

knowledge of and experience with injunctive remedies and are available to serve on these matters on very short notice, please contact one of our Regional Arbitration Directors listed on page 7.

If you want to know more about this rule please

refer to *NASD Notice to Members 95-83*.

Copies of this Notice may be ordered through NASD MediaSource<sup>SM</sup> at (301) 590-6578. If you have further questions on this rule, please contact Elliott Curzon at (202) 728-8451.

## ***Honoring Arbitration Settlement Agreements***

The SEC acted to support the evolution of non-binding and binding dispute resolution processes by approving on August 10, 1995, two new rules that uphold settlement agreements made in connection with NASD mediations and arbitrations. Although NASD members and their employees historically have complied with settlement agreements, the new Rules will enhance the credibility of the mediation and arbitration processes by assuring that a party who walks away from a settlement agreement will not do so with impunity. Because they will encourage prompt payment of settlements, the Rules also will reduce costs to parties incurred by delayed recoveries or actions to enforce such agreements.

The first Rule provides that if an NASD member firm or its employee fails to honor a settlement agreement as to any dispute submitted to arbitration at the NASD, other self-regulatory organizations, or pursuant to the securities arbitration rules of the American Arbitration Association, that failure will constitute a violation of the NASD Rules of Fair Practice. This change to the Resolution of the NASD Board of Governors—Failure to Act Under Provisions of Code of Arbitration Procedure applies only to

written settlement agreements that have been signed by all parties.

Disciplinary sanctions will be meted out by NASD Districts unless the member or employee demonstrates compliance with the settlement agreement or provides a valid reason for non-compliance. Similar authority already exists where NASD members or their employees fail to honor securities arbitration awards unless they have made timely motions or requests to upset the awards in a court of law.

The other change, which took effect August 10, 1995, extends the authority of the NASD to cancel the membership or registration of any member or its employee, respectively, upon 15-days notice of any failure to comply with written settlement agreements connected to an NASD-sponsored mediation or arbitration.

Please refer to *NASD Notice to Members 95-76* for more details about these rulings. You may order copies of this Notice through NASD MediaSource<sup>SM</sup> (301) 590-6578. If you have further questions on these Rules, contact Elliott Curzon at (202) 728-8451.

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# The Neutral Corner

## *A Great Beginning For NASD Mediation Program*

The NASD® Mediation Program is off to a fast start with 22 settlements in the 27 cases mediated since the program's official introduction last August. Parties in another 30 cases have agreed to use this voluntary, non-binding process and the number grows almost daily.

Interest in mediation as an option for resolving securities investment claims grew from the rising number of arbitration cases filed with the NASD in recent years. In 1994, more than 5,500 arbitration cases were submitted to the NASD, representing more than 80 percent of all securities-related arbitrations filed in any forum that year.

The new Mediation Rules, which took effect on August 1, 1995, were approved by the Securities and Exchange Commission (SEC) to enable the NASD to launch a program that offers parties a process to settle their disputes themselves, as an alternative to arbitration and litigation. Approval of these new rules additionally has enabled the NASD to offer its members and investors a more comprehensive and varied dispute resolution program. Kenneth Andrichik, a 15-year NASD employee who was formerly Deputy Director of Arbitration, was tapped to head this program as Director of Mediation.

### *Advantages Of Mediation*

Mediation offers a number of advantages to all disputants—whether individual investors or securities industry professionals. It gives those involved a real chance for early resolution of their disputes and the resulting settlement is likely to save the parties substantial time and expense.

Mediation is less formal than arbitration or litigation. An impartial person, the mediator, facilitates negotiations between disputing parties, helping them to find a mutually acceptable resolution.

### *Mediation Caseload*

Most of the mediation cases will come directly from the NASD's arbitration docket. We will see more than 6,000 new arbitration cases in 1995 and expect another 6,500 in 1996.

NASD staff will contact parties involved in arbitration cases and introduce them to the Mediation Program. This will involve describing what mediation is and the potential benefits to the parties. As more parties become aware of mediation in general, and the NASD Mediation Program in particular, they will request mediation more often. In those instances, the NASD only needs to seek the other parties' agreement to mediate. Parties may also agree to bring their cases directly into mediation without filing an arbitration case. We will accept those cases as long as the subject matter is appropriate for our arbitration forum.

