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Via E-mail at rule-comments@sec.gov

Nancy M. Morris
Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549-0609

Re: SR-NASD-2006-109

Dear Ms. Morris:

This is to comment on the NASD's proposed rule change regarding the representation of clients in securities arbitration hearings by out-of-state attorneys. I have been representing both securities industry participants and customers in securities arbitrations since 1991. I currently represent primarily customers. I have lectured and spoken often on the subject of securities claims by consumers, and the NASD[1] arbitration process (see attached). I am an NASD arbitrator.

Based on personal experience I oppose the NASD adopting a rule in which the default position is that attorneys can represent parties in any state in the Union, as long as they are licensed by one state, placing the burden on the States to "prohibit" such representation. That reverses the presumption which should apply: that an attorney *cannot* represent parties in other jurisdictions unless *he or she* demonstrates that the client will not be disadvantaged by out-of-state representation.

1. Forum selection clauses. *Attorneys representing clients in another state should be required to consent to the customer bringing any disputes arising out of the engagement before a forum in the client's home state.*

Consumers do not know to challenge forum selection clauses in attorneys' engagement agreements. I am currently representing a *Seattle* consumer/investor who hired *Florida* lawyers for an NASD arbitration arising out of events in Washington, with the hearing sited in Seattle. The attorneys, on the day before the hearing was to commence, withdrew because their

[1] Of course it is now FINRA, but for purposes of this letter I will refer to the agency as that whose practices are the basis for this comment.

evaluation of the case was that it was not worth traveling to Seattle. (My interpretation. They withdrew citing nonexistent "conflicts of interest".) The Florida attorneys refused to turn over to new (Seattle) counsel any of their discovery documents or files related to the case, because the client objected to paying them under the circumstances. The case ultimately settled with new counsel. The Florida lawyers demanded their contingent fee—and demanded the customer travel to Florida to litigate that issue. That matter is pending before the 9th Circuit Court of Appeals on procedural issues related to how federal courts are to enforce forum selection clauses.

Forum selection clauses, based on case law developed for *international commercial disputes*, now enjoy special deference in many courts even in domestic consumer cases; the showing necessary to avoid enforcement of the clauses is generally insurmountable.

2. Out-of-State Representation creates substantial additional costs to the client, to the detriment of the client's settlement position. *Attorneys representing clients in another state should be required to bear the additional travel and other expenses arising out of their appearance in the foreign state.*

As in the case noted in ¶ 1, out-of-state attorneys bear travel and lodging expenses in going to another state for a hearing. I assume, but do not know, that most attorneys treat travel, food and lodging as "out of pocket costs" which the client must pay, generally *out of their net* percentage of any award (after the attorney takes his or her fee). Those expenses can be significant: I just completed an NASD hearing in Seattle scheduled for 5 days, which took 12 days, spread over three months—which would have required three separate trips to Seattle if I lived in Florida.

Further, representing a client out-of-state adds travel time (and logistical issues) to the attorneys' work. Three trips between Florida and Seattle would effectively have added about 6 days' work to what local counsel had to expend.

The additional costs create pressure on clients—who tend to be very worried about how much they are going to have to spend in proceeding with what necessarily is an uncertain venture. The additional time required to litigate the matter (and the risk of incurring costs which the client may be unable to repay) creates incentives for the attorneys to recommend settlement at lower dollar amounts than local counsel would recommend.

This is not to imply that out-of-state attorneys are any less ethical or committed than in-state attorneys. But all settlement negotiations turn on the risk/reward equation, and in out-of-state representations both the client and the attorney incur greater "risk"—expenses and potentially uncompensated work—than they do with local representation.

Such considerations can, as happened with my client, even create pressures for the attorneys to withdraw from cases that do not settle.

3. On average, out-of-state lawyers will provide lower quality representation than local counsel. *Attorneys representing clients in another state should be required to certify, in connection with a certification process similar to that recently adopted in California*[2], *that they will familiarize themselves with, and assert, State law provisions that are appropriate for the client's circumstances.*

Securities arbitrations turn—or should turn—primarily on state law. While NASD regulations also play a large part, those regulations alone are a thin reed on which to try to recover damages for an investor. Federal securities law claims are rarely asserted by experienced practitioners in NASD customer/broker arbitrations.

- Each state has its own State Securities Acts, which generally provide far more protections, and favorable remedies, than federal statutes. It should be malpractice (in Washington, at least) to fail to assert claims under the local state Securities Act in the typical investor securities act arbitration. The highly-experienced Florida attorneys who abandoned my client, and who advertise in soliciting clients on the Internet that they have a "national practice", had asserted no state law claims on behalf of the customer.

- Many states have Consumer Protection Acts. Whether those acts apply or not in securities claims varies from state to state. Washington's act does apply, and does provide special remedies different from what is available in other states.

- Under some state laws their statutes of limitations apply to claims asserted in arbitrations. In other states (including Washington) they do not.

- In some states securities salesmen are deemed by case law to be fiduciaries (e.g., California), in others (Washington) they are not.

The NASD's discussion of its proposed rule change notes that "an attorneys' experience is more important than where he or she is licenses." That comparison makes utterly no sense. The issue is whether an *inexperienced out-of-state attorney is as good as an in experienced local attorney,* and the same with experienced attorneys. Where an attorney is licensed has nothing to do with his or her experience. Generally very experienced local counsel exist in every metropolitan area.

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[2] The California procedure does not call for the particular certification I propose here.

The NASD's discussion also compares securities arbitrations to practice before the NASD and SEC. This reflects a surprising lack of understanding about customer/broker securities arbitrations. Matters brought before the NASD and SEC are based almost exclusively on federal law and regulation. And the SEC *does* require that attorneys who appear before it have the specialized competence necessary to protect the client. Securities Exchange Act of 1934, Section 4C ("Appearance and Practice Before the Commission"), provides that the Commission can sanction attorneys appearing before it who do "not to possess the requisite qualifications to represent others."

Further, parties appearing before NASD and SEC tribunals are probably rarely being represented on a contingent fee basis. Lawyers representing such clients, on an hourly basis, do not have incentives to reduce the time involved or to encourage clients to settle on less favorable terms than local counsel might recommend.

4. Summary. The NASD's justifications for its rule change are remarkably superficial, and seem to reflect very little experience with the realities of individual investors being represented on a contingent fee basis by attorneys from distant states. The de facto rule should *not* be that just having one state's license to practice law is enough to represents clients in securities arbitrations in any state in the Union, and is permitted unless a state "prohibits" it. Most states have laws like the Model Act: they neither permit, nor prohibit, the practice. It depends on each individual case.

Selfless and diligent out-of-state counsel, who are extremely fair in their treatment of travel costs and the like, can no doubt represent clients in other states very effectively. Many attorneys would research the local law and make the monetary accommodations necessary to fairly and effectively represent that clients. But not all will. The NASD's rule should provide some protections for the public against the risks that are inherent in representation on a contingent fee basis by out-of-state attorneys in securities arbitrations.

Very truly yours,

Carlson & Dennett, P.S.

By Carl J. Carlson