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ARBITRATOR TRAINING AND SELECTION

Introduction

PROF. COFFEE: We are now ready to move along to arbitrator training and selection. We're going to have Ted Levine and Peter Cella lead us through this particular maze.

Ted Levine, I'm happy to describe, was one of my boyhood heroes when I was a young assistant professor down at Georgetown. He was a major figure in the Enforcement Division of the Securities and Exchange Commission combating evil in the face of good.

Then he moved on, as I recall, to Wilmer, Cutler and is now General Counsel at Paine Webber, where he has a broad range of responsibilities. I think it is significant that we have a number of general counsels here because this is an issue that is high on their agenda.

After Ted, we're going to have Peter Cella who is one of the original public members of SICA. He also has been an advocate for the consumer perspective in securities arbitration for some time, with particular emphasis on the area of arbitrator selection and training.

Panelists

MR. LEVINE: A lot of the discussion today has touched indirectly on the questions of the selection and training of arbitrators, particularly in the employment discrimination and punitive damage areas.

I think the arbitration process is at a crossroad in terms of the selection and training of arbitrators. I do not intend to discuss the interstices of how much training there should be or whether the right selection criteria are being used. I would like to identify, however, fundamental issues for thought.

The key question is, do we refine and fix the existing system for training and selection of arbitrators, or do we change the system? It breaks down to really three categories.

Question number 1: On the selection side, who should be in the pool of arbitrators?

Question number 2: Within those pools of arbitrators, who should be assigned to a particular matter?

Question number 3: What type of training is necessary in order to qualify an arbitrator to handle an arbitration in the nineties?

On the questions of who should be in the pool and who should be assigned to a matter, I would like to begin by noting that it is a question of quality, conflict of interest, industry disqualification, and disbarment issues.

It seems to me that profiles of arbitrators, the CRD review, recommendations, and the vetting process should be sufficient, if applied diligently, to ferret out anyone who should not be in the arbitration

process.³¹⁵ We can tinker with that system. We can add additional checkpoints if necessary. I don't see that as a major problem.

The pools of candidates *are* a major problem. From an industry perspective, we do not get our industry representatives to serve as arbitrators. I'm the chairman of the litigation group of the Securities Industry Association and one of the things that we did this past summer was to get out a notice to members to urge participation from a variety of individuals in our firms to be arbitrators.

There are three problems with increased industry member participation. The biggest problem is time. The more complex the arbitration process, the greater commitment of time, and there is a trade-off between the demands on an employee's time within the firm—especially if you are talking about a branch manager in the retail system, a trader, or someone in research—and the demands on their time to sit in ten, twelve, fifteen, even twenty arbitration sessions.³¹⁶ The time commitment, in short, is a real disincentive, despite all the urgings by the general counsels and senior management to get arbitrators from firms.

The loss of *that* industry expertise—the knowledge of products and how firms work—is enormous. That knowledge cannot be learned through lawyers, retired persons, or persons whose knowledge of broker-dealers has been obtained by attending some courses on broker-dealers.

To the extent you rely on experts (which may be essential in order to process arbitrations), it deludes the original intent of the arbitration process—which is a review by peers and public individuals in order to make sure that the dispute is resolved. So, the first challenge, and maybe the greatest challenge in arbitration, is to create a pool of arbitrators with sufficient expertise to hear matters.

We have to ask ourselves whether the arbitration process is working in terms of selection of arbitrators. There may be alternatives that we have to seriously consider for the future. Do we need one or more professional arbitrators?

If we analogize to the New York Stock Exchange Hearing Board process, where there is a Hearing Officer and two other persons, do we need either a professional chair or professional arbitrators who have developed the requisite expertise through intensive training and experience? I don't know that I can answer that question.

315. "The NASD maintains [records of] the qualification, employment and disciplinary histories of more than 430,000 registered securities employees of member firms through the automated Central Registration Depository." National Association of Securities Dealers, *An Introduction*, at 12 (1992).

