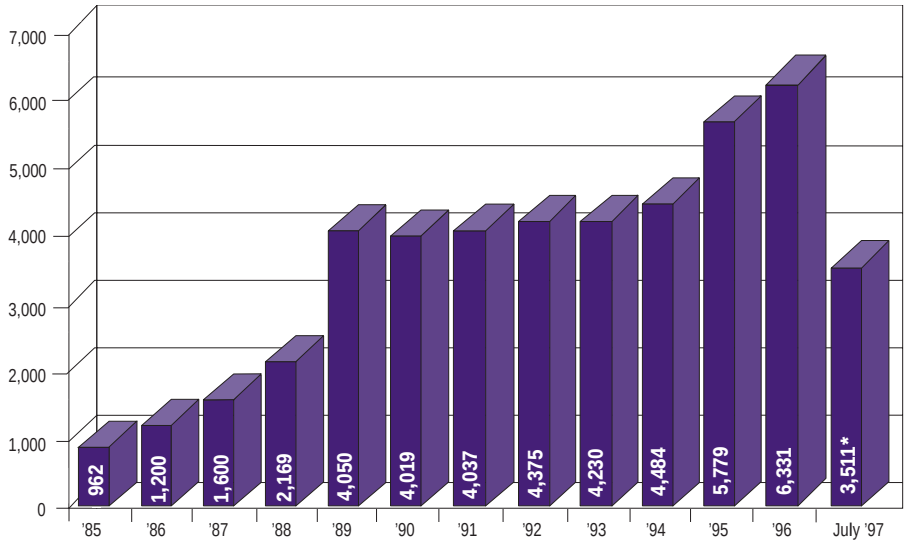
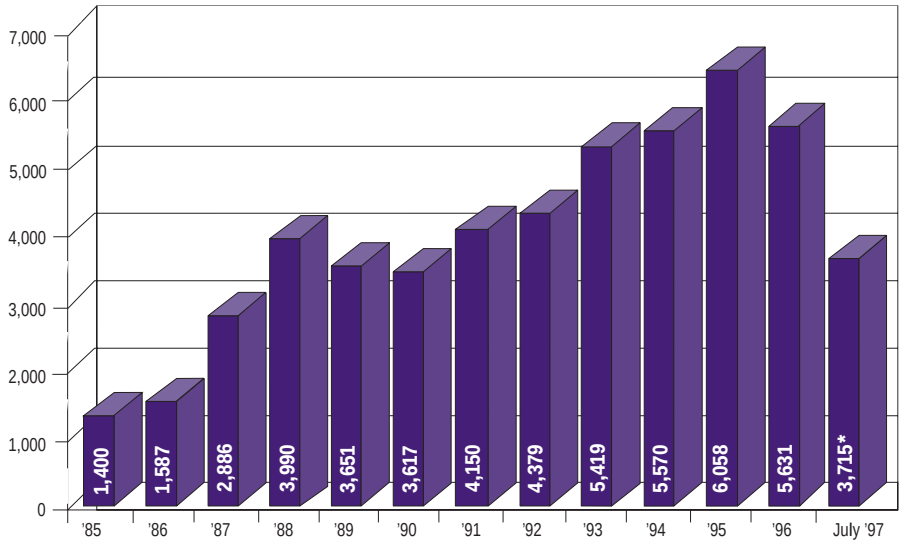
NASD Regulation Arbitration Cases Closed Annually



This represents a decrease of 7 percent over last year.

NASD Regulation Arbitration Cases Filed Annually



This represents an increase of 16 percent over last year.

The Neutral Corner is published by the NASD Regulation Office of Dispute Resolution in conjunction with NASD Corporate Communications. *The Neutral Corner* is distributed in January, May, and September of each year. Send all correspondence to Tom Wynn, Editor, NASD Regulation Office of Dispute Resolution, 125 Broad Street, 36th Floor, New York, New York 10004, or call (212) 858-4400.

This publication is provided at no cost to all NASD Regulation-approved neutrals. To change your mailing address, contact Margaret Duzant, NASD Regulation Office of Dispute Resolution, at (212) 858-4310. Annual subscriptions may be purchased for $25, and single issues may be purchased for $10 through MediaSource℠. Send a check or money order payable to the National Association of Securities Dealers, Inc., to NASD MediaSource, P.O. Box 9403, Gaithersburg, MD 20898-9403, or order using American Express, MasterCard, or Visa, by calling (301) 590-6142, weekdays, 9 a.m. to 5 p.m. (Eastern Time).

