

The Neutral Corner

OCTOBER 2003

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Proactive Arbitrators Keep the Case Moving...

*By Robert D. Herschman ***

Undoubtedly, there are many ways in which arbitrators, and in particular Chairpersons, may ensure that a case proceeds expeditiously and in an orderly fashion.

At the Initial Prehearing Conference (IPHC), the Chairperson, together with the panel, convenes with the parties to set hearing dates and discovery deadlines. Invariably, because of the number of cases that claimant's or respondent's counsel has scheduled, there will be a request to set the hearing dates so far in the future that it is unacceptable to one party, thereby prolonging the case despite the arbitrators' attempts to expedite the process. Additionally, counsel frequently need to consult with their clients and experts to determine their availability. The panel, in turn, may consist of practicing attorneys, accountants, industry representatives, etc., who have busy schedules as well. Consequently, scheduling is often time-consuming and problematic. This article is written to provide several proactive approaches that the panel may utilize in dealing with scheduling and other related issues that impact the commencement and/or continuance of a hearing.

First, if counsel mutually agree to schedule hearing dates many months after the IPHC, the best practice is for the panel to set the hearing dates as agreed. However, when one party offers dates that are so far in the future that the other side objects, the panel should suggest that counsel "redouble their efforts" in checking their availability. If, for example, the parties require four days to complete the arbitration and four consecutive days are impossible to schedule, be creative. Suggest two sets of two-day hearings, non-consecutive days, weekends and/or working longer hours, and perhaps the availability of another attorney in the office to handle the matter. Finally, if a particular arbitrator's busy calendar consistently causes undue delay in scheduling the hearing, he or she should consider withdrawing so that a

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replacement arbitrator can be appointed. More often than not, when counsel recognize that the panel is actively involved in ensuring that the hearing begins and concludes in a timely fashion, there is less chance that one side will delay the hearing to the detriment of the other.

Another issue that should be addressed at the IPHC is setting discovery deadlines so that discovery disputes do not impact the commencement of the arbitration or lead to a motion to adjourn or postpone. Again, the suggested approach is to be proactive. Schedule dates by which motions to produce and/or compel and the responses to such motions should be forwarded to NASD, and if requested, a follow-up telephonic conference with the Chairperson to resolve any outstanding discovery issues. Usually, when the Chairperson promptly issues a discovery order with deadlines for compliance, the follow-up telephonic conference call can be cancelled, as it will no longer be necessary. The Chairperson should inform the parties that if the panel were not notified of any outstanding discovery issues as of the discovery cut-off date, it would operate under the presumption that all discovery matters have been resolved among the parties. The onus is on counsel to confirm that unresolved discovery matters are addressed in a timely fashion, and therefore, should not be grounds for adjourning the hearing.

While it is impossible to anticipate each reason that counsel may provide for adjourning a hearing, the panel must carefully review the facts of each request and remember that its failure to grant a postponement for legitimate reasons may lead to the filing of a motion to set aside or

vacate the award in court. The panel should prioritize the parties' interest above their own scheduling commitments when ruling upon such motions, even though each panelist may have set aside numerous days on their respective calendars for the hearing. Finally, rule on such motions in a timely fashion after considering the number of prior requests and the burden on the parties. The Chairperson should forward the panel's written decision to NASD via electronic mail or facsimile transmission and follow-up with a telephone call to the assigned NASD staff person to confirm that the decision has been received.

These suggestions are but a few of the methods that have proven helpful in conducting well-managed hearings from the IPHC through final deliberations. Panelists should always be cognizant of the fact that their demeanor is of the utmost importance and that their goal is to have the case proceed as efficiently and expeditiously as possible. A cohesive panel that is prepared, professional, fair and unbiased towards all the parties will set the tone for the proper conduct it expects from all participants.

**** Robert D. Herschman is an attorney in private practice and specializes in all forms of Alternative Dispute Resolution. He has served as Chairperson on more than 250 arbitration cases at forums sponsored by the NASD, NYSE, and AAA. He also serves as a mediator at these forums.**

Since 1993 Mr. Herschman has been an NASD Dispute Resolution trainer of new arbitrators and Chairpersons. He authored this article utilizing his insights from conducting these NASD training programs and from his extensive arbitrator experience.

