

The Neutral Corner

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Mediation Celebrates Fourth Anniversary

On the eve of its fourth anniversary, NASD Regulation's Mediation Program ("NASDR Mediation") continues to grow, with mediation gaining acceptance as a dispute resolution method of first resort. Buoyed by the success of promotional and educational events this year, NASDR Mediation plans to offer even more in 2000.

Parties agreed to mediate 557 cases through July of this year, a 3 percent increase over the same period in 1998. Since NASDR Mediation's inception on August 1, 1995, over 3,000 mediation cases have closed, with an 80 percent settlement rate.

More parties are opting to mediate first. Through July, 113 cases—or one out of every five that parties have agreed to mediate this year—proceeded directly to mediation without first filing an arbitration claim. This represents a 250 percent increase over the number of cases mediating first during the same period in 1998.

Kenneth Andrichik, NASD Regulation's Director of Mediation, sees this increase as a trend: more parties and counsel now consider mediation at some point during every securities dispute, and consider it at an earlier stage in the dispute resolution process.

"Mediation has become part of the landscape," says Andrichik. "As parties and counsel become more comfortable with mediation, they gain confidence that it will result in a resolution of their disputes. Experienced counsel now discuss the mediation option with clients in almost every case, and refer appropriate cases to mediation early on."

Recognizing that mediation is being considered more frequently, and often at an earlier stage, NASDR Mediation recently sponsored a series of seminars to acquaint branch managers, compliance officers, and other securities firm personnel with its program. NASDR Mediation's Southeast Regional Office conducted Securities Mediation 2000 Seminars in Atlanta, GA, Boca Raton, FL, Charlotte, NC, and New Orleans, LA in September and October. NASDR Mediation anticipates continuing the series next year, with seminars planned in Memphis, TN and Little Rock, AR.

NASDR Mediation also continued its popular Settlement Week promotion in 1999, this year extending it to an entire month. During Settlement Month, mediation prices are reduced to encourage more parties to explore mediation's benefits. The Northeast Region held its Settlement Month event during August,

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Message From The Editor

Kenneth Andrichik has been appointed to lead Office of Dispute Resolution initiatives to expand dispute resolution services internationally and to explore strategies to promote new business opportunities for dispute resolution and neutral training services in the United States. Ken is a 19-year employee of the NASD, with over 14 years in the Office of Dispute Resolution. He successfully developed the first full-scale Mediation Program in the securities industry, and is an acknowledged authority in the alternative dispute resolution field. As Director of Mediation and ODR Business Strategies, he will continue to provide strong leadership to the Mediation Program in addition to his new responsibilities.

Gary Tidwell was recently promoted to the position of Director of Neutral Management. Over the course of the past year, Gary has been instrumental in the roll-out of a nationally directed program for neutral roster development, maintenance, and training. In the short time Gary has been with us, he has demonstrated exceptionally strong leadership and vision.

Please join the Office of Dispute Resolution in congratulating Ken and Gary.

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.

Dispute Resolution Briefs

Wanted: Experience In Electronic Markets

We are seeking arbitrators with experience, expertise, and knowledge relating to the electronic markets. If you are an NASD neutral with knowledge of electronic markets, and you would like this information listed in the expertise/experience section of your profile, please send an e-mail to Suzanne Parrino at parrinos@nasd.com explaining your background in this area. Include in the e-mail your arbitrator number, current mailing address, and daytime telephone number.

Arbitrator Lunch Reimbursement Policy

To provide more consistent and cost-effective operations, on March 22, 1999, the NASD Office of Dispute Resolution implemented a uniform national policy for arbitrator lunch reimbursement. Under this policy, arbitrators are reimbursed up to \$15.00 for lunch expenses incurred at a hearing. To be reimbursed, arbitrators must send to the assigned staff person a completed *NASD Arbitrator Expense Report* and the original expense receipts. Thank you for your continued support of our efforts to provide a more efficient forum for resolving disputes.

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resulting in agreements to mediate in over 50 cases, about twice that of a typical month. The Western, Midwest, and Southeast Regions conducted their Settlement Month events in October. In 2000, NASDR Mediation has scheduled a Settlement Month in every region during August.

