SECURITIES ARBITRATION
COMMENTATOR

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IN THIS ISSUE

BEWARE OF WHAT YOU ASK FOR:
You Might Just Get It

by Constantine N. Katsoris*

When the Uniform Code of Arbitration was first crafted over twenty-five years ago, the Securities Industry Conference on Arbitration (SICA) sought to preserve the three attributes of arbitration - - speed, economy and, above all, *fairness*. As the number of SRO filings grew dramatically, SICA periodically amended its Code in the interest of fairness, often at the expense of speed and economy.

To prevent trial by ambush, numerous discovery and pre-trial procedures were added. To prevent instances of conflict of interest, significant screening and disclosure requirements were implemented. To avoid the impression that arbitrators were being chosen by the SROs in an arbitrary or unscientific manner, an elaborate system of list selection was implemented where the parties participate in the process. These and other changes to the SICA Code were carefully effected so as to *level* the playing field, even though they escalated the cost and extended the duration of the arbitration.

The subject of Awards is presently covered in § 27 of the Code and provides, inter alia, that: (i) all awards must be in writing and signed by a majority of the arbitrators;[1] (ii) all awards are

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* Prof. Katsoris, a member of SAC's Board of Editors since 1997, argues in opposition to Award Explanations on demand.

ARBITRATION AWARDS
…Where the Sun Don't Shine

by H. Thomas Fehn*

Everyone with human intuition or small children knows that sunshine is a good thing. In addition to giving warmth and light, the sun promotes growth and abundance for living things. Few things flourish in the dark - mushrooms most notable among them. Common sense leaves little doubt about this obvious truth.

Back in the good old days when securities arbitration was invented and for a short time thereafter, arbitrators mostly got it right. Nobody thought about explaining awards because all participants clearly understood the reasons for the awards, which were prima facie reasonable. As the quality of arbitrators went down, the incidence of wrong awards went up.

Today, any experienced user of the arbitration system will testify without encouragement that the number of unexplainable and wrong arbitration awards is intolerably high and continues to increase. Experienced and talented arbitrators will be quick to verify that many of their fellow panel members lack the stuff to get it right. Disappointed participants will wonder out loud how it could be that the arbitration panel and their evidence were never in the same room. If explained awards

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* Mr. Fehn, a Partner with the Los Angeles law firm of Fields Fehn & Sherwin, argues in favor of Award Explanations on demand.

Note: Our guest authors' credentials are more fully set forth at the close of their articles.

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deemed to be *final* and not subject to review or appeal, except as provided by law;[2] (iii) arbitrators should endeavor to render the award within thirty business days from the date the record was closed;[3] and, (vi) the Director of Arbitration must serve the award on the parties in a prescribed manner.[4] The section also requires that the award be made publicly available and include summary data, such as: the names of the parties and their counsel, if any; the names of the arbitrators; a description of the issues in controversy; and, the amounts claimed and awarded.[5] This data is available to the public by various vendors, and in accordance with the policies of the sponsoring SRO.[6] While arbitration is not a system of precedents, the significance of publishing these awards is most important in maintaining the investing public's confidence in the SRO process.[7]

Section 27, however, does not go so far as to require the arbitrators to issue written opinions – *although they are free to do so.*[8] This may appear to be a weakness or deficiency in the Code and of SRO arbitration, because written opinions: (i) add "transparency" to the process by providing insight to the parties as to the rationale for the award; and, (ii) help parties in formulating opinions about arbitrators with a view towards exercising their preferences or challenges in the future.[9] As laudatory as these two goals are, the benefits they impose must be measured in light of maintaining the delicate balance between efficiency (speed, economy, finality) and fairness.

Indeed, although it may provide parties with a psychological lift to know why they won or lost, the plain fact remains one arbitrator's opinion in one case is of no precedential value to another arbitrator in a different case. As far as providing insight as to whether to select an arbitrator for a future case, there is some merit to the argument. However, the claimants' and industry's bar are already quite adept at sizing up arbitrators in the SRO pools.

It is not surprising, therefore, that some arbitration litigants might favor *mandatory* written opinions by its arbitrators. **After all, what harm is there to understanding why arbitrators decided one way or the other?** The day of reckoning, however, has arrived with the NASD's recent *surprise* announcement that it will now require arbitrators to write written opinions [a/k/a/ reasoned awards] if requested by the parties.[10]

I do not fault the NASD in seeking this transparency in order to improve the public's perception as to the fairness of the SRO process. Nevertheless, I disagree with those who suggest that this is but another instance where speed and economy should yield to the perceived interest of fairness.[11] Indeed, my instincts suggest that — on balance — neither fairness, speed nor economy is well-served by the proposal.[12]

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become available, this crisis will abate.

The goal of securities arbitration is to get a just result. This premise is so universal that not even lawyers will argue about it. All attributes of the arbitration process are valued according to how they assure a right result. It is difficult to discern which attribute is presently most valued, but it is certain that explained reasoned awards will eclipse whatever is presently in first place.

Here are the reasons why explained awards are a good idea:

1. Accountability. There is nothing that assures your good behavior more than having to explain your behavior to others. Awareness that your behavior must be justified inspires you to engage in justifiable behavior. Children learn this well before they arrive at the age of reason. Arbitrators know it too.

2. Closure. The parties have the right to know why they won or lost. They need assurance that their evidence was considered and their arguments were heard and understood. This is nothing more than basic fairness.

3. Prophylactic effect. If arbitrators articulate the factors underlying their decisions, industry participants will learn where they went wrong and can then develop corrective measures. Similarly, customers can revise their expectations of the behavior they can reasonably demand from industry professionals. Explaining awards is customer protection in its elemental form.[1]

4. Decreased waste. Knowing that arbitrators will think harder and reason better, claimants will bring fewer meretricious cases and respondents will assert fewer specious defenses. Human nature being what it is, combatants will wish to avoid exposure of the foolishness in which they often engage.

5. Settlement enhanced. As more becomes known about the arbitrators' deliberative process, pre-hearing settlements will be enhanced because hearing outcomes will be more predictable. Correlatively, mediations will more readily evaluate the true value of cases.

Any mechanism adopted to implement explained awards must be directed to achieving these goals. The best template would include the presentation of issues, pivotal factual findings, conclusions, and credibility determinations. In all but the most complex cases, detailed explanations or legal analysis are for the most part unnecessary. A well-written explained award will require less than one page.

Author's Note

I first proposed explained awards (I am sure I was not alone) more than 25 years ago when I began serving as an arbitrator. In the first few years, I actually wrote them without charge and in a simple format. I thought the explanation was especially useful in small claim - on the paper cases because the parties had no clue to the reasoning of their arbitrator.

At some point, the SRO administrators directed me to stop. They argued that explaining reasoned awards provided grist for the appellate mill and that this was *per se* undesirable. I offered the view that if I made a mistaken award, it would probably be a good thing if something corrected it and perhaps taught me a thing or two in the process. As a result of this rejection of my willingness to explain awards, I never learned if I made mistakes and thus I was denied the opportunity to enhance my insight. Certainly, no good came from that.

I wish to express my gratitude to the editors of S.A.C. for allowing me to express my views in these pages. It is a privilege to share this pulpit and exchange views with Professor Constantine Katsoris. Happily, in the end, we both speak about an idea that does a compelling job of speaking for itself. It is my hope that our views might bring focus to those rule writers who struggle to get it right. ■

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Endnotes

[1] For this reason, the right to request explained awards must be available to all parties.

Editor's Notes:

SAA 2005-04 Excerpt: NASD PROPOSING AWARD EXPLANATIONS: ***According to a News Release, dated January 27, 2005, the NASD's Board of Governors has approved an amendment to the Code of Arbitration Procedure which will allow customers and employees in industry disputes to require a written explanation of the Award.*** Requests will need to be made before the arbitration panel holds its first hearing. The explanations can be sans citations, but must address each claim that was granted or denied. Arbitrators will be paid $200 each when called upon to write a decision, but NASD will absorb half of that cost.

This is what we knew about the NASD Rule proposal when we wrote last month about the announcement in *SAC's Arbitration Alert*. In the News Release, NASD CEO Robert R. Glauber is quoted, praising the remarkable proposal: "We have found that investors want to know more about how a panel reaches its decision. By giving investors the option of requiring a written explanation of an arbitration panel's decision, we will increase investor confidence in the fairness of the NASD arbitration process."

As SAC went to print, the NASD-DR's National Arbitration & Mediation Committee was due to consider the exact text of the rule proposal at its meeting on March 1, 2005. The Securities Industry Conference on Arbitration has the proposal on its agenda for a meeting on March 15, 2005.

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Requiring written opinions would certainly delay the rendering of awards, as they often are arrived at on the basis of consensus.[13] For example, assume three arbitrators (A, B and C): (i) initially separately estimate damages of $10,000, $20,000 and $30,000, respectively; (ii) ultimately agree on a consensus $20,000 award; and, (iii) when they write the opinion, arbitrator A bases the award on unsuitability, arbitrator B on churning, and arbitrator C on unauthorized trading. Can arbitrators A, B and C realistically issue one reasoned award for $20,000, even though they totally disagree as to the reasons? Moreover, would they; or, would they instead write three separate opinions, or one opinion and two opinions concurring in part and dissenting in part, or some combination thereof?[14]

Nor would opinions necessarily enhance the cause of fairness.[15] Indeed, requiring such opinions might realistically result in *fewer* awards in favor of claimants based upon general equity grounds,[16] and would put additional pressure on already strained SRO staffs, while drafts of written opinions are circulated and re-circulated among the various arbitrators for corrections, re-drafts, and finalization.[17] Besides, who is to monitor the adequacy of such written opinions[18]; and, is it realistically expected that arbitrators will be able to comply with the thirty-day time frame suggested for the rendering of unreasoned awards?[19]

It is more likely that, instead of being a window into the rationale of arbitrators, a written opinion will be used as a platform and blueprint for many more motions and appeals, because it identifies or magnifies targets, meaningful or otherwise, for the losing party to attack.[20] Such additional motions and appeals are both costly and time consuming - - eroding the fabric of speed and economy - - and ultimately result in undue delay in the payment of any award.[21] In addition, I suspect that litigants will attempt to exploit the use of opinions written in completed arbitrations as precedential or collateral value in similar or related pending or future arbitrations.[22]

As I expressed earlier, I do not quarrel with the NASD's efforts to improve the public's perception of SRO arbitrations; however, reasonable people can differ as to the method. To this end, however, it should afford responsible arbitrators the opportunity of disagreeing and opting out ab initio -- *before* accepting an assignment. Ideally, therefore, parties should indicate their desire for written opinions at the pleading stage, before the arbitrators are appointed. Thus, when an arbitrator is asked to serve, he or she can make an informed decision initially — at the time of their acceptance — rather than first accepting and being later notified (before the first hearing date) that a written opinion will be required. This timing issue spares a conscientious arbitrator the unnecessary embarrassment/guilt that their post-acceptance withdrawal would delay the proceedings and escalate the cost. The SROs *owe* that courtesy to their *arbitrators*. Besides, it avoids the additional delay of later seeking a replacement arbitrator.

Would I refuse to sit as an arbitrator if a written decision was mandated? The answer is an emphatic no! However, before accepting such an assignment, I might want to examine the pleadings. I might also inquire as to who my fellow arbitrators are; for, if I have to co-author a written opinion, I would want to know the track record of my co-authors. I can conceive of circumstances where co-authoring a written opinion could be more time-consuming than the hearings themselves. I am afraid that the mischief of the NASD proposal, as well-intentioned as it may be, will be found in the details of its implementation; and, in the final analysis, the public will not be well-served.

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Endnotes

[1] Uniform Code of Arbitration § 27(b).

[2] *Id.* at § 27(c). A reasonable finality to the award is essential if the process is to remain one of speedy resolution and economical relief.

[3] *Id.* at § 27(e).

[4] *Id.* at § 27 (d).

[5] *Id.* at § 27(f).

[6] *See* Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483 (1996). [hereinafter Katsoris I]; *see also Award Report*, SEC. ARB. COMMENTATOR, June 1989, at 6-7; *Award Report*, SEC. ARB. COMMENTATOR, Oct. 1989, at 2-7. Indeed, some awards are often analyzed and commented upon. Id. At 8-10; *see also NYSE Awards* on Website, SEC. ARB. COMMENTATOR, Mar. 1999, at 14.

[7] *See* Katsoris I, *supra* note 6 at 516.

[8] *Id.*

[9] *Id.*

[10] *See* Susanne Craig, *Arbitrators May Have to Put That in Writing*, Wall St. J., Jan. 28, 2005 at C1. It is not clear from the press clippings whether both sides, or only the claimant will have the right to demand a written opinion. If such a rule is contemplated, fairness and common sense dictate that both sides are equally entitled to know why they won or lost. Any suggestion that the privilege be available only to claimants is prejudicial on its face. Some, however, will argue that because arbitration is basically mandatory for claimants [actually it is for both sides] and since three-person panels include a so-called "industry arbitrator," that additional *perks* must be given to the claimant to *level* the playing field. Accordingly, last year, an article suggested that only claimants should have

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the right to appeal arbitration awards. *See* G. Weiss, *Commentary: Give Investors Their Day in Court,* BW Online, March 22, 2204. Whether arbitration remains mandatory or how we should select arbitration panels are separate issues to be debated elsewhere; for, they in no way justify inserting into the arbitration code one-sided provisions that, instead of *leveling* the playing field, will tend to *tilt* it.

