

February 11, 2005

Following is a preliminary comment and objection to NASD's proposed rule SR-2005-23.

I am an attorney in California. The vast majority of my practice is representing investors in arbitrations pending at the NASD and the Pacific Exchange. I also represent individual brokers in claims against brokerage firms.

The NASD's proposed rule change, SR 2005-023, which was submitted to the SEC on February 9, 2005, should not be published in the Federal Register in its current form, but should be returned to the NASD for further refinement, for the following reasons.

(1) The proposal itself is inconsistent with the NASD's Statement of Purpose for the proposed rule change. The plain language of the proposed rule states that arbitration participants have the right to be represented by any attorney as long as that attorney is licensed anywhere in US. Yet, the NASD's statement of purpose states that issues regarding unauthorized practice of law are left to the states to decide.

If this statement of purpose is correct, why is the NASD bothering with proposing this rule change, that will (according to its own rationale) have no effect on whether an attorney can represent a party in an arbitration in any particular state?

Further, in litigation in California involving the application of state law on arbitrator selection and disclosure, the NASD and the SEC have repeatedly asserted that NASD rules approved by the SEC preempt contrary state law. Hence, this proposed rule would indeed preempt individual states' unauthorized practice of law statutes, unless the NASD or the SEC no longer believes that NASD rules have a preemptive effect.

Prior to publishing this proposed rule, the NASD should be required to make clear the effect they intend by proposing this rule change. If the NASD is serious about the rule proposal, then it should explain exactly why it is making this proposal.

(2) The language in subparagraph (b) of the proposed rule gives brokerage firms the right to be represented by a non-attorney, but in subparagraph(c) the rule seems to leave whether claimants and individual brokers have a similar right to a state by state determination. This rule therefore gives industry firm respondents favored treatment and an unfair advantage in, among other things, obtaining experienced, inexpensive advocates.

The NASD has also asserted in the California litigation that it cannot function under 50 different sets of procedural rules (a position taken in support of its argument that NASD rules preempt contrary state law). Yet, this proposed rule change will do exactly that -- whether a claimant can be represented by a non-attorney in NASD arbitration will

depend heavily on state law, and may change during the course of an arbitration should venue of the hearing be changed!

(3) Permitting 50 different approaches to who can represent parties in NASD arbitrations is also contrary to long-standing NASD practice, and conflicts with SICA-drafted "The Arbitrators Manual". As the NASD's statement of purpose makes clear, non-attorney representation has been a part of NASD arbitration since its inception.

Most disturbing, however, is that the NASD is unable to explain the effect this proposal will have on non-attorney representation. I asked the NASD earlier today about what impact this rule change would have on non-attorney representation. Specifically, I asked: "Does this rule change apply to non-attorney representatives, and in particular, is it intended to restrict or otherwise change the NASD's practice of permitting non-attorneys to represent parties in its forum?"

The NASD was unable to provide a straight answer. Instead, the best the NASD could do was refer me to "page 7" of the rule proposal. Specifically:

"You asked about Rule 10316, proposed paragraph (c). Our description of this part of the rule proposal is stated in the rule filing, beginning at page 7."

This proposal should be returned to the NASD without publication in the Federal Register, with directions to the NASD to explain exactly what it intends to accomplish with the proposed rule change, and to explain in a straightforward manner how this proposed rule change impacts non-attorney representation in NASD arbitrations.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions or concerns regarding the foregoing.

Tim Canning