NASD Proposes to Conduct Background Verification on Arbitrator Applicants

On August 14, 2003, the Securities and Exchange Commission (SEC) published for public comment an NASD proposal to conduct background verification on all new arbitrator applicants and to assess an application fee to cover the cost of the verifications.

NASD believes that verifying arbitrator applicant information and credentials will help enhance the integrity of the arbitration process in the eyes of the investing public and other forum participants. The verification fee will not apply to arbitrators who are presently on the NASD arbitrator roster, but will be charged for new arbitrator applications received after the effective date of this important change.

At the present time, all arbitrator applicants are required to provide NASD Dispute Resolution with their employment or business histories, education, professional licenses, expertise, associations, and other pertinent information. In addition, approved and available arbitrators have an ongoing duty to regularly update their biographical information. This information is disclosed to the parties when they are selecting arbitrators for their cases.

While NASD currently checks the arbitrator records of applicants who have been registered with NASD on the Central Registration Depository (CRD), it does not verify any arbitrator information in regard to applicants who do not have CRD records. This proposal will expand NASD verification of arbitrator information to all new arbitrator applicants. As part of the proposal, NASD Dispute Resolution has identified a vendor that will provide the following verification services:

- Criminal check in the county of the applicant's residence;

- Federal criminal check;
- Employment verification; and
- Professional license verification.

The SEC approved this proposal effective October 1, 2003. To view the entire NASD filing (File No. SR-NASD-2003-122) on our Web site at www.nasdaq.com follow these links: "Rules and Procedures; Rule Filings and Guidance; Rule Filings; Dispute Resolution Approval Orders."

Mediation Settlement Month and Day

During Mediation Settlement Month in October 2003, NASD Dispute Resolution reduces prices to encourage more parties to explore the benefits of mediation.

On Mediation Settlement Day, Thursday, October 30, 2003, dozens of New York-area organizations conduct special programs designed to promote mediation and to educate potential parties and attorneys about the mediation process.

View more information about this year's Mediation Settlement Month and Mediation Settlement Day at www.nasdaq.com/med_set_events.asp.

Editor's Note

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

Please send your article to Tom Wynn, Editor, *The Neutral Corner*, NASD Dispute Resolution, One Liberty Plaza, 165 Broadway, 27th Floor, New York, New York 10006. Call the Editor at (212) 858-4392 for editorial guidelines.

We Need Your Peer Evaluations

By Valerie Bailey Johnston **

NASD operates the largest securities dispute resolution forum in the world, administering more than 7,700 new case filings in 2002. The prominence of NASD Dispute Resolution is due primarily to the integrity and competence of its more than 7,000 arbitrators.

As the arbitration caseload grew and the cases became more diverse and complex, NASD took a number of steps, including the following, to prepare arbitrators for their challenging role:

- Expanded its Web site, making more resources available to arbitrators;
- Expanded publication of *The Neutral Corner* from three to six times a year;
- Improved the arbitrator application process;
- Established mandatory training requirements for newly approved arbitrators; and
- Implemented Online Chairperson Training, making it more accessible to arbitrators.

At the same time, NASD instituted formal arbitrator evaluation procedures to help maintain the quality of the process and to ascertain arbitrator training needs. These procedures require review by NASD Dispute Resolution staff of arbitrator performance after service on each case, and quarterly, to determine

the arbitrators' training needs and to consider the temporary or permanent removal of an arbitrator from the roster.

In addition to staff evaluations, NASD also converted its *Peer Evaluation Form* to a postage-paid mailer so that arbitrators may conveniently evaluate other arbitrators with whom they have presided, as well as evaluate the process itself. Finally, the forum instituted a postage-paid *Party Evaluation Form* whereby parties and/or their representatives may evaluate the arbitrators, the administrative services and the process. NASD Dispute Resolution implemented several of the above initiatives as a result of feedback from arbitrators and parties.

Peer and Party evaluations play an important role in helping NASD Dispute Resolution maintain a roster of the highest caliber. An independent survey of the evaluations entitled "Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations" is available on the NASD Dispute Resolution Web site, www.nasdadr.com, and can be accessed by following these links: "Resources for Parties; Other Information; Information on Evaluation of NASD Arbitrators; Results."