[11] *See* Katsoris, Post *Sawtelle* Tremors: Arbitration Faces New Questions About Sustainability of Punitive Awards, 22 ALTERNATIVES No. 4, May 2004, p. 61. [hereinafter Katsoris II] One area, however, where a written opinion may be advisable is in the case of punitive damages, because of its unusual nature; for, it would appear that specific findings explaining the basis of the award of punitive damages are desirable, so that the offending party and an appellate court can better understand the rationale behind the unusual punishment being meted out. *Id.*

[12] Instinct has been defined as "behavior that is mediated by reactions below the conscious level". Webster's New Collegiate Dictionary (1977). In this case, my instincts have been influenced by my serving for many years as an arbitrator, mediator, arbitrator trainer, Public Member of SICA, association with Fordham's Arbitration Clinic, and one who has recruited dozens and dozens of outstanding arbitrators for SRO arbitrations.

[13] Katsoris I, *supra* note 6, at 516.

[14] It would be interesting to see, if we had awards with three separate opinions (one superb, one borderline and one "off the wall"), how various courts would react on motions to vacate such awards. See also, *Jane C. McCarthy v. Citigroup Global Markets, Inc.*, Civ. No. 04-00477-JD (D. N.H., 1/28/05).

[15] *See* Katsoris I, supra note 6, at 517.

[16] *Id.*

[17] *Id.* It must also be kept in mind that not all arbitrators share a common background, i.e., some may be lawyers, accountants, brokers, bankers, business executives, etc. In an attempt to simplify the procedure, it would appear that the proposal does not necessarily contemplate the citation of cases or other authorities. Nevertheless, arbitrators bring to the table their own professional pride - - particularly as to opinions that bear their authorship. For example, some arbitrators may be former Law Review editors who take fierce pride in their scholarship and may insist upon some semblance of "blue-book" form.

[18] For example, would an opinion be considered adequate if it merely stated: "I find for X because he suffered injury at the hands of Y and Z"? Moreover, would arbitrator training be expanded to include opinion writing? Indeed, virtually all JD programs require a course in legal writing.

[19] *See supra* note 3 and accompanying text.

[20] *See* Katsoris, *The Resolution of Securities Disputes*, 6 FORDHAM J. CORPORATE AND FINANCIAL LAW 307 at 346. [hereinafter Katsoris III]

[21] *See* Katsoris I, *supra* note 6 at 518. *See also* Katsoris II, *supra* note 11. However, "when panels issue punitive awards the panel members should explain not only their reasons for the punishment, but also give some justification and blueprint as to their computation to defuse an appellate court's concern as to guidelines." *Id.* At 76.

[22] Such attempts are likely to cause mischief, particularly with inexperienced arbitrators. See Barbara Black, Do We Expect Too Much From NASD Arbitrators?, SEC. ARB. COMMENTATOR, Oct 2004, at 1. For instance, just imagine a 30-page statement of claim with 20 separate causes of action, including RICO, 10b-5, etc., etc., etc. ■

Securities Mediation in the Real World

A Response to Messrs. Smiley and Gard

by Matthew Farley and Brian F. McDonough[1]

We read "A Message to Mediators" (SAC, Vol. 2005, No. 1) twice, first in amazement at its tone and the second time with attention to the details. It makes us wonder if we have been participating in the same mediation process as have Messrs. Smiley and Gard all these years. If the claimants' bar is truly being besieged by bad-faith requests from respondents for mediation, and if the experiences of Messrs. Smiley and Gard are typical of PIABA's membership, then why not, in the words of a former First Lady, "Just say no!".

If the practices complained of in their article are truly representative, why aren't such overtures simply rejected? Instead, despite such grousing, the article concedes (accurately) that the success rate of securities mediation approaches eighty percent. If the results from **mutually** selected mediators are as biased, one-sided, and as unfair as the Smiley-Gard article suggests, then why are presumably competent claimants' counsel permitting them? Claimants' counsel should – if they disagree with the mediators as much as the Smiley-Gard article suggests – advise their clients against participating in the process or decline the mediator's proposal and proceed to the hearing.

At the onset of the institution of mediation services almost a decade ago, we were asked our view and responded tersely (but honestly at the time) that our clients were already so concerned about paying for one dispute resolution process that the possibility of potentially paying for two such efforts was not attractive. Two successful mediations later turned our thinking around. But we remain firmly of the view that mediations result from the failure of the parties' lawyers themselves to bring the dispute to resolution. Some cases, for whatever reasons, are simply not going to settle. These cases seldom mediate to a conclusion as well. Experienced litigants usually "test the waters" on one or more occasions in the prehearing time frame and generally can tell whether settlement efforts are worthwhile or not. The attorneys can (and should) pursue settlement on their own.

We have participated in approximately three dozen mediations. We have never suggested mediating for some "free discovery" concerning the claimant. Our case assessments are premised upon our best understanding of respondent's posture – the good and the bad – coupled with an experience-based assessment of what panels have done in comparable circumstances. That analysis includes some confidence that the claimant's portrait, as depicted in the Statement of Claim, has some basis in reality. Unless those factors change or are clearly shown to be wrong, neither our, nor our client's, assessment of the case is likely to be changed in the course of a mediation.

In the mediations in which we have participated, almost all were sought by our adversary, and almost all were successful. We have used well-known mediators, as well as those newly entering the field after years of advocacy and/or service on arbitration panels, and even some recently retired jurists. We regard all of them as honestly engaged in providing a service that **both sides must embrace** for the process to have any chance of success. Our experience suggests that the "skepticism" which underlies the Smiley-Gard article has little if any basis in practice and does not accurately characterize the vast majority of mediators or respondents.

Yes, there is a backlog for the "rock star" mediators whose services are now in great demand. It is also true that the more successful mediators are retained with frequency by a number of member firms who use them on a recurring basis. This is not a condemnation, but an arithmetic reality, given the fact that the number of brokerage firms with recurring arbitration volume is approximately two dozen, whereas the number of potential claimants' attorneys are in the thousands.

The notion that mediators routinely "low ball" a customer's likely recovery to seek recurring engagements from respondent firms is without real foundation. If the sentiments expressed in the Smiley-Gard article were widespread, then responsible claimants' counsel would be advising against settlements at the amounts mediators suggest and their clients would not enter into settlements at such low levels. And those mediators' skills would soon be called into question and their services not sought. If that scenario fails to occur, the fault cannot reasonably be laid at the feet of the mediators.

The Smiley-Gard article's fascination with recoveries "in excess of" the net out-of-pocket and its ridicule of offers (and sometimes even recommendations) well below net out-of-pocket loss ("NOP") ignore the crucial difference between **possibilities** (no matter how remote) and experience-based **probabilities**. A mediator's milieu is the latter and we are not willing to pay for ruminations as to the "value" of unlikely results.

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[1] Messrs. Farley and McDonough are members of Drinker Biddle & Reath LLP. They have been defending the financial services industry for over thirty years and participating in mediations since the process was in its infancy.

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Experienced respondents' representatives have no need for mediators who try to talk an offer up under the "Hey, you never know!" school of risk analysis. Respondents' attorneys understood that "unpredictability" risk before they traveled to the mediation. If adversaries are disappointed at the failure of mediators to hammer away at outcomes that are remote at best, then this topic should be pursued when counsel are speaking initially about the potential for settlement **before** a mediator is engaged.

Similarly, the article's suggestion that the mediator **require** the attendance of the individual broker **and** a senior representative of the firm **who has authority to settle up to the net out-of-pocket** is not only wishful thinking, but corrosive to the process itself. It is not the mediator's role to impose one side's wish list on the other and no rational respondent is going to commit to an unknown list of mediator "demands" when making a good faith commitment to mediation. We have come close to walking away from mediations when the selected mediator sought to impose a list of procedural demands that may have worked in his earlier judicial role when he forced a few dollars more from the regional State Farm representative on the eve of a trial of a routine fender bender. Any unusual procedural expectancies should be aired and agreed to before a mediator is engaged.

But the notion that the respondent's representative must attend with settlement authority "up to" the NOP (or any other artificially set amount) is sophistry. Unless the respondent's decision-makers have concluded that arbitration is likely to result in an award in that amount, that authority in most cases will never be given. If seasoned respondent's counsel (inside and out) have "priced" the case at twenty-five percent of the NOP, there is no way they will ever obtain, much less attend a mediation with, "authority" for two, three or four times that amount.

This is again a reason why we believe the parties' expectancies should be explored **by their counsel** before any mediation effort. Unilaterally imposing a minimum settlement authority of one hundred percent of the NOP, as a condition for doing every mediation, would be the most efficient way we know to cut the current mediation backlog, because in the vast majority of cases respondents will have no reason to attend.

No one is forced to engage the services of a mediator they do not wish to use. And no one is forced to abide the mediator's views. No party has a right or even an expectation to actions and commitment levels on the other side's part unless those issues have been raised, discussed, and agreed to. They will never be acceptable if they are going to be imposed unilaterally by the mediator after his services have been engaged. And to the extent there is some experience with respondents not being fully prepared to participate in mediations, it is offset by the propensity of their adversaries who propose mediations at the last minute due to their own lack of readiness. Since a hearing adjournment in favor of a mediation waives the hefty adjournment fee that would otherwise have been incurred, the mediation is effectively without cost to one side in those instances.

We do not suggest that every respondent who comes to a mediation has been fully prepared or has realistically assessed the case, any more than Messrs. Smiley and Gard can make the same claim with regard to every claimant and their counsel. But on balance, we believe mediation is a process that has served claimants and the securities industry well. We expect it will continue to do so without ultimatums by either side to fix a process that isn't broken. ■

IN BRIEF

(ed: "In Brief" is a regular feature of this newsletter, in which short pieces about important and timely developments are spotlighted for our busy readers. The articles that appear in this space may have been published within the past month or so in our companion weekly e-mail service on securities arbitration, SAC's Arbitration Alert***. Where this is the case, those earlier articles will generally have been edited and updated in order to reflect our current knowledge on the topic. The SAC Reference Numbers that appear at the end of some "In Brief" articles identify the Arb Alert in which the original news item on the topic was published and it also indicates that backup materials on the matter are available to requesting subscribers from SAC. When calling to acquire those materials, please use the SAC Ref. No. and ask for the copying and delivery charges before ordering.)***

"NASD SPEAKS" AT EVENING FORUM: ***Repeating an undertaking that she has met for the past six years, NASD-DR Vice President Elizabeth R. Clancy spoke to a group of arbitration practitioners and neutrals on February 7 about developments and plans for improvement at NASD Dispute Resolution.*** The February 7 gathering ("NASD Listens… And Speaks") was moderated by **Martin L. Feinberg**, former Chair and current member of the Committee on Arbitration and ADR of the New York County Lawyers Association. The evening forum was held at NYCLA's Vesey Street building. Ms. Clancy, who is Regional Director of the Northeast Office, reviewed case statistics, recent rule changes and responded to attendees' questions. She reported the promotion of NASD-DR's **Rick Berry** to the position of Vice-President, NASD; he remains, as before, in the position of Director of Case Administration. NASD will have at least one hearing location in every state by the end of March 2005 (Boise might wait until April). For Ms. Clancy's Northeast Region, that has meant the addition of new locations in Newark, Hartford and Providence, with sites soon in Augusta, Manchester and Montpelier. Among other things, Ms. Clancy spoke about new procedures, designed to improve processing time, which have been tested in the Northeast Region and are scheduled for extension to all Regions by the end of 2006. Studies have demonstrated, she reported, that the staff only controls a case-in-process about 20% of the time. Despite this fact, the staff have been able to significantly improve processing time in those staff-controlled areas through this new processing structure. Moreover, the 8,201 new filings submitted in 2004 were eclipsed by the close-out of pending docket items. There are currently about 11,500 cases pending nationwide and, with NASD's close-out figures surpassing new filings in 2004 and exceeding 2003's close-outs by 27%, NASD-DR staff was able to hold average turnaround time of "hearing decisions" to 17.5 months (from 17.4 months in 2003). Online claim filing is taking hold and the arbitrator re-classification project has caused "not much change." Finding that some arbitrators remain uncertain about their correct classification as Public or Non-Public, Ms. Clancy offered to assist those with specific questions after the evening session ended. Expungement procedures introduced by new Rule 2130 are gradually taking hold and the new requirements for "affirmative findings" from Panels will, Ms. Clancy expects, lead to fewer Stipulated Awards. On the arbitrator training front, we learned that NASD-DR has set a deadline of March 31, 2005 for arbitrators to take the online expungement training or lose their active status. She spoke about the new Customer Code, indicating that some amendments have been filed, most notably, a deletion of the proposed provision for arbitral sanctioning power over attorneys. The new Code will codify motion practice, recognizing its legitimacy in the SRO process, but NASD continues to emphasize that motions for pre-hearing dismissals will be granted only in extraordinary circumstances. On the issue of "Explained Awards," which is so much in the news since the NASD Board of Governors approved a new rule filing, Ms. Clancy predicted a rule filing in March after the NAMC has a chance to consider language at its March 1 meeting. Arbitrator removal procedures drew a question from the audience, leading to the information that unopposed motions to remove an Arbitrator will be granted. Referring to a recent Neutral Corner article, she urged care on the part of Arbitrators who are asked to serve in concurrent cases. One anomaly in the current Chairperson selection process creates the predicament of removing a selected Public Arbitrator – one, perhaps, mutually selected by the parties — where both Public Arbitrators on the Panel decline to serve as Chairperson. That possibility will be resolved when the new Code procedures, creating a separate Chair list, are adopted. *(ed: On that last point, should not the staff check with the parties first to see whether they would accept the Industry Arbitrator as the Chair? Unfortunately, Ms. Clancy did not have, as she did at last year's event (SAA 2004-05), statistics from NASD's post-Award tracking system, on the incidence of Award vacatur attempts and their outcomes.)* (SAC Ref. No. 2005-06-01)

