

The Neutral Corner

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Advocacy With Civility: A Prescription For Success

By Constantine N. Katsoris¹

Ever since the Supreme Court's landmark decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), most disputes between public investors and the securities industry are resolved pursuant to pre-dispute agreements containing clauses providing for arbitration before one of the self-regulatory organizations (SROs), principally the National Association of Securities Dealers, Inc. (NASD[®]) and the New York Stock Exchange (NYSE).

Arbitration provides the advantage of an economical and speedy resolution of disputes by persons knowledgeable in the securities area. In this regard, however, unless arbitration procedures are fair—starting with the pleadings stage, down to the final award—arbitration's popularity, as a means of resolving securities disputes, will greatly diminish.

As the number of arbitrations has grown, as the complexity of the cases increased, and as prehearing procedures have been installed to prevent "trial by ambush," arbitration increasingly resembles courtroom litigation in tactics and techniques. Some concern has been expressed that such tactics and techniques may erode arbitration's ability to provide a fair, speedy, and economical resolution of securities disputes.

Through the efforts of the Securities Industry Conference on Arbitration (SICA), a Uniform Code of Arbitration has been created that establishes guidelines as to how these arbitrations are to be conducted. Sound procedural rules, however, do not necessarily ensure a level playing field. To ensure fairness, you must also examine the administration of these rules by the SROs, as well as the conduct of the participants in the arbitration process, i.e., the parties,

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Messages From The Editor

Continuing Education Survey

Please complete the enclosed Continuing Arbitrator Education Survey and mail or fax it back to us. The results of this survey will help NASD Dispute Resolution staff determine the level of interest in continuing education for arbitrators and the types of training that might be appropriate. (Note: The survey is available only in printed, hard-copy format and is intended to be completed by NASD-approved neutrals.)

Guest Contributor

We extend our genuine appreciation to Professor Constantine N. Katsoris, Fordham University School of Law, for this edition's feature article on the *indispensability* of civil participant demeanor in arbitrations—entitled **Advocacy With Civility: A Prescription For Success.**

Arbitration Statistics

Cases Closed:	Cases Filed:
2000 – 5,474	2000 – 5,557
1999 – 4,767	1999 – 5,608
1998 – 5,484	1998 – 4,938

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

Reminder: Arbitrator Expense Reimbursement Guidelines

NASD Dispute Resolution only lists arbitrators for service outside of their primary business or residence if there is a need for additional arbitrators in those locations, *and* provided the arbitrators are willing to pay their own expenses to travel to such locations.

If you choose to serve as an arbitrator at hearing locations beyond your primary hearing location, NASD Dispute Resolution will *not* reimburse you for any travel, lodging, meals, non-refundable tickets, hotel room deposits, or related expenses, other than standard lunch expenses.

Arbitrators who agree to serve at remote hearing locations will bear their own costs even if the cases are canceled or postponed. Since these costs can be quite high, arbitrators should only offer to serve at hearing locations that are at or near their primary residence or office.

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the lawyers, the witnesses, and the arbitrators. The question then becomes, who monitors the conduct of these various players?

SRO personnel are supervised by their superiors at the SRO; and, the SRO in turn is supervised by the Securities and Exchange Commission (SEC). Arbitrators' conduct is supervised by the courts through appellate review and through evaluation forms filled out by the parties and filed with the SROs. That leaves the supervision of the parties, their lawyers, and witnesses; and, it is to such oversight this article will address.

Parties come to arbitration to resolve their disputes in an honest and expeditious manner. They do not expect to be abused or cheated in the process. The same is true for all of the others who participate in the process. It is not unreasonable, therefore, that arbitrators and the SRO forum should expect a certain minimum standard of conduct on the part of the parties, their attorneys, and witnesses that appear before them. Indeed, as administrators of the process, they have an inherent obligation to ensure that unprofessional or uncivil conduct does not affect the quality or outcome of the arbitration proceedings. This is not unique to arbitration, for many states have enacted codes of conduct to be applied in their judicial proceedings.²

Some attorneys seem to believe that a successful result justifies the use of any form of advocacy and tactics, even at the expense of ethics and civility. How wrong they are. I have served as a public arbitrator for over 30 years, and have never met an arbitrator who was impressed

by conduct that was unethical or uncivil. Indeed, such misconduct detracts from, and often taints a client's case. Arbitrators have no difficulty in distinguishing between good advocacy and incivility; and, while they admire the former, they find the latter distasteful.

Although arbitrators are obligated to conduct fair proceedings they should not permit uncivil demeanor that is directed at any party, representative, witness, staff, arbitrator, or other hearing participant.

