The Neutral Corner

September 1998 What's Inside

Update On Task Force Proposals

In 1996, the National Association of Securities Dealers, Inc. (NASD®) Arbitration Policy Task Force (Task Force) made numerous recommendations to improve the arbitration process. In 1996 and 1997 NASD Regulation, Inc., implemented many of these Task Force initiatives, including the early appointment of arbitration panels to resolve discovery issues and to schedule evidentiary hearings, and increasing staff dedicated to arbitrator recruitment, training, case management, and mediation.

This article provides the present status of Task Force proposals relating to the list selection of arbitrators in customer arbitrations, interim injunctive relief in industry cases, arbitrator honoraria, arbitration fees in industry and investor cases, claim eligibility, and punitive damages in customer arbitrations. In addition, the article announces the latest on other arbitration rule changes in regard to the mandatory arbitration of government securities, statutory employment discrimination claims, and the prescribed time to serve and file answers to claims at this forum.

List Selection

On July 30, 1998, the Securities and Exchange Commission (SEC) published for comment a proposed amendment to **NASD Rule 10308, Selection of Arbitrators in Customer Disputes**, that will allow parties in *public customer* cases a much more significant role in selecting their arbitrators. This proposal conforms substantially to one of the primary Task Force recommendations.

Panel Selection—If these procedures are approved, arbitrators will be placed on lists generated by an automated process called the **National List Selection System (NLSS)**. This automated system will generate lists for parties by sorting or searching for arbitrators according to four primary factors: public or non-public classification, geographic hearing location, rotation, and conflict of interest with parties. And, if a party requests that the lists include *some* arbitrators with subject-matter knowledge, NLSS will add this factor when it sorts and searches for arbitrators to be placed on the lists.

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Message From The Editor

Office Of Dispute Resolution Names New Director Of Neutral Training And Development

On July 13,1998, Gary L. Tidwell joined the NASD Regulation℠ Office of Dispute Resolution as its new Director in charge of neutral recruitment, training, and testing. Tidwell is a tenured Professor at the College of Charleston in Charleston, South Carolina. Before joining NASD Regulation, he was a Professor of Legal Studies in the School of Business where he won numerous teaching and research awards and grants, including the "Innovative Teaching Award" from the Southern Business Administration Association. Tidwell also served on the NASD's National Arbitration & Mediation Committee (NAMC) and chaired the NAMC Arbitrator Recruitment, Qualifications, and Training Subcommittee. In addition to teaching at the College of Charleston and serving on the NAMC, he was previously an attorney in the SEC's Enforcement Division and an Assistant Professor of Law at the United States Military Academy at West Point. Professor Tidwell holds the rank of Colonel in the United States Army Reserves and presently is assigned to the Law Department at West Point. (See page 9 for more information about Tidwell and his new role.)

Southeast Regional Dispute Resolution Office Moves

The Southeast Region has moved its offices. In May, the Florida Office of Dispute Resolution moved from Ft. Lauderdale to Boca Raton. Following are the new address and numbers.

NASD Regulation, Inc.
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5200 Town Center Circle, Suite 400
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Editor's Note: In future issues of *The Neutral Corner*, your letters to the editor will be featured here. We welcome and encourage your comments on the material presented in this publication. NASD Regulation reserves the right to publish or not publish the letters received.

Continuing Education Credit

The Certified Financial Planner (CFP) Board of Standards has **accepted** the NASD Regulation New Panel Member and Chairperson training programs for Continuing Education Credit (CEC). Therefore, CFP licensees may receive CEC for meeting the requirements of NASD Regulation's arbitrator training programs. Contact a dispute resolution office for more information.

Update On Task Force Proposals From page 1

The staff will provide the parties with a single round of public and non-public arbitrator lists. Parties will be able to strike any listed arbitrator and rank those remaining in order of preference. The NLSS will consolidate the party rankings and arbitrators will be appointed according to these rankings. Only if parties do not select a full panel will the staff appoint arbitrators from the NLSS roster.

Chairperson Selection—Parties may agree to select one of the appointed arbitrators to act as chairperson of the panel. If the parties cannot agree, the staff will select one of the public arbitrators to be chairperson.