316. The New York Stock Exchange reports that during 1992 the average arbitration hearing lasted 4.7 sessions (approximately 2.5 days). Robert S. Clemente, *Securities Arbitrator Training: Managing the Arbitration Process*, in *Securities Arbitration* 1993, at 95 (PLI Corp. L. & Practice Course Handbook Series No. B-819, 1993).

A professional chair or a professional group of arbitrators who have extensive experience in punitive damages and discrimination cases is one approach. Their knowledge of process, substantive law, statute of limitations, evidence, and the securities industry would be extremely valuable.

We are at a crossroads in terms of selection of arbitrators, i.e., a group of professionals who understand derivatives—and it isn't easy to understand how they work. If we are talking about the CMO market or fairness opinions (as the First Boston arbitration suggests), what are the standards to be applied, and how do you evaluate the work done are the questions. Are we talking about a much different body of law and much different focus than the traditional arbitration function? I think so.

In any event, whether you agree that you should create greater pools of arbitrators from the industry, and greater pools of arbitrators from the public sector, or whether you should go the more professional route, you must provide for greater training. There are some mandatory training vignettes, and films, and there is a lot of effort to encourage arbitrators to attend training programs; however, more needs to be done. For the more complicated disputes, there are several levels of training that are needed.

There has to be mandatory training, which requires the taking of arbitration courses. I would recommend Columbia or Fordham, but it could be wherever you want. The curriculum for such a program has to be created by arbitration groups within the SROs, with input from SICA, and also from other participants, so that there is a standardized, mandated process that would deal with, not only substantive issues of law, but also the arbitration procedure issues, the rules of evidence, punitive damages, and the securities business.

In addition, I would mandate a CAE (continuing arbitrator education) program so that on an ongoing basis you have to requalify. We're doing that with our brokers, as you know.³¹⁷ We're requiring ongoing, continuing education. We put judges through that process in our judicial system, and I don't know why we don't do it in the process of arbitration as well. A mandated training course at the outset, as well as the continuing arbitrator education process, will make the arbitration process work better, faster, and more efficiently.

Let me just deal with two other points. We essentially empower the arbitration chair, as a practical matter, with a lot of power, and a lot of control in the arbitration process—both in terms of picking them or by the way the process works. Sometimes they dominate the panel, and there is a lot of deference by the other arbitrators to the chair—

317. Securities industry training, in general, is receiving widespread attention. The SEC unanimously approved a continuing education program for brokers and other securities industry workers. See *SEC Approves Education Program For Brokers To Maintain Licenses*, Investor's Business Daily, Feb. 9, 1995, at A19.

not always, but a fair amount of the time. If he is a lawyer, on the procedural issues, that deference occurs a lot. The nature of things suggests that lawyers, maybe unfairly, get a lot of deference because they are thought to know the law or understand the arbitration process.

I think we have to answer the question whether we want a lawyer as a chair in the more complicated cases. There is a trade-off between the deference accorded the chair by the other arbitrators to handle disputes over evidence and to control the lawyers in the process, and the risk that the other arbitrators may take themselves out of the process more than they should, and it leaves too much power in the hands of the chair. So, one of my questions is, as we look at the system of arbitration and the selection of the group, do we have to redefine the roles and the authority of the various participants?

In conclusion, I would like to see more specific identification of pools along the lines of expertise—whether it is employment or other substantive areas of the law—so that the expertise is clearly identified, and the Directors of Arbitration, or others picking arbitrators, really can match expertise with the issue at hand.

I would also like to see the expansion of the pools and consideration of a more professional arbitrator, especially if you are going to get into the area of punitives—at least one who can run that process, whether you call him an administrative arbitrator, or however you describe him.

Finally, I am totally committed to mandatory training. It is unacceptable not to have mandated arbitrator training on all the processes and substantive law issues, in order to make arbitration work.