NASD PULLS ATTORNEY SANCTIONS PROPOSAL: ***On January 3, 2005, NASD Dispute Resolution revised its November 2003 overhaul package of the new Customer Code by filing with the SEC a revamped 345-page package that contains technical corrections, grammatical changes, and some substantive additions. Among the substantive changes was one big surprise – the forum has abandoned its attorney-sanctioning proposal.*** At the recent "NASD Speaks" seminar (see above), NASD-DR Regional Director Liz Clancy reported that NASD has deleted a controversial provision in the proposed Customer Code that would have given arbitrators a "Rule 11" power over arbitration attorneys. More precisely, proposed Rule 12211 purported to allow Arbitrators to sanction not only parties for noncompliance with arbitral orders, but their party representatives as well. About a year ago, NASD was so focused on gaining SEC approval of this rule revision that it submitted

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the sanction proposal in a separate filing (SR-NASD-2004-08) and requested accelerated approval (see SAA 2004-24 for details). That never happened and, when we recently checked on NASD's WebSite, the SR-NASD-2004-08 proposal was no longer listed among the pending rule filings. In fact, we could not find it on the NASD Rule Filing Status Report section at all, even when we checked the "withdrawn" proposals. What we did find was the revised Package, submitted on January 3, and there we located the proposed deletion of the reference to "any party representative" in new Rule 12211 (re-numbered Rule 12212). The new Package requires more than the cursory review that we gave it, but, with that caution, we noted that NASD has added the recently approved text of its rule on direct communications between Arbitrators and parties (SAA 2004-30). Rule 12207 would permit the Director of Arbitration to extend deadlines, not only in accordance with other provisions of the Code, but whenever "extraordinary circumstances" warrant. The Director's power to decline use of the NASD forum (Rule 12203) is enlarged to include situations where the safety or health of parties, Arbitrators or staff are at play. Section 12302 has been amended to include reference to the online notification and filing procedures adopted by the NASD (SAA 2004-31) and Rule 12407, entitled "Additional Parties" now clarifies that a motion to add parties must be served on all parties, including the party to be added, and the party to be added may respond without waiver of its rights or objections. (*ed: *SAC submitted a comment letter to the SEC, urging the Commission not to grant accelerated approval to the "attorney sanction" proposal in SR-NASD-2004-08, arguing that, in light of its unique and controversial nature, full opportunity for public comment was important. ** This "cleanup" amendment could signal imminent consideration of the omnibus proposal by the SEC. The re-structuring has been stalled more than a year at this juncture.*) (SAC Ref. No. 2005-06-02)

FLORIDA SUPREME COURT/ORAL ARGUMENT/RAPOPORT RULES: ***Almost exactly one year from filing of the petition, on February 10, 2005, the Florida Supreme Court heard argument from the Florida Bar and others on a proposal to amend the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration (No. SC04-135).*** The Board of Governors of The Florida Bar authorized the petition, which was filed on February 9, 2004, after formal notice of the proposed amendments was published in the January 1, 2004 issue of The Florida Bar *News*. The amendments were probably being formulated at the time, but they were thrown into the spotlight by the Court's February 2003 ruling in *Florida Bar v. Rapoport*, 2003 SAC, No. 1, p. 11. *Rapoport* held that a lawyer who was not licensed in Florida, but who maintained an office in Florida and solicited clients for representation in securities arbitration, was engaged in the unauthorized practice of law. The proposed amendments, however, deal more broadly with the issues that confront lawyers engaged in the multijurisdictional practice of law (MJP) and offer solutions for unlicensed attorneys who practice in Florida on a temporary and limited basis. The Petition opines that, in Florida, MJP, which it defines as "a lawyer providing legal services in a jurisdiction where that lawyer is not licensed to practice law," is prohibited, even on "a temporary or occasional basis." It also specifically asserts that "the only choice currently available to a party in arbitration is which member of The Florida Bar the person will retain." The categories of "temporary practice" affected by the Petition would include: (1) an out-of-state lawyer to work in Florida in association with "a member of The Florida Bar who actively participates in the matter;" (2) a lawyer who engages in "pre-*pro hac vice* admission activity;" and (3) an out-of-state lawyer who renders legal services "in a pending or potential arbitration, mediation, or other alternative dispute resolution." The third category would permit "temporary practice" where one of two conditions is met: "(1) the services are performed for a client who resides in or has an office in the lawyer's home state; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted." However, the "temporary practice" presumption ends if there are more than 3 appearances in a 365-day period "in separate representations" or the lawyer establishes an office in the State. The rules require the filing of an information statement with The Florida Bar, when an appearance is made, and the payment of a nonrefundable $250.00 fee "on a per arbitration (appearance) basis." The Petition notes that the Arbitration Committee of the Securities Industry Association filed comments to the proposed amendments and takes specific issue with two items raised by SIA. First, it rejects SIA's contention that regulation of securities arbitration is federally preempted, citing the Court's ruling in *The Florida Bar re: Advisory Opinion – Nonlawyer Representation in Securities Arbitration*, 696 So.2d 1178 (Fla. 1997). Secondly, the Petition disagrees that exemptions permitted for international arbitration should extend to securities arbitration as well. Appearances in connection with oral argument were entered by The Florida Bar, the International Law and Business Law Sections of The Florida Bar, the SIA Arbitration Committee, the Judicial Administration Committee, the National Association for the Advancement of Multijurisdictional Practice, and Stephen Krosschell of Goodman & Nekvasil. *(ed: Readers may review the transcript of the February 10 arguments before the Court by visiting the Florida Supreme Court's WebSite (http://www.floridasupremecourt.org) and clicking "Oral Arguments." The Krosschell presentation and submission was a breath of fresh air, coming from a Florida bar member who advocated far less restraint, especially as to securities arbitration. The Bar in this matter portrays itself as loosening restraints, seeking to bootstrap a conceptual, parochial and previously unenforced position that only Florida lawyers can present arbitration cases in Florida.) (Special thanks from SAC to Kacy Lake and Burt Wiand, Fowler White, Tampa, FL, for their assistance.)* (SAC Ref. No. 2005-05-05)

OHIO ALERT! UPL WARNINGS: ***In a decision that addresses limited facts with expansive language, Ohio's top Court enjoins an out-of-state non-attorney representative, who appeared in a securities arbitration, from the unauthorized practice***

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of law. The Defendants, a Massachusetts-based company named Alexicole, Inc. and Bandali Dahdah, were the subject of a complaint from their own client, a Cleveland resident, who reported the pair. A recommendation thereafter issued from the Board of Commissioners on the Unauthorized Practice of Law that the Ohio Supreme Court should issue an injunction in the matter. It opined in its recommendation that Alexicole and its owner (Mr. Dahdah) had engaged in the practice of law by their various activities in connection with the arbitration proceedings and particularized the terms of the recommended injunction. The Court, in *Disciplinary Counsel v. Alexicole, Inc.*, No. 2004-Ohio-6901 (12/22/04), agrees with the findings and issues the injunction. Alexicole maintains a WebSite (www.recoverinvestment.com), which advertises its willingness to represent claimants in securities arbitration around the country and lists Awards and settlements that it has obtained for clients in the past. The Court does not mention this consideration, nor does it appear to consider critical the situs of the hearing in the case. That Mr. Dahdah does not maintain an office in the State and has not held himself out as an Ohio attorney are not relevant. Pivotal, it seems, are the residence of the client (Ohio) and the nature of the activities that constituted legal services: representation of the client during discovery, settlement negotiations (including mediation), and pretrial conferences "by any person not admitted to practice in Ohio." The injunction that issues against Alexicole and Mr. Dahdah formally prohibits them from offering "legal advice to any person in Ohio, including but not limited to advice regarding the filing of a claim for a securities violation and advice regarding a person's right as a claimant or defendant in securities arbitration, a lawsuit, or other legal or quasi-legal proceeding, including any terms and conditions of a settlement of any dispute." *(ed: Given the unqualified view stated by the Court, even out-of-state attorneys who are not licensed to practice in Ohio will, as a tactical measure, want to pay heed to the contours of this ruling. SAC thanks to Pete S. Michaels, Michaels & Ward, Boston, for alerting us to this decision.)* (SAC Ref. No. 2005-02-04)

NASD-DR PROPOSES REPRESENTATION RULE FOR ARBITRATION: ***A new proposal filed by NASD attempts to address the difficult questions of party representation by out-of-state attorneys and by non-attorney representatives.*** "All parties shall have the right to representation by counsel at any stage of the proceedings." That is the sum and substance of current NASD Rule 10316. Under a rule proposal filed with the SEC on February 9, 2005, the right-to-representation provision in a U.S.-based, NASD arbitration would be overhauled to provide for (a) self-representation (*pro se*) by a party; or (b) representation by a licensed attorney. Partners may represent partnerships and officers of a corporation, trust, or association may provide representation. A representing attorney need only be admitted to practice in a United States jurisdiction or territory to be acceptable to NASD. Objections to the qualifications of any party representative are relegated to the courts, where the

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"applicable law" will govern. Such objections should not, absent a court order, stay or delay the arbitration proceeding. An amendment to Rule 10408 contains a similar provision regarding NASD mediations. NASD explains in the Rule filing that it seeks to address "the issue of multi-jurisdictional practice of law in arbitration." NASD recognizes that, while representation by out-of-state attorneys is common in its arbitrations, that practice "can be a violation of state unauthorized practice of law provisions." Both the *Birbrower* case in California and the *Rapoport* case in Florida have made that clear. The filing discusses the ABA's amendment of its Model Rules on Professional Conduct 5.5 to permit "temporary practice" by a lawyer in out-of-state (U.S.) jurisdictions under specified conditions. NASD proposes to expand its concept of representation "to allow a party to be represented by an attorney admitted to practice in any jurisdiction of the United States…, regardless of the jurisdiction in which the attorneys are licensed." A state might still determine that such practice constitutes the unauthorized practice of law, but this provision may, nevertheless, "assist attorneys in addressing the issue of multi-jurisdictional practice…." Although the language of the proposal does not expressly state that non-attorney representatives will be excluded from representing arbitration disputants, that is clearly the intent. NASD indicates that this provision "sets a standard of practice for the arbitration forum that is consistent with the other rules and proceedings of NASD, pointing to the disciplinary side where attorneys represent parties (Rule 9141) and to the SEC Rules of Practice (102(b)). Footnote 9 cites two instances of answers being stricken in NASD enforcement proceedings because the "respondent's representative had not indicated that he was a licensed attorney." *(ed: We recently heard from NASD sources that the proposal was not intended to change the status quo regarding NAR participation in securities arbitration. If that is the case, NASD should pull footnote 9.)* (SAC Ref. No. 2005-06-03)

NEUTRAL CORNER, 12/04: ***Special arbitration rules – those dealing with special situations in arbitration, such as Rules 10334 and 10335 - were the subjects of staff articles in the latest issue of NASD-DR's newsletter for arbitrators.***

Rule 10335, Expedited Action: Southeast Regional Director **Rose Schindler** wrote the lead article for the bi-monthly periodical, entitled "Injunctions." Ms. Schindler describes the workings of the "Injunctive Relief Rule" and reminds arbitrators that speedy dispositions are key to the effectiveness of requests for permanent injunctive relief. Awarding temporary or preliminary injunctive relief has been left to the courts since January 2002, when the Rule was overhauled. Applicable only to intra-industry disputes, the Rule now requires parties to seek such relief in the courts, while pursuing permanent relief in arbitration. That the relief sought is permanent does not mean the process should slow. In fact, the first hearing before the arbitrators must take place within 15 calendar days of the issuance of any temporary judicial relief. That expedited session is designed to consider permanent injunctive relief, while leaving the question of monetary damages or other relief, if needed, for subsequent sessions. The expedited requirements and application of Rule 10335 generally have as their predicate the issuance of a TRO or preliminary injunction by a court of law. Rule 10335 is designed to address the ongoing relief that will follow, but sometimes arbitrators reserve the issuance of relief until all hearing sessions have been completed. "The arbitration panel should issue a prompt ruling after the [expedited] hearing," Ms. Schindler writes. "…[D]elay defeats the purpose of Rule 10335 and may significantly impair the parties' rights and expectations."