NASD Regulation also has filed proposed amendments to other arbitration rules to conform to the new customer list selection rule.

Lastly, NASD Regulation plans to file with the SEC a separate, but similar, list selection rule for *intra-industry* cases. If approved, both list selection rules and conforming rule changes will become effective at the same time.

Injunctions

On June 25, 1998, the SEC temporarily extended the effectiveness of **NASD Rule 10335, Injunctions**, until January 3, 1999. The Rule was to expire by its terms on July 3, 1998.

On July 16, 1998, NASD Regulation filed with the SEC proposed modifications to this Rule that will improve it for all intra-industry users. The proposals will simplify and expedite the interim injunctive process at this forum, place time limits on injunctive relief issued by an arbitrator, and clarify the Rule as to court-ordered Temporary Restraining Orders and their effect on the subsequent arbitration of controversies.

The rule filing also will request that NASD Rule 10335 become a *permanent* part of the NASD Code of Arbitration Procedure.

Other Recommendations

In 1997, NASD Regulation filed proposed rule changes relating to other important Task Force recommendations that still await SEC approval. These include a proposal to raise arbitrator honoraria, which is tied to proposed increases in filing and hearing fees in *all* arbitration proceedings.

Last year, NASD Regulation also filed Task Force proposals relating to claim eligibility and a new punitive damages rule. These amendments have been published for comment by the SEC. As reported in the February 1998 edition of *The Neutral Corner*, even if approved, they will become effective only when the SEC endorses an amendment to **NASD Conduct Rule 3110(f)** that will improve NASD member firm disclosures to customers in *predispute* arbitration agreements their customers sign. On August 6,1998, the NASD Board approved an enhanced disclosure rule that will be filed with the SEC in September.

In 1998, NASD Regulation will act on other critical Task Force suggestions. Among these is the recommendation that it evaluate on an ongoing basis arbitrator training effectiveness by making additional refinements to training materials, training presentations, and arbitrator testing.

Government Securities

Effective June 19, 1998, the SEC approved changes in the interpretation—*not* language—of **NASD Rule 10201, Required Submission**, relating to the required or mandatory arbitration of intra-industry disputes and **NASD Rule 10301, Required Submission**, relating to the mandatory arbitration of customer or investor disputes.

The change in interpretation of NASD Rule 10201(a) permits NASD members to require members that are registered *solely* as government securities broker/dealers and their associated persons to arbitrate controversies involving government securities.

Although most government securities claims involve member-to-member cases, the change in interpretation of NASD Rule 10301(a) also permits customers to require members and their associated persons to arbitrate government securities disputes. In addition, members may require their customers to arbitrate government securities disputes provided the customers have signed valid predispute agreements to arbitrate at this forum.

Statutory Employment Discrimination Claims

On June 22, 1998, the SEC approved an amendment to **NASD Rule 10201, Required Submission**, that *will modify* the present requirement of NASD registered representatives to arbitrate statutory employment discrimination claims *solely* because of their association or their registration with the NASD.

This rule change will be effective and apply to sexual harassment and other statutory employment discrimination claims filed on or after January 1, 1999.

The amendment will *not* apply to other employment claims which still must be filed in arbitration. However, NASD Regulation is working on an additional rule that will address potential bifurcation issues. In addition, this change will *not* affect a member's or an employee's obligation to arbitrate these statutory claims under private *predispute* or *postdispute* agreements to arbitrate.

Other Code Changes

On March 16, 1998, the SEC approved amendments to **NASD Rule 10314, Initiation Of Proceedings**. The amendments increase from 20 business days to 45 calendar days the time within which a respondent may serve and file answers to initial claims, crossclaims, and third-party claims.

The changes also include a provision that *disfavors* staff granted extensions of time to answer. Since a respondent's time to answer has been increased substantially, staff will grant an extension to answer only if the reason underlying the extension request is extraordinary.

The amendments—which do *not* apply to smaller customer claims filed under **NASD Rule 10302, Simplified Arbitration**—are aimed at facilitating case administration by lessening the number of requests for staff extensions to answer. NASD Regulation will continue to monitor the effectiveness of these procedural amendments.

