

**TELEPHONIC MEDIATION** *cont'd from page 6*

tion alternatives. Telephonic mediation is an excellent transition towards video conferencing and other new technological alternatives.

**CONCLUSION**

As with mediation itself, telephonic mediation is its own best advocate because it works. Cost and convenience can be considered when results are not sacrificed. Anecdotal data indicate that telephonic mediations

produce results similar to those of in-person mediations.

Because the cost savings are great, many parties tend to consider telephonic mediations primarily for smaller, less complex cases. However, large cases also are successfully resolved through telephonic mediation. Dollar value need not be a determining factor of whether to mediate by telephone or in person.

The key to whether telephonic mediation is appropriate for a particular case has less to do with the case than with the parties' willingness to work towards a settlement. Just as with in-person mediation, with the full participation of all necessary parties, telephonic mediation is a viable option to be considered when selecting among alternative dispute resolution choices.

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## **ATTORNEY FEE AWARD SURVEY**

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**Introduction**

In the course of publishing Volumes 10 and 11 over the last 16 months, the *Commentator* has regularly offered a variety of mini-surveys about various aspects of the securities arbitration process. To do so, we have utilized SAC's Award Database of nearly 25,000 Awards, truly the most comprehensive database of securities and commodities Awards available, to obtain statistical results on topics ranging from the allocation of forum fees by arbitrators (10 SAC 1) to our latest survey in 11 SAC 2 on employment discrimination Awards issued in 1998 (other such mini-surveys have focused on "Raiding" Awards (10 SAC 3), frequency of service by arbitrators (10 SAC 6) and sanctions by arbitrators (11 SAC 1).

To perform these Award surveys, SAC utilizes a unique, field-based system of cataloging the Awards, which, unlike text-based systems, codes the Awards with uniform terms and phrases that permit easy, focused retrieval of relevant Awards. The Awards in SAC's Database of Awards from all of the active forums, including NASD, NYSE, PCX, CBOE, and the inactive forums (i.e., ASE, MSRB, PHLX), plus the AAA, are each broken down into more than 50 fields of information. Those fields unify data that is variously presented in the Awards into uniform wording that deals with party names, allegations, filing and issue dates, number of hearing sessions, amounts claimed as compensatory, punitive, attorney fees, and other types of damages, amounts awarded in parallel damage categories,

arbitrator names, situs city and situs state, professional names, and so on.

We have been publishing Award surveys as part of the newsletter service since 1989, when the Awards from the major SRO forums were first made publicly available. During the intervening period, we have performed many other mini-surveys of the Awards, along with our periodic reviews on a more general plane of all Customer Awards and all Intra-industry Awards. We are preparing now to release another omnibus survey of Customer Awards. However, not long ago, we witnessed an on-line discussion in which a practitioner seeking information on the frequency of attorney fee awards was initially referred to SAC. The moderator did a quick review and reported to the discussion group that SAC, indeed, had not released any survey information on this particular topic. He was right! This, then, is the impetus for the survey we now present.

**Methodology**

We focused in this Award Survey only upon recent years, 1996-1998, in an effort to corral enough Awards to present a statistically significant sample, while trying to reflect current practice among arbitration Panels. SAC's Award Database provides field-based categories for attorney fee damage requests and for attorney fee awards. In a text-based system, such Awards cannot be easily isolated. For instance, NYSE Awards contain a reference to attorney fees in each Award, regardless of whether they were requested or

awarded, so a text-based search will require considerable culling. Moreover, SAC codes dollar figures, so that "10.0" represents \$10,000, whether the Award presents that figure as "\$10,000," "ten thousand dollars," or "10 thousand dollars."

During the three-year period in question, 6,846 Awards issued, 5,142 of which related to customer-initiated disputes. Our primary focus fell on the larger matters, involving more than \$10,000 in dispute, which numbered 3,584. In addition to these, there were 1,558 Small Claims cases. Simplified arbitration is now available at NASD for claims up to \$25,000, but, for purposes of our Survey, we used a cut-off of \$10,000 and designated those above the claim amount as Customer-Member Awards and those below as Small Claims Awards.

Generally speaking, attorney fee claims and attorney fee awards are less frequent in the Small Claims arena. For example, we only found eight Awards during the three-year survey period where attorney fees were granted in Small Claims cases decided on the papers. Rather than try to parse out the statistics for those Small Claims where attorneys were involved on both sides or where hearings were held or not held, we concentrated our analysis on the Customer-Member Awards.

Not all Claimants request attorney fees. Attorneys are cognizant of the fact that, in order to obtain attorney fees

*cont'd on page 8*

**ATTORNEY FEE AWARD SURVEY** *cont'd from page 7*

in arbitration, one must establish either a statutory or contractual basis for such an award. Nevertheless, if a Claimant requested attorney fees, we counted that request without making any judgment as to whether a sound basis was present. However, in developing percentages as to how often attorney fees were awarded to investor-Claimants, we compared only those Awards where a request was recorded in the Award against those cases where an attorney fee award was actually granted.

