
Webinar Recorded October 19, 2011 at 2:00 p.m. ET

PROGRAM SUMMARY

Speakers: Honorable Joyce George and Susan Perin, Esq.

During this webinar, experts will discuss the recovery of legal fees and costs in arbitration and how it is not a given. The speakers will discuss if arbitrators have the authority to award legal fees, if a prevailing party automatically receives fees and costs in an award or settlement and much more. This program will provide best practices to address the issues in ADR contract language as well as throughout the arbitration proceeding.

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m. Goals for the Session (5 minutes)

2:10 p.m. Overview of Legal Fees and Costs (70 Minutes)

Arbitration vs. Litigation

Recoverable Fees and Costs in Arbitration

- Attorney Fees
- Interest
- Other

Timing of Requests for Recovery

- Contract language
- Filing of claims and counterclaims
- Briefs

Rules and Codes that Govern the Issue

Issues to Avoid

3:20 p.m. Conclusion and Questions (10 minutes)

3:30 p.m. Evaluation (5 minutes)

3:35 p.m. Adjourn
Honorable Joyce J. George

Current Employer-Title  Self-employed - Arbitrator, Mediator, Legal Educator, Retired Judge

Profession  Retired Judge, Arbitrator, Mediator, Legal Educator and Author
Adjunct Professor: Florida Coastal School of Law, Judicial Writing (2011)


Experience  Served as a trial and then appellate state court judge, hearing cases of every kind, magnitude, and complexity, including but not limited to, commercial, construction, tort, labor, personal and real property disputes, financial, consumer, administrative, trademark, franchise, employment, contract cases, statutory construction, as well as injunction, declaratory judgment, and other special proceedings. After retirement from the bench, I continued to serve as a visiting judge receiving assignments from the Ohio Supreme Court. Served as an attorney representing clients in medical malpractice, buy-sell transactions, drafting contracts, breach of contract disputes, commercial transactions, construction agreements, and trusts.

Alternative Dispute Resolution Experience  Served on numerous panels under the Large Complex Case Program for commercial, construction, and contract cases since 1995. On a majority of arbitrations, served as chair of the panel. Disputes included complex transactions, activities, and contracts between business entities involving millions of dollars. Also served as single arbitrator on commercial cases of more than $7 million. Served as an Early Neutral Evaluator. Regional Advisory Council Chair, 1998-2000. Mini arbitrator for steel industry, 1970-73. Recipient of the AAA Cleveland Office's Gavel Award for service in the field of ADR, 2001. Neutral's Trainer, 1997 to present; AAA Faculty: Managing Procedures, Process & Dynamics 1998; AAA Arbitrator I and II Training Commercial Arbitrators; Arbitrator I and II Training Construction Arbitrators 2000-2006; Arbitration Awards: Safeguarding, Deciding & Writing Awards 2003-2004; Chairing an

Honorable Joyce J. George
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**Alternative Dispute Resolution Training**

**Professional Licenses**
Admitted to the Bar: Ohio, 1966; U.S. District Court, Northern District of Ohio; U.S. Court of Appeals, Sixth Circuit; U.S. Supreme Court; Certified Florida Circuit Court Mediator; Certified Floris Circuit Court Mediator, Residential Mortgage Foreclosure Mediator.

**Professional Associations**
American Judicature Society; Ohio State Bar Association; American Bar Association; Akron Bar Association; Former United States Attorneys Association; American Arbitration Association (Past Board of Directors); International Mediation Institute (IMI) Certified Mediator.

**Education**
University of Akron (BA-1962); University of Akron, School of Law (JD-1966); National Judicial College (Certificate, Special Court-1976); University of Virginia, School of Law (LLM-1986); University of New York, School of Law (Certificate, Appellate Practice-1986).

**Publications and Speaking Engagements**
JUDICIAL OPINION WRITING

Compensation $350.00 Per Hour
Hourly rate for hearing and study time.

Citizenship United States of America

Locale Flagler Beach, FL
Current Employer-Title  Self-employed - Attorney, Mediator, Arbitrator

Profession    Attorney, Mediator, Arbitrator; Educator


Experience   Primarily practiced as civil trial lawyer in business, construction, and real estate litigation. Business and real estate litigation included issues in areas of contract, negligence, fraud, DTPA, personal injury, defamation, insurance, insurance products (life, health, disability, property and casualty, liability), insurance coverage, indemnity, employment law, employment agreements, covenants not to compete, trade secrets, injunctions, business dissolution, buy-sell agreements, partnership agreements, promissory notes, landlord-tenant (commercial and residential), leases, construction, inspections and appraisals of real estate, and environmental law. Real estate litigation cases were usually multi-party involving sellers, buyers, real estate brokers, agents, or inspectors, and involved expert witnesses such as appraisers, engineers, or accountants. Construction litigation (30-50% of practice) included representation of owners, developers, general contractors, subcontractors, suppliers, and surety companies, with experience in public and private projects. Residential construction consumer experience. Family law experience including issues related to division of property, retirement plans, health insurance, business valuation, and real estate. Practice is now full-time arbitration and mediation. Adjunct Professor from 1997 to 2003 teaching Mediation at the University of Houston Law Center. Instructor and speaker on employment and reemployment rights of military personnel and the responsibilities of their employers. Frequent speaker and author on arbitration and mediation. AV rating, Martindale-Hubbell. For additional information, see www.susanperin.com.

Alternative Dispute Resolution Experience Arbitrator since 1990 and mediator since 1991, with experience in complex, multi-party cases involving millions of dollars. Arbitrator in over 175 cases, serving both as sole arbitrator and as a panel member, often serving as panel chair. Mediator in over 1700 cases. Arbitrations and mediations have included the following areas of the law: commercial, business, construction, real estate, insurance, Deceptive Trade Practices Act, employment, personal injury, negligence, toxic tort, contracts, franchise, partnership dissolution, buy-sell agreements, health law, international law, copyright, premises liability, products liability,

**Alternative Dispute Resolution Training**

**Professional Licenses** Admitted to the Bar: Texas, 1980; U.S. District Court, Southern District of Texas, 1980.

**Professional Associations** State Bar of Texas (Alternative Dispute Resolution Section, Council Member); Houston Bar Association (Construction Law Section, Past Chair); State Bar of Texas (Construction Law Section, Founding Member, Council Member); American Bar Association; Houston Bar Foundation (Fellow); Texas Bar Foundation (Fellow); International Mediation Institute (IMI) Certified Mediator.