Rule 10334, Ex Parte Communications: Staff Attorney **Marya M. Santor** describes the new Rule on direct communications between arbitrators and parties quite briefly and switches the focus to *ex parte* communications that are not considered within the boundaries of Rule 10334. The provision permitting direct communications, without the usual arbitration staff relay, went into effect September 30, 2004. First, Ms. Santor reminds arbitrators that *ex parte* communications are generally prohibited and include conversations with parties or witnesses outside the scope of the dispute, such as "pleasantries exchanged in the elevator, hallways, or rest room." Parties should be instructed on the need to avoid such communications with the Panel and should be requested to wait outside the hearing room until they can enter the room together. Prompt disclosure of the nature of any *ex parte* communications should follow the incident and should be made on the hearing record.

This edition's **"Q&A" column** addresses the situation where an arbitrator finds herself on two cases involving the same party. What to do? "NASD Dispute Resolution strongly discourages arbitrators from concurrently serving on multiple cases involving the same party." The newsletter also has short takes on **Witness Sequestration** (Fact witnesses "typically" excluded; expert witnesses, not generally excluded); **Regional Updates** (new hearing locations; arbitrators serving away from their primary hearing location are not eligible for expense reimbursement); **Settlement Month** (twice the volume in October 2004); **Settlement Day** (NYC, 10/21/04); **Mediation Medal** (Gold Medal Award to NASD's Julie Crotty for mediation video); **New Web Look** (since November 1, 2004); **Case Statistics** (filings down 8%; closings up 26% through November 2004); **Phone-In Workshop**; and **Arbitrator Training** (new 2005 schedule). *(ed: The Neutral Corner is accessible online from the NASD-DR HomePage (www.nasdadr.com).)* (SAC Ref. No. 2005-02-02)

WAIVER-OF-STANDARDS RULE OUT FOR COMMENT: ***The SEC has published in the Federal Register a proposal by the NASD to extend its pilot regarding the California Standards to September 30, 2005.*** Publication of the extension request in the Federal Register occurred on January 14 (70 Fed. Reg. 10, p. 2685). The proposal itself (SR-NASD-2004-180, filed 12/9/04) would extend from March 31, 2005 to September 30, 2005 a pilot program operational since September 2002 that requires parties seeking NASD arbitration before a California-based Panel to waive the so-called California Standards. The California

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Standards are rules developed by the State to govern private arbitrations within the State and the disclosures and qualifications required of arbitrators hearing cases in California. NASD, NYSE and SEC have openly challenged the Standards, as they would apply to SRO arbitration, as preempted by the federal regulatory scheme and otherwise unlawful. Since the implementation of the pilot, the NASD and NYSE (and the PCX) have regularly approached the SEC at six-month intervals for an extension of the pilot, during the pendency of related judicial challenges to the Standards. The difference between those rule filings and this one has to do with the timing of this proposal. All of the filings in the past have been made just prior to the expiration of the six-month extension and, because of the imminent expiration, accelerated approval was requested and granted. In this case, NASD has filed the request three months before the deadline (see SAA 2004-50) and it did not request accelerated approval. Whether or not the idea was the SEC's or NASD's, it seems that a clean opportunity for the public to comment on the propriety, details and duration of the Standards waiver has been provided (comments on the rule were formally invited until February 4, 2005). We reported in SAA 2005-01 that a California Appellate Court in *Alan v. Superior Court* had scolded the NASD for protracting its refusal to entertain California cases, absent a waiver of the California Standards, and interpreted NASD's action, albeit in full compliance with the "Waiver Rule" (IM-10100(f) of the Code), as a "refusal to arbitrate" under the circumstances of the case at bar. The Court acknowledged that NASD was waiting for a resolution by the highest federal and state courts in California, but speculated that NASD might still want to wait for a petition to the U.S. Supreme Court. The *Alan* Court decided to let the case proceed in court, even though that same Court has determined that the California Standards are preempted by SEC-sanctioned SRO arbitration rules. *(EIC: The extension was granted by the SEC, without receipt of comments, on February 16, 2005,* 70 Fed. Reg. 35, p. 8862 (2/23/05)*.)* (SAC Ref. No. 2005-03-02)

NASD-DR NAMES LONDON HEARING SITUS: ***The SEC noticed the filing of a NASD-DR rule proposal regarding foreign hearing locations.*** NASD is proposing to amend NASD Rule 10315 to permit the forum to hold arbitrations in a foreign hearing location, to assess a surcharge for each day of hearings in the foreign hearing location, and to authorize a higher honorarium for arbitrators who serve in a foreign hearing location. This proposal was filed last March (SR-NASD-2004-042; SAA 2004-11), according to the January 26, 2005 comment Release (SEC Rel. 34-51082), and will allow the launching of the first of such situs arrangements in London. The proposal was published for public comment in a recent Federal Register. (70 Fed. Reg. 22, p. 5713, dtd. 2/3/05). (SAC Ref. No. 2005-05-02)

NTM 05-09: PREDISPUTE ARBITRATION AGREEMENTS (PDAAs): ***Setting an effective date of May 1, 2005, the NASD announces that brokerage firms with PDAAs will need to amend their agreements with customers.*** The amendments are aimed at upgrading the disclosures currently contained in the brokerage PDAAs to alert customers more fully to their rights and obligations in agreeing to arbitrate. However, the new provisions on pre-dispute arbitration agreements, which amend the terms of paragraph (f) of NASD Rule 3110, require more than just disclosures. They also add a new requirement that governs the process for compelling claims from court to arbitration. That requirement is designed "to protect investors against involuntary bifurcation of claims" and it compels members moving to arbitrate claims filed in court to "agree to arbitrate all of the claims contained in the complaint if the customer so requests." Just how much territory the "all claims" provision covers is conjectural at this point. It might, for instance, serve to revive a dismissed claim if the broker-dealer delays its demand for arbitration to engage in motion practice. The rule changes also require broker-dealers to honor requests at any time from customers for copies of their agreements and to inform customers of the rules of arbitration forums where claims may be filed. That provision, subparagraph (f)(3) of Rule 3110, is the only part of the new rule to have retroactive application. In other words, it applies to all customers, existing, past or future, of the broker-dealer as of the effective date of May 1, 2005, whereas the textual requirements apply only to PDAAs executed on or after May 1, 2005. (SAC Ref. No. 2005-05-04)

NTM 05-10, ARBITRATION TIME LIMITS: ***The six-year eligibility rule, in its newly modified form, corrects many of the ills that led to litigation in the past, but it is a more complicated rule and the new provisions will invite renewed judicial interpretation.*** The NASD Notice to Members announces the amended procedures applicable to determining eligibility of claims submitted to NASD arbitration and explains some facets of the new rule in detail. Arbitrators, not the courts, will determine if a claim is ineligible as untimely, but if the claim is dismissed from arbitration as ineligible, the Claimant will retain the right to pursue the claim in court. Before a respondent makes that motion, though, it must weigh the requirement that the Claimant be permitted to remove all claims to court, not just those declared ineligible. Indeed, defense practitioners worried during the rulemaking process about the theoretical possibility that claimants would insert stale claims as a tactical lever to free themselves of the arbitration obligation. Arbitrators, of course, can still dismiss claims on statute of limitations grounds, so this possibility seems less probable in practice. If the claims start in court and the defense seeks arbitration, counsel must take into account that the broker-dealer is waiving its right to claim ineligibility, if its motion is granted. Not only that, but under a change to Rule 3110(f) dealing with customer claims (see NTM 05-09), such a motion obliges the member to "agree to arbitrate all of the claims contained in the complaint if the customer so requests." That provision seems effectively to preclude a member from preceding a motion to arbitrate with attempts to cull claims with motions to dismiss on statute of limitations or other legal grounds. The effective date of this rule change is May 1, 2005 and it applies prospectively to all claims filed with NASD on

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or after that date. *(ed: Though the effective date is a few months away, practitioners dealing with arbitrable claims now in court will want to address the tactical concern that the new rule could alter the expected impact of actions taken pre-May 1. Since the Rule's applicability is pegged to when a claim is filed in arbitration, the earlier litigation history of the dispute could be retroactively affected by an arbitral filing that takes place on or after May 1, 2005.)* (SAC Ref. No. 2005-05-03)

NASD EXEMPTION FOR "PROFESSIONAL" MEDIATOR/ARBITRATORS: ***At the annual PLI Securities Arbitration Seminar in August 2004, guest speaker (and NASD Arbitration Director) George H. Friedman was asked whether mediator activities weighed in the determination of an Arbitrator's classification as Public or Non-Public; a new NASD rule filing addresses that specific question.*** The answer to the question from an audience member is less important than the significant difficulty that it posed, i.e., that the NASD has made the terms "professional" and "professional work" pivotal in determining the appropriate classification of an Arbitrator, but it has failed to define the terms. Instead, it has relied upon the independent interpretations of each Arbitrator, who has completed a questionnaire, asking, among other things, if s/he is a "professional," and it has based judgments on these answers when assigning "Public" or "Non-Public" status to each of its neutrals under new classification rules implemented in July 2004. Under the "Public" classification, the "annual [industry-related] revenue" of a "professional" or her/his "firm" cannot exceed 10% during "the past two years" or the classification will be lost. The "Non-Public" classification includes a "professional who has devoted 20% or more of his or her professional work" to industry-related "business activities" within "the last 2 years." Because securities mediators are retained and paid by "clients" who, perhaps half the time, are broker-dealers or associated persons, NASD has proposed a new Interpretive Material (IM) 10308 "to clarify that (1) fees for service as a mediator are not included in determining whether an attorney, accountant, or other professional derives 10% of his or her annual revenue from industry-related parties; and (2) service as a mediator is not included in determining whether an attorney, accountant, or other professional devotes 20% or more of his or her professional work to securities industry clients." The new proposal (SR-NASD-2005-007) was filed with the Commission on January 19, 2005 and moved quickly to the publication stage (SEC Rel. 34-51097, dtd. 1/28/05) (70 Fed. Reg. 22, p. 5715, dtd. 2/3/05). NASD explains

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that the July 2004 rule changes "arguably could be construed broadly enough to cover revenue derived from serving as a mediator in a case involving an industry party (since both sides in a mediation normally pay a share of the mediator's fees)…." Because "this was clearly not the intent of the recent rule changes," the NASD is formalizing its interpretation through this Rules filing. It adds that "the NASD Dispute Resolution Board also determined that parties may wish to know that an arbitrator on their list also serves as a mediator and may be familiar with the industry parties or their counsel. NASD believes that any potential conflict is best addressed by ensuring that arbitrators who are mediators disclose this fact in their arbitrator disclosures." By making this clarification, NASD concludes, arbitrators who also serve as neutral mediators may "remain classified as public arbitrators if they otherwise meet the public arbitrator classification requirements." *(ed: Well, that's good, but why not just define the term "professional" and resolve a host of classification problems, instead of providing* ad hoc *exemptions?)* (SAC Ref. Nos. 2005-04-03 & -05-02)

NASD ARB LISTS MOVE TO RANDOM SELECTION: ***The SEC posted notice that it has approved the NASD rule proposal to convert to a random list selection system from its current rotational system.*** NASD Dispute Resolution pulled this proposal (SR-NASD-2004-164) from its omnibus rule proposal regarding the Customer Code and submitted it as a separate rule filing. The new proposal seeks to change a single word in NASD Rule 10308, entitled "Selection of Arbitrators." The word change substitutes "random" for "rotating" and governs how the NASD-DR will create lists of arbitrator candidates for parties to consider (see SAA 2004-50 for more detail). The SEC staff has been reviewing the omnibus Code changes for over a year at this point and NASD needs to time properly the computer program changes for a random system to coincide with a transfer of the current CRAFTIS and NLSS systems to a combined MATRICS ("Mediation and Arbitration Tracking and Retrieval Interactive Case System") platform. The proposal was granted accelerated approval by the Commission on January 26, 2005 (SEC Rel. 34-51083) and was announced in the Federal Register (70 Fed. Reg. 21, p. 5497, dtd. 2/2/05) *(ed: One of the peripheral facts that appeared in this Release: in the past two years, NASD has added approximately 1,000 arbitrators to its pool.)* (SAC Ref. No. 2005-05-01)