Good advocacy is not only proper, it is expected. Indeed, it is the duty of every lawyer not to leave a stone unturned in the representation of his/her client. This representation, however, must be conducted ethically and civilly.³ Hopefully, unethical conduct is rare; but, if it is uncovered, must be addressed and dealt with. How that is handled depends upon the nature of the misconduct, and the effect upon the outcome of the case. It can vary from a slap on the wrist, or reporting the attorney to the appropriate bar association, or might even involve the imposition of some sort of sanction.

² See Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 Ford. L. Rev. 757 (2000).

³ Id. "We have much less of a sense of shared values than we used to have. There was a common understanding of how you acted. You zealously represented your client, but you had respect for the other side and treated them with dignity. Can we ever again achieve this level of professionalism? I hope so." Stephen C. Rice, *President's Message: We Need to Come Together as a Profession*, Advocate (Idaho), Jan. 1998, at 4, (quoting Dean Haynsworth of William Mitchell College of Law).

Similarly, there is no room in arbitration for incivility. If left unchecked, incivility breeds more incivility, and can become very disruptive to, and even undermine the process.

What constitutes uncivil conduct can vary from such things as: constant unwarranted interruptions, uncalled-for rudeness and intimidation of witnesses, throwing documents at an adversary, etc., etc., etc. We are generally not as concerned with isolated incidents, particularly if malice does not appear to be present. As a general rule, arbitrators will know incivility when they see it, and if such misconduct is intentional, disruptive, or repetitive, the arbitrators must put a stop to it.

Moreover, incivility can take on many forms, and be injected in various ways and at all stages of the proceedings, for example: not only against opposing parties and their attorneys, but also against witnesses, SRO arbitration staff, and occasionally even against the arbitrators themselves. If allowed to continue, at the very least it renders the proceedings unpleasant, often leads to delay, and on occasion, might even prejudice the outcome of the proceedings. Arbitrators simply cannot allow this.

Arbitrators must be fair and impartial. On the other hand, they should not permit incivility in the proceedings over which they are presiding. What can an arbitration panel do to prevent incivility

from occurring or recurring? It depends upon the circumstances. For example, it can vary from calling numerous short recesses while counsel, witnesses, etc., calm down; or, in a most egregious case, even dismissing the proceedings without prejudice; or, imposing sanctions, depending upon the source, seriousness, and/or malice of the misconduct. Ironically, it is often the malfeasant—whose conduct disrupts and delays the proceedings—who often complains that the hearings are taking too long. Perhaps they should look in the mirror.

An attorney or party who is a victim of such unethical or uncivil conduct by an adversary, should bring it to the attention of the arbitrators. It is then up to the arbitrators to do their utmost to ensure that the proceedings are fair to all sides. By the same token, such control over the proceedings can and should be asserted, when possible, with civility. Little is usually gained by asserting such control in an uncivil manner.

In the final analysis, the duty of ensuring civility historically falls upon the Chairperson. On the other hand, if the Chairperson fails in this role, then it is incumbent upon the other arbitrators to step forward. Indeed, if the presiding Chairperson cannot control the proceedings, maybe he or she should not be appointed as Chairperson in the future.

Rule Updates

Arbitrator Disqualification

On December 15, 2000, the SEC approved amendments to NASD Rules 10308 and 10312. The amendments authorize the NASD Dispute Resolution President or the Director of Arbitrator (Director) to remove arbitrators for cause at any time during the arbitration.

Under the new rules, the President or Director has authority to remove an arbitrator for cause based upon information from any source. In addition, the information should have been disclosed by the arbitrator and must not have been known by the parties when they selected the arbitrator.

These changes will apply to arbitrators appointed on or after February 12, 2001.

Injunctions

NASD Dispute Resolution will be filing with the SEC a proposal to amend NASD Rule 10335. The proposal will extend the current pilot injunctive relief rule for one year or until the SEC takes action on a pending rule filing to amend this Rule and to make it a permanent part of the NASD Code of Arbitration Procedure. For more on the pending amendment see the July 2000 edition of *The Neutral Corner*.

Large And Complex Cases

On November 17, 2000, the SEC published for public comment an NASD Dispute Resolution proposal to accelerate the expiration of NASD Rule 10334 Procedures for Large and Complex Cases from August 1, 2002 to December 31, 2000. The proposal also includes conforming amendments to NASD Rules 10332 and 10205.

In the rule filing, NASD Dispute Resolution explained that the key provisions of NASD Rule 10334, which became effective in 1995, are now included in other NASD arbitration rules, practices, or procedures. As a result of the preceding, and because of the higher fees required by Rule 10334, it has been rarely used by parties.

Since the early expiration of this Rule eliminated unnecessary, redundant, and expensive procedures, the proposal was considered non-controversial in nature and became effective on December 31, 2000.

A Letter From The NASD Dispute Resolution Administrative Staff To The Arbitrators

Dear Arbitrator:

Thank you for your valuable service as an arbitrator on our roster. Your willingness to commit time and energy is key to the alternative dispute resolution process. Without dedicated and professional arbitrators we would not be able to assist the thousands of parties who come to us each year seeking peaceful and final dispute resolution. Our administrative efforts—together with your skill and knowledge—make the process successful.