Mediation Program Celebrates Third Anniversary

This year NASD Regulation's Mediation Program celebrates its third full year of operation. Following is a discussion of recent events and statistics related to the Program.

Statistics—Parties agreed to mediate 469 cases during the first six months of this year. This is a 28 percent increase over the first half of 1997.

In the first half of this year, parties concluded five or more mediations in over 20 hearing locations through the dedicated effort of NASD Regulation mediators and staff. In this six-month period, 561 mediation cases closed, with an 83 percent settlement rate. Since August 1995, when the Mediation Program began, 1,900 cases have closed and 81 percent have settled.

The Neutral Corner

Staff News—In August, Staff Attorney Elizabeth A. McCoy was promoted to Assistant Director of Mediation. With over 10 years experience as a litigator and broker/dealer counsel before joining NASD Regulation in 1997, Liz has learned the value of mediation in resolving disputes from diverse perspectives.

Settlement Weeks—Settlement Weeks provide special incentives for parties to explore the benefits of mediation. The Southeast and Western Regions have scheduled Settlement Week events in October. Please call the NASD Regulation Dispute Resolution regional offices for more details on how to volunteer as a neutral or how to submit your case to mediation during Settlement Week.

1998 Settlement Week Schedule:

Southeast Region	Tampa	October 5-9
Western Region	LA/San Diego	October 5-9

Training—In 1998, NASD Regulation will sponsor *Advanced* Mediator Skills training focusing on experienced neutrals. In October, the Midwest Region will host a two-day program in Chicago featuring popular trainer Sam Imperati.

This year the Office of Dispute Resolution also will include *Advocacy* training in its menu. These programs are aimed at building the skills and confidence of the attorneys representing clients in the mediation process. NASD Regulation's Office of Dispute Resolution conducted this program in San Diego during August. Advocacy training also is scheduled in Chicago during October.

At the end of October, NASD Regulation's highly acclaimed *Introductory* Mediator Skills program returns to New York.

Please contact a regional office for program details and registration forms.

1998 Training Schedule:

Introductory Mediator Skills
October 28, 29, 30 New York

Advanced Mediator Skills
October 7, 8 Chicago

Mediation Advocacy
October 9 Chicago

Confronting Chaos In The Arbitration Universe: Dealing With The Under-Represented Party

by Francis O. Spalding

Francis O. Spalding has been a full-time arbitrator and mediator of commercial disputes based in Northern California since 1985. He served as a member of the NASD NAMC in 1991 and 1996 and was its chairperson in 1993 and 1994. He also served as a member of the NASD Arbitration Policy Task Force between 1994 and 1996. He was a Professor of Law at Northwestern University School of Law in Chicago from 1965 until 1981 and was a visiting professor at Hastings College of the Law in San Francisco between 1983 and 1985.

Editor's Note: The following article will help chairpersons avoid or solve fairly and efficiently the problems presented by under-represented parties.

It will be presented in two 'parts' over the course of two issues of *The Neutral Corner*. **Part One** introduces us to parties who may be under-represented at a hearing and to procedural problems that may result from under-representation. After discussing the chairperson's diagnostic responsibility it turns to a problem that is apt to be pervasive in these cases: unfamiliarity with the arbitration process.

Part Two, which will appear in the next issue, will discuss several problems that manifest themselves in some, but not all, under-representation cases: inappropriate attitude and deficiencies in specific case presentation skills.

In the arbitration universe, the arbitration process may be thought of as being held in its appropriate orbit by the gravitational pull of two process-related pole stars. The first and most powerful is at the "Due Process Pole." Its potent gravitational pull insists that the parties be afforded due notice of, and a reasonable opportunity to prepare for, their hearing, and that the hearing be a full and fair one before an impartial arbitrator. The opposing pole controls whenever the requirements of the first pole permit. Its gravitational pull is in the direction of efficiency of process, adaptability, flexibility—ensuring that, consistent with fundamental fairness, the time- and cost-saving benefits potentially available in arbitration can be realized in fact.