**Education** Newcomb College of Tulane University (BA, cum laude-1971); South Texas College of Law (JD, first in class-1980).

_Susan G. Perin, Esq._

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Compensation $3,200.00 Per Day
$400.00 Per Hour
Per Diem for hearing days. Hourly rate for study time; out of pocket expenses charged; travel time charged at $200.00 per hour for out of town cases. Cancellation/postponement fee: 50% of scheduled hearing days charged if notice within 8-14 days of hearing; 75% of scheduled hearing days charged if notice within 1-7 days of hearing.

Citizenship United States of America

Locale Houston, TX
TEXT OF MATERIAL FOR WEBINAR

AWARDING ATTORNEY’S FEES

I. THE AMERICAN RULE

The American Rule, adopted by the United States Supreme Court in 1796, provides that attorney’s fees are to be borne by each contesting party, regardless of the outcome. This rule requires each side to bear their own costs incurred as a result of litigation. Nonetheless, by agreement, the parties may provide for the shifting of attorney's fees should a dispute arise. Contractual clauses providing for the payment of attorney's fees may be held to be unenforceable when they are contrary to public policy. For instance, such a situation may arise when the more powerful party has drafted the document, such as in the case of an insurance agreement. The American Rule may also be modified by fee-shifting statutes, requiring the losing party to pay the prevailing plaintiff’s fees. Additionally, there are other exceptions, which are not uniformly applied, throughout all state and federal jurisdictions in the United States.

The Uniform Arbitration Act (UAA) was adopted in 1956 and has been enacted in a vast majority of jurisdictions. It did two fundamental things: First, it reversed the common law rule that denied enforcement of a contract provision requiring arbitration of disputes before there is an actual dispute. Once a real dispute arose, the parties were always able to agree to arbitrate. It is agreeing to arbitrate in anticipation of any possible disputes that the common law prohibited. Second, the UAA provided some basic procedures for the conduct of arbitration. The UAA does not mandate arbitration of any dispute. Its function is to let parties determine whether or not they want to use arbitration by agreement.

UAA Section 10, Fees and Expenses of Arbitration, provides:

Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

4 Uniform Arbitration Act, Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states at its annual Conference Meeting in its Sixty-Fourth Year, Philadelphia, PA, August 15-20, 1955, as amended at Dallas, TX, August 25, 1956.
State laws, based on the UAA, generally refrain from giving arbitrators the power to shift attorney’s fees. Thus, it is important in deciding whether to make a claim for attorney’s fees to carefully review, the language of the arbitration provision, the rules of the arbitration, and the laws of the jurisdiction as well.  

The Revised Uniform Arbitration Act (RUAA)\(^6\) was a revision made necessary with the ever-increasing use of arbitration, the development of the law in this area and the use of technology.\(^7\) The RUAA modernizes, revises, and explains arbitration law. Some of the changes in RUAA address electronic technology. It allows arbitrators to decide cases based on documentation that includes electronic information. It also allows the use of videotape, audio presentations, teleconferencing, or other means of modern communication to present witness testimony. About one-third of the states adopted it since 2000.

The RUAA also provides the power to issue subpoenas for witnesses and records and to issue interim awards, shift attorney’s fees\(^8\) and award punitive damages.\(^9\) It establishes new grounds for vacating awards, provides the procedure for commencement of arbitration, permits consolidation of arbitration proceedings, requires arbitrators to make disclosures of possible conflicts, institutes the pre-conference, and establishes the scope of discovery.

RUAA, in Section 21, entitled Fees and Expenses of Arbitration Proceeding, provides as follows:

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney’s fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

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\(^{6}\) Uniform Arbitration Act (Last Revisions Completed Year 2000), Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states, Annual Conference, Meeting in its One-Hundred-and-Ninth Year, St. Augustine, FL, July 28-August 4, 2000.


\(^{8}\) RUAA, Section 21 (b) (2004).

\(^{9}\) The comment under RUAA Sec. 21 states: “[I]t is now well established that arbitrators have authority to award punitive damages under the FAA…[and]…federal authority is in accord with the preponderance of decisions applying the UAA and state arbitration statutes.”
(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

(d) An arbitrator’s expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

The Federal Arbitration Act (FAA) is silent on awarding costs and fees, so that many federal courts have held that arbitrators cannot allocate these items unless the agreement explicitly provides for it. However, the federal policy favoring arbitration generally affirms the arbitrator’s authority to award a particular remedy. The courts have generally accorded maximum deference to an arbitrator’s award. The U.S. Supreme Court permitted punitive damages in Mastrobuono v. Shearson Lehman Hutton, Inc. when interpreting the FAA.

The Federal Arbitration Act provides four statutory bases to vacate an arbitration award.

Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

11 9 U.S.C. Sec. 10 (2000), “An arbitrator may award reasonable attorney’s fees…if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.”
13 9 U.S.C. Section 1, et seq.
(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

In addition to the FAA’s statutory grounds, federal courts have recognized several other grounds for vacatur. They are: manifest disregard of the law by the arbitrator; an award that conflicts with well-established public policy; completely irrational or arbitrary and capricious awards; and an award failing to draw its essence from the parties’ contract. However, these non-statutory grounds are not uniformly employed by the courts.

The American Arbitration Association (AAA) through its Commercial Arbitration Rules provides: “The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties…” and in another rule provides that arbitrators may award attorney fees if authorized by law. Thus, under AAA rules, the arbitrators are authorized to allocate the fees, expenses and compensation of the arbitrator as they deem fit and also to shift attorney’s fees, if all parties have requested such an award, or fee shifting is authorized by law or by their arbitration agreement.