During 1999, NASDR Mediation also sponsored a three-day Introductory Mediator Skills Training Program in Chicago, IL featuring acclaimed trainers Jeff Abrams and Heshia Abrams. Once again, participants in this Program rated both the course and the trainers very highly. The Introductory Program will be offered again on January 25-27, 2000, in Washington, DC. (See details in box below.)

In 2000, NASDR Mediation will host several Advanced Mediator Skills Training Programs, designed to sharpen the skills of experienced

mediators. Currently, NASDR Mediation plans one-day programs for Atlanta, GA, Chicago, IL, and Philadelphia, PA. Mediation Advocacy Programs, one-day programs directed at attorneys who seek to become more effective advocates in mediation, are planned for Atlanta, GA, Charlotte, NC, Omaha, NE, and Boston, MA. Mediators' Roundtables, where NASDR mediators meet to discuss issues of mutual interest, offer tips on mediating and give feedback on the NASDR program, are scheduled for Albany, NY, Buffalo, NY, Houston, TX, Philadelphia, PA, and Pittsburgh, PA.

For additional information on NASDR Mediation or updates on any of its scheduled programs, contact any Dispute Resolution Regional Office or visit the NASDR Web Site at www.nasdr.com under "Arbitration/Mediation."

Mediator Skills Training

The Office of Dispute Resolution will host a Mediator Skills Training Program in Washington DC on January 25-27, 2000. The training will be held at the NASDR Office, located at 1735 K Street, NW. Contact Steve Gary at (212) 858-4435 or Ed Sihaga at (212) 858-4359 or view our Web Site at www.nasdr.com under "Arbitration/Mediation" for more information.

Task Force Initiatives Approved

In 1996, the National Association of Securities Dealers, Inc. (NASD®) Arbitration Policy Task Force (Task Force) recommended that the level of arbitrator compensation be raised for several critical reasons: to attract and retain qualified persons from a wide range of backgrounds and professions to serve as arbitrators, to provide incentive to arbitrators to participate in training, and to compensate arbitrators to perform additional prehearing responsibilities, including managing the discovery process.

On February 16, 1999, the Securities and Exchange Commission (SEC) approved the NASD Regulation, Inc., rule proposal that increases

arbitrator honoraria. This article focuses on this important change together with approved increases in arbitration fees.

The article also provides the current status of other significant Task Force proposals—a *Discovery Guide* for use in *customer* cases, and proposed new rules relating to the arbitration of statutory employment discrimination claims.

Lastly, this article updates readers on the extension of NASD Regulation enforcement to awards and settlements at other forums, NASD Regulation amendments to the punitive damages rule filing in *customer* cases, and the status of the intra-industry injunctions rule.

Honoraria

NASD Regulation arbitrators will receive higher honoraria when they serve on cases *filed on or after March 18, 1999*, as set forth in the chart below.

IM-10104. Arbitrators' Honorarium		
For Service on <i>Cases filed</i>	<i>before</i>	<i>after</i>
	March 18, 1999	March 18, 1999
Single Hearing Session*	\$150	\$200
Double Hearing Session*	\$225	\$400
Travel to a Canceled Hearing	\$ 50	\$ 50
Chairperson-per calendar day	\$ 50	\$ 75
Simplified Arbitration per case**	\$ 75	\$125

* A hearing session is any meeting among the parties and arbitrator(s) lasting four hours or less, including a prehearing conference.

** A simplified arbitration is one where an award is based exclusively on the filed pleadings and additional documentary submissions—without a formal hearing.

Fees

For the first time since 1990, parties in *all* intra-industry and public customer cases *filed on or after March 18, 1999*, are paying higher claim filing fees and hearing session deposits. The increases in filing and hearing fees contained in

NASD Rules 10205 and 10332 should enable NASD Regulation to cover part of the direct cost of receiving, processing, analyzing, and serving claims; and selecting arbitrators. They also should allow NASD Regulation to cover some of the actual cost of administering hearings and compensating arbitrators.