For cases that come to us from the NASD's arbitration docket, mediation will occur while the arbitration case is pending. There will be no

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## A Letter To The Readers

**From:**  
**Deborah Masucci**  
**NASD Vice President of**  
**Arbitration and Mediation**

*As part of our ongoing effort to provide fair and efficient processes for dispute resolution, the NASD Arbitration and Mediation Department is pleased to introduce The Neutral Corner—The Newsletter For NASD Arbitrators And Other Neutrals—a publication designed to help you perform effectively in your role by providing you with timely, relevant, and insightful information.*

*As arbitrators or mediators for the NASD, you are on the front line, applying NASD Rules and procedures to resolve or facili-*

*tate the resolution of disputes filed under our Rules. To do this, you need to be informed on current issues and trends involving this process, including recent rule changes or judicial decisions. This newsletter will keep you informed of these developments and will serve as a resource accessing more in-depth information regarding particular topics involving dispute resolution.*

*You can count on The Neutral Corner to give you the official word of the NASD, the SEC, and other regulatory entities. In addition, we will draw on the experience and expertise of respected arbitrators and mediators, NASD executives, and others to provide you with the*

*tools, techniques, and information to make your job as a neutral easier and more rewarding.*

*Let us know how you like this newsletter. We welcome your suggestions for future articles and other comments regarding the format and content of the material we will provide to you.*

**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. The NASD reserves the right to publish or not to publish the letters received.

## Duty To Disclose: An Arbitrator's Ongoing Responsibility

Most arbitrators recognize their responsibility to provide full and accurate disclosure of any existing or past, direct or indirect, interests, relationships, or circumstances that either may affect their neutrality or give a reasonable impression of non-neutrality in the eyes of any disputant in arbitration.

The NASD Arbitration and Mediation Department has continuously stressed the vital importance of collecting and maintaining complete and current employment and other pertinent information on all arbitrators in order to provide the required arbitrator disclosure reports to parties in all cases.

The NASD arbitration staff examines and verifies the information provided by arbitrators in their applications prior to a candidate's initial enrollment and

classification as a public or industry arbitrator. Staff, subsequently, asks that arbitrators verify the present completeness and accuracy of their disclosure report every time they are actually appointed to serve on any arbitration case. This report is contained in the case packet materials forwarded to each arbitrator prior to the commencement of the first hearing session or review of the written submissions in simplified arbitrations not requiring a hearing.

The preceding is consistent with every arbitrator's duty to disclose on an on-going or continuous basis. This duty is explicitly set forth in Section 23(c) of the NASD Code of Arbitration Procedure (Code). While not every disclosure forms the basis for a challenge to the arbitrator's appointment to a particular case, an

arbitrator's failure to provide adequate disclosure may raise inferences of bias after a decision is rendered and constitute legal grounds to upset a panel's final decision. Arbitrators are also reminded of their duty to disclose immediately that they have become the subject of any pending civil action, arbitration or regulatory proceeding, since this will result in their temporary disqualification from service as an NASD arbitrator where the claims or complaints are investment-related or involve allegations of discrimination in some form. As important, an arbitrator's failure to make proper disclosure may result in a loss of forum integrity and, once diminished, this most valuable asset will be difficult to re-establish.

In view of the importance that complete and current

disclosure has to the forum's neutrality and the parties' perception of neutrality, please help us to help you perform this duty. When you are appointed to serve, please take the time to review your disclosure report and verify its current completeness and accuracy. After you make any necessary changes, call the staff person assigned to the case and advise the NASD of the changes and return the hard copy for our records. If you have not been appointed to serve recently, please take the time to request the current background information that we have on your disclosure report and update us on any new employment or other information about yourself, including any changes to your telephone number and address. To do this, please call an Arbitrator Coordinator at (212) 858-4377 or (212) 858-3992.

## ***Arbitrator Evaluations Crucial To Program Quality***

The NASD Arbitration and Mediation Department utilizes evaluations provided by parties and arbitrators to improve the arbitration process and identify training needs. The staff solicits these evaluations at several points in the life of a case.

Despite efforts to encourage parties, their representatives, and presiding arbitrators to complete evaluation forms/questionnaires designed to elicit information about arbitrator performance and process operation, receipt of these evaluations has been virtually negligible.

NASD evaluation initiatives include staff evaluations of arbitrator performance when staff is present at the hearings. These evaluations are important.

However, since staff does not attend all hearings, some alternate evaluation method is required.

Regular arbitrator evaluation of peers plays an important role in the retention of quality panelists. This is very important because the participation of qualified arbitrators is the fundamental component of a successful arbitration program.