NYSE SUPPLEMENTAL SELECTION PROCEDURES EXTENDED: ***The New York Stock Exchange filed an extension request with the SEC that would maintain alternative arbitration selection procedures until July 31, 2005.*** The Exchange previously obtained an extension of its pilot program on selection procedures until January 31, 2005 (SR-NYSE-2004-28, SAA 2004-27), but, in SR-NYSE-2005-10, it moves early to secure enough time for the Commission to consider a recent related rule filing (SR-NYSE-2005-02). Proposal 2005-02 would amend NYSE Rule 607 to permit a unilateral option for customers and non-member parties (which includes employee-disputants) to select either Random List Selection or traditional Staff Appointment procedures as the method for selecting arbitrators (see SAA 2005-01 for a more detailed explanation of the filing). The SEC published its approval (SEC Rel. 34-51085, dtd. 1/25/05) (70 Fed. Reg. 22, p. 5716, 2/3/05) of the extension, which will leave in place two alternatives to the default procedure (Staff Appointment) that can become operable only by mutual agreement of the disputants: (1) Random List Selection, under which the parties are provided randomly generated one or two lists of public and securities classified arbitrators from which to strike candidates and rank their remaining choices; and (2) Enhanced List Selection, in which six public and three securities classified arbitrators are selected by the Exchange staff, based upon the candidates' qualifications and expertise. This method restricts the number of strikes and requires ranking of those remaining. The 2005-02 rule filing proposes an end to the Enhanced option and leaves the choice of random selection or staff appointment to the non-member or customer party. The 2005-10 proposal for a six-month extension was granted immediate effectiveness as "non-controversial." (SAC Ref. No. 2005-04-04)

NYSE STATS, 2004: ***The New York Stock Exchange ended 2004 with a murmur, as the number of claims filed in the final quarter of 2004 slipped below 200.*** 800 new cases were submitted to NYSE Arbitration during the first three quarters of 2004, an average of more than 250 per quarter, but in the last quarter of the year, only 172 more claims were added. This leaves the Exchange with a final tally for 2004 of 972 case filings, the first time it has fallen below 1,000 new cases since 2001. In 2002, the number of customer disputes filed almost doubled, surging from 536 in 2001 to 1,008. That number began to subside in 2003 to 862, even while the number of industry disputes filed continued to climb (340 vs. 283 in 2002). Then, in 2004, the number of customer disputes accelerated its downward decline, while industry disputes dipped about 25% (255 v. 340 in 2003). All in all, the number of claims filed declined more than 20% from the 1,223 filed in 2003 and 26% from the recent highs of 2002. NYSE does not report statistics about turnaround time, win rates, or dollars awarded, as NASD does, but the information it does disclose about case close-outs indicates that it continues to attack longer turnaround times. There were 1,095 cases closed in 2004, about 13% more than the number of cases filed. That is the first time since 2000 that NYSE has closed more cases than it opened. Nearly 40% (419) of the 1,095 cases closed in 2004 ended after a hearing and Award, a much higher percentage than the 20-25% generally experienced by NASD. In addition to these "decided" cases, NYSE reported 542 "settled" cases (about 50% of all close-outs) and 124 "other" cases closed in 2004. That "other" figure is exceedingly large historically and four times larger than the 31 "other" cases closed in 2003, yet no explanation accompanies the statistical report regarding the components of the "other"

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figure. NASD experienced a surge in Stipulated Awards in 2004, which likely affected its "All Other" figure (SLA 2005-02), but the number of Stipulated Awards issued by NYSE is negligible. In total, the close-out performance exceeded tallies in recent years: by about 26% more than the 869 close-outs in 2003; and by 52% more than the 719 close-outs in 2002. (SAC Ref. No. 2005-03-01)

NFA's "ARBITRATOR UPDATE": ***The Fall 2004/Winter 2005 edition of the National Futures Association's newsletter for arbitrators contains timely information and answers to questions about NFA Arbitration.*** NFA includes an updated roster of the Arbitration staff with e-mail addresses, telephone and fax numbers, and even a thumbnail picture of each staff member with title and function. NFA deals with a much lighter volume of cases than NASD, whose forum is also open to administering futures disputes. Moreover, as a matter of policy, the NFA forum tries not to use the same arbitrators too often. As a consequence, it reminds neutrals in this newsletter that lack of service does not mean disqualification. Two-thirds of the forum's cases are situated in six states (IL, IN, TX, FL, NY & CA), so "arbitrators who do not live in or near those areas may not hear from us to serve very often." On the other hand, NFA is actively seeking new arbitrators in Seattle, Memphis, Nashville, Indianapolis, Denver and Houston, in order to increase its roster. It maintains a favorable turnaround time of 6.7 months and has, through a December 2003 change in its rules, expanded its scope to hear disputes "involving retail off-exchange foreign currency (Forex) – related disputes." These Forex claims have, over the past year, become a large (24%) segment of the new claims being filed for NFA arbitration. Qualified arbitrators who are familiar with this type of transaction are being actively sought. Training requirements still apply. "NFA expects its arbitrators to have participated in an accepted training course within the past three years." NFA provides a CD for training at home and periodically visits major cities for Arbitrator Training Forums. However, training with other forums, such as NASD, NYSE or AAA may substitute for NFA training, if NFA is properly notified. Finally, in a Q&A column, the staff addresses discovery abuses. Members who fail to produce documents can be sanctioned under Section 8(d) of the Code or Section 7(d) of the Member Rules, and those Members who act in "bad faith" may even be sanctioned without the predicate of a violated discovery order. "If the Member is not a party," sanctions are not recommended. The staff does offer, though, that "the panel can ask the Case Administrator to refer the complaint to the [NFA] Compliance Department as a violation of CR 2-5." Finally, NFA reports that it "now schedules a pre-hearing conference call with the parties and arbitrators in certain cases" and seeks feedback on the utility of these calls. "Do you find them useful? …Would you prefer that we not schedule a pre-hearing call but just use mail-in calendars to schedule the hearing?" (SAC Ref. No. 2005-02-03)

PACIFIC EXCHANGE FILES FOR FEE INCREASE: ***Tracking the fee schedule of the NASD, PCX has proposed raising its fees in industry controversies, imposing pre-hearing and hearing process fees in all disputes, and increasing its member surcharges.*** The Pacific Exchange runs a smaller program that concentrates almost all arbitrations in California, where it is based, but its Panel of neutrals are generally credited by California practitioners as worthy and Panel Awards, in form and substance, are superior to those issued by NASD or NYSE. In this filing, which was published in the February 4 Federal Register (70 Fed. Reg. 23, p. 6063), the Exchange maintains that its "arbitration program offers a comparable level of service to that of the NASD and is one of the competing forums for securities arbitration." It relates that it previously sought arbitration fee increases in 2002 and now returns to "bring its fees in line with competing forums as well as recover costs associated with the PCX arbitration program." The fee change was submitted on December 2, 2004 (SR-PCX-2004-118), according to the announcement Release (SEC Rel. 34-51102, dtd.1/28/05). Comments are solicited for submission by February 25, but the Exchange requested and obtained "immediate effectiveness." *(ed: NYSE submitted a fee increase proposal in October 2004 (see SAA 2004-42), but, from what we can tell, it has not yet been approved or even published in the Federal Register.)* (SAC Ref. No. 2005-06-04)

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INFORMATION REQUESTS: SAC aims to concentrate in one publication all significant news and views regarding securities/commodities arbitration. To provide subscribers with current, useful information from varying perspectives, the editor invites your comments/criticism and your assistance in bringing items of interest to the attention of our readers. Please submit letters/articles/case decisions/etc.

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Articles & Case Law

As a regular feature, SAC summarizes articles and case decisions of interest in the field of securities/commodities arbitration law. If you find one we missed or are involved in a case that produces an interesting decision, please write and send us a copy. ***As it is our objective to cover all relevant decisions, we will sometimes include decisions in the current "Articles & Case Law" section that issued a year or more ago. We also summarize unpublished decisions and orders. For these reasons, readers are cautioned to cite-check cases to assure they have not been overruled and may be cited in accordance with local court rules.*** **We thank our readers who have contributed court opinions and who, by their efforts, help us all to keep informed. Credit is given to contributors at the end of the relevant case summaries.**

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2nd Update: NASD To Require Arbitration—Award Explanation, by Lynn Cowan (updates with attorney Seth Lipner comment), WALL ST. JRNL. (on-line ed., 1/27/05)(NASD will require arbitration panels to provide written explanations in some circumstances under a new rule proposal).

Award to Investor Who Concealed His Identity Not Improper, Court Confirms, SEC. REG. & L. REP., Vol. 37, No. 5, 1/31/05.

BDO Loses Bid For Arbitration On Tax Shelters, by Jonathan Weil, WALL ST. JRNL. (on-line ed., 1/21/05)(Federal judge denies request by BDO Seidman to force former tax-shelter clients to arbitrate as firm's contracts with clients were fraudulent, rendering contracts' arbitration clauses unenforceable).

Class Action Over Analysts' Statement Goes Forward, by Michael Bobelian, NY L. JRNL. (on-line ed., 1/21/05)(the fraud-on-the-market doctrine may be applied to misstatements made by securities analysts in the Demarco v. Robertson Stephens Inc., [03 Civ. 590, S.D. N.Y.] class action suit).

Confirmation of Arbitral Win Is Issue in Suit, by Elizabeth Stull, WALL ST. JRNL. (on-line ed., 2/7/05)(summary judgment denied in a malpractice action against former partners of a defunct law firm that failed to confirm an arbitration award).

Investor Wins $1.15M Vs. Credit Suisse On Swap Fund Risk, by Lynn Cowan, WALL ST. JRNL. (on-line ed., 2/4/05)(an investor who claimed her broker inaccurately promised an investment fund would limit her risk was awarded $1.15 million [plus $385,000 in interest] in a AAA arbitration).

Investors' Arbitration Awards Hit Record $194 Million in 2004, by Lynn Cowan, WALL ST. JRNL. (on-line ed., 1/28/05)(the award figure is up 20% from 2003 according to NASD statistics).

Investors' Failure to Link Merrill's Reports to Losses Is Fatal to Suits, by Mark Hamblett, NY L. JRNL. (on-line ed., 1/21/05)(claims against Merrill and its analysts for the collapse of Internet stocks failed to charge requisite specificity leading to dismissal of lawsuits).

NASD May Require Written Decisions From Arbitrators, by Susanne Craig, WALL ST. JRNL. (on-line ed., 1/28/05).

NASD Proposes Plan to Require Written Awards on Request, by Justin Kelly, ADRWORLD.COM (on-line ed., 2/3/05).

Native American Tribe Wins $2.65M Award Vs Broker ING, by Lynn Cowan, WALL ST. JRNL. (on-line ed., 2/3/05)(a Wisconsin-based Native American tribe claimed an account for its children was pushed into inappropriate proprietary C-share mutual funds).

New Rule May Lead More Arbitrations Into Courtroom, by Susanne Craig, WALL ST. JRNL. (on-line ed., 2/4/05)(the NASD proposed a new rule that would force arbitrators to provide written decisions if asked).

Saving For A Sunny Day, by Neil George, BY GEORGE (on-line e-letter, 2/3/05)(discussing, among other things, accountability [or lack thereof] of NASD Arbitrators in rendering Awards and the new proposal which, if adopted, may require Arbitrators to back up their decisions with a reason).

Schwab Is Facing Elder Abuse Claim, by Angela Pruitt, WALL ST. JRNL. (on-line ed., 2/1/05)(a 71-year-old woman files an NASD arbitration claiming Schwab sold her improper investment products, including variable annuities, to finance her retirement).

To Write or Not to Write: the Arbitral Dilemma, by Richard Roth and Jordan Lam, NY L. JRNL. (on-line ed., 1/6/05)(courts have begun a trend of refusing to simply "rubber-stamp" the confirmation of arbitration awards).

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Arbitration and Arbitrability: Toward an Expectation Model, by Mark Berger, BAYLOR L. REV., Vol. 56, No. 3, Fall 2004, p. 753.

CALLING ALL ARBITRATORS – Reclaim Control of the Arbitration Process – The Courts Let You, by David E. Robbins, JNL. OF DISPUTE. RES. (AAA 2005).

Commentary: Considering Conflict Resolution Education: Next Steps for Institutionalization, by Jennifer Batton, CONFLICT RES. QUART., Vol. 22, No. 1-2, Fall-Wint. 2004, p. 269.

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Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators' Decisions, by Paul J. Krause, DEFENSE COUNSEL JRNL., Vol. 72, No. 1, Jan. 2005, p. 79.

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They Were Shocked, Shocked: The "Discovery" of Analyst Conflicts on Wall Street, by Barbara Moses, BROOKLYN L. REV., Vol. 70, No. 1, Fall 2004, p. 89.

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ARTICLE SUMMARIES

CALLING ALL ARBITRATORS – Reclaim Control of the Arbitration Process – The Courts Let You, by David E. Robbins, JNL. OF DISPUTE. RES. (AAA 2005).

Party representatives in arbitration today have complicated the arbitration process with the "implements of litigation." Arbitrators are fearful of wresting control of the process from the litigators, because they believe they risk vacatur. "That fear is unfounded," the author writes, and the persistence of that fear hurts arbitration. This article sets out to demonstrate that courts continue to respect the principle of finality in arbitration and to honor the parties' choice of a simpler form of justice. The author's purpose in canvassing the post-Award landscape to fortify this position is "to provide a backbone transplant to my fellow arbitrators, to endow them with the courage to reclaim control of the process while still affording all parties a fair opportunity to present their case."