Although investor fees are higher, NASD member firms are paying most of the fee increases. Moreover, NASD Rule 10333 requires NASD members to pay non-refundable surcharges and non-refundable prehearing and hearing process fees. Member surcharges and process fees are not assessable—meaning that arbitrators cannot charge these fees against any other party to a proceeding. (See the September 1997 and February 1998 editions of *The Neutral Corner* for more on the surcharges and process fees paid by NASD members.)

On September 30, 1999, the SEC approved the NASD Regulation proposal to create an independent dispute resolution subsidiary—NASD Dispute Resolution, Inc. This newsletter will keep you informed of developments.

Discovery

On September 2, 1999, the SEC approved the proposed NASD Regulation *Discovery Guide* for use in *customer* arbitrations. A copy of the Guide is enclosed with this edition. The Guide implements another key Task Force recommendation: streamlining the production of essential documents in arbitration. Approval of the Guide will also help to promote the success of another, already implemented Task Force initiative: appointing arbitrators earlier to direct discovery and resolve discovery disputes. The Guide is now available for use in all customer arbitrations

The *Discovery Guide* provides general guidance on a number of topics, including when the

Office of Dispute Resolution will provide parties with the Guide, time frames for production and objections, objections based on privacy or confidentiality, sanctions, and the admissibility of evidence. The Guide also consists of two document production lists specifying documents that are discoverable from NASD member firms/associated persons, and from customers in *every* customer case. These two lists are followed by 12 discoverable document lists that are based upon the allegation of particular causes of action or claims, such as a failure to supervise, unsuitability, or fraud.

The text and lists are designed to provide discovery guidance to the parties and arbitrators in customer arbitrations and are intended to be used as a *supplement* or an *addendum* to the *Securities Industry Conference on Arbitration (SICA) Arbitrator's Manual* on this subject.

The Guide has been written so that the documents listed are presumptively discoverable—meaning that without staff or arbitrator intervention the documents are required to be produced unless a timely objection to produce is sustained by the arbitrators. Nothing in the Guide, however, precludes parties from agreeing to an exchange of documents that is different from those appearing in the document production lists. Equally important, the Guide is not intended to bind arbitrators in a particular case. Arbitrators can order the production of documents not contained in the document lists, as well as sustain objections to the production of documents in the lists.

Employment Claims

To enhance NASD arbitration of employment disputes, including statutory discrimination claims, the Task Force recommended the following: improve the rules and procedures relating to such

disputes and expand NASD member firm disclosures to employees at the time they agree to arbitrate.

In June 1999, the SEC published for public comment the NASD Regulation proposal that adds *new* NASD Rules 10210 through 10216 to improve the arbitration of statutory employment discrimination claims. The proposal also includes conforming amendments to NASD Rules 10201 and 10202.

The new rules provide that any arbitrator selected to decide such claims must be classified as “public,” even if the arbitration involves non-statutory employment issues. The rules also require that presiding Chairpersons have special qualifications unless all of the parties waive these requirements after a dispute arises. The additional qualifications are enclosed with this edition.

If you are classified as a “public” arbitrator and you meet the special Chairperson qualifications for statutory employment discrimination disputes, complete the enclosed form and mail or fax it to Tom Wynn, Assistant Director, NASD Office of Dispute Resolution in New York.

The proposed rule includes procedures that address issues relating to the potential bifurcation or splitting of statutory and common law employment claims that are based upon the same alleged facts.

Finally, the proposal includes a *new* NASD Rule 3080 to expand arbitration disclosures made

by NASD member firms to their associated persons or employees when they sign a Form U-4*. The disclosures—modeled on member firm disclosures given to customers—are aimed at improving employee understanding of the arbitration process and the consequences of agreeing to arbitrate at this forum.

See the September 1998 edition of *The Neutral Corner* relating to the January 1, 1999 amendment to NASD Rule 10201 that *modified* the obligation of NASD registered representatives to arbitrate statutory employment discrimination claims *solely* because of their association or registration with the NASD. View *Frequently Asked Questions* relating to the arbitration of employment discrimination claims on the NASD Regulation Web Site at <http://www.nasdr.com/2804.htm>, or from the Site’s Home Page (www.nasdr.com), look under “Arbitration/Mediation” and click on “Rules and Procedures”. Also, see the December 1998 edition of the *NASD Regulatory & Compliance Alert*.