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14 Rule 45 (a). The AAA Construction rules are the same. Rule 45 (a).
15 Rule 45 (d) (ii). The AAA Construction rules are the same. Rule 45 (d) (ii).
Under the American Rule attorney’s fees are not recoverable unless the arbitrator is able to identify an authority for awarding them, a statute, rule, contract, or finding of bad faith. An authorization to award attorney’s fees may be conferred upon the arbitrator in one of four ways: by agreement, submission, specific statute or rule, or mutual request. Additionally the inherent power of arbitration may be used to sanction a party for bad faith conduct. Each is discussed below.

While the federal courts accept the American Rule, they also occasionally rely upon the inherent power of the court to authorize an award of attorney’s fees. This is a power state courts are reluctant to rely upon, and arbitrators do not enjoy.

Arbitration agreements frequently fail to address awarding attorney’s fees. Thus, whenever a request for attorney’s fees has been made and the agreement is silent, if there is any doubt as to whether there is authority to award attorney’s fees, the arbitrator should require the parties to brief the issue: What, if any, authority permits the awarding of attorney’s fees under the particular facts of the pending arbitration?

If there is authority to award attorney’s fees, such a request must be presented to the arbitrator in the same manner as any other claim. It must not only be pled, but must be proven. And this must be done before the hearing is closed. Seeking a court’s aid in securing attorney’s fees once the arbitrator has issued a final award will, generally, be denied. An award of attorney’s fees should be addressed by the arbitrator and made a part of the arbitration award.

On occasion the American rule is ignored and the arbitrator may impose a different method of allocating attorney’s fees, such as the “costs follow the event,” or the “loser pays” rule. The genesis for using this method is to make the claimant whole. When there is a showing of bad faith by one party, the courts may sanction the bad actor by awarding attorney’s fees to the opposing party. On rare occasions, arbitrators have done likewise, but only upon a record showing seriously egregious conduct.

The costs of arbitration are two-fold consisting of the “costs of the proceeding,” and the “costs of the parties.” The costs of the proceeding include the administrative fees involved in filing a demand, as well as, any other fees and expenses incurred or billed by the administrator dealing with the management of the arbitration process. This also includes the arbitrator’s fees, which may be calculated in a number of ways depending upon the individual arbitrator’s fee schedule or whether a fixed fee was set. The administrative fees, which do not include attorney’s fees, are typically shifted to the losing party. The attorney’s fees, which represent a portion of the cost of arbitration, are allocated or not, on a case-by-case basis. There is no default or uniform standard.


20 Widell v. Wolf, 43 F.3d 1150 (7th Cir. 1994); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991); Fed. R. Civ. P. Rule 11.
The costs of the parties, as used here, include those items necessary to present their respective positions and consist of legal costs, such as attorney’s fees, expert witness fees, depositions, translators and interpreters, court reporters and related expenses.\(^{21}\) Related expenses may be such things as the cost to prepare exhibits, travel for witnesses, cost of conducting discovery, etc. Such fees may also include the rental of the site for the arbitration hearing.

While these other costs and expenses should be kept in mind, in this article we concern ourselves only with the allocation of attorney’s fees in arbitration.

II. EXCEPTIONS

As indicated above the American Rule requires each litigant to bear the cost of either prosecuting or defending against litigation. The same is true for arbitrations. However, there are exceptions to this rule. Authority may be conferred upon the arbitrator to award attorney’s fees in one of several ways: by agreement, submission, law (a specific statute or rule) or mutual request. There is an additional exception. Where the arbitrator relies on his equitable authority to award attorney’s fees for bad faith conduct. The courts generally confirm such awards.\(^{22}\)

When there is no provision for awarding attorney’s fees, but the parties mutually request them, such a request may be treated as an expansion of the arbitrator’s jurisdiction, i.e. consent by the parties to award attorney’s fees to the prevailing party. Once this consent is mutually given, an attempt to withdraw it will, in all probability, prove to be unsuccessful.\(^{23}\) Additionally, should the claimant seek attorney’s fees, although prohibited by the agreement, the respondent should assert that such fees are not provided for in the agreement to arbitrate. Remaining silent could be taken as a waiver or a failure to object.

Agreement

In order for a contract provision to authorize an award of attorney’s fees, it is required to specifically address the subject of attorney’s fees. This is because an award of attorney’s fees is considered the exception, rather than the rule.

Oftentimes the attorneys will refer the arbitrator to AAA Construction R-45, Scope of Award, which reads:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.

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(b) In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess fees, expenses, and compensation as provided in Sections R-52, R-53, and R-54. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator may include:

(i) interest at such rate and from such date as the arbitrator may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement. (Emphasis added.)

Commercial R-43, Scope of Award, which reads:

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:
(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement. (Emphasis added.)

Counsel may argue that these rules provide for “any remedy or relief that the arbitrator deems just and equitable,” and therefore attorney’s fees are within the ambit of these rules. However, these rules do not, by themselves, authorize an award of attorney’s fees. There must be either a mutual request for attorney’s fees, statutory authority authorizing fee-shifting, specific language in the arbitration provision which authorizes an award of attorney’s fees or a showing of bad faith.

In arbitration, there is no inherent power or implied authority to award attorney’s fees. Because attorney’s fees are not ordinarily recoverable, before they can be awarded, one of the exceptions to the American Rule would have to be noticed. For instance, language in the agreement on the subject of attorney’s fees, the parties mutual request that attorney’s fees be awarded [AAA Commercial Rule 43 (d) (ii)], or statutory authority. Contract language might state something like: “the prevailing party is entitled to an award of reasonable attorney’s fees.” An arbitrator may also invoke the equitable remedy under [AAA Commercial Rule 43 (a)], to sanction bad faith conduct by awarding attorney’s fees, as well as the fees of arbitration. A bad faith sanction should not be imposed without the need and great care.

