



The Neutral Corner

JUNE 2003

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NASD Implements Online Chairperson Training

On June 2, 2003, NASD Dispute Resolution—with the assistance of FIRE Solutions, Inc.—launched an updated version of the former Chairperson Training curriculum in a Web-based format. This online arbitrator training program—Dispute Resolution's *first*—is available 24 hours a day, seven days a week. Arbitrators can access and enroll in the training via NASD Web site located at www.nasdadr.com.

The cost of training is \$100, and it takes approximately nine hours to complete. Participants have one month within which to complete the materials and obtain a passing grade of 80 percent on the test that appears at the end of the course.

"This online implementation will assist both the forum and individual arbitrators by providing the forum with more qualified and diverse Chairpersons while making the training itself more efficient and less costly for individuals," said Linda Fienberg, President of NASD Dispute Resolution.

NASD believes this new online delivery of Chairperson Training will allow arbitrators to more easily include it in their busy schedules. The new Chairperson Training Program replaced Chairperson Training that consisted of pre-course self-study reading, followed by in-person classroom instruction.

Update on the Status of the California Standards

In November 2002, Federal District Court Judge Conti of the Northern District of California dismissed NASD and New York Stock Exchange (NYSE) challenges to the California Judicial Council ethical and disclosure standards for arbitrators (California Standards) on Eleventh Amendment grounds. The Eleventh Amendment to the U.S. Constitution establishes a general bar against suing a state or a state agency in federal court.

In December 2002, NASD and the NYSE jointly appealed the Conti decision—asking the Ninth Circuit Court of Appeals to reverse this decision and rule, among other things, that the California Standards are not applicable to self-regulatory organizations. The primary issues—which are still on appeal to the Ninth Circuit Court of Appeals—include whether the California Standards are preempted by the national system of federal securities regulation established under the Securities Exchange Act of 1934; and whether the California Standards also are preempted by the Federal Arbitration Act.

In April 2003, Federal District Court Judge Fogel also sitting in the Northern District of California in a separate matter titled *Mayo v. Dean Witter Reynolds, Inc.* determined that the application of the California standards to the NYSE, and other self-regulatory organizations, such as the NASD, are preempted by both the Federal Arbitration Act and the Securities Exchange Act of 1934. NASD and NYSE intervened as parties in this case. To read this decision, see the home page on the NASD Dispute Resolution Web Site at www.nasdadr.com.

For more information on this subject, see the August and October 2002 editions of *The Neutral Corner* on our Web Site by following these links: "Resources for Neutrals; Education & Guidance; *The Neutral Corner*."

Proposal to Amend NASD By-Laws

In February 2003, NASD member firms approved amendments to NASD By-Laws, as requested in *NASD Special Notice to Members 03-04*.

In April 2003, NASD filed a proposal with the Securities and Exchange Commission (SEC) (File No. SR-NASD-2003-69) to amend Article V, Section 4 of NASD By-Laws to authorize NASD to suspend former associated persons for failure to honor NASD arbitration awards or any written and executed NASD arbitration or mediation settlement agreements for up to two years after the awards or settlements are entered.

In addition, the proposal amends Article VI, Section 3 of NASD By-Laws to clearly permit NASD to not only suspend or cancel the *registration* of former associated persons who fail to pay NASD arbitration awards or to honor NASD settlement agreements, but also to suspend or prevent such persons from any *association* with any NASD member.

To view the proposal on the NASD Dispute Resolution Web Site at www.nasdadr.com follow these links: "Rules and Procedures; Rule Filings and Guidance; Dispute Resolution Rule Filings."

Notice to Members

Notice to Members 03-23 announced that in March 2003 the SEC approved amendments to NASD Rule 3070. The amendments, effective May 21, 2003, require NASD member firms to promptly file with NASD copies of certain criminal and civil complaints and certain arbitration claims that name members or their associated persons as defendants or respondents.

NASD believes that a review of the information contained in such complaints or claims will enhance NASD regulatory efforts and better protect investors through early detection of broker misconduct.

To view the *Notice* on our Web Site, follow these links: "Rules and Procedures; Notices to Members."

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.

Questions & Answers on the Arbitrators' Duty to Decide Important Procedural Issues

Arbitrators are obligated to ensure that all parties are provided with a full and fair opportunity to be heard throughout a proceeding on all unresolved issues.

Performance of this arbitrator duty involves balancing the inevitable tension between process efficiency and procedural fairness. When arbitrators preside at evidentiary hearings or prehearing conferences, they can find the correct balance of fairness and efficiency by remembering that fundamental fairness preserves and protects award finality and forum integrity.

In regard to submitted claims and defenses, arbitrators must ensure every party's right to a fundamentally fair hearing by providing them with the chance to offer, examine, object, and comment upon the evidence, and to argue pertinent facts and applicable law.