Understand that, for better or worse, we often have to interpret what is provided in the Awards and, in that regard, have developed protocols to guide our judgments. These protocols affect our statistics, so we disclose them here in explaining our methodology. For inputting purposes, then, we always enter an attorney fee request as part of the claim, when attorney fees are awarded, even if the Award does not specifically indicate that they were requested. We also count as an award of attorney fees those instances where the Award states that the total amount awarded is "inclusive of" attorney fees, even though no separate figure for the fee award is provided.

We began our analysis, expecting that we would provide break-out Charts for the top ten states and for the NYSE and NASD forums. We found, though, that NASD accounted for most of the attorney fee awards, just as it accounts for so many of the overall number of Awards. There were only about 200 non-NASD Awards reflecting requests for attorney fees in our three-year sample. Only 32 of the Awards grant-

ing attorney fees in Customer-Member cases were non-NASD Awards; while most of that number were NYSE Awards, we felt they comprised an insignificant sample for valid comparison of NYSE with NASD. For that reason, we decided to forego a Forum Chart on this issue.

Nevertheless, to provide some data, we enlarged our survey period and the consequent sample for the limited purpose of doing a quick NYSE-NASD comparison and found that, from 1989 to 1998, NASD Panels awarded attorney fees in approximately 19% of the instances where they were requested; at NYSE, Claimants (again, in Customer-Member cases) won attorney fees about 13% of the time they requested them. Regarding the state-by-state comparison, we looked for the top ten states in terms of number of attorney fee awards. Three states, Arizona, Illinois and Washington, tied for the final position, so our Chart lists eleven states instead of ten. Some of the state statistics are, we concede, small enough to be challenged as, perhaps, non-representative, but, like arbitrators, readers can weigh the data and make their own assessments for "what it is worth."

**Award Survey Results**

Of the 3,584 Customer-Member Awards rendered during our three-year survey period, attorney fee requests appeared in 2,423 of the Awards. This constitutes about two-thirds (67.6%) of the available instances, which seemed rather a high incidence, given the so-called American Rule on attorney fee awards. Our review of past data also

indicated that this percentage is relatively high compared to prior years. In looking back, we found that some 6,000 Customer-Member Awards reflected attorney fee requests over a nine and one-half year period from mid-1989 to 1998, so a large plurality of such requests do focus in the recent three-year period.

Panels awarded attorney fees in 464 of the cases or about 19% of the 2,423 instances where the request was made. Now, we presume that attorney fee awards are generally received only when the Claimant is otherwise victorious and our double-checks on this proposition confirm this to be a valid assumption. So, when one considers that these 2,423 instances, where fees were requested, include the losers as well as winners, one realizes that the incidence of attorney fee awards in winning cases is considerably higher than 19%. Still, for negotiation purposes, it seemed to us the 19% figure was the more valid, as it factors in the risk of losing the entire case. Thus, in our State Chart, remember that the percentage derived from comparing fee award cases (numerator) to fee request cases (denominator) includes in the denominator Awards where the Claimant lost as well as those where the Claimant won.

The break-out by state yielded some surprises. We focused only on the top eleven states, in terms of number of attorney fee awards; within that group, though, we observed a wide variance from state to state in the probability of gaining such an award.

*cont'd on page 9*

**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. to:

**SECURITIES ARBITRATION COMMENTATOR**

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**ATTORNEY FEE AWARD SURVEY** *cont'd from page 8*

<b>Attorney Fee Awards</b>				
<b>Analysis by Top States -- Years 1996-1998 -- Customer-Member Awards Only</b>				
<b>Situs State</b>	<b>Awards w/ Atty Fee Requests (AFR)</b>	<b>Awards w/ Atty Fees (AFA)</b>	<b>Percent AFA/AFR (%)</b>	<b>Total Amt. Awarded In AFA Cases (\$000)</b>
<b>Florida*</b>	333	94	28.2	2243.7
<b>Texas</b>	156	54	34.6	1877.1
<b>New York</b>	401	35	8.7	805.6
<b>Georgia</b>	79	33	41.8	1034.9
<b>Michigan</b>	99	25	25.3	553.8
<b>California</b>	356	22	6.2	519.3
<b>Minnesota</b>	68	18	26.5	665.7
<b>Colorado</b>	70	16	22.9	286.3
<b>Arizona</b>	50	15	30.0	288.3
<b>Illinois</b>	92	15	16.3	311.7
<b>Washington</b>	37	15	40.5	294.0

\* Florida is the state with the highest number of attorney fee awards; it also has a high percentage of awards to requests (AFA/AFR). Florida, though, is *sui generis*, because arbitrators are not generally believed to have the power to authorize an attorney fee award or determine the amount of fees to be awarded. The courts make those decisions in a uniquely Floridian, bifurcated system that leads from arbitration to post-Award judicial proceedings. Thus, we cannot say, as we can with the other states, that a winning Claimant actually secured entitlement to attorney fees via an Award. Rather, we code the Award as a "win" on the attorney fee issue when the language of the Award evinces that intent, via a referral to a court of competent jurisdiction, a specific finding of a state securities violation, or like indicia.