Fundamental fairness is the touchstone of an arbitration that will withstand post-Award challenge. Adhering to procedures that assure both parties an equal opportunity to be heard and to have their evidence considered is key to fundamental fairness. Parties may contest arbitral Awards on a variety of grounds, some having to do with merits rulings and jurisdictional considerations, but the author's focus concentrates on post-Award challenges that relate to an arbitrator's hearing management skills. Demonstrating that fear of vacatur in these categories is unfounded should solidify arbitrator resolve to pursue efficient hearings more vigorously.

Arbitrator bias, or "evident partiality" as the FAA more precisely names it, most often stems from disclosures not made, as opposed to recusal failures after disclosed conflicts. Mr. Robbins reviews the circumstances of numerous court decisions, establishing principles for guidance along the way. Bias challenges based upon actions and statements in the hearing

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room, as opposed to known and unknown conflicts are generally not successful. Where parties have seen abrasiveness, rudeness and hostility on the part of the arbitrator as bias, the courts have tended to view such allegations within the context of expediting and managing the proceedings. Even opinions on the sufficiency or credibility of the evidence do not demonstrate bias. As one court put it: "An arbitrator … may develop an opinion during the course of the hearing and even express it."

Similarly, evidentiary rulings and procedural decisions rarely form the basis for a bias finding. Arbitrator misconduct, such as an unreasonable refusal to postpone the proceedings, can provide grounds for vacatur, but errors in judgment alone will not suffice. The arbitrator's mindset is not in question, as with bias, so perception is not the issue. Rather, a party must show serious damage to its rights as a consequence of the ruling. In the case of postponements, "courts consider whether there was a reasonable basis for the decision and whether the denial created a fundamentally unfair proceeding." Excluding evidence as irrelevant or cumulative will similarly be protected, so long as the judgment is simply erroneous, but not egregious.

Exceeding powers as a ground for vacatur is based on the contractual authority granted the arbitrator. "Arbitrators should take care," the author advises, "in making their jurisdictional rulings and deciding only the claims submitted that are subject to the parties' agreement to arbitrate." Arbitrators must render their Award in the form required by the agreement and conduct the hearings as required by the rules. Again, though, prejudice from the imperfect execution is required to reach the high threshold set for vacatur.

Mr. Robbins provides numerous illustrations of vacatur attempts based upon non-statutory standards developed by the courts, including manifest disregard, irrationality, public policy and lack of due process. At intervals, he elaborates upon an illustrated ruling to draw a more general lesson about arbitral conduct and to return, in the midst of many rulings recited, to the primary theme of arbitral latitude and flexibility. Indeed, the collection of case holdings covered in the article approaches prodigious and it threatens at times to become confusing.

Ultimately, though, the case studies themselves begin to make the point, separate and apart from the commentary. Virtually all of the cases in which vacatur was granted reveal circumstances that are egregious and fundamentally unfair and over-the-top. On the other hand, one often thinks the circumstances questionable where Awards are upheld, yet the courts declined to interfere or to second-guess the panels. Given the favor accorded arbitral rulings by the courts, the author sums up, "[a]rbitrators should be emboldened [to] promptly establish and thereafter maintain control of the case to its conclusion…. [T]here is little to fear from the courts. So, go ahead," he writes, "reclaim control of the process."

EIC: David Robbins is a member of SAC's Board of Editors.

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Cases

SUMMARY OF DECISIONS

(ed: The court decisions summarized below are arranged by major subject heading first and digested in a single sentence. This enables readers to quickly refer to the courts or topics that are of key interest. The decisions are then arranged in alphabetical order by Plaintiff and summarized more fully. The single summary sentences are repeated and bold-type headnotes are added to facilitate quick scanning for topics of interest or for sorting decisions by major issues. Generally speaking, these case synopses were prepared for SAC's other newsletter service, the Securities Litigation Commentator/Alert (SLC) *and have been previously published in that organ's weekly e-mail alert service ("Lit Alert"). Where the synopsis has been written by one of SLC's Contributing Editors, the author's first initial and last name appear at the end of the summary. We thank the SLC Contributing Editors for their assistance in creating these case summaries.)*

ARBITRABILITY: *Where interstate commerce is involved, federal substantive law requires enforcement of arbitration agreements, unless there is proof of fraud as to the agreement to arbitrate itself (as opposed to the contract as a whole).* PRUDENTIAL SECURITIES V. NAPIER **(KY App.)**

BREADTH OF AGREEMENT: *Where multiple parties are named as contemporaneous employers of an individual, her agreement with one employer to arbitrate disputes may be extended to permit the others to join.* KOZLOWSKI V. NEW YORK LIFE INS. CO., INC. **(NY App. Div., 4Dept.)**

CALIFORNIA STANDARDS: *Where the NASD refuses to proceed with an arbitration in California because the claimant refuses to waive the California Ethical Standards, then the case will be ordered to proceed in Superior Court.* ALAN V. SUPERIOR COURT (RPI: UBS PAINEWEBBER, INC.) **(CA App.)**

MANIFEST DISREGARD: *Manifest disregard of the law requires that no grounds justifying the Award can be inferred by the reviewing court.* DEUTSCHE BANK SECURITIES, INC. V. STOOPS **(S.D. NY)**

MANIFEST DISREGARD: *The doctrine of manifest disregard does not apply, unless the action of the Panel is totally irrational or violates strong public policy.* KIRLIN SECURITIES, INC. V. SAND **(NY Sup. Ct.)**

MANIFEST DISREGARD: *The doctrine of "manifest disregard of the law" as a basis for vacating an arbitration award will not apply absent, inter alia, argument of the applicable law to the arbitrators.* MORGAN STANLEY DW INC. V. AFRIDI **(NY App. Div., 1Dept.)**

MOTION TO COMPEL: *Missouri Local Rule 33.5.1 does not require the filing of concise suggestions and legal authority in a document separate from the motion.* DUNN V. SECURITY FINANCIAL ADVISORS **(MO App.)**

RATIONALE OF AWARD: *Despite a failure to follow the court's clear directive to conduct a new hearing, an amended Award with an explanation "sufficient to cure previous defects" is confirmed.* ROFFLER V. SPEAR LEEDS & KELLOGG, INC. **(NY App. Div., 1Dept.)**

REPRESENTATION ISSUES: *Representing Ohio residents in securities arbitration without Ohio licensure constitutes the unauthorized practice of law.* DISCIPLINARY COUNSEL V. ALEXICOLE, INC. **(OH Sup. Ct.)**

VENUE ISSUES: *A federal district court has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the arbitrators.* STERLING FINANCIAL INVESTMENT GROUP, INC. V. HAMMER **(11th Cir.)**

Cases

Alan v. Superior Court (RPI: UBS PaineWebber, Inc.), No. B-178840, 2004 Cal. App. Unpub. LEXIS 11650 (Cal. App., 12/21/04).

California Standards (Waiver) * Enforceability (Refusal to Arbitrate) * Forum of Choice * Arbitration Agreement * Venue Issues (Hearing Location) * Appealability. *Where the NASD refuses to proceed with an arbitration in California because the claimant refuses to waive the California Ethical Standards, then the case will be ordered to proceed in Superior Court.*

This is the second time that this case reached the Court of Appeal of

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California on a writ of mandate on the issue of claimant's refusal to sign a waiver of the California Ethical Standards. On the first occasion, the claimant successfully obtained issuance of a writ after the trial court ordered arbitration. *See,* 111 Cal App 4th 217 (2003); SLA 2003-32. The Court of Appeal noted that the NASD had not yet designated a place for the hearing after the claimant had refused to sign the waiver. Hence, the Court remanded the matter, and directed the trial court to determine, after the NASD set the hearing location, whether such designation would be fair and just. If not fair and just, the case would proceed in court. However, before the trial court could rule, the same Court of Appeal division that had issued the writ decided *Jevne v Superior Court,* 113 Cal App 4th 486 (2003)(SLA 2003-46), in which it ruled that the California Ethical Standards were preempted. The trial court thereupon concluded that 1) the ethical standards were preempted; 2) they could not be applied retroactively; and that 3) the applicability of the ethical standards was prospectively waived by virtue of the execution of an agreement to arbitrate according to NASD rules. As before, the trial court ordered arbitration. Alan then filed a Statement of Claim and paid the required filing fee, but Alan persisted in refusing to sign the waiver and the NASD again refused to designate a place for the hearing. Alan then petitioned the trial court to reconsider its decision ordering arbitration, but the trial court refused to do so. Since the NASD would not arbitrate without the waiver and Alan would not sign the waiver, the case was in limbo. In the interim, the California Supreme Court granted a petition for review of *Jevne,* which meant that it could not be cited in future cases. Thus, Alan once again sought a writ of mandate. Paine Webber, the respondent in this matter, asked the Court not to grant the writ and to wait until the Supreme Court decided *Jevne*. But the Court noted that since September 2002, when this case was originally filed with the NASD, 93% of general unlimited civil cases filed in Los Angeles County Superior Court had been disposed of, and so it issued the writ, accompanied by some harsh words for the NASD (which did not intervene in the case). The Court stated: " *** the trial court resolved three issues—preemption, retroactivity, and prospective waiver—in [defendants'] favor. Even so, the NASD was not influenced by these rulings. It still refused to arbitrate the dispute. And that is what matters. Nor would the legal landscape change if we were to decide these issues. Regardless of our conclusions, the NASD would remain on the sidelines. The NASD is not concerned with the rulings of a trial court or a decision by the Court of Appeal; it is not willing to conduct arbitrations in California, absent a signed waiver, until the pending litigation in the California Supreme Court *** is final. For now, the NASD, the forum selected by the brokers, declines to hear the matter, so the dispute is to be tried in court." *(P.Dubow: The Court's impatience with the NASD, at least in this case, was understandable. Here's why. The NASD's general practice of requiring a waiver in California cases is prudent, since the grant of review in* Jevne *prohibits it from relying on that decision. But in this case, a trial court ruled that the standards were preempted. Alan could not appeal that decision, but he could have sought a writ. He did not. Thus, the trial court's decision was the law of the case and the NASD could have dispensed with the waiver without consequences to itself, even if an arbitration decision adverse to Alan were vacated following a reversal of* Jevne. *But we suspect that the NASD did not have discretion to dispense with the waiver because the pilot rule, approved by the SEC,* requires *it to obtain the waiver in all California cases. Perhaps the NASD should amend the pilot rule, giving it the power to dispense with the waiver where there is a final decision ordering arbitration. What is the future? For now, claimants who do not want to arbitrate will have to engage in an elaborate dance. They will need to file a claim with the NASD, then refuse to sign the waiver, and then ask a court to order the case to trial. And, if the case is in a different appellate district from* Alan, *the defendants can ask the court not to follow* Alan *and if that request fails, they can appeal rather than seek a writ of mandate, because it would be a decision denying arbitration. Hopefully, the Supreme Court will decide* Jevne *before the dance begins.)* (SLC Ref. No. 2005-01-02)

Deutsche Bank Securities, Inc. v. Stoops, No. 04 Civ. 2323 (LLS) (S.D. N.Y., 10/18/04). **Award Challenge * Confirmation of Award * Manifest Disregard of Law * ERISA (§510) * Federal Statutes Interpreted (29 U.S.C. §1001) * Rationale of Award.** *Manifest disregard of the law requires that no grounds justifying the Award can be inferred by the reviewing court.*

Former "equity salesman" William A. Stoops won an arbitration Award against Deutsche Bank for failing to pay him compensation and benefits due under company policy, but denied him when the firm "intentionally miscontru[ed] his termination as being for cause when no cause existed." (NYSE ID #2003-011504, NYC, 2/19/04). The Panel ordered a payment to Mr. Stoops of $114,211.39 on a compensatory claim of $250,000, without offering any justification for the figure. Deutsche Bank sought vacatur, insisting that the awarded amount could only have been reached "by applying the formula for calculating severance payments made under the firm's ERISA plan. Since the award was made under the Plan, it argued, the Arbitrators were required to adhere to the Plan's (and ERISA) requirements. Severance plan disputes are subject to an "exhaustion of administrative remedies" requirement under the Plan and, by ignoring the exhaustion requirement, the Arbitrators acted in manifest disregard of the law. The Court disagrees, finding

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that, "[I]n this case, it is by no means clear that the duty to exhaust was applicable." Case law excuses the duty to exhaust when the requirement would be "futile." The Arbitrators might have so determined here or they could have found that ERISA §510 had been violated. That provision makes it unlawful to discharge an covered employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the Plan" and claims under §510 are not subject to the exhaustion requirement. Manifest disregard of the law cannot support vacatur where "a ground for the arbitrator's decision can be inferred from the facts of the case." Any "colorable justification" for the outcome defeats vacatur, "even if that reasoning would be based on an error of fact or law." Mr. Stoops' cross-motion for confirmation is granted. *(Blaine H. Bortnick, Liddle & Robinson, LLP, New York City, represented the employee in the arbitration and confirmation proceedings.)* (SLC Ref. No. 2005-02-01)