Arbitrators also must ensure every party's right to be heard on important procedural issues. These issues may include the following:

- ★ Is there jurisdiction to decide a claim under NASD Rule 10101?
- ★ Should a postponement be granted to a party because of the unavailability of a witness; to obtain a lawyer; to continue discovery; or to conduct settlement discussions under NASD Rule 10319?
- ★ Should a party be precluded at the hearing from presenting documents or witnesses that were not properly

exchanged or identified before the first scheduled evidentiary hearing under NASD Rule 10321(c)?

- ★ Should a respondent be precluded at the hearing from presenting defenses or facts that were not included in a filed answer under NASD Rule 10314(b)?
- ★ Should an amendment to filed claims or answers be allowed at the hearing under NASD Rule 10328?
- ★ Should the production of additional witnesses or documents be ordered at the hearing under NASD Rule 10322(b)?
- ★ What action is appropriate when a party has not complied with an arbitrator or panel order to produce witnesses or other evidence under NASD Rule 10324?

Arbitrators may face other critical procedural issues such as questions of jurisdiction over a respondent under NASD Rule 10301 or NASD Rule 10201; proper notice of scheduled hearings under NASD Rules 10315 and 10310; and proper service of the filed claims under NASD Rule 10314(a). The latter issues arise where a named respondent, who has not filed a signed uniform submission agreement or answer, does not appear at a scheduled hearing, and the claimant requests that the panel proceed with the matter.

To read the NASD Rules listed above on our Web Site, follow these links: "Rules & Procedures; Code of Arbitration Procedure."

Question: Why are panel decisions on these and other procedural issues so very important?

Answer: Panel decisions on these issues become critically important when any party seeks to vacate or set aside the award in a court of law by asserting that such decisions amounted to serious arbitrator misconduct that prejudiced or interfered with the rights of the party. To view the grounds upon which awards can be vacated under Section 10(a) of the U.S Arbitration Act on our Web Site, follow these links: "Rules and Procedures; United States Arbitration Act."

Question: Why is it important for presiding arbitrators to *make a record* of their important procedural decisions?

Answer: When arbitrators *make a record* of these procedural decisions, they provide information that helps a reviewing court uphold these decisions and the award.

Question: What does it mean to *make a record*?

Answer: *Making a record at the hearing* means stating on the record the panel's decisions and underlying reasons. This may entail marking and admitting into evidence, as panel exhibits, any documents the panel considered when it made these procedural decisions. It also may include referring on the record to rules or ethical canons, if they are part of the panel's reasoning.

Making a record in the award means including these procedural decisions and reasons in the "Other Issues Considered And Decided" part of the award. To view this part of the award, review the Award Template on our Web Site by following these links: "Resources for Neutrals; Education & Guidance; Arbitrator's Reference Guide."

Question: Why should presiding arbitrators consider *making* a record of their important procedural decisions both at the hearing and in the award?

Answer: Ordinarily, a reviewing court will read the award. The hearing record is the second place the court may examine. Read the article titled "Questions & Answers on Keeping a Record of Arbitration Proceedings" in the April 2003 edition of *The Neutral Corner* on our Web Site by following these links: "Resources for Neutrals; Education & Guidance; *The Neutral Corner*."

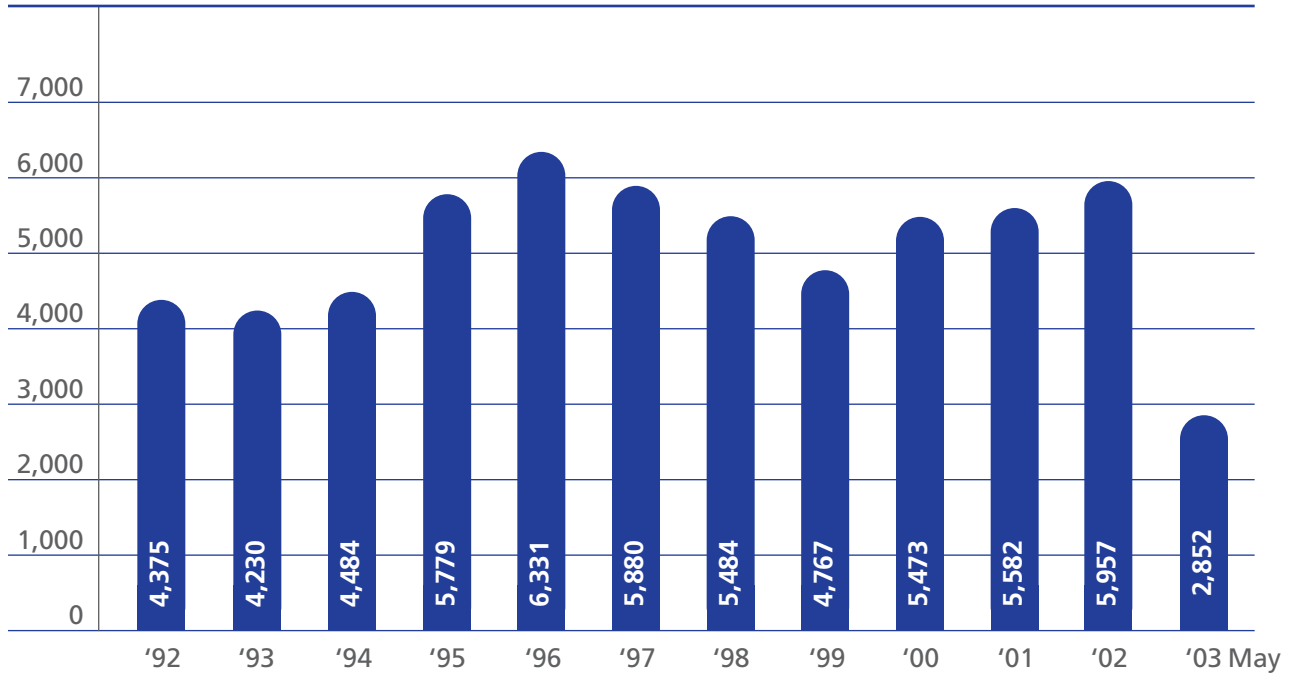
Question: How can the Hearing Procedure Script (Script) help ensure that the presiding arbitrators dispose of any outstanding procedural issues?

