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Nancy Morris, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Release No. 34- 52045

Dear Ms. Norris:

I write to comment on **SR-NASD 2006-109.**

This proposal, which evolved from the NASD's February 9, 2005 filing, (File No. SR-NASD -2005-023), and which is intended to clarify the issue of representation of parties in dispute resolution, raises more issues than it clarifies. It remains, despite some of its reasoning, virulently anti-consumer. This proposal is designed to help the industry pay out fewer dollars to aggrieved customers in arbitration and mediation; nothing more and nothing less.

In my August 10, 2005 letter commenting on the NASD's prior proposal, I urged that trained and knowledgeable representatives, regardless of whether or not they were attorneys, would greatly benefit the arbitration system and all participants. I still believe that to be true, and that knowledge and training in this forum means more than a law school diploma.

The NASD, in this new proposal, gives lip service to that concept: the proposed rule change *"is intended to reflect the current practice in the forum which, based upon experience, indicates that the outcome of a dispute resolution proceeding depends more on the level of knowledge, training and skill of the attorneys, rather than the jurisdiction from which the attorneys received their license to practice."* Nothing in the proposed rule actually furthers that intention. Rather than provide training that would increase the knowledge and skill of all practitioners, the NASD has responded with a nonsensical regulation that fails to address this problem, or the problem of who can or should be allowed to represent parties in every state.

This rulemaking is ostensibly in response to actions taken in several states attempting to restrict representation of parties in SRO arbitrations exclusively to attorneys licensed in the state where the hearing is to be held. As with the NASD's prior proposal, this new proposed rule misses that mark completely.

The new proposals for NASD Arbitration Code Sections 12208, 13208 and 10407 still leave the issue to state law, state courts and "other regulators". Why is it that the NASD and the Commission refuse to assert federal pre-emption over who participates in NASD forums? Why leave it to state courts? Isn't that exactly what this rule was supposed to correct? What is wrong with one set of rules for all 50 states?

I for one believe that state regulatory input on arbitration is important and of growing importance as investor choice for an arbitration forum shrinks to one, with the Commission's blessing. With state regulation, consumers in California could have availed themselves of the safeguards and disclosure rules which their legislature believes would benefit all participants in arbitration in that state. But the industry and the Commission staff didn't see it that way. What changed?

The NASD's deference to state law and state courts on this issue speaks volumes in light of its diametrically opposite position in NASDR v. Judicial Conference of California. It certainly seems that if the state law is good for the consumer the NASD opposes it, and if it is good for the industry, the NASD favors it. This, from the private company that Commission is about to allow to become the only regulator and only arbitration forum for the entire system. (In my humble opinion, the U.S. capital markets and U.S consumers deserve better.)

If attorneys may represent parties in the NASD's arbitration forum, *unless state law prohibits such representation,* how does this new rule deal with the issues of multi-jurisdictional practice? The "problem" that the NASD was attempting to "fix" when it first proposed changing this rule, was the fact that certain states had refused to allow practitioners who were not licensed to practice law in their state from participating in NASD arbitrations. This applied to both out of state attorneys and non-attorney practitioners. By deferring to state law, the newly proposed rule does absolutely nothing to address this issue.[1]

By allowing state law to govern, the Commission is guaranteeing a patch work approach that will do nothing to help consumers, promote the integrity of the marketplace, or solve the problem of multi-jurisdictional practice. All this proposed rule does is create more work for lawyers as state court judges will deal with 99th hour requests for TROs.

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[1] The NASD continues to cite Birbrower, which has been abrogated by legislative action with the blessing and support of the Securities Industry Association, and Florida Bar v. Rappaport, whose spurious origins I discussed in my letter of August 10, 2005. If the Commission merely asserts: "*Any person who brings an arbitration proceeding through the NASD may be represented by any person of their choosing (or preferentially, by a practitioner who has been trained and certified by the NASD)*", any state court will understand that local law has been pre-empted. What, exactly, are you guys afraid of?

Divergent results, appeals and a considerable amount of wasted time, effort and money are the only guaranteed results of this rulemaking.

As things stand now, and will continue to stand if this regulation is approved, if the **best** representative for a particular case resides in New York or California, residents of Florida can't use them. Why? Because Florida lawyers don't want the competition, not because Florida residents need to be protected from lawyers who happen to live in New York or California. The Florida Bar's actions aren't about protecting consumers. They are about protecting the Florida lawyer's turf.