These poles, usually as reliable as the stars, provide consistent guidance to the arbitrator in confronting and resolving procedural problems presented by the case. In the otherwise-orderly universe of arbitration, as in the natural heavens, however, black holes sometimes appear. In those intimidating places, raw grating noise seems to replace the music of the spheres. There, instead of working in their usual seamless harmony, arbitration's pole stars characteristically seem to tug in opposite or conflicting directions—or, worse, threaten to send the arbitrator's compass spinning helplessly. In the arbitration universe, this disorientation, when it occurs, is not the product of quantum mechanics. Rather, it is the peculiar contribution of the under-represented party. For the arbitrator, the experience is apt to be the earthly equivalent of the Apollo 13 mission: a cold, bumpy, dangerous, and scary ride—if survived.

Who Is The Under-Represented Party?

The under-represented party comes in two varieties: the party appearing *in pro per.*—without the benefit of any counsel at all—and the party whose counsel is sufficiently incompetent in the conduct of the representation to raise the question whether the party might not be better off appearing *in pro per*. Some problems for the arbitrator are common to both. Others may be particular to—or even worse in—one category or the other.

In whatever context the problem of under-representation arises, it can be exacerbated by any sharp disparity in the quality of representation between parties to the case. At the least, the presence of highly competent counsel opposing the under-represented party will highlight the problems that the under-represented party presents. At worst, an advocate skilled at infighting in an adjudicative process can savage the under-represented.

Fortunately, however, the most skilled and most professional of counsel, able to sense both the awkwardness and the danger presented by an under-represented opponent, can and often will temper usual styles of advocacy in a way that assists the arbitrator in the effort to afford the parties the fairest hearing possible in the circumstance. As the best advocates realize, this

concession can be made in most instances without in fact sacrificing anything by way of effective advocacy. Whatever might be thought to be given up in foregoing an aggressive thirst for the blood of the weaker opponent is almost certain to be more than offset by the favorable reaction of the arbitrator.

Impact Of A Party's Under-Representation On The Arbitration Of A Case

The very elements of unpredictability and incongruity introduced by the presence of the under-represented party make it difficult to measure the precise impact that under-representation may have on the course of a particular arbitration proceeding, and in particular on the work of the arbitrator. Such problems may cascade like falling dominos, or two particular problems that happen to concur may give rise to a third problem simply by virtue of their concurrence. Nor is it always easy to predict the particular outfall of even a single problem.

Thus most of what can be said by way of generalization in aid of the arbitrator in such a case may seem to amount to little more than an enumeration of problem categories. It is possible, however, to sort out typical problems under more or less cogent heads based upon their likely root cause—the nearly universal problem of unfamiliarity with the process and the frequent but more idiosyncratic problems of an inappropriate attitude, or of an unclear case strategy, or of inadequate advocacy skills.

Likewise any proposed solutions are apt to sound like a catalogue of tips and tricks. Most, if not all, of the tools available to the arbitrator to deal with these problems are familiar ones—albeit that their application in the context of under-representation may require special sensitivity and skill. The number of possibilities is not great: patient explanation, gentle nudging and encouragement, the occasional flash of shock or anger (carefully reserved for the most problematic moments), and above all the protective cloak of frequently proclaimed determination to maintain neutrality. With a measure of luck in the use of these tools, the arbitrator may succeed not only in establishing and maintaining the control necessary in any case, but also in solving the problems peculiar to the under-represented-party case in a way that permits a reasonably efficient hearing and that maintains minimum levels of fairness and integrity in the process.

Diagnosis

The arbitrator's first responsibility in the case of an under-represented party is obviously diagnosis. In some instances—the admittedly naïve unrepresented party, for example—this step is self-executing. In other cases, more careful sifting and consideration may be necessary. Moreover, the fact of a single disability in advocacy is not always the only fact to be uncovered. The unrepresented party, for example, may have a natural gift for examining witnesses but may have only a muddle-headed understanding of an appropriate theory for his or her case. On the other hand, counsel for the under-represented party simply may suffer from an inadequate understanding of the difference between the arbitration and trial processes—or may be lacking in the basic skills of advocacy in any adjudicative process. In any event, sensitivity is as much a requirement of the diagnosis phase as it is of any other part of the case management responsibility of the arbitrator. And of course in a multi-arbitrator case, intra-panel communication and sensitivity are essential as well.