NASD REGULATION

The Neutral Corner

NASD Task Force Recommendations Continue To Move Forward

The National Association of Securities Dealers, Inc. (NASD®) formed the Arbitration Policy Task Force (Task Force) in September 1994 for the purposes of studying the securities arbitration process administered by the NASD and of making suggestions for reform. The Task Force, chaired by David S. Ruder, former Chairman of the Securities and Exchange Commission (SEC), delivered its report to the NASD Board in January 1996. This article provides the current status of the Task Force recommendations.

Eligibility

On June 24, 1997, NASD Regulation, Inc., filed with the SEC proposed amendments to NASD Rules 10304 and 10324. We anticipate that the SEC will publish the proposals for comment. If approved, the proposals will provide a clear, quick, fair, and final procedure for parties wishing to challenge the eligibility of any claim. Rule 10304 describes what claims will be eligible; how and when parties may make eligibility challenges; and the Arbitration Director's (Director) final decision-making authority on these issues. Rule 10324 clarifies that final eligibility decisions rest exclusively with the Director and not with the arbitrators. (See the April 1997 edition of *The Neutral Corner* for highlights of the eligibility proposal.)

The proposed rule language uses "Plain English" principles of written communication as encouraged by the SEC. NASD Regulation℠ believes that the use of plain English in dispute resolution rule filings will facilitate understanding of the rules by the parties, the arbitrators, and the staff.

continued on page 3

September 1997
What's Inside

NASD Regulation Mediation Program Celebrates Its Second Anniversary

NASD Regulation's Mediation Program picked up steam during its second year. The number of cases closed in the second year of operation exceeded the first year total by 300 percent. Almost 850 cases closed in mediation during the first two years, with a settlement rate of 80 percent. The number of cases in which parties agreed to mediate has increased in each of the last six months. New activity in the Midwest and Florida regions, plus the continued momentum in the New York and Western regions, resulted in the dramatic growth.

continued on page 4

Message From The Editor

Andrichik Named Director of Mediation And Neutral Management

In April 1997, NASD Regulation Mediation Director, Kenneth L. Andrichik, was promoted to Director of Mediation and Neutral Management. Andrichik now heads up all NASD Regulation neutral activities, including initiatives relating to arbitrator recruitment, qualifications, and training. (See the April 1997 edition of *The Neutral Corner* for a description of Andrichik's expanded responsibilities.)

New Address For Midwest Office

NASD Regulation's Midwest Regional Office has moved to a new floor in their current building. The new address is:

NASD Regulation, Inc.
Office of Dispute Resolution
10 S. LaSalle St., **Suite 1110**
Chicago, IL 60603-1002
(312) 899-4440
Fax: (312) 236-9239

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.

Directory

Mary L. Schapiro
President,
NASD Regulation, Inc.

Elisse B. Walter
Chief Operating Officer,
NASD Regulation, Inc.

Linda D. Fienberg
Executive Vice President,
NASD Regulation, Inc.

Deborah Masucci
Vice President, Office of Dispute Resolution

Kenneth L. Andrichik
Director, Mediation and Neutral Management

Neal Blacker
Director, Neutral Training and Development

Dorothy Popp
Director, Operations

Tom Wynn
Assistant Director
Editor, The Neutral Corner

William N. Bonilla
Assistant Director, Technology and Financial Planning

John C. Barlow
Regional Director, Chicago

Elizabeth R. Clancy
Regional Director, New York

Judith Hale Norris
Regional Director, California

Rose Schindler
Regional Director, Florida

NASD Regulation Dispute Resolution Offices

New York
125 Broad Street, 36th Floor
New York, NY 10004
(212) 858-4400
Fax: (212) 858-4429

Florida
515 E. Las Olas Boulevard, Suite 1100
Fort Lauderdale, FL 33301
(954) 522-7391
Fax: (954) 522-7403

Chicago
10 S. LaSalle Street, Suite 1110
Chicago, IL 60603–1002
(312) 899-4440
Fax: (312) 236-9239

California
525 Market Street, Suite 300
San Francisco, CA 94105
(415) 882-1234
Fax: (415) 546-6990

NASD Regulation Dispute Resolution Satellite Offices

Washington, DC
1735 K Street, NW
Washington, DC 20006
(202) 728-8958
Fax: (202) 728-6952

Los Angeles
300 S. Grand Avenue, Suite 1620
Los Angeles, CA 90071
(213) 613-2680
Fax: (213) 613-2677

Dispute Resolution Skills Training Program

NASD Regulation will hold a Dispute Resolution Skills Training Program in Phoenix, Arizona on November 5. The program is a practical, hands-on session that will address NASD Regulation arbitration and mediation initiatives and the professional skills required of arbitrators. This one-day session immediately precedes the 1997 Fall Securities Conference to be held November 6-7 at the Arizona Biltmore. To obtain registration information and a copy of the Fall Securities Conference brochure, please call (202) 728-6900.