MR. CELLA: The best-designed adjudicatory system will not work unless the people who are charged with its administration and with the substantive determination of rights are qualified, competent, and of a chemistry or character to sit as quasi-judicial persons. When we looked at arbitration pre-*McMahon*,³¹⁸ you had typically the classic securities customer complaint, with small panels of arbitrators. The volume of cases was relatively low, things were manageable, and it moved in a quiet and rather unruffled atmosphere.

Then came *McMahon*, with the courts cleaning out their dockets, and continuing to do so, there was an explosion in the need for additional arbitrators to deal with the mandatory arbitration of customer complaints. And the sticks were beaten to find the bodies, and requests went out for recommendations from every and any source, because you had to deal with the cases that were there.

Obviously, all those that were placed on the panels were not of a competence or background that one would desire. And so, the winnowing-out process had to develop. I think Ted and I agree that the

318. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

process of admission to a panel of arbitrators is one that can't be very much improved on—fine-tuned a bit, yes. It is what you do with these bodies and how you observe their conduct and capabilities as arbitrators that becomes critical.

Compounding that problem, the problem of identifying quality and competence for the adjudication of a mandatory process, you have the complexity of issues that would befuddle and indeed has befuddled state, and to a lesser degree, federal judges.

You are taking arbitrators, many of whom work full time in their various professions, and asking them to sit in multiple sessions to deal with issues of securities arbitration in the nature of claims of churning, unauthorized trading, the classic complaints; then, you throw on top of that RICO, employee disputes, insurance questions, and injunctive problems. The result is that you are burying people of good will and of intelligence under a load they may not be able to handle.

What started out as a process that was manageable has reached a point where the system is becoming burdened, and the critical point is the arbitrator panels. Right now we have multiple panels for the different SROs. Admittedly, there are some arbitrators who sit on a number of, or are members of a number of, different panels. That's a situation that seems to me to be duplicative of time, effort, and money, and it affects the training process.

Training, I think is the issue—oversight and training. You have to find out just how good these people are that you have admitted to your panels, because the letters of recommendation frequently are not as exact and as candid as they should be.

Another part of the problem is who's got the time to sit as an arbitrator in multiple sessions? The busy businessman and the professional really don't. They are stretched. They do it as a public service. The honorarium is nothing to them. They are really giving generously of their time.

What you do get are panels that are loaded with retired industry people and other persons, all of whom, and I can't say it is an evil thing, would like to have something to do, indeed get paid for it, and have lunch with two other nice people.

And that is a problem. Because it creates a perception, when you start looking at the awards, that there's something wrong here; that the award to the claimant is maybe forty percent of the claim consistently, and, as well, in some cases the claimant never wins. This creates real apprehension on the part of the public investor.

I think Ted is correct; we're reaching a point where multiple systems of education and training for arbitrators is stressing the finances of the SROs.³¹⁹ I think the commentary this morning, that in the earlier in-

319. Since 1992, the AAA, AMEX, NASD, and NYSE (as well as some of the regional exchanges) have cooperated on and cosponsored arbitrator training pro-

vestigation of the benefits of a single forum,³²⁰ which went nowhere at the time, there did appear to be considerable benefit from having one pool, a unified pool of arbitrators, that all SROs would draw upon.

Now, you have focused on one group, and you can design, indeed, you have to design—and they have to be willing to give the time, and you may have to pay them for their training—an intensive program to deal with the complex issues and complex securities products that keep coming to market—limited partnerships, and now derivatives. What comes tomorrow?

You've got to train them because it's unfair to tell them you can deal with RICO, as the Supreme Court said,³²¹ quite incorrectly, I believe, at that time—you can deal with all of the issues. I think that's incorrect. So, you need a uniform pool from which all the SROs will draw upon. They need intensive training and it's going to cost the industry money. I might point out this is a process that the industry much desired. They got it. Now they have to pay for it.

We have the employment issues that are now arising,³²² and the number of cases is going to grow. It seems to me perhaps a segregated pool of either trained or already-qualified arbitrators to deal with that complex area might well be necessary.

