vice President with management responsibility over NASD Regulation's arbitration and mediation programs. In this role, he reports to Executive Vice President Linda D. Fienberg.

Before joining NASD Regulation, Friedman spent 22 years with the American Arbitration Association (AAA). He began as an AAA Tribunal Administrator in the New York Region. He was promoted to Regional Director, then to Vice President of Case Administration, and finally to Senior Vice President. In his last position, he was responsible for the AAA's Case Administration, Information Systems, Audit functions, and certain regional offices.

Friedman was awarded his J.D. from Rutgers Law School and is a member of the New York and New Jersey Bars.

"George brings a wealth of knowledge and experience to NASD Regulation's arbitration and mediation forum," said Executive Vice President Linda Fienberg. "We feel fortunate to have attracted a person of George's experience, intellect, and integrity in the alternative dispute resolution field."

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 Regulation reserves the right to publish or not publish the letters received.

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New Ceilings

New thresholds for simplified and single arbitrator cases became effective *simultaneously* with the new list selection procedures. The changes to NASD Rules 10302 and 10203 raise the ceiling of public customer and intra-industry claims that may be decided by one arbitrator *exclusively on the papers* filed from $10,000 to $25,000. The changes to NASD Rules 10308 and 10202 raise the ceiling for standard cases that may be heard by one arbitrator from $30,000 to $50,000.

Although the SEC approved these changes in May 1997, their implementation was to coincide with the approval of proposed increases in filing and hearing fees for all arbitrations. The fee proposals, together with a proposal to raise arbitrator honoraria, still await SEC approval.

Mass Mailing To Arbitrators

On November 18, 1998, NASD Regulation mailed a packet of documents to 7,205 available arbitrators. The purpose of this mass mailing was to advise arbitrators of NLSS, to provide arbitrators with their disclosure reports, and to request that they correct, update, and elaborate on the information contained in these reports. Arbitrators also were asked to provide information concerning hearing location preferences. Lastly, they were advised of the NASD Regulation arbitrator travel policy.

This information is critically important because it will help to ensure that parties are provided with accurate, current, and complete information concerning the neutrals they decide to strike or select under NLSS. In addition, this information will allow NASD Regulation to better serve all forum participants—arbitrators, as well as parties.

Arbitrators who have not filed the mass mailing documents should do so immediately. Send the documents to Gary Tidwell, Director, Neutral Training and Development, NASD Regulation, Inc., Office of Dispute Resolution, 125 Broad Street, 36th Floor, New York, NY 10004.

Confronting Chaos In The Arbitration Universe: Dealing With The Under-Represented Party

by Francis O. Spalding

Editor's Note: ***Part One*** *of this two-part article, which appeared in the September issue, introduced the types of under-represented parties arbitrators may encounter, highlighted the Chairperson's diagnostic responsibility, and considered the almost universal problem presented by the under-represented—unfamiliarity with the arbitration process.* ***Part Two****—appearing in this issue—addresses several problems of frequent, though not universal, occurrence in cases of under-representation and discusses possible solutions.*

Problems Related To An Inappropriate Approach Or Attitude

Whether the incompetent lawyer brings to the hearing a combative attitude ill-adapted from courtroom experience or the unrepresented party throws himself or herself helplessly upon the mercy of the tribunal, the arbitrator's best defenses are control and example. He or she must establish control (without stifling the process) no matter what the circumstances of the hearing, and that objective is only more important where a party has an inappropriate attitude. The arbitrator's own example of businesslike disdain for that which is inappropriate may be supplemented, with care, by favoring, or even specifically endorsing or encouraging, the appropriate conduct of those participants who do not present an attitude problem. Specific lecturing on the problem may be required in some circumstance, but the arbitrator must be sensitive to the fact that any such chastisement must be public—in the sense that it occurs in the presence of the other parties—since neutrality can never be sacrificed by ex parte dealings with a party in the attempt to solve this or any other problem of this character.