In arbitration, the "prevailing party" can be defined as the party that received an award in their favor. Moritz v. Hoyt Enters., Inc., 604 So.2d 807, 810 (Fla. 1992); Zhang v. D.B.R. Asset Management, Inc., 878 So.2d 386, 387 (Fla. 3d DCA 2004). The arbitrator must determine whether a party is “prevailing” by considering whether it was successful on any significant issue or any major issue in arbitration which achieves some of the benefit the party sought in making its claim. Moritz, 604 So.2d at 809-10, citing to Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983); Payne v. Cudjoe Gardens Property Owners Ass’n, Inc., 875 So.2d 669, 671 (Fla. 3d DCA 2004). The arbitrator should consider the result obtained.

The definition of “prevailing party” then becomes an issue. In the case of Intercontinental Group Partnership v. KP Home Lonestar L.P., 295 S.W.3rd 650 (Tex. 2009), the Texas Supreme Court addressed the simple question: What does “prevailing party” mean? The facts were that KP Home filed a breach of contract action against Intercontinental and sought lost profits. The jury decided that Intercontinental breached the contract, but gave KP zero dollars in damages. However, the jury awarded KP $66,000.00 in attorney’s fees. Both parties claimed to be the “prevailing party.”

24 ReliaStar Life Insurance v. EMC National Life Ins. Co., 564 F.3d 81 (2nd Cir., 2009). Also see, An Arbitration Panel’s Authority to Award Attorney’s Fees, Interest and Punitive Damages, Rutgers Conflict Resolution Law Journal, Vo. 6, No. 2 (Spring 1009).
court held that because KP did not receive any affirmative judicial relief and the contract did not define “prevailing party” that KP could not be considered the prevailing party. The attorney’s fees award was thus reversed.

If the claimant did not receive all that was claimed, but he did succeed on portions of his claim, making him the prevailing party, is he entitled to attorney’s fees on the entire arbitration? No. There would have to be an effort made to cull out that portion of attorney’s fees devoted to the successful claim. The arbitrator should seek briefs from the parties to determine the amount of attorney’s fees that are reasonable under the particular circumstances. Only those fees associated with the successful claim are to be considered in awarding attorney’s fees.

Where there was a claim and a counter-claim, both parties request attorney’s fees, and each party was successful on a portion of their respective claims, how do you determine attorney’s fees? Under these circumstances, there are two methods to use. One, weighing the value of the affirmative relief each received, you may be able to declare one party the prevailing party over the other. In such a case, the prevailing party should submit evidence of the amount of attorney’s fees he is requesting. Two, if the affirmative relief each received is equal; you may decide to declare each of them the prevailing party on their respective claims. Hence, each would be entitled to attorney’s fees associated with the winning claim and each should submit evidence of the amount of attorney’s fees he is requesting. Thereafter, each should be given an opportunity to challenge any attorney’s fee request.

To award attorney’s fees the contract language must first be reviewed to see whether attorney’s fees were specifically mentioned. When the contract between the parties provides for the awarding of attorney’s fees, and the contract is enforceable, the arbitrator need go no further to seek authority and an award of attorney’s fees may be made under this exception.

Submission

At the time the parties submit their dispute to arbitration, they may add among other provisions that the winning party is entitled to recover attorney’s fees. Again, no further action is needed to consider the request. To issue an award of attorney’s fees, of course, the arbitrator must have sufficient evidence of the attorney’s fees assessed and permit opposing counsel to challenge the reasonableness of them.

Law (A specific statute or rule.)

When there is no contract or submission language regarding attorney’s fees and mutual assent has not been given, black letter law may be applicable. There are over two hundred federal statutes that allow for an award of attorney’s fees. Some examples include copyrights, discrimination, and labor. Additionally, each state has its own

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statutes, some of which permit the shifting of attorney’s fees. In order to rely on a statute, it must be specifically applicable in order to provide the authority needed to obtain an award of attorney’s fees.

Bad faith is an exception to the American Rule and permits attorney’s fees to be shifted. In Stone v. Greenburg Traurig, LLP, the district court held that:

“Federal courts have the inherent power to assess attorney’s fees against counsel in response to abusive litigation practices…A district court may impose sanctions if it specially finds bad faith or conduct tantamount to bad faith…Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment or an improper purpose.***[A]ttorney fees and sanctions are by nature collateral to the merits [of the case] within the district court’s jurisdiction even after a dismissal under Rule 41 (a).”

Consequently, the Court assessed attorney’s fees against Plaintiff and its counsel.

In an appeal, in the case of ReliaStar Life Insurance v. EMC National Life Ins. Co., a 2-1 panel held that a broad arbitration clause:

…“confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney’s fees or arbitrator’s fees.”

Because the underlying goals of arbitration are the expeditious resolution of disputes and avoidance of costly litigation, the appeals court reasoned that these goals are thwarted when one party acts in bad faith. Sanctioning a party’s bad faith actions, by compelling the payment of attorneys’ fees, is an appropriate remedy squarely within the confines of an arbitrator’s equitable authority.

In another case, after the plaintiffs prevailed in their civil rights action in Mendez v. County of San Bernardino, the trial judge sanctioned plaintiffs’ lead counsel for failure to appear personally at a hearing on an Order to Show Cause. In reversing the sanction, the Ninth Circuit stressed the high standard that must be met to establish the bad faith prerequisite to inherent power sanctions:

“The district court's authority to impose sanctions under its inherent powers is broad, but not limitless. ‘Before awarding sanctions

26 An Arbitrator’s Authority to Award Attorney’s Fees for Bad-Faith Arbitration, Hinchey and Burch, Dispute Resolution Journal, May/July 2005.
28 564 F.3d 81 (2nd Cir., 2009).
29 2008 U.S. App. LEXIS 18426 (9th Cir. Aug. 27, 2008).
under its inherent powers . . . the court must make an explicit finding that counsel's conduct 'constituted or was tantamount to bad faith.'*** A finding of bad faith may be appropriate when, among other things, a party engages in behavior that has the effect of ‘delaying or disrupting the litigation or hampering enforcement of a court order.’ *** We have emphasized, however, that ‘[t]he bad faith requirement sets a high threshold.’ *** Even in a case where the district court described a litigant's arguments as ‘totally frivolous,’ ‘outrageous’ and ‘inexcusable’ and called his behavior ‘appall[ing],’ we nonetheless refused to equate this characterization of conduct as synonymous with a finding of bad faith. *** Here the district court said only that it found it ‘difficult to understand’ that Gonzales would not have known his personal appearance was required. This does not suffice as a finding of bad faith, nor is this a case where ‘bad faith is so patent that we will infer the necessary finding.’ ***

This holding demonstrates the high threshold needed to support a finding of bad faith by the trial court. This threshold is even more stringent in arbitration.