Indeed, after consideration, there might well be a need for other special pools of arbitrators. But to continue separate pools of arbitrators for each SRO, to me, makes no sense. It's not cost effective and it doesn't achieve the end of education and training, which is the problem.

The selection problem, we can't do much with. You've got to catch them when they're sitting. Before they sit you've got to try to train them, and you must continually winnow out until you get a core that you can trust with the complex issues they have to face today. It seems to me that if you want arbitration to work, and as time goes by, as more is dumped on it because the courts and federal agencies want to free themselves of the burden, it's going to cost the industry more money. If the industry doesn't want to pay the tab, then, with a stroke of the pen, you can solve your problems. Make the contract with your customer non-obligatory. Make arbitration voluntary. Go back to what it was and then you're free again. And let the federal courts pick up the cases.

But if you want, as I've heard around the table today, to maintain securities arbitration, and indeed labor arbitration, employer relations arbitration, then you are going to have to revamp the separate pools into one pool of arbitrators. You are going to have to provide truly

grams. In addition, these organizations have an agreement of reciprocity regarding arbitrators trained by any of the forums.

320. See *supra* pp. 1643-50.

321. *McMahon*, 482 U.S. at 238.

322. For a discussion of employment discrimination, see *supra* pp. 1613-42.

comprehensive training programs with the materials that go with it; then, you're going to have to oversee the conduct of the panels by having administrative staff of experience and seniority sitting there in the hearing room and observing, rather than only having a tape recording to refer to. It isn't going to be easy, but I think Ted has put a spotlight on some of the problems.

My own suggestion is this unified pool for all the SROs, which I think is necessary under the circumstances we labor under, with a lot of time and money spent on training them and supervising them.

I think down the road that Ted may be right. You will need—call them qualified, certified, or professional arbitrators in securities industry arbitration, be they full time, paid by the industry—sitting as chairpersons, those who are acknowledged to be truly just and independent people, in order to carry forward the mandate that the Supreme Court has delivered with regard to this mandatory process.

As I say, if you don't want to do it, get out of it, and put the public back to having a choice. If you want to do it, be prepared to spend money, wisely, but get results that I think should make you proud in light of what the public will think of the forum that you provide in the future. Thank you.

Discussion

PROF. COFFEE: Thank you. I don't hear the two of you disagreeing. This is not a case where one says A, the other says not A. Therefore, we need someone else to disagree a bit, and I want to raise at least a devil's advocate thought.

I think I agree with your statement of the facts. This is not something that is terribly remunerative, and one of the biggest problems is that good people are short of time. The people you want most have the least economic reason to do this.

They may be doing this, and I think I've seen it in my limited exposure, because either it's kind of a public citizenship thing, which I've seen some very good lawyers do it on that rationale, or people like me did it for an educational reason. How does this system work; what's really going on when the rubber meets the road?

I worry about some of the changes that you're discussing driving some of those people out. To put it bluntly, I would worry about whether some of the movement towards intense training, intense professionalization, will produce a civil service bureaucratization of the arbitration process. I don't mean to say that definitively. I mean to raise that as a fear.

If you insist that the partner in a good firm, or even the senior associate in a good firm, while he could be a fine arbitration panel member, has to go off and take so many hours a week, or a month, in courses where he may already know this field from the cases he's

working on in court; you may simply cause that person to leave the process and focus on what he can make a lot more money at. I'm worried about whether we'll be excluding, dare I say it, the really good, gifted amateur. By that I mean the person who is a really fine lawyer, but hasn't bothered to really specialize in arbitration.

There may be ways of marrying the two. Maybe you can have a professional chair who has gone through all this training, and other people who are good lawyers, demonstrated by all kinds of credentials, but not having worried that much about learning the full theology of arbitration—now, I am just saying this as a devil's advocate without much confidence, but I'd like to hear you address this.