Problems Related To An Unclear Case Strategy

Perhaps the most difficult problem that the under-represented party can present to the arbitrator is that of an incomplete, muddled, or ill-considered case strategy. It is hardly possible to conduct a fair and efficient hearing unless and until there is some modicum of agreement between the parties as to what the case is about and until each side is prepared to present a coherent view of its position on the issues presented. Yet it is hardly fair for the arbitrator, who is and must remain neutral, to coax or coach the unprepared party more effectively to meet the case of his or her better-prepared opponent.

There is no definitive line to be drawn here. The arbitrator must use open-ended and suggestive questions that go to, but never beyond, what he or she perceives as the limit of fairness. The arbitrator must act throughout with patent sensitivity to the concerns of the other, properly prepared side, and must ultimately be prepared to draw the line when the limit of appropriate assistance to the under-represented party is reached. If necessary or appropriate, the neutral should feel free to explain to all parties in open hearing the rationale for whatever line the arbitrator believes must be drawn.

Without attempting to be more specific, it can be observed as well that the arbitrator is unlikely ever to act as solicitously toward the incompetent lawyer as he or she may act in aid of the sympathetic unrepresented party.

Problems Related To Lack Of Case Presentation Skills

Substitute advocacy is at the heart of the problem presented by under-representation. Why should the under-represented party have the benefit of the arbitrator's skills and effort in partial substitution for skilled professional representation that this party was unwilling or unable to procure? Yet how can the process be minimally fair and minimally efficient without some adjustment in favor of the ill-represented party? Obviously there is no single satisfactory answer. The facts and context of the case—whether the under-represented party is the investor or the member firm, for example—can shape the answer significantly. So in fact can the skills and ingenuity of the arbitrator in creating the atmosphere in which the case will proceed. Every arbitrator with experience in such cases will have other suggestions to add.

Although it is important to avoid offending or confusing the advocate for the better-represented party, it is sometimes possible to frame suggestions for improving advocacy, addressed in fact to the under-represented party, in a more obviously neutral way by the device of speaking in form to both parties. For example, the arbitrator may say: "In order that I may fully understand the position of each side on this important point, I invite each party to submit its arguments to me in writing. . .". Or perhaps the arbitrator may speak in pseudo-abstract terms—for example, "In my view any party in a case confronting a situation such as this would be well advised to . . .". Some circumlocution is inevitably entailed in using such devices, but no case with an under-represented party is apt to break hearing speed records. And the arbitrator needs to communicate at every reasonable opportunity (and primarily if not exclusively by indirect means) this message: "I am bound and determined to conduct a full hearing that is fair to all parties, even in the difficult circumstances that we all face here."

Specific problems of case presentation present some of the most difficult challenges of the under-represented party case: motions, briefs, objections, arguments, and the like. Perhaps nothing can leave the unrepresented party with a greater feeling of frustration and unfairness than the impression that the case was decided against him or her by virtue of legal mumbo-jumbo not even understood. Then, even when unfamiliar technical terminology has been explained, there remains the problem of actually doing whatever has been under discussion.

As noted, the arbitrator hearing a case in which a party is unrepresented should try to discourage the use by any participant of jargon that is plainly unnecessary or expendable—and of course should find ways to speak himself or herself exclusively in plain English. Where technical terms cannot be avoided, the arbitrator should explain and try to demystify to the greatest extent reasonably possible.

To ensure fairness and efficiency in proceedings that involve under-represented parties, Chairpersons must establish and maintain appropriate control of the hearing. Chairpersons will achieve requisite control in these cases if they are aware of the presentation and examination problems they may face and the various techniques or tools they can use in resolving them.

Once a reasonable effort has been made to enable the lay party to understand what is under discussion, the greater challenge is to suggest what that party might need or want to do as a result of the discussion. The arbitrator must be careful to avoid crossing the line of improper advocacy but often can accomplish much by explaining in general terms the options that may be presented and, if appropriate, by making neutral, balanced suggestions as to next steps. The unrepresented party can be assured, as well, that it is substance and not form that is important. For example, a motion or a brief, while needing to be purposeful, need not be cast in any particular form.

