JUST RESOLUTIONS NEWSLETTER

American Bar Association • Dispute Resolution Section

Improving Attorneys' Fees and Interest Awards

By Robert E. Bartkus

Looking back at the drafting of hundreds of arbitration awards over the last (almost) 40 years, one recurring problem stands out: dealing with requests for attorneys' fees and interest, especially in complex, multi-claim, and multi-party matters. Introducing a few simple concepts at the outset of the arbitration can greatly improve the process for the arbitrators and the parties. Remember that billing in anticipation of an indemnification claim or a fee-shifting statute or clause is not the same as billing for a client, nor is the determination of what might be "reasonable." After all, at the outset of a matter, a client may specify how it wants the bills to be presented, whether for its own convenience or preference or because it uses billing audit processes, or the client may request changes in format once it receives your initial invoice.

The legal standard for determining whether a prevailing party has a contractual, statutory, or other right to fees or interest is not the topic of this article. Those issues often depend upon a choice of law analysis and the contract or dispute at hand. For example, there is a legitimate question of whether the contract "law" should apply or the arbitration clause "law." Parties also may find themselves liable for the other's fees by reason of a rule of the arbitration forum, such as American Arbitration Association Commercial Rule R-47(d)(ii), which permits an arbitrator to award fees – even in the absence of other authority – "if all parties have requested such an award" in the filed demand and answer, initial court proceedings, Initial Pre-hearing Conference, or other point. Some states may make attorneys' fees mandatory in certain commercial cases.[1] These issues can be briefed for each case.

Nor does this article concern when the factual basis for these components for an award should be presented to the arbitrators. The parties and arbitrators can discuss the most practical procedure and timing applicable for each case, including how to calculate the "lodestar" and if a premium is warranted. In some instances, it may be best to issue a partial award on liability and damages, which may or may not be subject to the applicable arbitration statute's time limits for confirmation or challenge, depending on the applicable law and terms of the "award."[2] Similarly, parties may agree to introduce evidence regarding the appropriate hourly rates and allocation of the lawyers working on various matters before closing the principal hearing, or they may wait until the partial award is issued, and then conduct a separate evidentiary hearing.

The topic of this article is much more practical: How do the parties optimize the evidence the arbitrators must analyze in order to calculate the amount of the fees or interest to be awarded?

Here are eleven practical suggestions:

- Under Rule R-47(d) of the AAA Commercial Rules, the fact that both parties have requested fees may be a basis for the arbitrator to make such an award, even absent any other contractual or statutory basis. However, as part of the list of issues the parties should discuss at their "meet and confer" before the Preliminary Pre-Hearing Conference, as identified in the P-2 Checklist of the AAA Commercial Arbitration Rules and Rule 16 of the JAMS Comprehensive Arbitration Rules and Procedures, the arbitrator should add whether the parties are seeking an award of attorneys' fees or interest and the basis for that assertion.

- Rule 1.5(a) of the Rules of Professional Conduct (Fees) lists particular factors that must be addressed in determining whether a fee is reasonable, whether billed directly to a client or presented in a fee application. These factors must be considered at the outset of any case whenever a fee application may be made and addressed in the application. Generally, counsel seeking fees at the end of the case must, from the beginning, maintain contemporary time records that take these factors into account.

- When the application for attorneys' fees is raised at the Preliminary Conference, the arbitrator may discuss the practical problems in calculating that portion of the eventual award. The parties may address the arbitrator's preferences, if any.

- During that discussion, the arbitrator may suggest that "block" billing can create problems. Even though a client may permit attorneys to group a day's time in a single entry, without a breakdown of the time for each task, a more detailed breakdown should be used whenever fee shifting is anticipated – just as when a client or its insurance carrier may require greater detail for purposes of its auditing process.

- As suggested in "5 Billing Tips for Young Lawyers: Making the Most of Your Time," ABA Litigation Section, Commercial Section, *Practice Points* (Oct. 27, 2017), "be descriptive." The description of the task should be sufficiently detailed so that an arbitrator or adversary may intelligently consider whether the amount of time, or the "service," is appropriate. For example, "defend deposition of xxx" may be specific enough, but "research regarding xxx" may be particularized to indicate the claim or issue without revealing privileged information or work product. Billing attorneys should be reminded that redacting portions of entries may be required, so the descriptions should be drafted to make that job as painless as possible. Time for meetings should always indicate the

types of meeting (Zoom, phone or in-person, etc.), the individuals present and the general subject — not merely "re X v. Y." It is not unheard of for parties to object to large meetings on overly-general topics. Carefully drafted entries can either avoid this problem or make it easier to exclude such entries from a request, either initially or during the inevitable meet and confer regarding objections to fee requests.