If we add to the cost of training an intense involvement, we may be driving out exactly those people who have the highest demands on their time already.

MR. CELLA: That is a risk, but if you don't go the route that I've suggested, you remain with the problem, the undercurrent of which I sensed today, that the panels are not up to speed on this avalanche of issues that grow more complex with the passage of time.

So, you are faced with a conundrum, perhaps. Do we go on with the intelligent amateur, as you put it, who, using the best of his background and intellect is groping for a fair solution, without perhaps fully understand what he's dealing with; or do you opt to train, and take casualties by a loss or indeed maybe a replacement, because there may be those who are willing to step in?

Indeed, you may even go out and solicit from the specialized bar associations a greater number of applicants for admission to the panels, from the labor area, for example, which might help. It seems to me you have a risk, as you have defined it, but the risk has to be taken.

You are going to take some casualties along the way, but if you don't, we continue to face the problem of panels that, if not in fact deficient in understanding the problem, may be perceived to be. Then you get this whole perception and suspicion of arbitration, and the fairness of its process and result.

MR. LEVINE: The more basic issue beyond the availability of a pool of lawyers or other persons to serve is really do you want the process going forward to be a group of industry and other persons to administer it, or do you want a group of administrative persons who rely on expert testimony to resolve disputes?

I think we're at that point in time, and I am concerned about the latter one, which is an administrative law judge approach solely, which would then rely essentially on—

PROF. COFFEE: That is the civil service bureaucratization?

MR. LEVINE: Right. I am concerned about that because I think it won't work. It will work, but it will be a much different process than it is.

I really believe, though, a dominant chair with the adequate pool of expertise, which you could either get exemptions or otherwise to deal with, is the way to go.

PROF. COFFEE: Let me just in one sentence illustrate what I was talking about. What drove my little vignette was that I served on a panel about two years ago with two other individuals who were both members of the American Law Institute and were both finding that they didn't have much more time and that this might be their last arbitration. Their complaint was they didn't have the time to go to all those training meetings. These were not really amateurs. These were very good lawyers. I'm taking, for the record, the American Law Institute member as a standard, someone who's a recognized person of professional stature. If they are driven out because of the bureaucratization features, the need to go to a training session in another county, I think you lose something.

I think you degenerate the process down into something that begins to look a lot more like Social Security appeals, where you figure out what the going rate is for a shoulder injury. That would be one concern.

MR. O'HARA: Well, it seems to me that one of the real major problems is building the confidence of the public in these people. The complaints I hear are these people that are doing the arbitrating and are making the judgments are generally all industry people,³²³ and they don't feel, going into the process, that they have a fair shake.

I have a question: Is the problem finding someone who can make a judgment fairly and intelligently, or is it a problem of having to have an attorney as an arbitrator? To me, an individual who has been a lifetime investor, no matter what his occupation is, should be really qualified for this type of position.

There are beginning to be all kinds of security analysts out there that are retired. Certainly it would seem to me these people would be well qualified. Just individual investors who have sizeable investments should be qualified. I think that kind of person, looking at an individual coming up with a case, is certainly going to feel confidence in the system.

323. NYSE Rule 607(a)(1) requires a majority of nonindustry arbitrators on each panel unless the public customer requests a panel consisting of a majority of arbitrators from the securities industry. NYSE Rules, *supra* note 14, Rule 607(a)(1), ¶ 2607. Rule 607(a)(2) defines securities industry arbitrator as a person who "is retired from or spent a substantial part of his or her business career [as a member, broker/dealer, government securities broker, government securities dealer, municipal securities dealer or registered investment adviser]." *Id.* at Rule 607(a)(2), ¶ 2607.

MR. ROGERS: I think we're all agreed now that some training is desirable, and we really get down to the semantics of the real issue of what training means. I think of necessity it has to be general. I mean, there can be training about how to be an arbitrator, how to weigh issues, and general frameworks of laws; but, after all, if they know everything, what's the role of the counsel for the parties anyway?