NASD Task Force Recommendations Continue To Move Forward From page 1

Punitive Damages

On July 7, 1997, NASD Regulation filed with the SEC a *new* Rule 10336 relating to punitive damages in *public customer* cases. Rule 10336 sets forth when punitive damages may be awarded; award limitations; and the evidentiary standards to be followed by presiding arbitrators when making these important decisions. NASD Regulation will address this issue in *intra-industry* cases in a separate rule filing. We anticipate that the SEC will publish this rule proposal for comment. The Rule also has been drafted in the plain English format. (See the April 1997 edition of *The Neutral Corner* for more on this proposal.)

List Selection

NASD Regulation will be filing with the SEC a proposed rule change to amend Rule 10308. This rule filing will substantially amend Rule 10308 and will include a list selection process of appointing arbitrators in *public customer* cases. If approved, however, it will not be implemented until NASD Regulation has developed the technology to administer this process. In addition, NASD Regulation must enroll a sufficient number of qualified arbitrators in order to provide arbitrator lists in accordance with the requirements of the Rule. (See the December 1996 edition of *The Neutral Corner* for the highlights of this proposal.)

Large And Complex Cases

On September 5, 1997, the SEC approved an amendment to Rule 10334. This amendment eliminates the present requirement that, in every case eligible for processing under this rule (cases involving any claim of $1 million or more), the parties must participate with a staff member in an administrative conference. Although the conferences have provided a procedural road map for some parties, very few cases have actually proceeded to a final disposition under this Rule since its inception on May 2, 1995. As a consequence, mandating such conferences without considering party intentions not to utilize the Rule's special procedures has created an unnecessary burden to the parties and to the staff. The SEC has agreed to the NASD Regulation request that the amended Rule be extended until August 1, 2002, in order to obtain adequate experience with this change prior to determining whether the Rule should become permanent. (Since Rule 10334 was to expire on August 1, 1997, the SEC had agreed to a temporary extension of the Rule pending this final action on the proposal. See the August 1996 edition of *The Neutral Corner* for a discussion of this Rule.)

Other Code Changes

On September 22, 1997, amendments to NASD Rules 10305, 10310, 10311, 10313 and 10330 became effective. These amendments contribute to the comprehensive improvement of arbitration code procedures. Rule 10305 states that arbitrators have authority to dismiss *with* prejudice any claim, defense, or proceeding where a party intentionally fails to comply with their orders if lesser sanctions to obtain such compliance have failed. While NASD Regulation believes that arbitrators presently have full dismissal authority, arbitrators have appeared reluctant to use it under appropriate circumstances absent the explicit authority contained in this Rule. Rule 10310 requires that parties be provided with notice of the arbitrators and their backgrounds at least 15 (presently 8) business days prior to the first hearing date. Rule 10311 clarifies that the Director's authority to allow additional peremptory challenges extends to diverse circumstances and to any proceeding. Rules 10311 and 10313 extend the time to exercise peremptory challenges to 10 (presently 5) business days of notice of an arbitrator's identity. Rule 10330 authorizes the service of awards by facsimile transmission or other electronic means.

Arbitration Funding

Member Surcharge

On July 1, 1997, the SEC announced the *immediate* effectiveness of an amendment to NASD Rule 10333. This rule change increased the non-refundable surcharges levied on NASD member users of arbitration.

continued on page 4

NASD Task Force Recommendations Continue To Move Forward From page 3

The primary reason for the increases is to *assist* in funding the implementation of the NASD Board Task Force *arbitration* initiatives. These initiatives are directed at improving program fairness and expedition for all forum participants. They include the early appointment of arbitration panels to resolve discovery and other prehearing issues and to schedule hearing dates; a list selection method of appointing arbitrators in *public customer* cases to allow parties a more significant role in choosing presiding arbitrators; and the ongoing review and enhancement of arbitrator recruitment, qualifications, and training. In addition, record case filings and the Task Force-sponsored changes will necessitate upgrading computer systems; hiring additional staff; and increasing arbitrator compensation in order to assure process quality and efficiency.