Disciplinary Counsel v. Alexicole, Inc., No. 2004-Ohio-6901 (Ohio Sup. Ct., 12/22/04). **Representation Issues (Unauthorized Practice of Law) * State Statutes Interpreted (Gov.Bar R. VII(7)(B).** *Representing Ohio residents in securities arbitration without Ohio licensure constitutes the unauthorized practice of law.*

Alexicole is a Delaware corporation owned by Bandali Dahdah, which is based in Burlington, MA and represents clients in securities arbitration proceedings. SAC's Award Database discloses that Alexicole and Mr. Dahdah, a non-attorney, have represented clients in two cases that produced Awards, one in New York (*de Guevara v. SSB*, NASD ID #01-01420 (3/11/04)) and another in Nevada (*Wang v. MLPFS*, NASD ID #02-03225 (10/27/03)) (Alexicole's WebSite, www.recoverinvestment.com, reports about a dozen settlements). Acting upon a complaint by a Cleveland resident whom Alexicole/Dahdah were representing in a NASD arbitration against McDonald Investments, Inc., Ohio's Board of Commissioners on the Unauthorized Practice of Law found that, "[a]lthough Dahdah has not held himself out as a licensed Ohio Attorney, he has, acting in conjunction with Alexicole, represented claimants in securities-arbitration cases." It ruled that such representation constitutes the practice of law and recommended an injunction issue against the pair. The Ohio Supreme Court concurs in the Board's findings and recommendation. In its decision, the Court makes no distinction between practice in the Ohio courts and practice in arbitration or between out-of-state attorneys and non-attorney representatives. It broadly states that "[t]he unauthorized practice of law consists of rendering legal services, including

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representation on another's behalf during discovery, settlement negotiations, and pretrial conferences to resolve claims of liability, by any person not admitted to practice in Ohio." It further opines, in sweeping tones, that "a corporation cannot lawfully engage in the practice of the law, and it cannot lawfully engage in the practice of the law through its officers who are not licensed to practice law." Based upon these statements and findings, the Court enjoins both Alexicole and Mr. Bandali from representing Ohio residents in securities matters and Mr. Dahdah from providing "legal advice to any person in Ohio, including but not limited to advice regarding the filing of a claim for a securities violation and advice regarding a person's right as a claimant or defendant in securities arbitration, a lawsuit, or other legal or quasi-legal proceeding, including any terms and conditions of a settlement of any dispute." *(Thanks to SLC Contributing Editor Pete S. Michaels, Michaels & Ward, LLP, Boston, who alerted us to this decision.) (EIC: *Attending mediation sessions on behalf of a client was an activity specifically mentioned in the injunctive order, as well as participation in settlement negotiations. **Unlike the Florida case involving Mr. Rapoport (SLA 2003-09), this Court's focus fixes on the activities constituting the practice, rather than the physical presence of a law office or advertisements offering legal services within the state.)* (SLC Ref. No. 2005-02-04)

Dunn v. Security Financial Advisors, No. WD64164, 2004 WL 2933851 (Mo. App. W.D., 12/21/04). **Arbitration Agreement (Customer Agreement) * Jurisdictional Issues (Motion to Compel Arbitration) * Appealability * State Statutes Interpreted (Mo. Local Rule 33.5.1) * State Statutes Interpreted (Mo. Stats. §º435.440.1(1)).** *Missouri Local Rule 33.5.1 does not require the filing of concise suggestions and legal authority in a document separate from the motion to compel arbitration.*

First Heartland Capital filed a motion to dismiss and to compel arbitration of this customer's claims, based upon a pre-dispute arbitration clause in the brokerage account agreement. The trial court denied the requested relief on the sole ground that the motion did not conform to Local Rule 33.5.1, which requires the filing of "brief written suggestions" at the same time the motion is filed. In reversing the trial court, the Court of Appeals first rejects Dunn's argument that the Court lacks appellate jurisdiction. Under Missouri Statutes §º435.440.1(1), an exception to the final judgment rule, a party may appeal from an order denying an application to compel arbitration. As to the merits, the Court holds that Local Rule 33.5.1 does not require the filing of suggestions in a document separate from the motion. The rule merely requires that brief written suggestions in support of the motion be filed at the same time as the motion, which Heartland did. As the failure to file concise suggestions is the only ground for denying relief under the rule, the trial court on remand should decide the motion on its merits. *(W. Nelson)* (SLC Ref. No. 2005-03-02)

Kirlin Securities, Inc. v. Sand, No. 9847/04 (N.Y. Sup. Ct., 11/15/04). **Award Challenge * Confirmation of Award * Manifest Disregard of Law * Irrationality * Public Policy * Damages Calculations * Unauthorized Trading (Ratification).** *The doctrine of manifest disregard does not apply, unless the action of the Panel is totally irrational or violative of strong public policy.*

Sand was awarded $175,000 by a NASD arbitration panel. Kirlin asserts that the panel "manifestly disregards" the law and seeks to vacate the Award (NASD ID #03-04576, NYC, 6/21/04). This Court finds that the error made by the arbitrators must be obvious, which was not the case here. "[U]nless the court concludes that it is totally irrational or violative of a strong public policy and, thus, in excess of the arbitrator's powers," the doctrine does not apply. The Court also finds that it cannot look behind an arbitrator's damage calculation and concludes that the figure awarded is "beyond judicial scrutiny." *(P. Hoblin: It is interesting that, although Sand did not open her confirms, a defense of "ratification" was not applied. In most cases, the failure to review documents would strongly act against her.)* (SLC Ref. No. 2005-02-03)

Kozlowski v. New York Life Ins. Co., Inc., No. 1722 (N.Y. App. Div., 12/30/04). **Scope of Agreement * Arbitration Agreement (Form U4) * State Law, Applicability of * SRO Rules (NASD Rule 10101 "Insurance Business" "Certain Others") * Breadth of Agreement.** *Where multiple parties are named as contemporaneous employers of an individual, her agreement with one employer to arbitrate disputes may be extended to permit the others to join.*

The order below granted New York Life's motion to stay the proceeding and to compel arbitration. Plaintiff-Appellant, a former sales agent of New York Life and affiliates had an agent contract with New York Life that contained no arbitration agreement. However, Appellant was also registered with New York Life Securities, Inc. and, under a Form U4 agreement, agreed to arbitrate employment disputes. She claims Appellees breached their contract with her and defamed her by citing as the reason for her termination "insubordination." The Court unanimously affirms the arbitration orders, finding that the Form U4 covers this dispute. "[T]his action arises out of an alleged defamatory statement in the Form U-5, and thus is integrally related to her securities employment contract and her concomitant agreement to arbitrate any dispute arising thereunder. Her contention that her claims arose from insurance matters only is thus without merit." As the dispute is arbitrable, non-member

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New York Life may join the arbitration. NASD Rules provide for arbitration between associated persons and "certain others" and New York Life is "sufficiently immersed in the underlying controversy for it to be considered a 'certain other[ ]' party" under the NASD Rules. (SLC Ref. No. 2005-02-02)

Morgan Stanley DW Inc. v. Afridi, No. 4630, 2004 NY Slip Op 09425 (N.Y. App. Div., 1Dept., 12/21/04). **Award Challenge (Manifest Disregard/Irrationality) * Confirmation of Award * Culpability Standards * Derivative/Vicarious Liability (Respondeat Superior) * FAA (§1 et seq).** *The doctrine of "manifest disregard of the law" as a basis for vacating an arbitration award will not apply absent, inter alia, argument of the applicable law to the arbitrators.*

Abdul Afridi ("Afridi"), a retiree, deposited the bulk of his life savings in a Morgan Stanley account at the request of his son Adel, a newly licensed broker employed by Morgan Stanley. Adel lost his father's entire investment by engaging in risky and speculative investments that were entirely unsuitable for Afridi. Afridi, thereafter, commenced a NASD arbitration seeking to recover his losses from Morgan Stanley, Adel and Adel's branch manager. Afridi sought to hold Morgan Stanley vicariously liable for Adel's misconduct (under the doctrine of respondeat superior) and directly liable for its supervisory failure. Without stating its rationale in the award, the arbitration panel dismissed the claims against Adel and his branch manager and held Morgan Stanley solely liable to Afridi for $150,000 in compensatory damages, $30,000 in pre-award interest and $40,000 in attorneys' fees (NASD ID #01-03013, NYC, 3/24/03) (the "Award"). Morgan Stanley filed a petition seeking to vacate the Award alleging the arbitrators "manifestly disregarded the law" and reached an "inherently contradictory and completely irrational" result by holding it solely liable to Afridi while dismissing all claims against Adel. The trial court agreed that the Award was "totally irrational" and granted Morgan Stanley's petition to vacate while denying Afridi's cross petition to confirm. The Appellate Division reverses holding none of the grounds for vacating an arbitration award as set forth in the FAA applies. The Court determines further that the doctrine of "manifest disregard of the law," a judicially created ground for vacating an arbitration award, "applies only where the record shows that 'the arbitrator knew of the relevant [legal] principle, appreciated that this prin-

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ciple controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'" As Morgan Stanley's counsel never argued to the arbitrators that governing law required either a finding of liability against both Morgan Stanley and Adel or, alternatively, dismissal of the claims against both, the Court rejects "manifest disregard of the law" as a ground for vacating the Award. The Court also rejects the argument that the Award was irrational reasoning the arbitrators could have rationally determined that Morgan Stanley's culpability far outweighed that of Adel and, as such, it should be held solely liable for Afridi's losses (citing *Perpetual Sec. v. Tang*, 290 F3rd 132, 140 (2nd Cir. 2002)). The Court confirms the Award. *(Steven P. Krasner, Editor-at-Large and Securities Attorney*) (SLC Ref. No. 2005-03-10)

Prudential Securities v. Napier, No. 2003-CA-002700-MR (Ky. App., 12/17/04). **Agreement to Arbitrate * Enforceability (Fraudulent Inducement) * State Statutes Interpreted (Ky. R.S. 417.050) * State Law, Applicability of * FAA ("Interstate Commerce").** *Where interstate commerce is involved, federal substantive law requires enforcement of arbitration agreement, unless there is proof of fraud as to agreement to arbitrate itself (as opposed to the contract as a whole).*

Prudential Financial Advisor Dale Deaton solicited retirees from Shamrock Coal Co. to roll over their retirement accounts into Prudential accounts, after which he invested all of them in the same proprietary mutual fund, Prudential Equity Fund B. When they sued the firm, branch office manager and broker in state court, the court denied defendants' motion to compel arbitration. On appeal, the Court notes that the lower court relied on Marks v. Bean to find that arbitration is not required where the contract was procured by fraud. This case was overruled by Louisville Peterbilt v. Cox, 132 S.E.3d. 850 (2004), to hold that Kentucky's statutory savings clause, which provides that written arbitration agreements are enforceable "save upon such grounds as exist at law for the revocation of any contract," applies only when the allegation of fraud goes to the making of the arbitration clause itself and not to the underlying contract in general. Marks did not involve interstate commerce and has no applicability to the present controversy. Where interstate commerce is involved, federal substantive law of arbitrability governs the enforceability of arbitration clauses and a party is relieved of the duty to arbitrate only upon proof that he is a victim of a fraud that goes directly to the making of the agreement to arbitrate, citing Prima Paint, 388 U.S. 1801 (1967). *(S. Anderson)* (SLC Ref. No. 2005-03-01)

Roffler v. Spear Leeds & Kellogg, Inc., No. 4698, 2004 N.Y. App. Div. LEXIS 15635 (N.Y. App. Div., 12/28/04). **Award Challenge * Confirmation of Award * Exceeding Powers * Manifest Disregard of Law * Irrationality * Remand to Arbitrators * Rationale of Award * State Law, Applicability of * Stare Decisis ("Law of the Case" Doctrine).** *Despite a failure to follow the court's clear directive to conduct a new hearing, an amended Award with an explanation "sufficient to cure previous defects" is confirmed.*

The original Award in this arbitration, which began at the American Stock Exchange and switched to NASD in June 1999, was rendered in late 1999 (NASD ID #99-02963, NYC, 10/8/99). Spear Leeds was ordered to pay the Rofflers, owners of Bullseye Securities, $1.25 million, but Spear Leeds sought to vacate that Award. It succeeded in its petition, both at the trial (SLA 2000-09) and appellate (SLA 2002-10) levels, by persuading the court that shareholders (the Rofflers) could not properly be the direct beneficiaries of an award for losses sustained by the corporation (Bullseye). The grounds for vacatur were sweeping, covering manifest disregard of the law, exceeding powers, and irrationality. On remand, the Arbitrators were directed to hold a new hearing and consider the issues raised by the court. Instead, the Panel conducted no further proceedings, but, on stipulation of the parties, merely attached an explanation for their original determination (NASD ID #99-02963, NYC, 3/10/03). Quite naturally, the lower court vacated the second amended Award. But, on appeal, this Court reverses that order and reinstates the Award. It confirms the assessment of $1.25 million and remands for the entry of judgment, including statutory costs and interest from the date of the amended Award. According to the majority, the Arbitrators' explanation was "sufficient to cure the previous defects in that the panel found respondent (SLK) responsible for the actions of its partner, and that Schettino had guaranteed that any losses incurred by petitioners would be "made good" by respondent." The remainder of the majority's short Opinion tries to explain what happened. Justices Tom and Williams dissent, however, and criticize the Court for interfering as it did in the first place. Justice Tom writes: "I consider the disposition of the previous appeal to be an infringement upon the prerogative of the arbitrators to render an equitable determination, free of judicial intereference." However, the law of the case has been established and should be adhered to. Moreover, the Arbitrators ignored the order of the Court on remand and did not hold new hearings or re-consider in light of the judicial guidance. (SLC Ref. No. 2005-03-03)