On the state level, statutory language may be used where provisions of the contract between the parties indicate that the laws of a particular state are applicable. Contract interpretation is a matter of state law and the state where the agreement is made and enforced is important, as is the choice-of-law state as is the applicable federal district where litigation may be brought. Then if, in a review of that state’s code, there is provision for awarding attorney’s fees under the same or similar circumstances, the arbitrator may use that authorization to award them. If the agreement is silent as to the applicable state law, unless both parties agree as to the jurisdiction, it would not be prudent to award attorney’s fees in reliance on state law.

In the event an award of punitive damages is issued, attorney’s fees may also be requested. If the award of punitive damages both punishes the bad actor and makes the other party whole, a request for attorney’s fees would be duplicitous. However, if the punitive damages were punishment only, a request for attorney’s fees would be proper. The granting of same is, of course, discretionary with the arbitrator. Normally, a party seeking punitive damages will request punitive damages in a certain amount and attorney’s fees in a certain amount. However, the request for attorney’s fees should not overlap the punitive damages award.

**Mutual Request**

The parties may include language regarding attorney’s fees (to include or exclude them) in the arbitration agreement when it is first drafted. Such language also can be included within a submission. If a dispute arises, and the contract is silent on attorney’s fees and if there is an applicable statute providing for the awarding of attorney’s fees, a request can be made by the claimant. If the contract is silent, the parties may mutually
request attorney’s fees at any time during the arbitration procedure under AAA rules. However, this must be done before the hearing is closed.

Arbitration of attorney’s fees may be implied from the conduct of the parties, i.e. when both parties submit briefs and evidence on attorney’s fees.

If only one party seeks attorney’s fees and the contract is silent, they cannot be awarded. If both parties request attorney’s fees and subsequently one withdraws their request for attorney’s fees, the withdrawal is of no import. Once there is a mutual request, the arbitrator has been given authority to award attorney’s fees. Both parties will have to provide an itemized statement and other evidence to show that the time expended was necessary, that the hourly rate is reasonable and that the statement reflects fees that are acceptable in the legal community in which they were rendered.

When the contract is silent on the subject, the arbitrator must find some other basis upon which to award attorney’s fees, either by reliance upon black letter law or by a mutual request of the parties as provided in the arbitration rules to award them. If only the claimant requests attorney’s fees and the contract is silent, attorney’s fees would be proper only if authorized by an applicable statute.

Under AAA Commercial and Construction rules,\textsuperscript{30} should the parties each request that an award of attorney’s fees be made, it is authorized. There is no time limit as to when they may be requested, but obviously it must precede the “closing of the hearing” because such an award requires the submission of evidence.

For instance if the claimant, in its claim, demands that attorney’s fees be awarded as part of the award, and should the respondent answer and file a counterclaim and also request that respondent be awarded attorney’s fees, then the arbitrator is authorized to make an award of attorney’s fees. Under these circumstances the arbitrator may choose to award each party attorney’s fees or decide only one party is entitled to them. When the arbitrator decides to award attorney’s fees, justification for such a decision should be included in the award language.

\textbf{III. LACK OF AUTHORITY}

When there is no contract or submission language authorizing the award of attorney’s fees; no mutual agreement; no black letter law that is applicable; and no authority can be found, an award of attorney’s fees is improper. The requesting party must be able to point to the authority which permits the granting of attorney’s fees.

\textsuperscript{30} Construction R-45, Scope of Award, Subsection (d) provides: The award of the arbitrator may include: (b) an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement. (Emphasis added.) Commercial R-43, Scope of Award, Subsection (d), provides: The award of the arbitrator(s) may include: (b) an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement. (Emphasis added.)
IV. ISSUES

When is an award of attorney’s fees proper? (a) When the agreement expressly permits such an award. (b) When the agreement is silent but both parties have asked for attorney’s fees. (c) When there is a statute or rule that permits an award of attorney’s fees. (d) When bad faith has been shown?\(^{31}\) (e) When punitive damages are awarded for egregious, willful or wanton conduct which harmed another.\(^{32}\)

In *Todd Shipyards Corp. v. Cunard Line, Ltd.* (1995) 64 F.3d 735, the arbitrator awarded attorney’s fees based on a finding of “improper conduct and bad faith” exhibited by *Cunard* during the course of the arbitration process. The U. S. Court of Appeals for the First Circuit upheld the award holding that in the absence of a manifest disregard of the law, the award should not be disturbed. The losing party proceeded vexatiously when it acted frivolously, unreasonably or without foundation.

The U. S. Supreme Court held that “bad faith” was an exception to the American Rule on shifting attorney fees in the case of *Alyeska Pipeline Serv. v. Wilderness Sac’y*.\(^{33}\) Bad faith involves various forms of conduct: (1) conduct occurring during the course of the hearing (2) while bringing an action or in causing an action to be brought and (3) conduct that gives rise to the substantive claim. A bad faith inquiry looks at the manner in which the litigation itself is carried out. A conclusionary statement that a party acted in bad faith will not suffice a challenge to its legitimacy. Such a finding by an arbitrator must be specific and include some rationale.

If one party attempts to undermine the legitimate objection of arbitration and the arbitrator finds bad faith, the arbitrator may grant attorney’s fees on this basis but should articulate the conduct considered to be bad faith. In *ReliaStar Life Insurance v. EMC National Life*\(^{34}\) the U. S. Court of Appeals affirmed a $3.8 million award of attorney fees as a sanction for bad faith in an arbitration even though the written agreement provides that each party “shall bear the expense of its...[own]...attorney’s fees.” The court reasoned that: “...a broad arbitration clause...confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith...”