Pending Fee Proposals

On June 12, 1997, NASD Regulation filed with the SEC proposed amendments to NASD Rules 10205 and 10332. If approved, these proposals will raise filing and hearing session fees for intra-industry and public customer arbitrations. Like the surcharge increases, these increases will *partially* fund the cost of arbitration program improvements and caseload administration.

Single Arbitrator

On May 14, 1997, the SEC approved amendments to Rules 10302 and 10203 that raise from $10,000 to $25,000 the dollar ceiling of public and industry controversies that may be resolved by a *single* arbitrator *exclusively on the papers filed.* The SEC also approved amendments to Rules 10308 and 10202 that raise from $30,000 to $50,000 the dollar ceiling of public and industry disputes that may be resolved by a *single* arbitrator pursuant to *standard hearing procedures*. These modifications will be implemented when the pending fees proposals become effective. (See the April 1997 edition of *The Neutral Corner* for a description of these changes.)

The NASD Regulation Board will continue to act on other Task Force recommendations, including those relating to collateral litigation, discovery process improvements, and disclosures in customer predispute arbitration agreements.

NASD Board Action Update

On August 7, 1997, the NASD Board of Governors announced that a proposed amendment to the arbitration rules will be filed with the SEC. If approved, the proposal will eliminate the NASD mandate that statutory discrimination claims involving registered persons must be arbitrated. Presently, the NASD requires registered representatives and principals to arbitrate *all* disputes with their NASD member employers when they sign Form U-4s.* (See the September 1997 edition of the *NASD Regulatory & Compliance Alert* for more on this decision. To purchase a hard-copy version of this publication for $25, please call NASD MediaSource at (301) 590-6142. Or visit NASD Regulation's Web Site at *www.nasdr.com* and look under "Members Check Here" for this publication later this month.)

*Uniform Application For Securities Industry Registration Or Transfer

NASD Regulation Mediation Program Celebrates Its Second Anniversary From page 1

The average mediation case is open only two to three months. Quick turnaround time and the streamlined process translate into savings of time and costs for parties using the mediation alternative. Moreover, parties and counsel report a high degree of satisfaction with the process. Ninety-eight percent of the participants who responded to a recent survey said they would use the process again. (See article on page 10 of this publication for more details on this mediation survey.)

Building on the success of the program, NASD Regulation is sponsoring a separate "Settlement Week" event in each of five major cities. Settlement Week is designed to encourage the quick settlement of cases and to facilitate exploration of the benefits of mediation. To make the mediation alternative cost-effective for even more parties, NASD Regulation mediators have agreed to serve at reduced rates during Settlement Week. The special provisions should

encourage parties with smaller claims to take advantage of the benefits of mediation. For claims with less than $30,000 in controversy, a three-hour mediation will be arranged for a cost of only $150 per party. Unique incentives also exist for parties in larger cases during Settlement Week. Eight hours of mediation will cost each party $600. Half of the $600 will be applied toward the party's arbitration costs if the matter is not resolved as a result of the mediation. The first Settlement Week was in Fort Lauderdale (September 8-12), followed by New York City (October 13-17), Houston (November 10-14), Los Angeles (December 1-5), and San Francisco (December 8-12).

The Mediation Program has almost 500 mediators qualified for the NASD Regulation roster nationally. Parties choose from lists of mediators with a variety of backgrounds.

During 1997, NASD Regulation has also sponsored several three-day mediator skills training programs in Kansas City, New York, and Seattle. Participants rated the training programs very favorably. NASD Regulation plans additional training in 1997 in Phoenix (October 27-29), New York (November 3-5), and Fort Lauderdale (January 1998).

The mediation alternative is here to stay. The growth trend is attributable to the educational efforts made by NASD Regulation staff, mediators, and advocates. Parties save time and costs and control the process and the outcome of their own disputes. As parties and counsel learn to use the flexibility that mediation offers, they will find more and more cases suitable for mediation.

Settlement Week Update

During the first Settlement Week in Fort Lauderdale, 20 out of 24 disputes involving $3,000 to $1.5 million, were settled by the parties in mediation.

Uniform Law Commissioners Tackle The Uniform Arbitration Act

By Thomas J. Stipanowich

Thomas J. Stipanowich is a W.L. Matthews Professor of Law at the University of Kentucky. Since 1984, he has taught and conducted research about commercial arbitration, alternative dispute resolution, advanced mediation, contracts, commercial and construction law, legal history, and property. He was appointed Academic Adviser to the National Conference of Commissioners on Uniform State Laws Drafting Committee on Reform of the Uniform Arbitration Act in 1996. Stipanowich has wide-ranging experience as an arbitrator, mediator, special master, and mini-trial adviser in commercial and construction cases. He is a member of the NASD Regulation National Arbitration and Mediation Committee and one of the Public Member representatives to the Securities Industry Conference on Arbitration.