Sterling Financial Investment Group, Inc. v. Hammer, No. 03-15745 (11th Cir., 12/16/04). **Arbitration * FAA (§3 Motion to Stay; §4 Motion to Compel) * Venue Issues (Hearing Location) * Forum Selection * Competing Agreements * SRO Rules * Judicial Authority, Scope of * SRO Rules (NASD CAP**

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§10315) * Enforceability (Fraudulent Inducement). *A federal district court has jurisdiction to enforce a forum selection clause in a valid arbitration agreement that has been disregarded by the arbitrators.*

This decision from the Eleventh Circuit Court of Appeals addresses the question of whether a federal district court properly enjoined arbitration in one forum and compelled arbitration in another forum. A former employee commenced an arbitration proceeding against a Florida-based broker-dealer and requested a Texas arbitration panel. The firm objected to the Texas venue and requested that the NASD transfer the matter to Florida. The firm's request was denied and the matter was referred to a Texas arbitration panel. The firm filed a motion in a Florida federal district court seeking to stay the Texas arbitration and compel arbitration in Florida (asserting that the federal district court had jurisdiction to enforce the forum selection and choice of law clauses in the parties' agreements). The district court granted the firm's motion and the former employee appealed. On appeal, the former employee argued that, since both parties agreed that arbitration was appropriate, all decisions (including venue decisions) should be made by the arbitration panel. The former employee further argued that a federal court may only review an arbitration proceeding after it has concluded. The Eleventh Circuit disagrees and rules that Section 4 of the Federal Arbitration Act grants district courts jurisdiction to order parties to proceed to arbitration in accordance with the terms of a valid arbitration agreement. The district court's order granting the firm's motion to stay arbitration in Texas and compel arbitration in Florida was affirmed. *(J. Ballard) (EIC: IM 10100 forbids a broker-dealer from requiring associated persons to waive arbitration, but the Interpretation does not speak directly to restricting venue choices.)* (SLC Ref. No. 2005-01-01)

SAC's Bulletin Board

The *Bulletin Board* is open to all subscribers who wish to post a message related to arbitration practice or process, free of charge. When insufficient room is available, you may not see your message until the next issue. Please check with us if you are uncertain about when we will be able to publish your announcement.

People

Bingham McCutchen LLP has expanded its securities enforcement and litigation practice in Washington with the addition of **Stephen J. Crimmins** (202-778-6108; stephen.crimmins@bingham.com) and **Ivan Knauer** as partners in the Firm's Broker-Dealer and Securities Litigation groups. **David A. Thompson** and **Kara L. Haberbush** have joined the Firm as associates. All previously practiced together at Pepper Hamilton LLP in Washington. Mr. Crimmins is a trial attorney with more than 25 years of experience in securities litigation and investigations conducted by the SEC and other securities industry regulators. As Deputy Chief Litigation Counsel and a senior executive of the SEC's Enforcement Division in Washington from 1993 until 2001, he co-managed a unit of 25 first-chair trial attorneys representing the SEC in hundreds of federal securities cases. Mr. Knauer has 15 years of experience in the area of securities litigation and securities enforcement. He represents public companies, broker-dealers, investment companies, investment advisers and individuals in SEC, NASD and other regulatory enforcement matters, as well as in class actions and arbitrations. He also counsels financial institutions about regulatory compliance matters. Mr. Knauer was previously senior counsel in the SEC's Enforcement Division in Washington. Mr. Thompson was an attorney with the NASD's Enforcement Department in Washington before joining Messrs. Crimmins and Knauer at Pepper Hamilton. Ms. Haberbush focused on private securities litigation before joining Messrs. Crimmins and Knauer to work on securities regulatory investigations and litigation. Messrs. Crimmins, Knauer, Thompson and Ms. Haberbush can be congratulated at Bingham McCutchen LLP, 1120 20th Street, Suite 800, Washington, DC 20036.

Goodkind Labaton Rudoff & Sucharow LLP is pleased to announce that **Christopher J. Keller** has become Partner of the Firm; **Richard T. Joffe** and **Christopher J. McDonald** have become Of Counsel to the Firm; and **Craig A. Martin, Jon Adams, Zachary M. Ratzman, Diane M. Simons, Shelley Thompson** have joined the Firm as Associates. Mr. Keller joined the Firm's New York office in May 2000 and has achieved numerous successes in the Firm's securities class action litigation practice. Mr. Joffe joined the Firm's New York office as an associate in 2001. His practice primarily involves class action litigation, including securities fraud, antitrust and consumer fraud. Mr. McDonald is part of the Firm's antitrust department. He also spends a significant portion of his practice representing institutional investors in securities fraud cases. As Associates in the Firm's New York office, Messrs. Martin, Adams and Ratzman's practices focus on securities class actions, securities and consumer class action litigation and securities fraud litigation, respectively, while Ms. Thompson has joined the Firm's Case Development Group. As an Associate in the Firm's Florida office, Ms. Simons is primarily involved in complex litigation with an emphasis on securities fraud class actions.

Edward A. Kwalwasser has joined **Proskauer Rose LLP** as Senior Regulatory Counsel. Mr. Kwalwasser joins Proskauer Rose after working with the NYSE for 20 years, most recently as Group Executive Vice President-Regulation. Mr. Kwalwasser spent 17 years with the SEC prior to joining the NYSE. He will be working in the Firm's Broker-Dealer and Investment Management Group with clients that include financial institutions, brokerage firms, investment banks, advisors and companies, business development companies, hedge funds and private funds and banks. Mr. Kwalwasser can be congratulated at Prokauer Rose LLP, 1585 Broadway, New York, NY 10036; (t) 212-969-3515; email: ekwalwasser@proskauer.com.

Saul Ewing LLP is pleased to announce the promotions of **Bruce D. Armon, David W. Erb, Kara H. Goodchild, Michael R. Greco, Katayun I. Jaffari, James A. Keller, Adrienne C. Rogove and Jay A. Shulman** to Partners in the Firm. Mr. Armon (215-972-7985; **barmon@saul.com**) and Ms. Jaffari (215-972-7161; **kjaffari@saul.com**) are Partners in the Business Department of the Firm's Philadelphia, PA office; Mr. Erb (410-332-8979; **derb@saul.com**) is a Partner in the Litigation Department of the Firm's Baltimore, MD office; Ms. Goodchild (215-972-7187; **kgoodchild@saul.com**) and Mr. Keller (215-972-1964; **jkeller@saul.com**) are Partners in the Litigation Department of the Firm's Philadelphia, PA office; Mr. Greco (610-251-5757; **mgreco@saul.com**) is a Partner in the Litigation Department of the Firm's Wayne, PA office; Ms. Rogove (609-452-3149; **arogove@saul.com**) is a Partner in the Litigation Department of the Firm's Princeton, NJ office; and Mr. Shulman (410-332-8618; **jshulman@saul.com**) is a Partner in the Bankruptcy Department of the Firm's Baltimore, MD office.

SAC's Bulletin Board (Cont'd.)

Relocations

Bressler, Amery & Ross, P.C. has relocated its Florida office to Huntington Centre II, 2801 S.W. 149th Avenue, Suite 300, P.O. Box 279807, Miramar, FL 33027; (t) 954-499-7979; (f) 954-499-7969.

Announcements

NEW BUSINESS: Kevin Carreno is pleased to announce the launch of **Experts Counsel Inc.** With 20 years of experience in growing, managing, supervising and developing Broker-Dealer and Investment Advisor firms in both the US and UK, Kevin, through Experts Counsel, will act as consultant for the securities/investment advisory industry, expert witness and mediator. For more information, please contact Kevin at Experts Counsel Inc., 2202 N. Westshore Blvd., Suite 200, Tampa, FL 33706; (t) 813-639-4201; expertscounsel@tampabay.rr.com.

IN MEMORIAM: Royce O. Griffin, Jr. died February 13, 2005 at the age of 59 of pneumonia, a complication that resulted from his contracting the flu a week before. Mr. Griffin was a nationally recognized expert in securities law and a member of the Securities Experts Roundtable. His credentials were formidable: Harvard University, U. of Texas Law School, law firm partner, federal court law clerk, Arkansas Assistant Securities Commissioner, Colorado Securities Commissioner, Senior Counsel to U.S. House of Representatives Telecommunications and Finance Subcommittee, Arkansas Chief Deputy Attorney General, General Counsel to NASAA, and, most recently, expert witness and partner in Griffin & Block, Little Rock. As these credentials suggest, his business life was based upon public service, to which his volunteer work with AmeriCorps, Upward Bound, and other organizations further attested. One news article quotes his surviving wife: "He firmly believed people deserved equality," his wife Brenda said. "He was a yellow-dog Democrat and a civil-rights champion." Memorials may be made in his honor to the Pulaski County Humane Society and the Union Rescue Mission, www.ruebelfuneralhome.com.

SCHEDULE OF COMING EVENTS

If you know of an arbitration event scheduled in the coming quarter, please tell us and we'll post it here.

Mar. 4-5: "The SEC Speaks in 2005," sponsored by the Practicing Law Institute (in cooperation with the SEC), will be held at the Ronald Reagan Building & International Trade Center, **Washington, DC.** Annette L. Nazareth, Director, SEC Division of Market Regulation and Paul F. Roye, Director, SEC Division of Investment Management, Co-Chair this program, which will provide a unique opportunity to attendees to hear about the concerns and initiatives of the SEC directly from senior staff, commissioners and commentators. Regis. Fee: $895. For info., contact PLI, 800/260-4PLI or register online at www.pli.edu.

Mar. 17-18: "Broker/Dealer Information Management: Ensuring Compliance with Email Retention and Process Documentation Requirements," sponsored by American Conference Institute, will be held at the New York Marriot Financial Center Hotel, **New York, NY** (pre-conference workshop, **Mar. 16**). The program will specifically focus on identifying the specific needs of Broker/Dealers when complying with regulations and protecting companies from liability. The event brings together an outstanding faculty of leading industry players, expert outside counsel, and top retention consultants who will provide invaluable information and insight. Regis. Fee: $1,595-$1,895 (depending upon date of registration). For info., call 888-ACI-2480.

Mar. 31-April 1: "Investor Rights Symposium," co-sponsored by the Pace Investor Rights Project and Pace University School of Law, will be held at Pace's campus in **White Plains, NY**. The symposium shall promote academic thought, scholarship and discussion of legal issues critical to investor protection. Professor David S. Ruder will deliver the keynote speech providing insight on the current regulatory climate for investor protection and the symposium securities industry speakers will explore the current balance between protecting investors and encouraging capital formation. For regis. and other info., call 914-422-4061 or visit www.pace.edu/lawschool/pirp/symposium.html.

April 3-6: "SIA Compliance & Legal Division's Annual Seminar," will be held at the JW Marriott Desert Springs Resort & Spa, **Palm Desert, CA.** 2005 Chair and Co-Chair are **Harris I. Suffian,** First New York Securities, LLC, and **Edward G. Turan,** Citigroup Global Markets, Inc. Registration Form and Brochure are available on the SIA C&L WebSite: www.siacl.com.

April 28-29: "Securities Litigation: Planning and Strategies," sponsored by ALI-ABA Committee on Continuing Professional Education, will be held at the Westin Embassy Row, **Washington, DC**. This 30th annual advanced course study, comprising 12 full hours of instruction, is designed for outside and in-house counsel, accountants, compliance officers, members of government agencies, and others who have a current interest in securities litigation. The presentations will primarily examine issues confronted by the trial practitioner with attention also directed to strategies used to avoid litigation and to litigation management techniques. Tuition: $995. For info., contact ALI-ABA, 800-CLE-News, www.ali-aba.org.

June 2: "Hot Topics in Securities Arbitration," will be held between 6-9PM at the Home of Law, Association of the Bar of the City of New York, and will be moderated by mediator-arbitrator Roger M. Deitz. Watch for details here and on the CityBar WebSite: www.abcny.org.

June 21-22: "NYSE Regulation First Annual Securities Conference," sponsored by the NYSE, will be held at the Grand Hyatt Hotel, **New York, NY.** Join NYSE Regulation senior staff and leading industry representatives to gain insight on the most pressing regulatory issues facing today's financial community. Regis.: $995 for NYSE Members and employees of Member organizations; $1,195 for non-members. Regis. includes selection of 12 workshops, two luncheon presentations, a Congressional panel, and a cocktail reception on the Exchange floor. For info., call 518-785-0721; www.nyse.com/regconference.