Answer: At the end of evidentiary hearings, the Script contains two questions that the presiding Chairperson should ask of the parties or representatives:

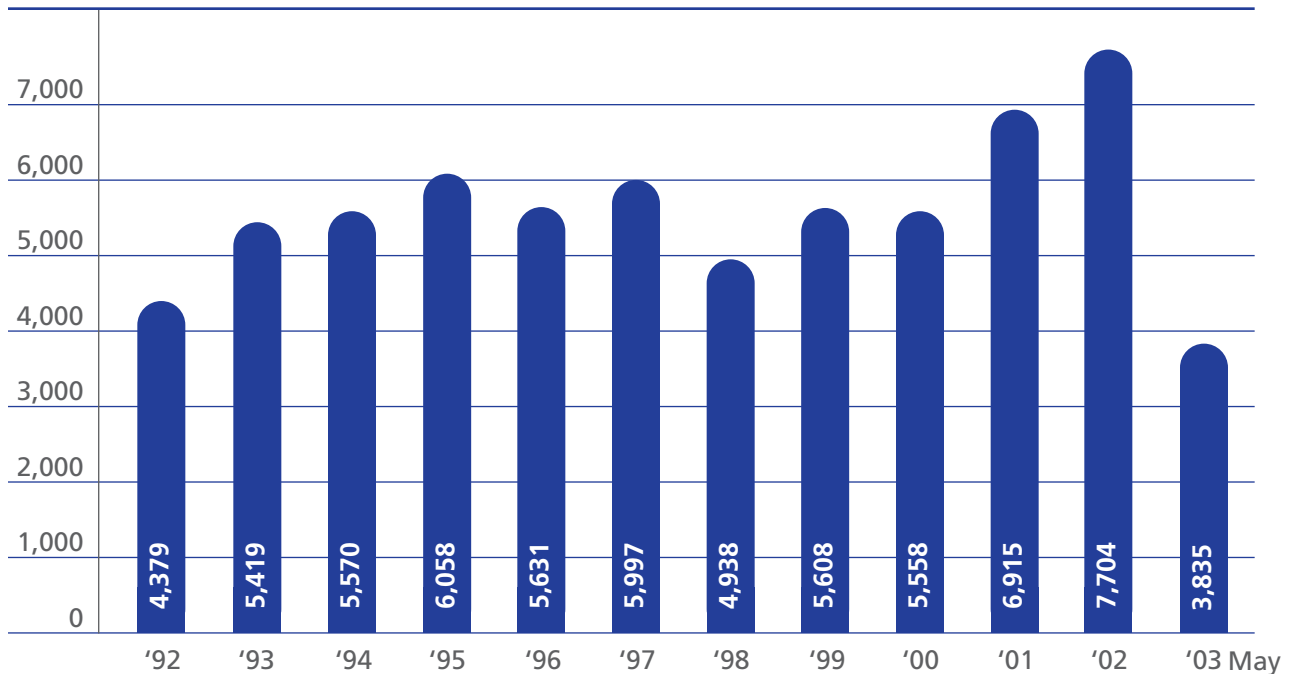
- * Before closing arguments—"Do the parties have any further evidence or testimony to present?"
- * Before closing the hearing—"Will each of the parties state affirmatively whether you have had a full and fair opportunity to be heard?"

Both inquiries demonstrate the panel's ongoing concern that all parties be fully and fairly heard on the substantive issues of liability and damages. Equally important, the responses to these questions may permit the arbitrators to determine on the record any unresolved or lingering procedural questions, evidentiary or otherwise. To view the Script on our Web Site, follow these links: "Resources for Neutrals; Education & Guidance; Arbitrator's Reference Guide."

NASD Arbitration Cases Closed Annually



NASD Arbitration Cases Filed Annually



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

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