Awards/Settlements

On May 17, 1999, NASD Regulation amended IM-10100** of the Code of Arbitration Procedure to facilitate the use of non-self-regulatory (non-SRO) dispute resolution programs that are *selected* by parties. The change provides that NASD Regulation may take disciplinary action against an NASD member firm or a person associated with an NASD member if the member or associated person fails to comply with an award or a written settlement agreement that was rendered or reached under or in connection with the rules of the non-SRO. Since the proposal was aimed at enforcing awards and settlements at other forums, the SEC considered the proposal non-controversial in nature and granted it immediate effectiveness.

Punitive Damages Update

NASD Regulation filed with the SEC proposed amendments to the 1997 rule filing relating to punitive damages in *customer* cases. The amendments *permit* NASD members to contractually limit the amount of punitive damages that may be awarded to customers by arbitrators.

Under the latest proposal an NASD member may, in its discretion, draft a customer agreement to arbitrate with a punitive damages cap or limit as long as the disclosure requirements in NASD Conduct Rule 3110 and the conditions in Rule 10336 are met. One of the key conditions in Rule 10336 is that the punitive damage cap contained in such agreements must not violate the rule limitation of no more than twice compensatory damages or \$750,000. The next step is the SEC publication of the proposals. See the February 1998, September 1997, and April 1997 editions of *The Neutral Corner* for more on the proposed customer punitive damages rule.

Injunctions Update

At the request of NASD Regulation, the SEC extended the temporary effectiveness of NASD Rule 10335 Injunctions through January 3, 2000.

* *Uniform Application for Securities Industry Registration or Transfer.*

** "IM" means *Interpretive Material*.

NASD Regulation Senior Vice President George Friedman discussed Office of Dispute Resolution initiatives and plans in the May 1999 issue of *World Arbitration And Mediation Report* (Vol. 10, No. 5).

For your convenience, this article is enclosed in this mailing of *The Neutral Corner*.

Duty To Disclose

NASD Regulation regularly reminds neutrals to notify staff of changes in employment status, address, availability, or other important matters that may impact their ability to serve on a particular case. There might also be developments or circumstances that would *disqualify* neutrals from the roster of available neutrals.

NASD Regulation asks arbitrators and mediators to review the *National Arbitration and Mediation Committee—Temporary and Permanent Disqualification Criteria* set forth on

the following pages. As part of your continuing obligation to disclose material changes, we expect our neutrals to inform the staff at the closest Office of Dispute Resolution of any facts or circumstances that might meet the temporary or permanent disqualification criteria.

If you have any questions about the disqualification criteria, please write Mark Nowicki, Assistant Director, Neutral Training and Development, at the Midwest Regional Office or send an e-mail to mark.nowicki@nasd.com.

ARBITRATOR DISQUALIFICATION CRITERIA—*TEMPORARY*

Criteria	National Arbitration & Mediation Committee Position
Pending Actions	Arbitrator is the subject of or is a party to a pending investment-related civil action or arbitration claim initiated by a customer; or, civil action or administrative complaint initiated by a regulatory body; or, a civil action or regulatory complaint alleging discrimination or sexual harassment. This provision excludes cases where the arbitrator’s conduct in his or her role as an arbitrator is at issue.
Subject of Claims or Complaints	Arbitrator is the subject of or is a party to three (3) or more claims or complaints (reportable on Form U-4) within the last ten (10) years regardless of outcome.
Filed a statement of claim or complaint	Arbitrator is a party (excluding representatives and unnamed parties to class actions) that has filed two or more investment-related civil actions or arbitration claims within the last ten (10) years.
Final decisions, awards	Arbitrator is the subject of or is a party to a final, adverse investment-related court decision or arbitration award of \$25,000 or more within the past seven (7) years resulting from a customer-initiated complaint or claim.
Decisions, awards, involving discrimination/sexual harassment	<p>Arbitrator is the subject of or is a party to a final, adverse court decision or arbitration award of \$25,000 or more involving any discrimination claims including sexual harassment, issued within the last seven (7) years.</p> <p>Arbitrator is the subject of or is a party to a final, adverse regulatory decision involving any discrimination claims, including sexual harassment, issued within the past seven (7) years.</p>
Final regulatory action	Arbitrator is the subject of or is a party to any final adverse decision issued by any regulatory authority within the past seven (7) years, where the adverse decision does not involve a technical violation or does not give rise to a statutory disqualification.
Director of Arbitration’s judgment	The Director of Arbitration may temporarily remove an arbitrator, if, in his or her sole judgment, it is determined that the arbitrator is not otherwise properly included in the list of eligible neutrals.
Footnote	Temporary Disqualification will result in temporary declination as to new applicants and a status of “inactive” as to already enrolled arbitrators.