A dispute involves specific legal issues and facts. I don't think we could expect that you'd have a panel of people who are absolutely expert in all of the issues. I mean, the issue of learning the nature of derivatives was mentioned. If I learned everything there were to learn about derivatives in the next two weeks, I'd forget it six months from now if I didn't have cause to use it. But there's a level of detail that I think it is unrealistic to expect that arbitrators would learn unless they became professional administrative law judges, which really does not seem desirable.

One thing I was interested in, perhaps from Mr. Clemente, was that in the New York Stock Exchange arbitrations there are case counsel, and the ones I've dealt with are very sophisticated lawyers. I don't know what goes on behind the doors when they are in there with the arbitrators. I do know that often when the arbitrators retire to make a decision on discovery or some other issue, the case counsel's in there, and then when we go back in and there is a result, it usually makes some sense. But I was interested in the extent to which you already have at least the beginnings of a process where there is some administration or guidance to the arbitrators.

MR. CLEMENTE: The purpose of the staff attorney being present is to provide procedural guidance to the arbitrators should they request it. They are not permitted to tell, and I assure you—there are a few of them sitting here—that they don't tell the arbitrators how or what to decide.

What they do, and this is a very important function, is when the arbitrators have hit a point that they are not sure of what to do, or perhaps an issue that should be explored further, they'll suggest that the arbitrators go back and ask questions, or ask for additional arguments or briefs on the particular issue involved. They also, where relevant, will point the arbitrators to the arbitration rules or Code of Ethics for guidance in resolving certain questions.

MR. ROGERS: I had only one other question in that regard and that was the extent to which the staff counsel are involved in evaluating arbitrators, if at all, in reviewing them, because the one thing I found a bit of frustration in is, I believe that maybe you have review forms that are supposed to be sent out, but I've never really received them in an arbitration, and sometimes I've wanted to comment.

MR. CLEMENTE: Well, let me say that you are free to send a signed or unsigned letter to me with specific comments about any of

the arbitrators that you appear before. In fact I encourage you to do so. I wish more of the users of the forum would do so.

The staff counsel is really the front line, and to a large extent, the only evaluation of arbitrators that we receive in the overwhelming majority of cases. I have some numbers on this that I'd like to share with the group here today. I think this is a major part of the problem in dealing with the so-called unqualified arbitrator or identifying appropriate areas in which to train arbitrators.

We have had an arbitrator evaluation process since as far back as 1988, or even earlier, where everyone involved in the case, the parties, the arbitrators, and the staff, are asked to evaluate the arbitrators. In addition the parties are asked to comment on the overall arbitration process.

The party evaluation form is strictly anonymous, yet the response is virtually nonexistent. Here are some statistics for the last three years: In 1992, we issued 456 awards, yet we received only 23 evaluations from the parties; in 1993, 306 decisions were issued, yet only 24 party evaluations were submitted; through the end of November of this year, 254 decisions were rendered, yet only 17 party evaluations forms were returned in 1994.

This is the biggest part of the problem of screening and eliminating arbitrators who may not be up to the job. A lot of people are willing, even anxious to attack the process and the arbitrators, as we have heard throughout this Symposium, but few are willing to help improve it by submitting evaluations and identifying the so-called unqualified arbitrator. It is frustrating to me, and I'm sure to Deborah Masucci, Rosemary MacGuinness, and Janice Stroughter, when we hear complaints about the panelists, about them not being up to the job before them, to handling the issues, but there is no specific arbitrator or specific case identified.

I'm happy to have the opportunity to put into the record today, to plead with the people around the room and your respective colleagues, it is strictly an anonymous process. They don't go further than my desk—the arbitrators do not see them. But unless I get them, unless the staff gets them, and the other SROs get them, it is very difficult for us to screen out arbitrators who may not be qualified.

MR. LEVINE: Why don't you mandate it? Why don't you mandate it before award?

