

Re. File No. SR-NASD-2005-023

Pursuant to paragraph IV of the Release No. 34-52045, we respectfully request that, in adopting the changes to Rules 10316 and 10408 of the NASD Rules of Procedure, the following comments be considered:

Introduction

In footnote four to the background section of the proposed rules, the NASD Dispute Resolution states that “[t]he proposed rule change does not address the issue of representation by non-attorneys in arbitration and mediation cases.” However, the express language of the rules contradict this statement, and indeed, require an interpretation that only “an attorney at law admitted to practice before” a court within the United States is permitted to represent others in NASD arbitrations. *See* Text of Proposed Rule 10316(b). Notably, this is the only outcome permitted under the clear and unambiguous law of many states, including California. We respectfully request that the NASD Dispute Resolution delete footnote four from the background section, and clarify that the NASD does not tolerate the practice of law by those who are not members of at least some bar of some court in the United States.

Existing State of Affairs

Under existing rules, “[a]ll parties have the right to representation by **counsel** at any stage of the proceedings” (emphasis added). As of now, although the NASD Dispute Resolution “continues to be concerned about the on-going problems” caused by such representations (Proposed Rule Change at 6, n.11), it seems to permit non-attorneys to represent clients by, among other things, signing pleadings and appearing at hearings on a client’s behalf. No organization, including the NASD, has articulated any standards or minimum skill levels governing these non-attorneys. These non-attorneys currently operate in NASD proceedings with impunity and without overriding supervision from any regulatory body -- unheard of in any other adversarial setting.

The Current State of Affairs Violates California Law

The ability to place limitations and prohibitions against the unauthorized practice of law “is within the state’s police power and is designed to ensure that those performing legal services do so competently.” *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 127 (1998). California’s legislature has unambiguously provided that “[n]o person shall practice law in California unless the person is an active member of the State Bar.” Cal. Business & Professions Code §6125. The California Supreme Court

already has decided that the statutory prohibition against the practice of law in California by persons not members of the State Bar extends to arbitration proceedings. *Birbrower* at 133. Therefore, California has exercised its right, under its police power, to prohibit non-attorneys from representing others at arbitrations taking place in California. There is no evidence that California intended to create an exception for NASD arbitrations. Indeed, where California intended to create exceptions, it has done so expressly by statute. *See, e.g.*, Cal. Code of Civ. Proc. §1282.4(g). Therefore, NASD's current practice of permitting non-attorneys to represent others at NASD arbitrations runs afoul of California's well-established rules.

On Their Face, the Proposed Changes to Rules 10316 and 10408 Prohibit Non-Attorneys From Representing Others At NASD Arbitrations

The proposed changes to Rules 10316 and 10408 replace the term "counsel" -- an arguably vague term -- with "an attorney at law admitted to practice before" a competent court within the United States -- an unambiguously clear phrase. Therefore, on their face, the proposed new rules bar non-attorneys from representing clients at NASD arbitrations. However, in the background section of the release concerning these proposed rules, the NASD Dispute Resolution casts doubts on this otherwise clear language, and states that "[t]he proposed rule change does not address the issue of representation by non-attorneys in arbitration and mediation cases." Proposed Rule Change at 4, n.4.

Footnote four seems inherently inconsistent with the text of the proposed rules because it is hard to imagine how a non-lawyer could be "an attorney at law" or admitted to practice before a competent court within the United States. Given this language, it is difficult to imagine a situation where a non-attorney would be permitted to represent a client at an arbitration. Notwithstanding, we suspect that non-attorneys will rely on the ambiguity created by footnote four to argue that they are permitted to continue representing clients in NASD arbitrations. We respectfully request that the NASD replace the confusing footnote four with a clear admonition that it will no longer tolerate participation of non-attorneys in NASD arbitrations.

Prohibiting Non-Attorneys From Representing Clients at NASD Arbitrations is Consistent With NASD Policies

Prior to being permitted to practice law in any state, each attorney, in every jurisdiction within the United States, has to pass an exam and/or otherwise demonstrate that he or she has the minimum skill set necessary to represent clients. Most jurisdictions require attorneys to take continuing education classes to ensure that each attorney's skills are maintained. Notably, attorneys licensed to practice law in the United States are bound by

an oath to act ethically and in the best interest of their client. Attorneys who fail to do so, are subject to censure and discipline by the Bar to which they belong. On the other hand, non-attorneys are not bound by any rules of ethics, they do not have to demonstrate any skill level, and they are not subject to discipline or regulation by anyone. Such lack of control has lead to well-documented problems at a cost to unsuspecting clients. *See, e.g.*, Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys, 22 Fordham Urb. L. J. 507 (1995) cited in Proposed Rule Change at 6, n.11. By barring non-attorneys from representing others at arbitrations, the NASD can minimize these problems and promote its policy of protecting the interests of investors and the public. *See* Section 15A(b)(6) of the Securities and Exchange Act of 1934.

Respectfully submitted,

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