As indicated above, arbitrator or peer evaluations play a critical role in the evaluation process because they constitute another effective tool for obtaining valuable opinions on arbitrator demeanor and performance. Unfortunately, arbitrators and parties do not complete and

return their evaluation forms in great numbers. To maintain the high level of service expected by forum participants, NASD Dispute Resolution is appealing to its arbitrators to participate in improving arbitrators' performance and process quality by routinely completing and submitting the *Peer Evaluation Form*. After each case, we ask that you use the form to provide your critical and honest opinions, whether positive or negative, about the arbitrators with whom you have served. While NASD Dispute Resolution appreciates all of the comments and suggestions it receives from arbitrators, the *Peer Evaluation Form* is the best vehicle for communicating those comments and suggestions. Arbitrators can find or access this form in the following ways:

- In the *Information and Forms for Arbitrators Booklet* that is sent to arbitrators upon appointment;
- As a postage-paid self-mailer in the *Case Packet* that arbitrators receive when appointed to cases;
- As a postage-paid self-mailer in the hearing room when the hearing is conducted at an NASD facility; and
- On the NASD Dispute Resolution Web site at www.nasdadr.com/pdf-text/peer_eval.pdf.

Arbitrators also may contact the NASD staff person assigned to the case for a copy of the form.

Peer Evaluation Contents

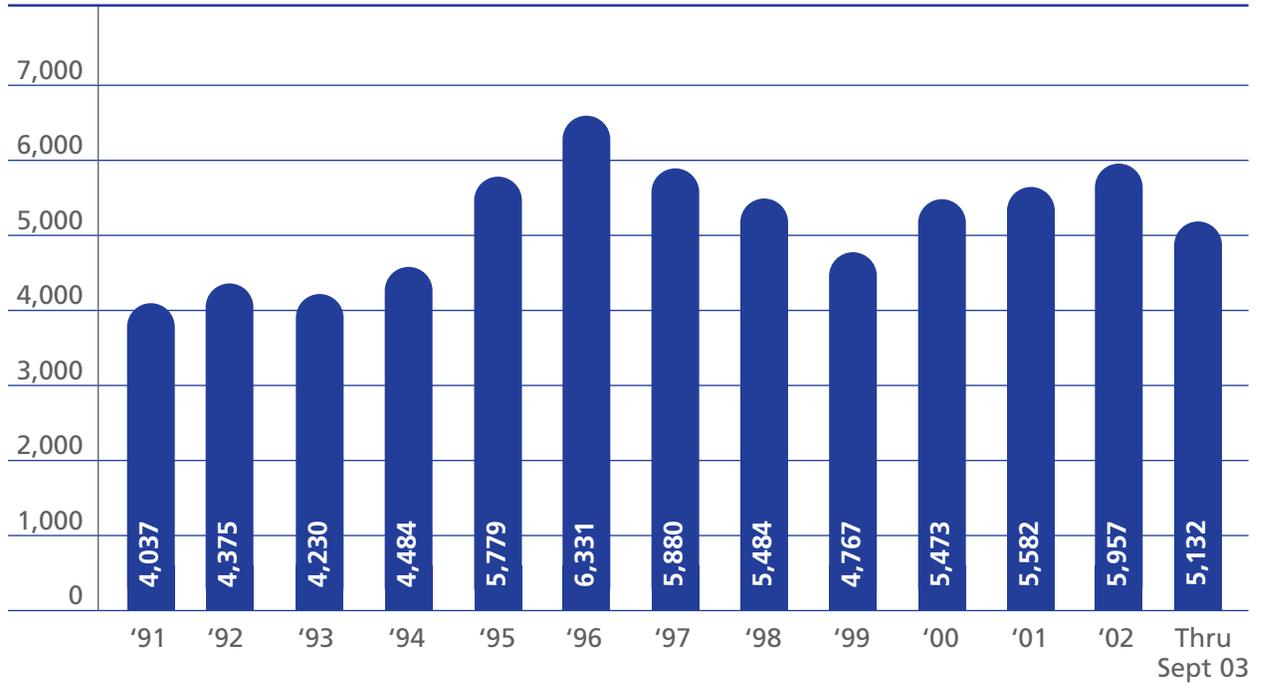
The *Peer Evaluation Form* solicits feedback on the chairperson's performance and each arbitrator's overall performance and ability to:

- Listen actively;
- Analyze problems and identify the issues;
- Use clear and neutral language;
- Be sensitive to the parties' values, gender, ethnicity, and cultural differences; and
- Be professional.