If the contract provides that the prevailing party is entitled to recover reasonable attorney’s fees, can the arbitrator refuse to award them? The specific language of the contractual provision must be examined to see whether there is any discretion in awarding attorney’s fees or whether it is mandated.

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<tr>
<th>Is entitled</th>
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<td>Shall be entitled</td>
<td>mandatory</td>
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\(^{31}\) *An Arbitrator’s Authority to Award Attorney Fees for Bad-Faith Arbitration*, supra.

\(^{32}\) “[A]ttorney fees may be awarded as an element of compensatory damages where [there is a finding] that punitive damages are warranted.” *Columbus Finance, Inc. v. Howard*, 42 Ohio St. 2d 178, 183 (1975); *Punitive Damages in Arbitration*, [http://joycejgeorge.com/blog/punitive-damages-in-arbitration/](http://joycejgeorge.com/blog/punitive-damages-in-arbitration/) (Last viewed 9/18/11.)


\(^{34}\) 564 F.3d 81 (2nd Cir., 2009).
May be entitled discretionary
May seek discretionary
Must award mandatory
Shall award mandatory

The arbitrator may or may not find that attorney’s fees are recoverable or the
language of the agreement may be mandatory, and require the arbitrator to award them to
the prevailing party. Under such circumstances, whether or not such fees are recoverable
is not an issue to be decided. Rather the issue is the amount of attorney’s fees.

V. FACTORS TO BE CONSIDERED

In determining the amount of an award of attorney’s fees, the arbitrator should
consider the following factors:

1) Time and labor involved.
2) Novelty, complexity and difficulty of the questions involved.
3) Professional skill required to perform the necessary services.
4) Experience, reputation and ability of the attorney.
5) Miscellaneous expenses of the litigation.
6) Fee customarily charged for similar services in the legal community.
7) Amount involved and the results obtained.

The arbitrator should also consider the amount recovered by the successful party,
the number of claims successfully asserted in relation to the number brought, and the
relationship between the successful and unsuccessful claims.

The burden is upon the requesting party to show the reasonableness of work hours
devoted to the case. There must be some evidence presented by the requesting party
supporting an award of attorney’s fees. This burden remains even if the other party does
not object to the fairness and reasonableness of the claimed award.

Attorneys are bound by a Code of Professional Responsibility and the fees
charged must be reasonable considering the result obtained. The requesting party must
demonstrate to the arbitrator’s satisfaction that the time spent was fairly and properly
used and that the work hours devoted to the matter were reasonable.

VI. RULES FOR AWARDING ATTORNEY’S FEES

1. The submission or agreement providing for the award of attorney’s fees must be
enforceable; or the statute providing for such an award must be specific; or there
must be a mutual request for attorney’s fees.
2. The arbitrator need not hold a full hearing on attorney’s fees. However, the
arbitrator, having found the prevailing party is entitled to attorney’s fees, must
take sufficient evidence by testimony, deposition, affidavit or otherwise, to make
a determination the (a) the time spent was reasonable (b) “professional
3. Once authority has been established, the requesting party must provide an itemized statement showing the date, the legal activity undertaken and the time expended and provide a total being requested as to fees.

4. Time spent by the attorney must be related solely to the successful claim or counterclaim and must be shown to be necessary to the arbitration.

5. Opposing counsel must be given the opportunity to challenge the items in an effort to reduce the amount of the attorney’s fees to be awarded. Opposing counsel may also submit evidence of a different reasonable hourly rate acceptable in the legal community.

6. Evidence of a “reasonable hourly rate” or that the work done on the itemized statement is in conformity with legal community standards, should not be offered by an associate in the law firm of the moving or defending party. It should be offered by another attorney in the legal community that has no interest in the outcome of the arbitration.

7. Once the opposing party has had an opportunity to challenge the movant’s request, the arbitrator must scrutinize the statement of fees to ensure that there are no double entries or unrelated matters and to address the challenges made.

8. The amount of attorney’s fees recoverable are within the arbitrator’s discretion.

9. Attorney’s fees awarded in arbitration cannot be assessed as costs.

10. The authority to award attorney’s fees does not entitle a party to expenses, i.e. such as hearing preparation expenses, deposition expenses, etc.

11. Attorney’s fees should not be awarded when shown to be attributable to the movant’s misconduct.

What if you are asked to use a contingent fee agreement between the Claimant and its counsel to award attorney’s fees. Is it reasonable to expect the Respondent to pay according to a contractual agreement to which it was not a party? While the arbitrator may consider the contingent fee agreement, to do so may not be prudent. Even the courts do not encourage this practice. The better practice is to determine attorney’s fees on the basis of those factors listed above.

An award of attorney’s fees must be predicated on statutory authorization or upon a finding of conduct which amounts to bad faith or in conjunction with an award of punitive damages. Further, an award of attorney’s fees is generally considered compensatory in nature. However if the award includes punitive damages, then any attorney’s fees awarded are considered part of the damages. The award of attorney’s fees under these circumstances is not compensation but flows from the finding of malice.

Punitive damages are not compensatory damages although they are incidental to a compensatory award. Punitive damages are exemplary damages, awarded to make an example of the person who caused the harm and hopefully to deter others from the same kind of conduct. Such damages are considered a civil penalty for causing egregious, willful or wanton harm to another. The standard of proof for punitive damages is “clear
and convincing” evidence.\footnote{Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Also, see for example, Ky. Rev. Stat. Sec. 411.184(5) and (2) and ORS 31.730 (1).} Should punitive damages be awarded, attorney’s fees may also be awarded. However, prejudgment interest may not be assessed against such an award of punitive damages although post-judgment interest may be.\footnote{Punitive Damages in Arbitration, supra.}

An arbitrator may decline to award attorney’s fees if the party upon whom such fees are to be imposed successfully rebuts the presumption that reasonable fees should be awarded. For instance, if the arbitrator determines that the punitive damages awarded are adequate both to compensate the Claimant and for his attorney’s fees and fulfill the punitive and deterrent purpose of the exemplary damages awarded, they need not be separately awarded.