The National Conference of Commissioners on Uniform State Laws (NCCUSL or Conference) aims to "promote uniformity in state law on all subjects where uniformity is desirable and practicable." Uniform law commissioners are bar members—lawyers, judges, legislators, and law professors—appointed by state governors or other authorities for terms prescribed by state law. Unless you've been a part of their deliberations, the commissioners' work is a mystery. Yet the occasional fruits of their labors influence the day-to-day lives of all American citizens. Since 1892, the Conference, which exists primarily through appropriations from the states, has drafted more than 200 uniform laws on a wide variety of subjects. Some, like the Uniform Arbitration Act (UAA), have been widely enacted.

Revisiting The Uniform Arbitration Act

In 1996, I became Academic Adviser to the NCCUSL Committee charged with revising the UAA, which provides for the specific enforcement of

continued on page 6

Uniform Law Commissioners Tackle The Uniform Arbitration Act From page 5

arbitration agreements and awards, and is in effect in most states. Although the Act was developed more than 40 years ago, it has never been modified. While the role of state arbitration law has been diminished sharply by the preemptive judicial expansion of the Federal Arbitration Act, state versions of the UAA are still cited as controlling authority on various arbitration issues. In addition, sound changes to state arbitration law may lead to healthy improvements in the United States Arbitration Act.

The current effort began with the appointment of a Study Committee in 1995. This Committee produced a set of general recommendations for the guidance of drafters revising the UAA. The Drafting Committee—comprised of 10 commissioners (including seven practitioners, two judges, and a law professor), two academic advisers, and several "observers" representing national associations and arbitration "provider" organizations—met in Spring of this year. All Committee members participated in the discussion, although only the commissioners were entitled to vote. There was a free exchange of opinions and the commissioners were appreciative of input from the field, including information on the workings of standard arbitration rules.

Sound changes to the Uniform Arbitration Act may lead to healthy improvements in the Federal Arbitration Act.

What's On The Table

The meeting commenced with a discussion of the principles that will guide the revision of the UAA. The group generally ascribed to the traditional policies of party autonomy, speed, lower cost, efficiency, and finality, along with "fundamental fairness." The remainder of the meeting was devoted to introducing a spectrum of issues, some of which may result in proposed amendments. These issues include:

- arbitrability of disputes
- arbitrator immunity
- consolidation of two or more arbitrations
- arbitrator disclosure for conflicts of interest
- arbitrator authority to conduct pre-hearing conferences
- discovery procedures
- interlocutory judicial review of pre-award arbitrator orders
- judicial and arbitral provisional remedies (e.g., interim injunctive orders)
- awards of attorney fees
- awards of punitive damages
- judicial review of arbitrator awards

Next Steps

The Committee's deliberations represent the critical first step in the lengthy process of remaking a uniform law. The Committee proposals will be subjected to two readings before the entire NCCUSL. They will also be submitted for review by the American Law Institute. Because the UAA is only one of several current uniform law projects currently in the pipeline, there is the possibility of delays in the process. Once these hurdles are passed, there is still the matter of persuading the state legislatures to incorporate the proposed revisions into law.

The hoped-for result will be revisions to the UAA that further sound policies: respect the rights of private parties and accommodate the expanding range of processes that fall within the ambit of arbitration, while preserving arbitration as a true alternative to litigation.

When drafts of the revised UAA are produced, they will be available on the Uniform Laws Web Site, *http://www.upenn.educ/library/ulc/ulc.htm*. If you have thoughts to offer, please contact me—Thomas J. Stipanowich—at *tstipano@pop.uky.edu* or write to me at the University of Kentucky, College of Law, Law Building, Lexington, Kentucky 40506-0048.

Mediation: Doing It By Phone...Successfully

By Sterling N. Frost

The following article is a first-person account of an innovative dispute resolution technique conducted by one of the foremost authorities in the field of mediation. Sterling N. Frost has extensive experience at the executive level in mediation, arbitration, management consulting, finance, and operations. Frost is a member of NASD Regulation's mediation and arbitration panels. He is also a judicial mediator, arbitrator, and neutral case evaluator, as well as an arbitrator for the American Arbitration Association, and the New York and Pacific Stock Exchanges.

Request

Wednesday, I received a call from the NASD Regulation Office of Dispute Resolution concerning a case against a broker and a national brokerage firm involving charges of securities fraud, breach of fiduciary duty, and mismanagement. Was I available to mediate in the short window of opportunity that had suddenly opened early the following week?