ARBITRATOR DISQUALIFICATION CRITERIA—*PERMANENT*

Criteria	National Arbitration & Mediation Committee Position
Preamble	If an arbitrator answers in the affirmative to any questions contained in Question 13 of the Arbitrator Application Form, the arbitrator's explanation for the affirmative answer will be closely reviewed by the Director. If the affirmative answer does not constitute a statutory disqualification, the explanation for the answer will be disclosed to the parties unless the information is non-regulatory or does not reflect negatively on the individual's character and is not significant to an individual's performance as a neutral.
Misstatement/omission	Misstatement or failure to disclose material information in the Arbitrator Profile.
Disciplinary actions	Final, adverse disciplinary action by any domestic or foreign regulatory or governing professional body on a finding of, including but not limited to, false statement or omissions, material violation of investment-related regulation, or the violation of a non-technical rule of such organizations or statute.
Misdemeanors/felonies	Misdemeanor involving investments, investment-related activities.
Felonies	Felony conviction or plea of guilty or nolo contendere to a felony charge.
Fraud	Final adverse court decisions where there has been a finding of fraud.
Statutory disqualifications	Statutory disqualifications not included above.
Director of Arbitration's judgment	The Director of Arbitration, upon the approval of the National Arbitration & Mediation Committee may remove an arbitrator if in his or her judgment the arbitrator is not otherwise properly included in the list of eligible neutrals.
Footnote	Permanent disqualification means the application of any new applicant will be rejected and enrolled neutrals will be removed from the pool without possibility of reconsideration.

Expungements

In response to concerns over state recordkeeping laws expressed by the North American Securities Administrators Association (NASAA) and several states, NASD Regulation implemented a moratorium on arbitrator-ordered expungements of information from the Central Registration Depository (CRDSM). As announced in *Notice to Members 99-09* (February 1999), the moratorium is effective for all arbitration awards rendered after January 19, 1999. In that same *Notice to Members*, NASD Regulation explained that it will honor *two exceptions* to the moratorium, and will continue to expunge information if:

- ➔ a court of competent jurisdiction confirms the arbitration award, or
- ➔ if the dispute was between a firm and a current or former associated person, and the expungement order is based on the defamatory nature of the information in CRD.