In addition, regular completion of arbitrator evaluations of the process and staff will underlie improvements to the Arbitration Rules and their administration by our staff. Please assist us in ensuring arbitration quality by doing your part in the evaluation system.

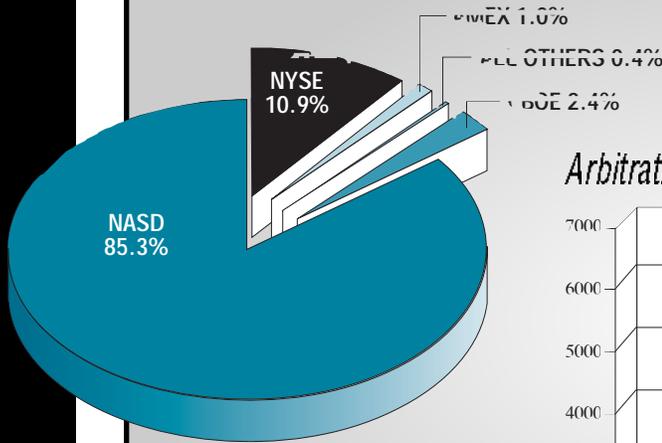
## ***Working Together—The Chairperson's Role In Promoting Panel Teamwork***

Participants in arbitration—whether disputants, lawyers, other representatives, witnesses, or arbitrators—want and deserve effective hearings, especially in a process that results in final decisions or awards. Arbitrators must be neutral in fact and perception, the arbitrator's knowledge or experience needs to be sufficient to determine the submitted issues, and above

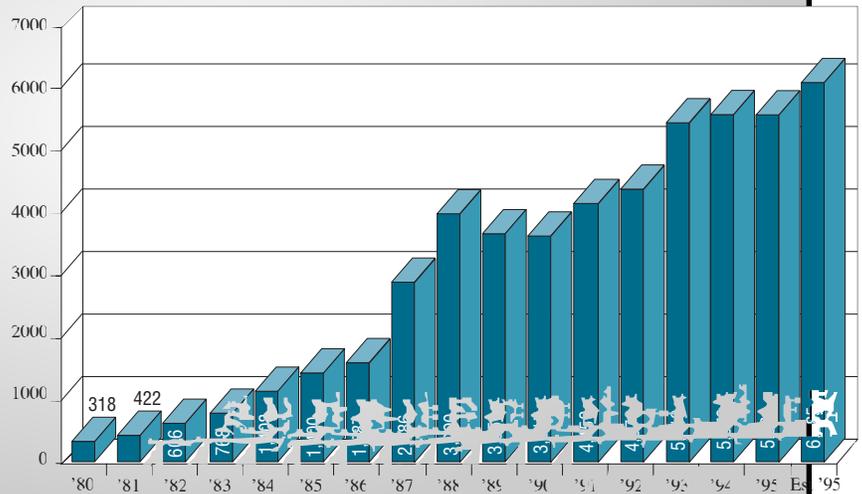
all, teamwork among all panel members is absolutely imperative.

NASD arbitration staff should always encourage panel teamwork, especially when they attend hearings. However, in many cases, staff is not present at the hearing, and panel teamwork is largely up to the appointed Chairperson and his or her leadership

*NASD Market Share Of Securities Arbitration Cases*



*Arbitration Cases Filed With The NASD*



ability. As The Arbitrator’s Manual describes, the Chairperson controls or directs the arbitration proceeding and his or her approach will determine the hearing’s effectiveness.

*Executive Sessions*

In order to get the other arbitrators on board the team from the start and facilitate competent, neutrally-delivered panel decisions during the hearings, the Chairperson should meet privately with his or her co-panelists prior to the first evidentiary hearing session, or as soon as feasible early in the first session. By taking the time to conduct this meeting, the Chairperson has already spoken volumes about the importance of the arbitrator team, and the most important tool available to ensure panel teamwork and effective hearings: the private, off-the-record executive session among arbitrators.

During this pre-hearing executive session, the Chairperson should be certain that all panel members understand that executive sessions may be called for

any purpose or reason that may facilitate the full and fair presentation of evidence by all parties. The Chairperson should make it clear that he or she will always call for an executive session whenever the panel is faced with any serious issues—whether substantive, such as motions or requests to dismiss claims, or procedural in nature, such as requests to clarify, amend or change filed claims or answers, or requests to postpone scheduled hearings. To further enhance teamwork, the Chairperson should take this opportunity to make it clear that if any of the panelists has a question, concern, or observation at any time during the hearings, at their request an executive session will be granted. The Chairperson should also make it clear that he or she will call at least one executive session before the parties make their closing arguments or summations to be certain that everyone on the panel believes there is enough evidence to permit the panel to make a fair, informed, and final decision.