Generally, statutes in each jurisdiction and some federal statutes provide that a person may be entitled to reasonable attorney’s fees for certain types of claims, such as a tenant’s recovery of his security deposit, in a replevin action, class actions, in an indemnity agreement, breach of a franchise agreement, a salesman’s recovery of his commissioned sales, and a party’s frivolous conduct. Attorney’s fees may also be authorized by the jurisdiction’s rules of civil procedure.

\textbf{VII. LOGISTICS OF BOTH PARTIES REQUESTING ATTORNEY’S FEES}

When the parties have filed a claim and a counterclaim and each is successful for a portion of their claim or counterclaim and their agreement authorizes the award of attorney’s fees, the arbitrator must decide how to obtain sufficient information to make an appropriate award. Once the successful claims and counterclaims are identified, the arbitrator should request that the parties submit briefs providing evidence of the allocation of time spent on those successful claims or counterclaims.

\textbf{VIII. INTERIM AND FINAL AWARDS}

In the event attorney’s fees are to be awarded, the arbitrator or panel, may decide to issue an interim award at the conclusion of the evidentiary hearing, dealing exclusively with the merits of the arbitration. This interim award establishes which claims or counterclaims are successful so that attorney’s fees may be awarded on them. Once an interim award is issued, the arbitrator(s) should set a briefing schedule to receive evidence of attorney’s fees related to the successful claim(s). The arbitrator(s) would then issue a final award and make reference to the interim award.

Should the arbitrator or panel decide not to issue an interim award, at the conclusion of the evidentiary hearing, the arbitrator(s) should set an attorney’s fees briefing schedule. The parties must submit evidence to support an award of attorney’s fees. Since the parties do not know whether all their claims will be successful, they will have to separate out the fees chargeable against each claim. The arbitrator(s) then would
issue a final award which would include the merits of the case, as well as, an award of attorney’s fees. The problem with this approach is that the losing party will have expended considerable time and effort preparing the evidence necessary to an award of attorney’s fees, when he ultimately is not entitled to them.

Arbitration awards that shift attorney’s fees to the prevailing party or are awarded as a sanction for bad faith conduct are often challenged in court with a motion to vacate or modify the award. The issue raised is whether the award exceeds the authority given to the arbitrator or whether the amount of the award is unreasonable. In other words is the award grossly excessive?  

IX. POST JUDGMENT INTEREST

Post judgment interest may be awarded on attorney’s fees upon confirmation of the award. However, does the particular case put into issue whether the post judgment interest should be paid at a federal rate or a state rate? If so, counsel must provide the court with information on which rate applies.

_Nissho-Iwai Co. v. Occidental Crude Sales, Inc.,_ 848 F.2d 613 (5th Cir.1988) provides that: Post judgment interest has a substantive characteristic because the applicable rate of interest and rules of accrual can increase or decrease the amount of a monetary award. But post judgment interest is better characterized as procedural because it confers no right in and of itself. Rather, it merely follows and operates on the substance of determined rights.

_Pacific Peiju Wu Restaurant Partners v. Haramis_, Case Nos. A123117, A123918, & A124430 (1st Dist., Div. 5 Apr. 2, 2010) (unpublished), involved attorney’s fee judgment for $1,798,105 (out of a requested $2.5 million). This was appealed and the appellate court held the literal terms of the judgment called for the fees and costs to be added to the judgment pursuant to a costs memorandum, with interest running from the date of entry of judgment.

_Cheryl Nardone v. Patrick Motor Sales, Inc., et al, _46 Mass. App. Ct. 452 (1999), held: Post judgment interest on an award of trial attorney's fees and post judgment interest on punitive damages were properly assessed in a G. L. C. 151B discrimination case. The case further held: A Superior Court judge had no authority to award appellate attorney's fees and costs in circumstances in which the prevailing party had not requested such fees in the appellate court.

The case of _Zimmerman v. Harrisburg Fudd I, L.P._, clarifies the standard for the award of post-judgment interest and attorneys’ fees under the Pennsylvania Contractor and Subcontractor Payment Act (CASPA). In this case, the Superior Court held that a contractor who obtained a judgment against an owner under CASPA may recover post-judgment interest and penalties, as well as attorney’s fees and expenses incurred to collect the money owed.

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X. GLOSSARY

Interim Award: A partial award, is not an interim award. Rather it is an award of only part of the claims or cross claims which are brought, or a determination of only certain issues between the parties. Importantly, this leaves it open to the parties to either resolve or to continue to arbitrate (or litigate) the remaining issues.

The interim award, AAA Commercial Rule 43 (b), may be an award on the merits with other matters, such as attorney’s fees to be decided or it may be an award on liability with the award on damages to follow. It anticipates being followed by a Final Award which disposes of the arbitration.

Final Award: The final award, AAA Commercial Rule 43 (c), is similar to a judgment in the courts. It concludes all matters involved in the arbitration. It is the award upon which the winning party may seek court confirmation of the award and then execute on it.

Punitive Damages: Punitive damages are exemplary damages that are not considered compensatory, but rather penal in nature. When there is a showing of malice, conduct which is specifically intended by the defendant to cause tangible or intangible injury to plaintiff, punitive damages may be awarded.

Bad Faith: Bad faith is the antithesis of good faith, which is the observance of reasonable standards of fair dealing. It is not mistaken judgment. It includes a fraudulent deception of another person or the intentional or willful refusal to perform some duty, order or contract. It is present when the rights of someone else are intentionally or maliciously infringed upon. The existence of bad faith can negatively impact any claims alleged by the offender. Further, punitive damages, attorney’s fees, or both, may be awarded to a party who must defend against bad faith conduct.

Prevailing Party: The prevailing party is considered to be the party that won the arbitration. However, this is not always clear and consideration of who is the prevailing party may spark further dispute. It is essential that the arbitrator identify the prevailing party. Even though the claimant has failed to conclusively support the claims made, a determination must be made by comparing the outcome against the claims made to establish that he is or he is not the prevailing party. If both parties have been successful to some extent, this becomes even more important. Courts generally will not scrutinize an arbitrator’s conclusion that one party has prevailed.38

Offset: An offset, sometimes called a setoff, is a deduction one party can make against an award issued to another party which reduces the award to the other party. Such an offset is usually based upon a counterclaim against the party making the original claim. As an example: Respondent files a counterclaim against claimant for $6,000 for

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work done and not paid for. Claimant’s demand has three separate claims, only one of which is successful. The successful claim is for breach of contract and claimant is awarded $60,000 on that claim for respondent’s failure to install certain mechanicals. The other two claims, one for punitive damages and the other for attorney’s fees, are denied. Respondent is awarded $6,000 on its counterclaim. Thus the counterclaim should be set off against the claim so that respondent is indebted to claimant for $54,000 and not $60,000.