- Also recommended in "5 Billing Tips for Young Lawyers: Making the Most of Your Time" is to proofread entries before hitting "save." When submitted, the entries should be correct, as sloppy entries reduce the credibility of the submission and are difficult to correct at the final stage.

- As part of its regular billing practice for fee-shifting cases, the firm should use or adopt standard billing task categories such as the ABA Uniform Task-Based Management Task Code Set and Litigation Code Definitions, which the parties can stipulate to, related to the issues in the case.[3]

- The list of tasks adopted should always relate to the specific claims or issues in the case for which fees will be sought. If a party prevails on some but not all issues, then a thoughtful claim-by-claim breakdown will avoid an erroneous allocation by the arbitrator.

- Whatever rules the billing firm adopts, it should consider the detail *it* would demand if it were reviewing invoices when being asked to pay or reimburse fees to the other party.

- Since an arbitrator often will require parties to submit invoices sent to a client, the invoices should contain a summary of the time and dollars for each attorney and task, and each task (separately). This detail often is required in a fee application in court under RPC 1.5(a), too, so a little advance planning in constructing a monthly invoice format (generated by the computer based on inserted codes) can avoid confusion later on. It also may help in justifying why a specific attorney, or multiple attorneys, were assigned to given tasks, whether or not the client has agreed to pay for that assignment/allocation.

- These concepts can be reintroduced for discussion at the Final Pre-hearing Conference, including whether the arbitrator will require evidence of whether the client has agreed to the requested hourly rates and paid the fees being requested.

Each of these suggestions may, by itself, appear to be overly picky; however, parties that do not consider the issues that can arise with a fee application, until the end of the case, will find it more difficult to reconstruct a proper evidentiary basis for the application if they have not introduced and used good practices from the outset. While it is true that "fees on fees" may be reimbursable in a given case, an opposing party may object to time and amounts that could have been avoided by adopting good practices – and the arbitrator may agree. Disputes about whether time is reimbursable can result in their own mini-litigation, for example in analyzing bulk billing time entries, and may not be compensated.

As for pre-award or pre-judgment interest, parties should remember that under most (but not all) states' laws, such awards are discretionary. Any application should include the applicable law and rate to be applied and do the calculation for the arbitrator. When different interest rates are applicable to different invoices or loans or time periods – remember that rates often change each year – the arbitrator should not be expected to conduct that research independently. Even if the *amount* of a damages award is not known in advance, the parties should be able to present the calculation methodology the arbitrator should use, including a daily rate, if that is appropriate.

Robert E. Bartkus is of counsel to McCusker, Anselmi, Rosen & Carvelli, P.C. in New York City and Florham Park, N.J., where he now concentrates his practice on arbitrating commercial and other business disputes. He is co-author, with Hon. William A. Dreier (P.J.A.D.)(ret.), of New Jersey Arbitration Handbook (2021 ed.).

[1] *See, e.g.*, Texas Civil Practice and Remedies Code Section 38.00.

[2] *See, e..g., Mitchell v. Franchise Servs. of N. Am., Inc.,* No. 18-723, 2019 U.S. Dist. LEXIS 200248 (S.D. Miss. Nov. 19, 2019) (describing conflict among the circuits); Robert E. Bartkus, "A Multiplicity of Procedures for Enforcing or Challenging an Award," ABA Dispute Resolution Section Newsletter, *Just Resolutions* (April 2020).

[3] *See* Litigation Code Set, American Bar Association, https://www.americanbar.org/groups/litigation/resources/uniform_task_based_management_system/litigation_code_set/ (last visited Mar. 23, 2021). *See also* Litigation Code Definitions, American Bar Association (2020), https://www.americanbar.org/groups/litigation/resources/uniform_task_based_management_system/litigation_code_definitions/ (last visited Mar. 23, 2021).