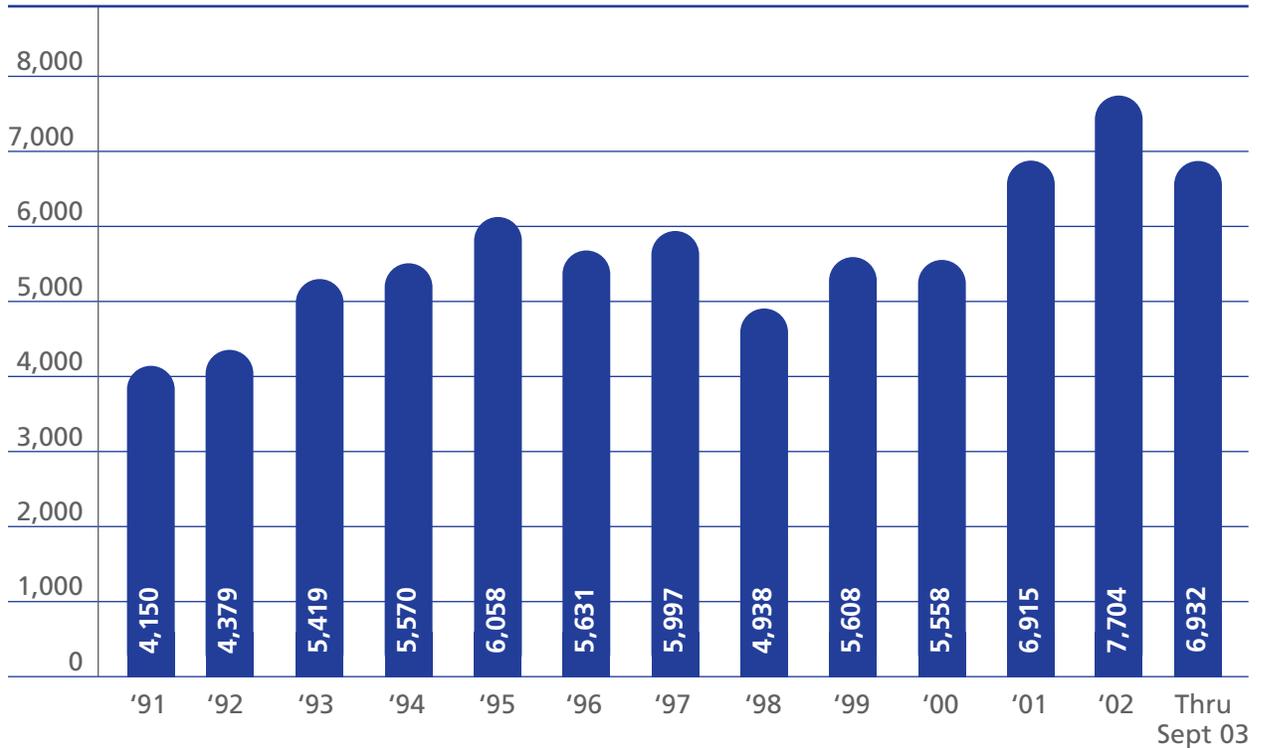
**** VALERIE BAILEY JOHNSTON is an Associate Director with NASD Dispute Resolution responsible for the development and delivery of staff training on case administration procedures. Before this, she managed the Northeast Region's program to recruit and train dispute resolution arbitrators. Valerie co-wrote the arbitrator training materials and regularly lectures on the securities dispute resolution process before numerous bar groups, law schools, and other organizations.**

Valerie is a graduate of Fairleigh Dickinson University in Rutherford, New Jersey and Brooklyn Law School in New York. She is a member of the American Bar Association and New York State Bar.

NASD Arbitration Cases Closed Annually



NASD Arbitration Cases Filed Annually



To view detailed statistics updated quarterly, use the following URL <http://www.nasdadr.com/statistics.asp>.

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