A quick—but correct—analysis of the nature of a particular problem and of its root cause may go far in helping the arbitrator find an appropriate way to deal with it effectively—just as familiarity with the kinds of actions that an arbitrator may take is tantamount to keeping the available tools ready to hand.

Problems Related To Unfamiliarity With The Process

It is always important to ensure at the outset that the participants in an arbitration are adequately familiar with the process upon which they are about to embark. This need is not unique to the case posing problems of under-representation. Even skilled trial counsel unfamiliar with the arbitration process need guidance in adapting successful courtroom techniques to the different requirements and dynamics of an arbitration. The need is more urgent and more pervasive, however, where a party is under-represented. The solution is careful, patient explanation, at every point where needed but particularly at the outset, of what the ensuing process and sequence of events are to be.

The arbitrator may find it appropriate, for example, to address the parties early in the proceeding on such topics as: the power of the arbitrator; his or her neutrality and the steps designed to ensure it; the similarities to and differences from litigation; the swearing of witnesses; the usual order of proceedings, and the opportunities and occasions for departure from the usual order; the entitlement to representation and to cross-examine opposing witnesses; the procedures to be used for handling documentary evidence; the significance of receipt of submissions into evidence; the probative defects of hearsay and other evidence that may be admitted into evidence "for what it is worth"; the projected timetable for the hearing and for post-hearing proceedings; and the like.

The length of this punch list of basic issues underscores the requirement that whatever the arbitrator thinks is essential to cover be addressed in an intelligible, unpedantic fashion; that it be free of condescension; and that it be accomplished without otherwise warping the process. The fact that the arbitrator may be obliged to deliver one or more lectures on the process, for example, should not be taken as an invitation to the view that the arbitrator is going to take over the proceeding, or to be any more "activist" than the situation absolutely requires.

To ensure that under-represented parties are adequately familiar with the process and with hearing procedures, a chairperson should provide clear, neutral, and patient explanations at a hearing's outset and, as needed, throughout a proceeding.

Appropriate introductory remarks also can be helpful in setting the proper tone of neutrality. For example the arbitrator may say: "I'm sure that for the most part I'll only be repeating what is already well understood by all of us. Nevertheless, let me say, in order to be sure that we all start from the same point, that. . .". No one can be offended by what follows such an introduction—-by way of elementary explanation of the process—and some around the table, are almost certain to need it and to benefit from it.

Special Problems Related to Unrealistic Expectations—It is especially important to disabuse any participant of any unrealistic expectations. Given the range of possible misunderstanding about the process, even on the part of some lawyers, it is hard to predict just what major misapprehension a party may maintain: that the process is completely like or unlike litigation; that discovery is fully available, or not available at all; that the award is subject to judicial review, or that no post-hearing resort to the court may ever occur; and so on. To the extent that problems of this character can be foreseen and forestalled, future problems—occasionally serious ones, such as attempts by the unrepresented party to make *ex party* post-award contact with the arbitrator—may be avoided.

Avoiding Problems of the Arbitrator's Own Creation—No doubt there are many things that a thoughtless—or improperly motivated—arbitrator can do that have the effect of making the process *more*, rather than *less*, mystifying and intimidating to the unrepresented party. Discussion of one of these—almost certainly the most common—should suffice to make the relevant point here.

Nothing more quickly confuses lay persons involved in the arbitration process, perhaps, than the use by arbitrators of unintelligible professional jargon. Lawyers are certainly the principal culprits here. When non-lawyer arbitrators lapse into the jargon of their professions, it is at least likely that the jargon relates to the subject matter of the dispute—subject matter that is likely to be familiar to the non-lawyer participants in the proceeding. Few lawyer-arbitrators who have served on panels with non-lawyer arbitrators are left in much doubt about the capacity of this kind of initial confusion to turn, over time, into something approaching rage. Intelligent lay persons serving as arbitrators, with lawyers, often lose all patience with what they come to perceive as a kind of game of deception deliberately played at their expense.