Ultimately, however, the arbitrator may feel obliged to be blunt. In a case that looks as if it may well turn upon a difficult point of law, for example, it may become necessary to tell the unrepresented party (or counsel who proclaims himself or herself unqualified in the field in question) that there is a significant risk in proceeding without competent counsel—with the implicit but clear subtext that no party can or should count upon the arbitrator to fill this void.

Special Problems Related To Lack Of Skill In Examining Witnesses

The skill of an experienced trial lawyer is thrown into its sharpest relief, perhaps, by watching the painful process of examination of a witness by an incompetent examiner. The arbitrator, nevertheless, almost certainly must allow the process to run at least a large part of its own course, subject to the use, in appropriate instances, of several tools.

First, once the existence of a problem has been established, it may be possible, without undue intrusion, to elicit from the examiner what amounts to a generalized offer of proof in advance of the testimony of a witness called on direct. Where this can be done, it may be possible for the arbitrator to suggest an approach or course of proceeding, including, if appropriate, advance steering of the questioning away from areas that can be predetermined to be irrelevant, or from kinds of questions that may be impermissible or inappropriate.

Second, what amount to evidentiary objections may be used judiciously to shape and tailor the examination. Particularly in the case of unrepresented parties, it may be that the arbitrator himself or herself can and should in effect take over the making of such objections—doing so, however, not in the confrontational style of trial advocates but in the fashion of a dialogue between the arbitrator and the examiner. At its best, this process may be perceived as a favor by both parties, while giving the arbitrator significantly more control of testimony than he or she ordinarily would exercise. The arbitrator needs to be sensitive, however, to the possibility that this process may not always work effectively, in which event he or she should be prepared to pull back.

Third, the arbitrator's own questions—permissible, with restraint, even in a well-advocated case—may be used with telling effect. In this case, it is even more important than usual, however, that such questions be propounded diffidently, without seeming to take over the representation. They should be neutrally worded and non-leading. Obviously, this technique may require departure from the practice, usually preferred, of deferring arbitrator questions until all parties have completed their examination of a witness. So used, it can help to deal with problems arising either on direct examination or on cross. In the case of cross examination, however, it is particularly important that the arbitrator's questioning should not reflect, as an advocate's may on cross, any evaluation of the substance or truthfulness of witness's answers, not to mention of the merits of the parties' respective cases. As in any case, after examination of a witness by the arbitrator, the parties should always be afforded the opportunity to ask further questions of the witness "within the scope" of the arbitrator's examination.

Special Problems Related to Narrative Testimony

If the way to appreciate skillful trial advocacy is to watch trial incompetence, the way to appreciate the question and answer method of examination is to listen to narrative testimony. Even skilled lawyers, when they represent themselves (as they often do in statutorily mandated lawyer-client fee arbitration, for example), find it difficult to present

an account of events or perceptions nearly as clearly in narrative form as they could under skilled examination. Non-lawyer parties representing themselves never do better and often do worse at presenting their own testimony—typically, the heart of whatever case they have.

Here, with a sufficiently gentle hand, the arbitrator may be able to break in, and to break up the account into intelligible, digestible bites, by so simple a device as asking the party to allow occasional interruptions and then by asking low-key, open-ended questions such as "What happened next?" With luck and a fair wind, the arbitrator may be able to guide the testimony of an unrepresented party in a way that is perceived as fair and helpful by all concerned. Even where this technique is for some reason not entirely effective, the arbitrator should not hesitate to "break in and break up," as gently as possible, the testimony of an unrepresented party in a way that helps to keep it intelligible and on point.