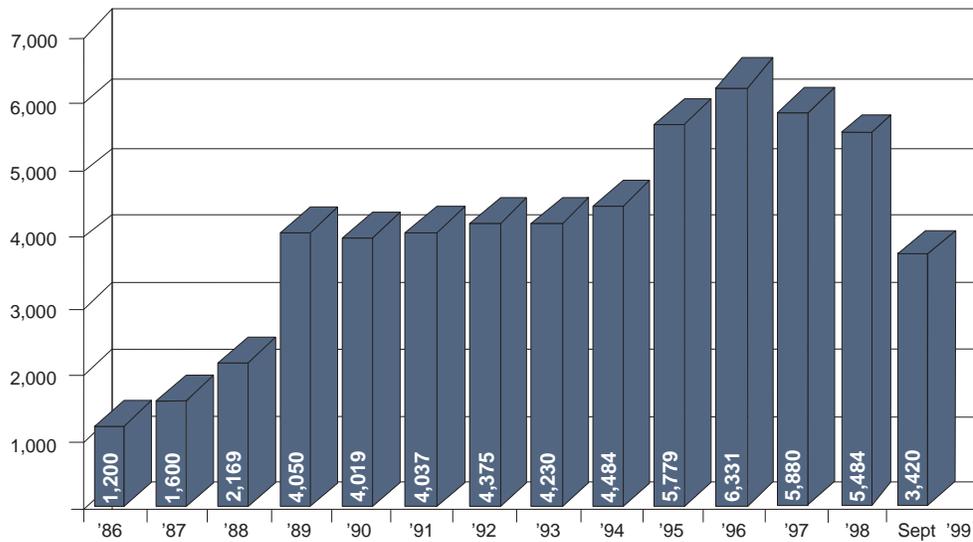
Clarifying the defamatory nature requirement in *Notice to Members 99-54* (July 1999), NASD Regulation advised that **“arbitrators must clearly state in the ‘Award’ section of the award that they are ordering expungement relief based on the defamatory nature of the information in the CRD system”** (emphasis in original). The *Notice* added, however, that arbitrators are not required to state explicitly in the award that they have found that all of the elements required to satisfy a claim in defamation under governing law have been met.

Therefore, please be aware that awards in intra-industry cases that do not contain the above highlighted language will not be sufficient to cause expungement of the information in CRD unless they have been confirmed in court. This requirement also applies to settlements that result in a stipulated award. If the above statement (indicating the arbitrator is ordering expungement “based on the defamatory nature of the information”) is not made in the award, then the parties must obtain confirmation of the award in court and submit that court order to CRD to effect the expungement.

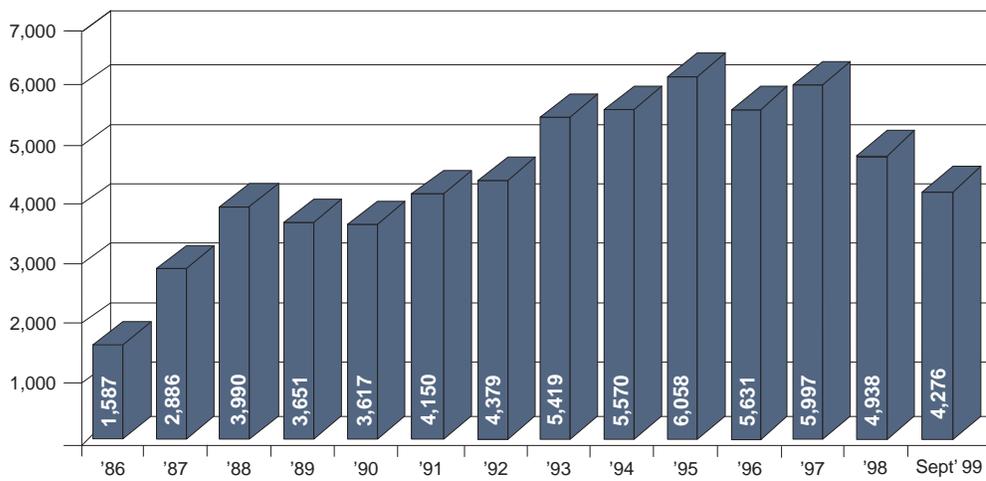
For further information, please read *Notices to Members 99-09 and 99-54*, which are available on the NASD Regulation Web Site at www.nasdr.com by selecting “Notices to Members” on the Home Page’s drop-down menu or through “Members Check Here.”

Arbitration Statistics

NASD Regulation Arbitration Cases Closed Annually



NASD Regulation Arbitration Cases Filed Annually



Directory

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This publication is provided at no cost to all NASD Regulation-approved neutrals. To change your mailing address, contact Margaret Duzant, NASD Regulation Office of Dispute Resolution, at (212) 858-4310. Annual subscriptions may be purchased for \$25, and single issues may be purchased for \$10 through MediaSourceSM. 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 (301) 590-6142, weekdays, 9 a.m. to 5 p.m. (Eastern Time).

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