The standard suggested where there is an unrepresented party is this: lawyers' words of art that are not a part of everyday lay speech should be avoided if there is a reasonably efficacious alternative. In every other circumstance such terms should be carefully defined, and their use in place of plain language fully justified by the arbitrator to the satisfaction of all principal participants in the proceeding. It must be left to the individual arbitrator, in whatever particular circumstance may be presented, to determine whether special concessions can and should be made even to the under-represented party under this head. It is well beyond the scope of this undertaking to assert that this suggested standard could and should have application in all arbitrations.

Initiatives Move Forward Under New Director Of Neutral Training And Development

In his new role as Director of Neutral Training and Development, Gary Tidwell is responsible for coordinating and directing neutral training, testing, evaluating, and recruiting activities, as well as staff training.

Training Arbitrators—One of Tidwell's first tasks is to oversee and participate in updating and developing all arbitrator training materials. This effort is not new to Tidwell, who played a major role in the development of the first version

of these materials while a member of the NAMC. "The Office of Dispute Resolution must provide training to help ensure that arbitrators are fair, competent, and efficient," notes Tidwell. This year, the panel member and chairperson training materials will be updated to reflect changes in rules and procedures. Chairperson training also will be made more specific concerning the unique role and issues facing a chairperson. All training materials will be made more comprehensive and rigorous.

Testing Arbitrators—On March 2, 1998, NASD Regulation moved from assessing to testing arbitrator trainees. Before serving on any case, a newly qualified arbitrator must pass a 25-question, multiple-choice examination that tests his or her knowledge of all training materials. Next year, chairperson training also will include an objective examination.

Evaluating Arbitrators—After an arbitrator has been made available for service, and actually serves on a case, the arbitrator will be evaluated by peers, parties, and staff. NASD Regulation continues to encourage everyone to participate in these evaluation initiatives. This data will be used to help ensure that arbitrators on the roster are neutral and competent. The data also will be used to help focus and improve training. Tidwell observed, "We have obtained extremely positive data from the new *Party Evaluation of Arbitrators Form* implemented in November of last year."

Arbitrator Disclosure—"Arbitrators have an ongoing duty to ensure that their arbitrator profile information is current and accurate," emphasizes Tidwell. This will allow parties to make informed decisions when they select arbitrators under the list-selection rules. Please refer to page one for more information on list selection. NASD Regulation requires that arbitrators update their disclosure reports each and every time they are selected to serve on a case. However, arbitrators should amend their profile information as soon as possible by writing to the NASD Regulation Dispute Resolution Office where they serve.

Recruiting Arbitrators—NASD Regulation recruitment efforts will continue to focus on providing parties with a highly qualified and diverse roster of arbitrators. Tidwell will be coordinating the efforts of two full-time recruiters.

Tidwell indicates that he is "excited about this new position; there are lots of challenges ahead, and I look forward to working with a good group of people who are committed to putting forth their best efforts."