MR. CLEMENTE: We *request* that the evaluations be returned after the hearing, but before the award is issued. Requiring that they be returned before we release the award I don't think would really produce a valid and candid evaluation, or for that matter, one which any serious thought has gone into.

PROF. COFFEE: Bob, I want to follow up with something that actually was raised by Deborah earlier, and I think it really was a com-

ment that was very interesting, and it fits more in this panel than in the last.

It was really the standard for punitive damages. She said there is this folklore out there that's developing, possibly because of either the lack of training or the lack of standards, that maybe some panels are really giving punitive damages as a way of covertly giving attorneys' fees. It is also equally possibly they were covertly giving punitive damages because of something counsel did, because they didn't have Rule 11 available to them.

How, in the training and supervision process, can you address or deal with the need to get some common standards on questions such as whether damages are appropriate because you think attorneys' fees are warranted or because you think the counsel did something improper? How do you address that?

MR. CLEMENTE: In our training programs we address the issue of awarding attorneys' fees as a possible sanction, among others, for noncompliance with an arbitrator order in regard to discovery.

The arbitration decision form contains a separate place for the award of attorneys' fees, and when we discuss with the arbitrators the award of attorneys' fees, when they are warranted, we strongly suggest to them that when they award any type of exceptional remedy, such as attorneys' fees and punitive damages, that they state why they are doing it and what they're basing it on—the rules, the law, or other criteria. For example, are they basing the award of attorneys' fees on a state consumer statute that entitles the winner to attorneys' fees, or some other statute, or the arbitration rules regarding sanctions for non-compliance with an arbitrators' order.

There is an argument that appears today in many arbitrations, that if the respondent asks for attorneys' fees, and the claimant asks for attorneys' fees, then they have put it in issue, regardless of what state law applies. We do try in the training program to identify these areas for the arbitrators and the types of situations they will face.

We identify and discuss these various issues with arbitrators in our training programs. Ultimately, it comes down to what arguments are made by the respective advocates, and what arguments the arbitrators are convinced by. It has been my experience, through many years of involvement and observation of arbitration hearings, that attorneys' fees are often asked for in the pleadings, but are neither proved, nor even mentioned at the hearing.

PROF. COFFEE: Let me ask you just to summarize. Do you share Deborah's apparent sentiment that there was something of a folklore out there that affects the behavior of the parties because they think this is how arbitrators are behaving?

MR. CLEMENTE: I definitely think that there is a lot of folklore out there, particularly in the punitive damages area. In the past four years we've had only nine punitive damage awards, totalling less than

two million dollars. I'm unaware of any Exchange arbitration where an arbitrator awarded punitive damages for something other than what they thought was an egregious act.

I don't put aside, though, the fear that is obviously out there, that it only takes one outrageous award to take down a house of any size, but I think how arbitrators deal with this issue really is more conjecture than fact today. I'm not saying that these things couldn't happen, but at least in my experience, in the cases before the Exchange, it hasn't happened. It hasn't even come close to happening.

MR. EPPENSTEIN: Speaking as someone in the trenches in this area, we always look for people who have common sense to sit as arbitrators. Not necessarily someone who is going to be well versed in the specific investment vehicle at issue, because it is very hard to find that. The questions that are most likely going to be resolved are questions of credibility—who's telling the truth?

Moreover, in these areas, you don't need a rocket scientist, as was mentioned this morning. You need someone who has a life's worth of experience, such as the gentleman mentioned before, someone who might be an investor for all his life, someone who may be a businessman but has been used to resolving disputes over bills of any commercial sort.

I think a lot of the discussion that I've been hearing about the selection of arbitrators goes beyond the resource that we have to pay these people. I don't think that you are going to find, if you pay them \$300 a day, that people are going to be willing to go and take courses at Fordham or Columbia, no matter how entertaining the professors may be.

I would also like to say something about the fact that when you go to court you're dealing with a judge and a jury, and they are no better versed about these esoteric investment vehicles than the common arbitrator is, without any training.