Respondents' counsel requested mediation by telephone to avoid the time and expense of travel to the mediation site. Was I willing to mediate with one participant attending by teleconference?

With some reservations, I agreed to set the session for the following Wednesday. Statements of Claim and Answer were available. Also, the Dispute Resolution Office faxed to each counsel a Mediation Session Summary that could provide more information, with a request for a response by the following Monday. Relying on their prior pleadings, neither counsel responded to the request.

Initially, respondents' counsel planned to present the opening statement and answer any questions. He requested that the respondents attend by telephone, but instructed them not to participate orally in the telephone session.

It has been my experience that agreement is often facilitated by some expression of remorse or an apology from one of the parties. This would not be possible if the respondents remained mute during the joint session. Counsel finally agreed that he would permit the respondents to answer a question posed by the mediator, but only in the context of—"Has all pertinent information been presented?"

Claimant agreed to the respondents' request to participate by phone, and decided to do so subsequently as well. Like his counterpart, claimant's counsel was reluctant to allow his client to actively participate in any discussion. I believe that a participant will frequently state a personal concern or emotion—not included in a formal Statement of Claim—that can be important in reaching agreement. As a concession to the mediator, counsel agreed to allow the claimant to present her opening statement, but said that he would answer any questions.

Concerns

Conducting a mediation entirely by telephone under the restrictions placed by both attorneys raised several concerns. These concerns are magnified when each participant is at a separate location. The first concern focused on the capability and expense of teleconferencing services. Calls to two major long distance carriers revealed that both provide a service to convene a teleconference group, divide the total into two or more subgroups, move one or more participants between subgroups, and re-merge the total group as needed. This service may be available from other telecommunications companies as well. While the service is not inexpensive, it is efficient and less costly than cross country round-trip air fare, plus living expenses.

The second concern dealt with the attendance, attention, and participation of all involved. From my own experience in conducting and participating in teleconferences, it is very easy to become distracted by other activities during a conference call. This is particularly true if participants are not actively engaged in the conversation or have a computer terminal in front of them.

The third concern included the lack of visual information exchange. The mediator can obtain a

continued on page 8

Mediation: Doing it By Phone... Successfully *From page 7*

large amount of information from body language and facial expressions. Some participants are interested in seeing the reaction of the other participants, particularly if they are consciously or subconsciously seeking an apology or remorse. Without visual information, listening skills become even more important for all concerned.

Facts

Information in the Claim and Answer revealed that the claimant was a widow with two small children. When opening her account, she discussed her total financial situation with the respondents and stated her investment objectives as income and preservation of capital. She planned to invest the receipts of her deceased husband's insurance proceeds to provide an annual income in the range of 6 to 7 percent of the principal so that she could stay at home and raise her children.

Initial investments were evenly split between a U.S. Treasury securities fund and a moderate growth strategy mutual fund. A year later, with the balance in her account down over 7 percent, she liquidated both. After consultations with the respondents, she authorized the purchase of shares in a fund with a portfolio containing investment grade government securities primarily from the United States and two foreign countries. Over a period of two months she authorized the investment of her entire principal in this fund.

Slightly over a year later, claimant realized approximately 75 percent of the original investment when she liquidated her entire account. The Claim stated that, while she received the desired level of income for the last year, the balance in her account continued to decline. Claimant said the drop in value occurred mainly in the foreign investments. The Claim alleged that when she questioned her broker, he told her that "his people" in the foreign countries had assured him the investments were safe. She requested $100,000 in actual damages plus $300,000 for emotional distress and $500,000 in punitive damages.

Respondents denied any wrongdoing. Respondents' answer asserted that claimant was a sophisticated investor familiar with fluctuations in the market. In addition, respondents contended that part of the reason for the decline in principal was that the claimant withdrew more than her stated income requirements from the account to finance personal expenditures and to pay for repairs and alterations to her home.

Approach

Properly preparing for the session required a multi-faceted effort. First, I approached the case as if doing a neutral evaluation from the written material. This approach yielded a comprehensive list of the professional services, investments made in chronological sequence, dollars involved in each transaction, and the strengths and weaknesses of each party's case. Next I approached the situation as if a sole arbitrator preparing an arbitration ruling from the same information. Finally, I developed a potential BATNA (Best Alternative To a Negotiated Agreement) and WATNA (Worst Alternative To a Negotiated Agreement). Significant personal feelings would have to be discerned during the session.

