

## NASD RULE ON SUBPOENAS AND ORDERS TO PRODUCE OR APPEAR

- *Erwin J. Shustak, Esq., senior partner*  
*Shustak Jalil & Heller, P.C., California and New York*

There has been a great deal of confusion regarding the propriety of pre-hearing subpoenas and orders to produce or appear, both before the hearings and at the hearings. The help clarify the confusion; the NASD recently issued guidelines on the process of Subpoenas and Orders to Produce or Appear.

### **Subpoenas**

Generally, anyone authorized by law to issue a subpoena may do so in securities arbitration. In many states- California and New York for example- attorneys are authorized to issue subpoenas. That power to issue subpoenas, however, has a jurisdictional limitation. Attorneys are authorized to issue subpoenas **only** in the jurisdiction in which they are licensed, maintain an office and in which the arbitration is pending. One common abuse often seen in arbitrations and practiced mostly by counsel for brokerage firms is the service of a "subpoena" issued by an attorney on one state to another financial institution in another state. There is no basis for an attorney in, for example, California to issue a subpoena, of any kind, to a third party in another state. While done routinely, those "cross-state" subpoenas are improper and unauthorized.

If documents are sought from a third party subject to the jurisdiction of the NASD (ie. a member firm, a registered rep), the proper procedure is to ask the panel to issue an NASD subpoena. Unlike counsel, the NASD Panel has the authority to issue a nationwide subpoena to any person or firm licensed by and under the auspices of the NASD. The only requirement is that the requesting party bear the expenses of the subpoena. If a claimant wants a particular person to appear at the hearings who resides out of state, so long as the requesting party bears the expenses of, for example, flying the witness to the place of hearings and paying for the witnesses hotel room and other incidentals of travel, the Panel has nationwide

jurisdiction to compel the appearance of a witness anywhere in the country *provided* the witness is subject to the NASD's jurisdiction.

Generally, the Chair of the Panel is the person who typically signs the NASD subpoena form. The process involves sending a letter requesting the Chair or other panel member sign the subpoena form together with the subpoena form. Subpoena forms are available on the NASD web site. Notice and a copy of the cover letter and actual subpoena must be copied to the other side(s). It is important to note, however, that it is discretionary, not mandatory, that the Panel sign a subpoena. While the general policy is for Panels to issue subpoenas at the request of any party, the Panel does have the discretion to question the need for the subpoena and may, under certain circumstances (i.e. if the Panel believes the subpoena seeks irrelevant information; is oppressive; is too broadly worded) deny to issue the subpoena.

### **Enforcement of Subpoenas**

It is just a fact of life that not everyone served with either a judicial or NASD subpoena responds to the subpoena. If the subpoena is directed to a non-NASD member, the process of enforcing the subpoena is for the courts, which can be a complicated and time-consuming process involving potentially the courts of one or more states. If the subpoena is issued to an NASD member firm or registered person, however, the requesting party may ask the Panel to issue disciplinary action against the recalcitrant party receiving the subpoena. IM-10100 of the Code of Arbitration Procedure, for example, provides that failure to comply with the terms of an order to appear or produce any document in the subpoenaed party's possession or under his, her or its custody and control, may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 of the NASD's Rules.

If a person subpoenaed ignores the subpoena, it is up to that party to seek enforcement of the subpoena through the courts. Arbitrators may, however, draw a negative inference about a party's failure to abide by a subpoena.

The other side receiving a copy of a subpoena does have the right to seek to quash the subpoena. That motion to quash is decided typically by the Chair who may quash the

subpoena for a number of reasons including but not limited to relevance; inconvenience to the part subpoenaed; confidential records and a number of other reasons. Remember; copies of any request for issuance of a subpoena must be served upon the other side in advance to give the other side an opportunity to object, seek to limit or move to quash the subpoena.

###

**SHUSTAK JALIL & HELLER, A Professional Corporation**

Erwin J. Shustak, Esq., Senior Partner  
Shustak Jalil & Heller, New York and California  
619.696.9500  
[shustak@shufirm.com](mailto:shustak@shufirm.com)  
[www.shufirm.com](http://www.shufirm.com)

**California Office**

401 West "A" Street, Suite 2330, San Diego, CA 92101  
tel: 619.696.9500  
fax: 619.615.5290

**New York Office**

400 Park Avenue, 14th Floor, New York, NY 10022  
tel: 212.688.5900  
fax: 212.688.6151

© 2005 Shustak Jalil & Heller – All Rights Reserved.