I'm a member of the AAA's Securities Advisory Committee on Arbitration, and when we looked at this issue over a year and came up with some suggestions in 1993 to revise the AAA rules, we were concerned with the selection process of the panel. We looked at the way you do it here at the New York Stock Exchange, and the way it's done at the NASD, as opposed to the AAA model where you have your list of five securities-related people, your list of public people, with unlimited peremptory challenges. And we found that system worked better because there was a better likelihood that both sides would wind up with the people that they would be satisfied with in order to resolve the dispute.

I would also like to mention the point about evaluations. The AAA sends out a form in every arbitration case and asks the parties to fill it out, but they send it out after the award is rendered.

I think Ted Levine's suggestion was much better, that the request should be sent out not only to the parties, but also to the expert witnesses, to render opinions on the arbitrators before the awards come out. I think you get a better, objective view that way.

MS. MASUCCI: You know, Peter answered one of your questions about the diminution, the reduction in our arbitrator pool, by requiring continuing education programs;³²⁴ well, we'll have to see if that will happen. We do have some statistics that show what occurred after we instituted the mandatory introductory training program. At the NASD, our pool of arbitrators went from seven thousand nationwide to twenty-four hundred. And that was at a time when our case load was increasing.

We are committed to offering programs, and, in fact, maybe in the future there will be a mandatory continuing arbitrator education program, but there are going to have to be trade-offs for instituting such a program, and one of those trade-offs definitely will have to be arbitrator usage.

Earlier, I indicated that people complain that we overuse certain people. Well, for an individual to go ahead and attend the training programs that we offer, they've got to use the skills that they learn, and they have to use those skills within a short period of time after going to the training program.

I'm not really talking about the substantive issues. I don't think any course that we teach—or conduct, rather, because I don't know that we really teach them—can substitute for a life-long knowledge that's built up in a person; but, we can only scratch the surface on the substantive issues. If you don't use those people, they'll lose it. They lose the knowledge. They lose the talent that they have.

The other area in terms of evaluation is a particularly irksome one to the SROs, because we have been using the arbitrator evaluation process since 1987-1988. What we've been doing is using alternative forms of the evaluation to bring the feedback in.

There has been some discussion about mandating that the forms be returned prior to the award. Basically, hold the award hostage. We don't want to do that. I think it diminishes the value of that feedback if it's forced, because you don't know if you are going to get credible feedback if it is being given to you only because they want that award faster. There's got to be more responsibility on the part of counsel to make sure that evaluation form gets in.

MR. LEVINE: The only analogy I've seen that's been somewhat effective is in CLE courses where they give out evaluation forms at

324. A recent report stated: "Qualifying standards implemented by the NASD in response to a General Accounting Office Report have cut the number of arbitrators available to hear cases." *For Your Information: Arbitrator Shortage Slows Investor Disputes*, Star Trib., Feb. 1, 1995, at 2D.

the end. By and large, if you hit someone at the time while they are there, and it is fresh in their mind, the return is greater. Whether you have the staff give it out, and try to get it at the time of the end of the hearing, I just think it is far superior than trying to wait for someone to send it in after the time.

MS. MASUCCI: I agree with you, and you know, we leave the forms in the anteroom so that they can pick it up on their way out. You don't know how many times they pick it up and then put them in the garbage outside in the hallway.

We have recently received letters from the plaintiff and defense bars indicating their fear of giving feedback because it will somehow impact the decision, whether it be positive feedback or negative feedback. And then when you look at the feedback we receive after the award, it loses its value because you don't know how much the award really impacted that.

We modeled our evaluation process after the AAA, and it is my understanding that they don't get any more feedback than we do. This is a process that is a problem throughout the arbitration area.

PROF. COFFEE: Okay. I think we are reaching the end of the day. Unless someone else has a final comment on this topic, I am going to turn it over to Gus for wrap-up.