XI. REFERENCES

Sample Contract Provisions

Below are several contract provisions that may aid in drafting a provision concerning attorney’s fees.

1. The "prevailing party," whether on a claim or counterclaim, shall be entitled to recovery of attorney's fees.

2. If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney’s fees to be paid by losing party as fixed by the Court. *Intercontinental Group Partnership v. KP Home Lonestar L.P.*, 295 SW3rd 650 (Tex. 2009).

3. The arbitrator(s) may award costs and fees to the prevailing party in the event a dispute is arbitrated.

4. At the arbitrator’s discretion, legal costs may be allocated between the parties. However, the costs of arbitration shall be borne by the unsuccessful party.

Statutes and Rules

Below are listed some statutes and rules that may be helpful in making a request for attorney’s fees. This is just a small sampling.

Laws giving a court discretion in determining who is a prevailing party: See, 42 U.S.C. § 2000-5(k); 42 U.S.C. § 3613(c)(2)

Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) provides: "In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney’s fees and costs of the action to either party." 29 U.S.C. § 1132(g)(1).

Fed. R. 11: Frivolous litigation has been defined as litigation filed where there is a complete absence of a legal or factual justiciable issue. This requires a showing that the action was devoid of merit, both on the facts and the law, as to be completely
unsustainable. There are other sanction provisions, such as Federal Rule of Civil Procedure 37 (regarding discovery) and Federal Rule of Civil Procedure 56(g) (regarding summary judgment affidavits made in bad faith). It is important that there be judicial findings, supported by the record that the claimant has engaged in fraud, misrepresentation, or other egregious misconduct.

17 U.S.C. § 505. Remedies for infringement: Costs and attorney's fees, subsection 5 reads: In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party… Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

35 U.S.C. § 287(b) reads: “The court shall award, to a prevailing party, fees and other expenses incurred by that party in connection with that proceeding, unless the court finds that the position of the nonprevailing party or parties was substantially justified or that special circumstances make an award unjust.”

Cal. Civ. Code § 1717(b)(1) defines a prevailing party in a contract as “the party who recovered a greater relief in the action”; Cal. Civ. Proc. Code 1032(a)(4) defines prevailing party” as the “party with the highest net monetary recovery.”

26 U.S.C. § 7430(c)(4)(A)(i)(II) defines the prevailing party as one who “has substantially prevailed with respect to the significant issue or set of issues presented”; In Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res., 532 U.S. 598 (2001), the Court applies several definitions for the “prevailing party” including “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded " which is quoted from Black’s Law Dictionary 1145 (7th ed. 1999).

Cases

Listed below are several cases that are not included in the text.

1. The U.S. Supreme Court heard a Fourth Circuit decision involving the payment of attorney’s fees in an ERISA long term disability case. The case is Hardt v. Reliance Standard Life Insurance, 130 S. Ct. 2149 (2010). The majority opinion held:

“In most lawsuits seeking relief under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq., "a reasonable attorney's fee and costs" are available "to either party" at the court's "discretion." § 1132(g)(1). The Court of Appeals for the Fourth Circuit has interpreted § 1132(g)(1) to require that a fee claimant be a "prevailing party" before he may seek a fees award. We reject this interpretation as contrary to § 1132(g)(1)'s plain text. We hold instead that a court "in its discretion" may award fees and costs "to either party," ibid., as long as the fee claimant has achieved "some degree of success on
the merits," Ruckelshaus v. Sierra Club, 463 U.S. 680, 694, 103 St. Ct. 3274, 77 L. Ed.2d 938 (1983)."

2. In the case of Astrue v. Ratliff, 130 S. Ct. 2521 (2010), Justice Thomas delivered the opinion of the Court.

“Section 204(d) of the Equal Access to Justice Act (EAJA), codified in 28 U. S. C. §2412(d), provides in pertinent part that “a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified.” We consider whether an award of “fees and other expenses” to a “prevailing party” under §2412(d) is payable to the litigant or to his attorney. We hold that a §2412(d) fees award is payable to the litigant and is therefore subject to a Government offset to satisfy a preexisting debt that the litigant owes the United States.***”

3. In the case of Corona v Amherst Partners (Corona I), 107 Cal.App.4th 701 (2003), Corona v. Amherst Partners, No. D040084 (Cal. 4th App. Dist., 4/1/03. Corona I provided that:

"[A] court must award costs in a judicial proceeding to confirm, correct, or vacate an arbitration award”].

Corona sought fees incurred in arbitration from the court without first seeking them from the arbitrator.

XII. SUMMARY

An arbitration award that shifts attorney’s fees, sanctions for bad faith, or grants punitive damages is likely to be challenged. The challenge will be directed first at the authority to award such relief and then at the amount of the award. These awards may be reversed on appeal when they are contrary to the parties’ agreement, when they contradict controlling substantive law or when the compensatory award does not justify the amount of attorney’s fees. The exposure to fee shifting or extra-contractual damages may be limited when drafting the arbitration provision. And even if this precaution may have been taken, should a party join in a mutual request for attorney’s fees, it has given the arbitrator the authority to decide attorney’s fees and may not be permitted to withdraw such request. It has waived its right to claim that fee-shifting is contractually precluded.39

39 An Arbitration Panel’s Authority to Award Attorney’s Fees, Interest and Punitive Damages, supra., Conclusion, p. 20.
Click here to go to the Commercial Arbitration Rules

Click here to go to the Construction Arbitration Rules

Click here to go to the Employment Arbitration Rules

Click here to go to the Labor Arbitration Rules