Ground Rules

The mediation session began with a roll call that elicited a response from each participant and the normal introductions. During the discussion of arrangements with counsel, I requested that all participants take the call at a location, such as a conference room, away from their normal work area to prevent interruptions. In addition to my regular opening remarks, I reminded the participants to:

- remain on the line for the entire period of the call, including the private caucus periods;
- maintain complete attention to achieve a satisfactory conclusion and to practice active listening;
- not put the call "on hold" and to avoid any external activity or interruptions; and
- direct questions to the attorneys rather than to their clients.

Sessions

The opening statements were straight forward. Claimant presented her position in precise terms, but it was obvious that, in addition to the loss of her money, she was upset by what she saw as a betrayal of her trust. Counsel for the respondents presented their positions. In response to my question whether the respondents wished to add anything to counsel's presentation, the answer was "no."

Given the tight control placed on the parties by their counsel and the lack of any visual information to work with, the next step was to begin private caucusing. Since the respondents had not made an offer of settlement, I decided to begin there. After discussing some of the strengths of the claimant's case and the weaknesses of the respondents' position, the respondents put forth a possible settlement offer. This opened the door for serious negotiations.

This also began what I came to call "music-on-hold" diplomacy. The teleconference service allowed me to move between caucus groups as needed, go on music-on-hold while the parties held their own private discussion, then rejoin their caucus before changing groups, or put myself on music-on-hold for a short time between caucus group discussions to allow me some time to think.

During that first caucus, I asked a question of the respondents. There was an awkward silence. I asked again and still no reply. I asked a third time. With some minor background noise, one of the respondents replied in a very sheepish tone. Taking this as an indication that at least one participant was not giving full attention, I began each caucus thereafter with a roll call and tried to elicit at least one oral response from each participant during the caucus. After the mediation, respondents' counsel advised me that the delay in response occurred because he gave his clients firm instructions to remain silent and they were apparently unsure what to do. Nevertheless, I think the use of roll calls and direct questions to each participant is an effective way to promote involvement.

Progress in the caucuses ebbed and flowed as is usually the case, but the advance preparation definitely paid off. Control exerted by both attorneys was such that the discussions in the caucuses was almost entirely between counsel and me. However, we managed to overcome roadblocks through candid discussions of the strengths and the weaknesses of the participants' positions. In addition, reviewing the information from the perspective of how I might have ruled in such a case was very useful. This was particularly true when discussing BATNA and WATNA.

Finally, I was authorized in caucus to present an offer that was accepted by the other party in caucus. To seal the deal, the entire group reconvened in conference so the claimant could hear the offer from the respondents and the respondents could hear the claimant accept. A few final details were worked out and one counsel agreed to prepare the final document for signatures. Everyone agreed that the settlement document should be faxed for review and final approval. I received copies of the document in order to ensure completeness of the information.

Final Thoughts

To a purist this case might seem more of a negotiated settlement than a mediated agreement, but it worked.

While both attorneys were courteous and professional in all of their actions, the manner in which they controlled their clients added to the formality of the process. The positive in this is that it prevents a client from going off on a tangent, thus making life easier for everyone in general and the mediator in particular. The negative in this is that it might result in unresolved issues that could have been dealt with otherwise. In this particular case, as with many I have mediated, there seemed to be a desire by the claimant to see some remorse, hear an apology, or feel some sympathy for her loss. Following the mediation, claimant's counsel stated that he strongly agreed that his client was looking for some apology or remorse, and he believed that it might have gone a long way in expediting the settlement. I have observed situations that were almost at loggerheads change for the better when the aggrieved party received some empathy.

No doubt the mediator's task is greater when conducting the mediation by teleconference. Without visual feedback and/or direct discussion of the issues with the parties, a mediator's ability to explore alterna-

continued on page 10

Mediation: Doing it By Phone… Successfully From page 9

tive solutions is severely hampered. As a result, much more process skill and preparation are required. Some mediators say they prefer to approach each case with little direct knowledge, in essence acting as a blank marker board on which information is recorded during the presentations by the parties. The theory being that by the time the board is full, there will be a solution. That procedure definitely would not have worked in this case. At times, the process kept moving only because of the ability to discuss the specific strengths and weakness of the case, and the BATNA and WATNA, if mediation failed to result in a settlement.

Subsequent to the mediation, respondents' counsel said that he believed the amount of time I spent in preparation resulted in a reduction in the time required to resolve the case. Actually respondents' counsel is quite pleased with teleconferencing as a method of conducting meditations. This was not his first mediation by teleconference, and based on his experience, he thinks the mediation process is better served by teleconferencing than face-to-face sessions. He feels teleconferencing generally eliminates the prolonged emotional outbursts that sometimes occur when parties are face-to-face and are detrimental to the process. In addition, he believed discussions by teleconference are less apt to go astray.