Recognizing your importance in the arbitration process, and our cooperative relationship as neutral colleagues, we want to take this opportunity to share some thoughts that we believe will enhance our relationship—

- Be familiar with and understand the *Code of Arbitration Procedure (the Code)* and the *Arbitrator's Manual*. Recognize that our role in the process is to administer cases in accordance with the Code—we are not in a position to revise or amend it.
- Accept that we have no control regarding the number of time arbitrators are listed for service on cases, much less how often they are selected by parties. We understand that some arbitrators would like more opportunity to serve, but this is not within our control.
- Understand and comply with the policies of NASD Dispute Resolution regarding reimbursement of expenses and arbitrator honoraria. Our role is to enforce those policies, not to change them. If you have general concerns regarding those policies, please feel free to refer them to NASD Dispute Resolution management.¹
- Recognize that each of us is an integral part of the process. We are here to help the parties and you. Please treat us with courtesy and respect. Avoid hostile, demeaning, or humiliating words in written or oral communications with us. We recognize that you are entitled to the same courtesy and respect.
- Be punctual in action and deed. Be prepared and prompt for hearings and conferences and remind the parties to do the same. Please decide promptly all matter presented to you. We recognize our obligation to make ourselves promptly available to you in the event you have a question or concern.
- Take your arbitral obligations seriously by, among other things, agreeing to serve through the conclusion of a matter. Withdrawal from a matter should occur only for unanticipated “good cause.”

¹ For concerns about the policies of NASD Dispute Resolution regarding reimbursement for expenses and arbitrator honorarium that are not case-specific, you may write to NASD Dispute Resolution, Barbara L. Brady - Director of Neutral Management, 125 Broad Street, New York, NY 10004.

What's New On Our Web Site – www.nasdadr.com?

Over the past several months, NASD Dispute Resolution made several updates to its Web Site to further increase its value as a reference tool for NASD arbitrators. Some of this information is listed below and for your convenience, we have included the Internet address to get you to these items.

How To Become An Arbitrator: Arbitrator candidates can review information about NASD's Arbitration Program and find out how to apply to become an arbitrator. This area of the Web has a link to our Recruitment & Training Web Pages where candidates can obtain more information. <http://www.nasdadr.com/recruit.asp#arb>

Arbitrator Want Ad: After reviewing the brochure *How To Become an Arbitrator*, candidates are encouraged to review the online chart that indicates hearing locations where qualified arbitrators are needed. This Web Page has a convenient link back to the Arbitrator Recruitment Brochure and the Arbitrator Application located on the Web Site. http://www.nasdadr.com/arb_ad.asp

Downloadable Arbitrator Application: Arbitrator candidates can obtain a downloadable version of an application and instructions. This new application combines a previous two-part process, which consisted of completing separate Application and Profile forms. http://www.nasdadr.com/arb_brochure.asp#arb_app

Printer-Friendly Code of Arbitration Procedure: We have posted a printer-friendly version of the *NASD Code of Arbitration Procedure*. This document allows visitors to the Site to easily print out the *Code* as a single document. http://www.nasdadr.com/arb_code/Arb_Code_PrintVers.asp

Arbitrator Update Form: Arbitrators already on our roster may use our new online form to advise NASD Dispute Resolution of any new or revised information, including changes to their narrative profile. <http://www.nasdadr.com/ArbInfoUpdate.asp>

Arbitrator's Briefing Sheet: Arbitrators may review a document intended as a brief reminder of their duties and obligations as NASD Dispute Resolution arbitrators. http://www.nasdadr.com/arb_brief.asp

Federal Arbitration Act: Arbitrators and parties can view the Federal Arbitration Act (text originally published by the NASD in October 1999). http://www.nasdadr.com/pdf-text/us_arb_act.pdf

Alternative Dispute Resolution Fact Sheet: Parties new to the process can read an overview of the types of dispute resolution available at this forum—mediation and arbitration. http://www.nasdadr.com/pdf-text/factsheet_flyer.pdf

As always, the following arbitrator reference material can also be found on our Web Site...

The Neutral Corner: The NASD Dispute Resolution newsletter, which is published for our mediators and arbitrators, is also online. It informs NASD neutrals about new initiatives, proposed rule-filings, and important procedures and guidelines. http://www.nasdadr.com/nc_index.asp

Arbitrator's Manual: The Arbitrator's Manual—published by the Securities Industry Conference on Arbitration (SICA)—serves as a guide to procedures and policies for arbitrators. http://www.nasdadr.com/pdf-text/arb_manual.pdf

We encourage you to visit our educational and evolving Web Site to see the above material for yourself!

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