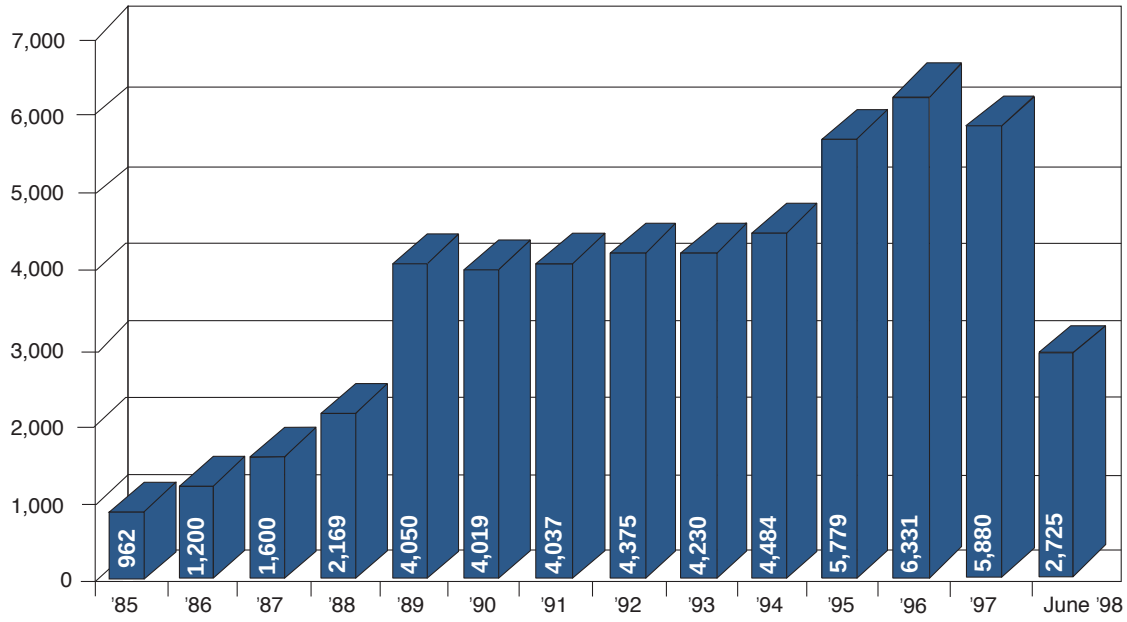
NASD Regulation will continue to provide the status of these and other initiatives in *The Neutral Corner* and in other publications.

Dispute Resolution Skills Training Program

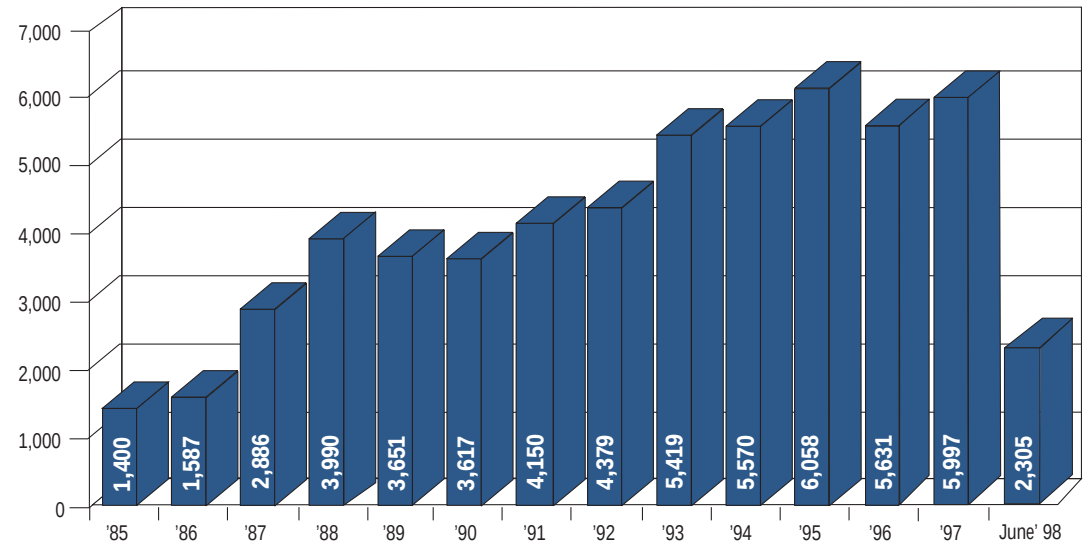
NASD Regulation is sponsoring a day-long Dispute Resolution Skills Training Program on Wednesday, November 4 at the Sheraton Palace Hotel in San Francisco. This program immediately precedes NASD Regulation's annual Fall Securities Conference. Join securities industry arbitration experts and NASD Regulation Office of Dispute Resolution staff for this all-day, role-play session that will take you through the steps of a typical arbitration hearing. The program will feature two stages of a hearing—pre-hearing and hearing phases—through the examination of a 'mock case.' For more information, contact NASD Conference Services at (202) 728-8383.

Arbitration Statistics

NASD Regulation Arbitration Cases Closed Annually



NASD Regulation Arbitration Cases Filed Annually



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