On the other hand, claimant's counsel said that he was not entirely convinced of respondents' sincerity in view of their reluctance to personally appear at the mediation. In addition, he suggested that, since some caucuses by one party, with or without the mediator, are lengthy, the cost might be reduced by permitting the other party or parties to hang up rather than stay on music-on-hold. The conference operator could then reconnect the other party or parties when requested. The long distance carriers confirmed that fees are based on the minutes of connection time for each party; therefore, that procedure would reduce costs. The mediator's decision to suggest this money-saving procedure should take into consideration the expected length of the caucuses and the possible loss of participant concentration and momentum during the mediation.

While opinions on the values and pitfalls of the different methods of conducting a mediation are many and varied, any mediation that reaches agreement is a success. This was a case of doing it by phone… successfully.

Mediation Survey Yields Favorable Results

Steven A. Yadegari is a third-year law student at the Benjamin N. Cardozo School of Law. He serves as a mediator at the Brooklyn Mediation Center and is state certified to mediate community disputes. Upon graduation, Yadegari plans on pursuing a career in the securities industry and ultimately hopes to incorporate alternative dispute resolution practices and techniques in his practice of securities law.

In May of this year, Yadegari conducted a survey of participants in NASD Regulation mediations. The survey's findings indicate that, overall, survey respondents view NASD Regulation's mediation program favorably.

The methodology involved mailing surveys to a total of 250 claimants and respondents, as well as their attorneys, who participated in an NASD Regulation mediation. Results are based upon 100 returned surveys. The survey's questions were designed to gauge the sample's experiences with the NASD Regulation mediation process.

Yadegari's complete report is divided into three parts—(1) a review of the development of the NASD Regulation Mediation Program; (2) the actual results of the survey; and (3) an examination of the future of mediation in securities law, as well as other areas of the law. For purposes of this article, we will discuss excerpts found in part two of Yadegari's report—the results.

The results of the survey indicated that participants of NASD Regulation mediation are satisfied with the process, and identified a number of reasons why mediation can be a beneficial form of alternative dispute resolution.

Participants were asked to give an overall rating of the NASD Regulation mediation process, of the mediator, and of the mediator's skills. These are the average results of the questions (ratings were calculated on a scale of 1-10, with 10 being the highest):

- The average rating of the NASD Regulation mediation process given by the participants: 9
- The average rating of the NASD Regulation mediator given by the participants: 8
- The average rating of the NASD Regulation mediator's skills given by the participants: 9

The survey also asked about specific categories in which participants found the mediation to be beneficial. The table below indicates these results.

mediation process again. "This includes parties who did not respond favorably to their overall experience with the process."

Attorneys commented that "the mediator helped the parties understand their interests as well as their strengths, weaknesses, and risks of their positions." Claimants indicated that mediators "helped the parties better understand their issues." Parties taking part in the survey also commented that "they appreciate the fact that the mediation session is confidential. They are also pleased that they are not compelled to reach an agreement if they are not satisfied with the outcome of the session."

If you would like a copy of the complete survey, please contact Steven Yadegari at (212) 982-8982.

Percentage of those surveyed who identified mediation as beneficial in the following categories:

	Cost Savings	Time Savings	Clarified Issues	Improved Communications	Achieved Better Results	Restored Business Relationships
All (Total) Participants	92%	84%	52%	42%	29%	5%
Attorneys	93%	74%	54%	38%	26%	5%
Claimants	94%	82%	76%	47%	35%	6%
Respondents	91%	88%	38%	38%	33%	4%

As shown in the table above, survey participants indicated that cost and time savings are a major benefit when utilizing mediation. Participants also found that mediation helped clarify issues, achieve better results, and improve communication between parties. As for the low percentages in the area of restoring business relationships, Yadegari states in his report that this "is not really indicative of the mediation process. By reaching an early resolution without undue financial or time strains on either party, the chances for preserving a business relationship are greatly enhanced."

Another important statistic captured by the survey, but not in the table above, is that 98 percent of mediation participants responded they would use the

Mediator Skills Training

The NASD Regulation Office of Dispute Resolution will host a Mediator Skills Training Program in Scottsdale, Arizona on October 27-29, 1997. The session will be held at the Marriott Camelback Inn. Contact Felicia Fox at (312) 899-4440 for more information.