This pre-hearing executive session is the most appropriate time for the Chairperson to demonstrate

the importance of contributions by every panelist on all issues, pointing out the equal, one-vote status of each panel member on all issues pursuant to the NASD Arbitration Rules. If the Chairperson feels it is prudent to make minor procedural decisions on the panel's behalf, such as objections to questions leading the witness, he or she should first seek the approval of the co-panelists to avoid any misperception that the Chairperson will make, or appear to make, decisions unilaterally. Likewise, the Chairperson should inform all parties and their representatives of this authority at an appropriate, early stage.

### *Proactive Participation*

Unlike jurors, arbitrators may ask the witnesses questions. If the Chairperson encourages co-panelists not only to exercise this unique right in a neutral, fact-finding, and appropriately timed manner, but also to request an executive session if they have any concern as to what, when, or how to question any witness, each panelist will likely play a more active and vital role on the team.

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***...the most important tool  
available to ensure panel  
teamwork and effective hear-  
ings: the executive session.***

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Finally, the Chairperson should acknowledge that there may be times during the hearing when each panelist may reasonably disagree with his or her co-panelists, but that those disagreements must always occur off-the-record and in executive session. If, after thorough panel discussion, the disagreement is solved by a majority vote of the panel, rather than unanimously, the vote will be announced on-the-record as the panel's decision. The Chairperson would do well to remind the panelists that the Arbitration Rules require this to preserve panel unity.

### *Chairpersons Set The Tone*

Arbitrators will more consistently demonstrate the ability to listen, to conduct themselves professionally and with sensitivity, and to speak in a clear, neutral manner during the hearing, if they are led by a Chairperson who takes the time to demonstrate these same characteristics.

Judicious use of executive sessions starting with one prior to the beginning of the first evidentiary hearing will allow a Chairperson to set the tone of arbitrator teamwork by demonstrating these abilities with his or her co-panelists. Teamwork early will mean teamwork later. More effective hearings will mean more effective deliberations and more informed decisions on all issues — liability, damages, and otherwise.

Panelists are more likely to feel like genuinely important team members, and therefore more ready and willing, as well as able, to contribute to all aspects of the proceeding, including analyses of complex facts and other issues, if the Chairperson takes the time early on to emphasize that all of their concerns; their questions of witnesses and their delivery; their views on the sufficiency of evidence; and their votes on all important issues are of paramount importance to effective hearings and competent decisions during and after the proceeding.

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## ***NASD Recruitment Effort Kicks Into High Gear***

More than 800 new arbitrators were recruited in the first six months of the NASD's plan to recruit 3,000 through the end of 1996. The plan was approved by the National Arbitration and Mediation Committee (NAMC) in April 1995.

The four primary reasons for this recruitment effort are: the continuing increase in new NASD arbitration case filings; changes in the types and complexity of cases filed; the desire to diversify the reservoir of available arbitrators; and the significant reduction in the number of available NASD arbitrators since January 1993, when formal arbitrator training became mandatory.

Arbitrator Recruitment Councils (ARCs) have been established in each of the four NASD dispute resolution regions to assist in this effort. The ARCs are composed of individuals from a wide range of constituencies in the public and industry sectors. Their primary mission is to assist the NASD in meeting the recruitment goal in terms of qualifications, diversity, and numbers by getting the word out individually and through organization contacts.

The NASD is seeking candidates from both the public and securities industry sectors. Applicants must have at least five years business, professional, investing, or other related experience to be considered to become an arbitrator. Applicants employed in the securities industry may come from management, sales, operations, legal, and compliance, etc. Knowledge and experience with account-related issues, such as those involving breach of contract, failure to super-

vice, and negligence will be helpful. In addition, many arbitrations involve allegations of fraud, unsuitability of investment, breach of fiduciary duty, unauthorized trading, employment, contractual, and human resources issues. Common stocks or equities and limited partnerships are the products most often involved in NASD cases. Persons with a regulatory or disciplinary record or who have been the subject of significant criminal or civil actions/arbitrations, will not qualify as NASD arbitrators.