Special Problems Related to Separating Argument from Testimony

It is likely to prove impossible to induce or enable the unrepresented party to separate completely argument from percipient testimony. It is certainly worthwhile, nevertheless, to explain this distinction to such a party early on in the hearing, and to advise the party that the arbitrator will intervene when appropriate in order to maintain that distinction insofar as is practicable. It is also necessary to be sure that such a party understands that, while argument should not be interspersed in testimony, there will be full opportunity to argue at the appropriate point, and to make clear when that point will occur.

Maintaining Control—And Preserving Fairness And Integrity

As noted, the arbitrator in a under-represented-party case needs to establish control of the case at an appropriate early stage. If the arbitrator is aware of the kinds of problems presented by an under-represented party and skilled in the application of the tools available to solve them, he or she will be successful in establishing requisite control. Indeed, in the hands of a skilled arbitrator, the demands of these cases may afford enhanced opportunities for establishing and maintaining control.

The remaining test is the ultimate one: To preserve the fairness and the integrity of the process even in the face of the disorienting presence of the under-represented party. Although the pole stars do not provide their usual guidance in this circumstance, the goals toward which their gravitational pull normally draw the process—fairness and efficiency—must remain the arbitrator's navigational guide, even in the face of the challenge posed by the under-represented party.

Injunctions Pilot Extended

At the request of NASD Regulation the SEC has extended the effectiveness of NASD Rule 10335. Injunctions from January 4, 1999 to July 3, 1999. This six month extension will allow NASD Regulation to consider and respond to additional comments received by the SEC in regard to proposed changes to the rule. NASD Regulation filed proposed changes in July 1998 and the SEC published them for comment in September 1998.

Arbitrator & Case Distribution By Hearing Location — As of November 17, 1998

Hearing Locations	Non-Public Arbitrators	Public Arbitrators	Total Available Arbitrators	Cases Filed in 1997 with Arbitrators Assigned		
				Paper	Hearing	Total
Albuquerque	16	24	40	1	8	9
Albany	29	41	70	4	29	33
Anchorage	4	20	24	1	4	5
Atlanta	69	86	155	10	118	128
Baltimore	55	123	178	7	32	39
Boston	112	173	285	18	150	168
Buffalo	24	43	67	6	36	42
Chicago	172	270	442	27	184	211
Charlotte	39	39	78	5	51	56
Cincinnati	15	21	36	3	34	37
Cleveland	39	45	84	8	56	64
Columbus	20	35	55	2	34	36
Dallas	128	102	230	10	155	165
Washington, DC	78	168	246	6	80	86
Denver	77	91	168	13	104	117
Detroit	101	85	186	7	126	133
Ft. Lauderdale/Boca Raton	258	382	640	41	349	390
Honolulu	21	22	43	0	14	14
Houston	108	93	201	13	149	162
Indianapolis	37	43	80	2	46	48
Kansas City, MO	46	69	115	4	49	53
Las Vegas	36	36	72	2	26	28
Los Angeles	169	358	527	35	424	459
Louisville	15	28	43	4	27	31
Little Rock	19	19	38	0	14	14
Memphis	30	25	55	2	17	19
Milwaukee	27	44	71	3	40	43
Minneapolis	93	86	179	7	92	99
Nashville	32	39	71	2	47	49
New Orleans	33	31	64	1	35	36
Norfolk	10	5	15	3	8	11
New York City	537	646	1183	116	865	981
Oklahoma City	28	35	63	1	40	41
Omaha	28	27	55	3	29	32
Philadelphia	94	110	204	16	130	146
Phoenix	87	111	198	9	90	99
Pittsburgh	23	30	53	4	38	42
Portland	42	61	103	3	47	50
Raleigh	16	28	44	0	26	26
Richmond	36	26	62	3	23	26
San Diego	70	118	188	16	111	127
Seattle	35	80	115	14	68	82
San Francisco	136	204	340	28	232	260
Salt Lake City	14	22	36	7	22	29
St. Louis, MO	61	76	137	1	52	53
Tampa	176	210	386	16	214	230

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