These eleven states account for 342 of the 464 attorney fee awards, or 74% of the total fee awards in Customer-Member cases during our three-year survey period. It is noteworthy that only three of the eleven states fall below the 19% average and that the others range as high as Georgia, which reflects a surprisingly high 41.8% inci-

dence of attorney fee requests being granted. New York and California reflect very low percentages, compared to the rest of the states, but the high volume of Awards that issue from these states have a disproportionate impact on lowering the overall average. New York can be explained somewhat rationally, in that, in looking for a statutory

platform upon which to base an attorney fee award, arbitrators cannot look to the state securities statute, as they might in most other jurisdictions. As we understand it, New York's securities statute is not generally considered to recognize a private cause of action, so attorney fees may be harder to re-

*cont'd on page 10*

**ATTORNEY FEE AWARD SURVEY** *cont'd from page 8*

cover. Just what causes the low percentage in California, we must leave to those more familiar with local law and practice in that state.

As to the high side, we were surprised by the high percentages in such states as Georgia and Washington and felt further scrutiny was justified. To double-check our figures, we performed an Award-by-Award review of the results in Washington. Here is what we found: during the survey period, there were 55 Customer-Member Awards that issued. Of these, 37 were winners for the Claimant-investor, rendering a quite high 67% "Win" rate for customers in the larger-claim category. As the State Chart indicates, in 37 of these 55 Awards, attorney fees were requested. This corresponds generally with our overall finding that about 2/3 of the Awards request attorney fees.

Of the 37 winners, 11 of the Awards did not reflect a request for

attorney fees. Of the remaining 26, where an attorney fee request was made, 15 resulted in attorney fees being awarded. Thus, where attorney fees were requested *and the Claimant prevailed*, attorney fees were awarded in 57% of the winning Awards.

**Conclusion**

Attorney fee awards are not the general rule, either in arbitration or in the courts. However, legislatures have enacted specific statutory exceptions to the American Rule, that each side bears its own attorney fees, and these statutes can serve as a basis for a fee award. Arbitrators must also consider their authority to grant an attorney fee award, although the case law has laid this issue to rest in most jurisdictions. We found in this mini-survey of customer-initiated Awards, rendered during the 1996-1998 period, that Claimants are more likely than not to make an attorney fee request and arbitrators are taking those requests seriously. ■

Whether the incidence of such awards is satisfactory or, indeed, comparable to the courts, lies beyond our purpose here. In fact, though, in many jurisdictions, we felt the survey disclosed a surprisingly high incidence of attorney fee awards. It can almost be said in some situs states that, when the customer prevails, attendant attorney fee awards are more the rule than not.

Just why there is such a wide variance from one situs to another, is a topic for deeper analysis than we pursue here and one that may be more susceptible to local expression than Award analyses. To know the norms and understand the probabilities, though, has value to practitioners on both sides in their negotiations, case evaluations, and discussions with clients. Next time somebody asks in a discussion group what the chances are of getting attorney fees, we will have some statistical bases from which to frame an answer. ■

**In Brief****NASD Issues Notice to Members 99-96 to Clarify Start Date for New Employment Discrimination Rules**

In the last edition of SAC, 11 SAC 2(10), we reported that the SEC had approved NASD's rule enhancements for employment discrimination arbitrations. The Release did not set an effective date, but that was clarified recently with the publication of NASD Notice to Members 99-96 (12/99). The Notice sets forth in full the new additions to the NASD Code and draws members' attention to the requirement for a disclosure statement to be provided to persons signing Form U-4 applications for registration. It adds: "These rule changes, which will become effective on January 18, 2000, will enhance the dispute resolution process for the handling of employment discrimination claims and expand disclosure to employees concerning the arbitration of disputes."

As to private agreements to arbitrate, the Notice states that "the mem-

ber is responsible for either making proper disclosure to its employees about its private arbitration agreement, or risking an adverse decision in later litigation concerning any inadequacy in the disclosure." NASD also reports that, as to the "specialized roster of available arbitrators for intra-industry cases in which statutory discrimination is alleged...., over 200 arbitrators have been placed on this specialized roster."

On the bifurcation aspect of the new Rules, NASD explains generally that the parties can agree to have all claims litigated in court, despite the fact that some claims may be arbitrable under the Code." There is a specific change to Rule 10201 to accommodate that. Other permutations of the bifurcation scenario are briefly covered, with the Notice assuring that "[a]ny claims not accepted by the court under any of these methods, however, would con-

tinue to be arbitrable." NASD has been careful in past Notices regarding new arbitration rules to indicate whether the new requirements are prospective only or have application to pending cases. We saw no such clarification in this Notice, so we assume application is prospective.

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**AWARD COPIES**

Award Database subscribers can order photocopies of any of the arbitration Awards mentioned in this issue or otherwise. Just supply us with the Forum ID numbers of the Awards you want. We'll photocopy the Award and send it to you promptly. Prices are \$3 per Award, regardless of length. Minimum order: \$15.00. FAX service is also available for an additional \$5 per Award.