### ***Qualified Chairpersons Sought***

As part of this effort, the NASD is identifying arbitrators who will be provided with supplemental training on the role and skills required for chairpersons. This is a key position on the arbitration panel managing each proceeding with a view towards ensuring the fair conduct of the proceeding.

Please assist us in our effort to recruit qualified, diverse persons for inclusion in our arbitrator pool. "Party confidence in the process and decisions is contingent upon our ability to attract and retain competent arbitrators and chairpersons. The best source of new candidates are the persons who already have participated in the process and know its nuts and bolts," said Deborah Masucci, Vice President, NASD Arbitration and Mediation Department.

For more information, call Margaret Duzant, Arbitrator Relations Supervisor, at (212) 858-4310. To request applications, call (212) 858-3992.

### ***A Great Beginning For NASD Mediation Program*** From page 1

delay in the arbitration process unless the parties agree otherwise. The mediation will run concurrently with the arbitration so that the parties will not lose any time on the arbitration track. In contrast to the average arbitration hearing, which lasts almost three days, a mediation session is typically concluded in a single day, so it can be scheduled very quickly. In a number of cases, we have been able to set up the session within five to seven days of the parties' request

for mediation. The expedited nature of these sessions provides a significant potential for cost savings. Further, since mediation is usually successful (about 80 percent of the cases settle), the process is low risk.

### ***Recruiting Mediators***

As in any dispute resolution forum, the quality of the neutrals will be the key factor in the success of the Program. So far, we have qualified more than 100

## **Mediation Program** Continued

mediators to participate in our program, and mediator recruiting continues in cities around the country. The mediator's skills are different from those of the arbitrator, so a separate qualification process has been established. A subcommittee of the NAMC reviews the background and experience of each potential mediator. Formal mediator training and case experience are important factors considered. In addition, a candidate must supply the NASD with four letters of reference from parties who have observed the applicant's mediation technique. Parties can therefore be assured that each potential mediator presented to them has a thorough knowledge of the mediation process and has demonstrated the type of skills necessary to help them resolve their dispute.

We encourage those who are interested in becoming mediators, especially those with securities knowledge or expertise, to start with a quality training program. The NASD is sponsoring a three-day Mediator Skills Training Program February 12 - 14 in New York. The Program, conducted by the Insti-

tute for Conflict Management of Portland, Oregon, includes instruction on all of the appropriate elements of mediator styles and ethics and offers role-play opportunities. We also expect to offer the training in other locations during the coming year.

### ***A Cohesive And Compatible Effort***

The NASD sees the development of the Mediation Program as a part of its overall goal of offering a full spectrum of dispute resolution services. We expect to develop more choices for investors and member firms to fairly and expeditiously resolve their disputes.

Contact any NASD Arbitration Mediation Office (listed on page 7) for more details about the Mediation Program. If you are interested in becoming a mediator, or know of someone who should be considered, any of these offices can send you the application forms. Registration forms for the February Training Program are also available.

## ***Intra-Industry Disputes Subject To Injunctions***

Beginning January 3, 1996, parties in intra-industry disputes will be able to obtain interim or temporary injunctive relief in NASD arbitrations under new Section 47 of the NASD Code of Arbitration Procedure (Code), approved recently by the Securities and Exchange Commission (SEC).

This new rule is aimed primarily at expediting the arbitration of so-called "raiding" cases. These controversies ordinarily involve employees and their former and present NASD employers, and issues relating to the ownership and use of customer records. The rule provides for the appointment of a single arbitrator authorized to grant or deny temporary injunctive relief requests in these cases. However, the rule also permits any party, in their discretion, to obtain such relief in a court of law rather than from a single arbitrator. In either event, it provides for the expeditious scheduling of a hearing on the merits of the entire dispute before a

full panel of arbitrators.

The Resolution of the NASD Board of Governors—Failure to Act Under Provisions of Code of Arbitration Procedure was also amended to provide that any member or employee who fails to comply with injunctive orders issued by an arbitrator under Section 47 of the Code may be subject to disciplinary action for violating the NASD Rules of Fair Practice.

### ***One Year Trial Period***

Section 47 Injunctions will be effective for a one-year trial period to allow the NASD to monitor its operation and effectiveness to determine whether it should become a permanent part of the Code. During this time, the staff will monitor the use, speed, and fairness of this section as it affects all industry participants.

If you are an NASD arbitrator with in-depth