The same result will be true for the non-attorney representatives, whom the proposed regulations call *"others."* There is a myth, perpetuated by the member firms and the NASD, that the public needs to be protected from these individuals. I say myth, because there is not one shred of empirical evidence in the public record, to indicate that those individuals who have acted as non-attorney representatives have done anything to warrant special treatment. If anything, the record indicates that non-attorney representatives are as successful as attorneys in bring disputes to resolution in NASD arbitration and mediation forums.[2]

The proposed regulation prohibits attorneys who have been suspended or disbarred (presumably by a State Court or State Bar Association) and "others" who are currently suspended or barred from the securities industry in any capacity because the NASD believes that the general public, in the context of arbitration proceedings, needs to be protected from "*persons who have been found by a regulatory body in essence to be unfit to represent clients or to conduct securities business with the public*".

This sounds admirable, but there is no nexus between prior bad acts in other contexts and a person's knowledge or skill as a practitioner or representative in arbitration or mediation. There is nothing tangible here to which anyone can point. Where are these customers who need this protection? How have they been hurt?

In both cases, this rulemaking adds new penalties to sanctions which have been set forth in other matters, and in other contexts. I say this because I can find no public record of a single practitioner being sanctioned for actions and occurrences that took place <u>within</u> the context of an SRO arbitration. As far as I can tell, not one practitioner, attorney or "other", has ever been disbarred by a state, or expelled from the NASD for conduct that took place within an NASD arbitration. Banning those who have been disbarred or expelled for *other reasons* doesn't protect the public, or make the arbitration system any better. [3]

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[2] The $100,000 threshold casually mentioned by the NASD because "it may be difficult for investors with claims of less than $100,000 to retain an attorney on a contingency basis" is an arbitrary figure. There is no basis to relegate non-attorney representatives to smaller cases. This comment begs the question why the lawyers, who are ultimately seeking relief under this rule, have not filled the void by taking the smaller cases, either for reduced fees or pro bono.

[3] It seems questionable whether or not the Commission is actually authorized under Section 15 of the Exchange Act to bar someone from an arbitration forum as a *sanction* for some other conduct, or that the

Moreover, as far as I can tell, no member firm employs any disbarred lawyers or persons barred from the securities industry in the capacity of a representative in arbitration. That being said, the only persons barred under this rule, will be those currently representing public customers.[4] So the industry will be largely unaffected by this rule, but the public will have less of a choice. [5] How can that be good? Or even handed?

Does the Commission also propose to establish a mechanism whereby individuals who have been statutorily disqualified for other reasons can apply for re-instatement? The current system usually requires a member firm to apply with or for a statutorily barred individual. The member firm generally agrees to extra-ordinary supervision. How would this apply here? What member firm intends to apply for permission for an individual who helps customers file claims against the industry?

This proposal has been around, in one form or another, for quite some time. There is no real urgency requiring its approval. It still misses the mark by a wide margin. With the impending merger between the NASD and NYSE about to significantly change the landscape for arbitration, there is no good reason to adopt this regulation, in its current form, at this time.

I urge the Commission to review the arbitration system in the context of the complete monopoly that the NASD will have after the proposed merger is complete. The NASD ***is*** the industry. And this proposed rule will help nobody but the industry.

I urge you to reject this rule, again, and to allow consumers to have the representative of their choice, without restriction, regardless of where that individual resides. I further urge you to instruct the NASD to establish relevant standards for practitioners in this forum, so that consumers will have the benefit of representation by individuals who understand not just the law, but also the marketplace which this forum serves.

Respectfully,

Irwin G. Stein

Commission really wants to. (In re: Paul Van Dusen, 34 Act Release No. 18284). Recent court rulings in other matters even call into question whether or not securities arbitration, in its present state, given the privatization of the NASD and the monopoly over arbitration the Commission is about to give to it, actually furthers the Commissions' statutory objectives... but that is another matter.

[4] Has anyone looked at how many "statutorily disqualified" persons are actually functioning as non-attorney representatives? Can anyone say that the public actually needs to be protected from these individuals? Has anyone considered how many cases this rule will disrupt? Has anyone asked the customers whose cases will be disrupted if they really want this rule?

[5] No state currently bars individuals who are "statutorily disqualified" from the NASD from acting as representatives in arbitration. The proposed regulation, which seems to leave the issue to the states, adds this additional requirement. Thus we get two layers of regulation on this issue and no firm resolution that an attorney from New York can conduct an arbitration hearing in Florida, even though the same attorney could certainly take a deposition there.