

Award Survey: Top BDs of 2017 – Part II: Use of Counsel

In SAA 2018-24, we identified the four broker-dealers (BDs) with the largest presence in securities arbitration, with special emphasis on their Customer-Member Awards. This week, we finish our survey, turning our attention to their use of counsel.

That is to say, we determine how often a given BD relies on its own corporate counsel, or inside counsel (ISC), to handle an arbitration and how often they turn to a law firm, or outside counsel (OSC), to represent them. And, as we did, we compare our results this year to those we found in the two previous years (see SAAs 2017-09 (Mar. 1) and 2016-06 (Feb. 3)).

Methodology

The four BDs we survey this year, in alphabetical order, are: Wells Fargo Advisors, Morgan Stanley, UBS and Merrill Lynch. We divide each BD's Awards into four groups, based on the nature of the dispute in which it is involved. Two of these groups are familiar to our regular readers: Customer-Member Awards (cases brought by customers requesting either more than \$50,000 in compensatory damages or without specifying the amount of compensatory damages they are requesting) and Small Claims (cases brought by customers for no more than \$50,000). The third group consists of intra-industry disputes (those brought against the BD either by brokers or by other BDs, usually the former). The final group involves disputes in which the BD being surveyed is the claimant; the bulk of these cases are against their own ex-brokers, though they occasionally sue other broker-dealers or, in rare cases, customers. We then count up the number of Awards in cases where each type of counsel – ISC and OSC – appeared in each of these groups and in all of the BD's Awards. (*ed: In a small number of cases, a BD used both ISC and OSC in the same case.*) Our results appear in the Chart below:

LARGE BROKER-DEALER'S USE OF INSIDE COUNSEL (ISC) AND OUTSIDE COUNSEL (OSC)						
Broker-Dealer	Type of Counsel	Broker-Dealer (BD) as Respondent			BD as Claimant	Total
		Customer-Member	Small-Claims	Intra-Industry		
Merrill Lynch	ISC	0	0	0	0	0
	OSC	25	4	20	5	64
Morgan Stanley	ISC	34	5	19	0	58
	OSC	18	0	7	26	51
UBS	ISC	0	0	14	0	14
	OSC	28	3	39	12	82
Wells Fargo Advisors	ISC	25	7	18	10	60
	OSC	4	0	21	27	52

KEY TO CHART: The numbers in the Chart represent the number of times that a broker-dealer employed either inside counsel (ISC) or outside counsel (OSC) in FINRA Awards issued in 2017. The column headings describe in which capacity (claimant or respondent) the broker-dealer appears as a party and, where it is a respondent, the type of dispute in which it is named.

Analysis of Results

The Chart shows a variety of patterns in counsel assignments. At one end of the spectrum, Merrill Lynch relied exclusively on OSC, regardless of context. This was nearly true in prior years as well; Merrill's ISC rarely appeared in an Award (only five times in the 2015 and 2016, combined, four in which the BD was an intra-industry respondent and one Small Claims case). UBS has also relied exclusively on OSC cases in customer-initiated claims and when appearing as a claimant, not only this year but in 2015 and 2016 as well. UBS did use ISC when defending intra-industry claims, but only in a minority of the cases each year.

Morgan Stanley and Wells Fargo Advisors followed a very different pattern. They both relied primarily on ISC in Customer-Member cases (though Wells Fargo leaned more heavily on ISC than did Morgan Stanley in that type of dispute) and both depended on ISC exclusively in Small Claims cases.

These top BDs adopted a different strategy when acting as claimants; Merrill relied

exclusively on OSC, while Wells Fargo relied on both kinds of counsel, though with a preference for OSC (by a margin of more than two-to-one) each year. Finally, the two BDs diverged in their capacities as intra-industry respondents. Wells Fargo used both types of representation roughly the same amount each year. As Claimant, Morgan Stanley relied mostly on ISC in 2017, but only after transitioning from a preference for OSC in that context (moving from 14 OSC and 1 ISC in 2015 to 9 OSC and 5 ISC in 2016).

(ed: Pardon us for saving the most interesting tidbit for last. Query: what caused Morgan Stanley to make such a radical change in its choice of counsel as an intra-industry claimant?)

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