DISCOVERY REFRESHER COURSE & SOME FRESH IDEAS: TIPS, TIMELINES & TABLES

Jenice L. Malecki, Esq.,[1]

I am among many PIABA members have sat on a number of panels as arbitrator and/or as a chairperson;[2] litigated as a claimant's counsel feeling on different occasions that I did or did not receive documents I needed; and, among the few who have even been the defense attorney, worried about a knowledgeable claimant's attorney with a good case or, on the other hand, wondering whether an adversary had a clue what they were doing. We learn by watching and doing, the right moves as well as the mistakes.

Discovery is an opportunity to plead your case and exhibit your knowledge of the securities law, show your skills and gain credibility: first to your adversary, then to the arbitrators. Although there are some cases that do not require a motion to compel, we all know too well that it is the norm, not the exception, to be embroiled in discovery disputes. As one would tell a witness before even approaching the NASD or NYSE building, the arbitrators assess your credibility from the first time they see or hear you until the minute you leave their presence. The same holds true for the conduct of attorneys. It goes without saying that every attorney has their own style that works for them, but we will also address practical tips so that you can exhibit your strengths while not undermining your own case or credibility.

---

[1] Thank you to Julie K. Mathew, Esq., my associate, for her contributions to this article.

[2] If you are not an arbitrator, it is time to become one!

BACKGROUND: DISCOVERY IN GENERAL

The standard articulated in the NASD Arbitrator's Manual (available on-line at www.NASD.com) is that discovery requests must be specific and relate to the matter in controversy. Arbitration is designed to allow customers and broker-dealers to resolve disputes efficiently and cost effectively, in contrast to court proceedings. The arbitration process is influenced by the panel, parties and the arbitration forum's code, which has specific time limitations. Despite improvements in the process of arbitration, several aspects of arbitration remain unfavorable to protecting investors. In particular, the discovery abuses prevalent in the arbitration forum set up road blocks for customers undermining the timely and complete production of documents and information presumptively produced in similar actions, denying them an equitable and expeditious hearing.

While recently there have been many highly publicized examples of sanctions for discovery abuses by NASD Regulation: "*NASD Fines Citigroup, Merrill Lynch and Morgan Stanley a Total of $750,000 For Failing to Comply with Discovery Obligations in Arbitrations*," NASD Press Release, July 19, 2004; the NASD Arbitration Department's actual approach to training, monitoring and requiring sanctions for discovery abuses is weak.

In November 2003, NASD Regulation issued Notice to Members ("NTM") 03-70 to: (1) remind members of their duty to cooperate in arbitration discovery process; and (2) notify them that NASD Dispute Resolution will continue to monitor compliance with its discovery rules, and will refer perceived abuses to NASD Regulatory Policy and Oversight for disciplinary review. The NTM reiterates that the NASD Discovery Guide and Document Productions Lists specify which documents are presumed to be discoverable in customer disputes. Further, it states that absent a written objection, or an agreement by the parties to the contrary, parties must exchange documents listed on applicable Document Production Lists within the specified time frames.

NASD Arbitration in reaction to NASD Regulation's NTM 03-70, rather than pro-actively, has also created an online course called *Discover, Abuse & Sanctions,* part of its comprehensive Arbitrator Training Program to further educate and train its roster of arbitrators. While it is too soon to determine whether this course will help, it clearly will not solve many of the problems, unless and until the activities of the arbitrators are reviewed, monitored and, at least minimal regulatory complaint filings or sanctions are mandatory.

Although these are some positive developments in the discovery process, there is widespread inconsistency in discovery orders and their enforcement, only encouraging parties to violate discovery requirements and test the panel's limits and patience. There is little to no accountability for arbitrators to act fairly, impartially and ethically in the decisions they make, short of filing costly, time consuming and difficult motions to vacate in court.

Parties rely upon limited biographical information, unreasoned decisions and the vague recollections of their colleagues, if that, to determine whether an arbitrator is worthy to sit on your client's case. Even then, your ability to have input into the ultimate panel is limited, when striking can create entirely new pools being appointed.

Arbitrators are timid in sanctioning parties and attorneys. While arbitrators should reserve sanctions only for the appropriate case, failure to issue sanctions, which is the result the majority of the time, results in arbitrations being swarmed with pre-hearing conferences just to resolve discovery disputes making it expensive and time consuming, contrary to arbitration's purpose.

TIPS, TIMELINES & TABLES[3]

Given all of the above, you need to be proactive and smart. I want to lay out my top five recommendations in discovery (in true New York, Letterman Style):

PROACTIVE & SMART TIP NO. 5:
START DISCOVERY ON THE FIRST DAY YOU ARE ENTITLED & USE SUBPOENAS OFFENSIVELY:

The timely exchange of documents and information between parties to arbitrations is vital to the efficient, cost-effective resolution of disputes. As such, at the earliest opportunity, Claimant should begin discovery by serving discovery demands. Pursuant to NASD Code of Arbitration Procedure Rule 10321(b) any party may serve a written request for information or documents upon another party 45 calendar days from the service of the Statement of Claim or upon the filing of the Answer. The NYSE only makes you wait 20 calendar days. Unless a greater time is allowed by the requesting party, discovery demands shall be satisfied or objected to within 30 calendar days from the date of service. As such, counsel for Claimant should serve discovery demands 45 days from the service of the Statement of Claim, even though Respondents have yet to file an Answer.

START "DAY ONE": SUBPOENAS: Despite the restrictions on filing a discovery request on your opponent, from the very day of filing of the statement of claim and getting a case number, you have the right to issue subpoenas. Respondents hate when you get a jump on anything. They want to believe that you are a lazy or mill-like claimants attorney, hoping for a settlement, and that they will be able to call the shots on what documents you get and do not get in arbitration. Do not fall into that trap.

Like it or not, subpoenas are more and more becoming a reality in arbitration. Most claimants' counsel try to resist them, get hot and bothered, but have not experienced the virtues of one important thing: you can use them to your advantage.[4]

[3] See also the Timeline Flow Chart and Example Motion to Compel Table following this article.
[4] This is a controversial PIABA position.

TAKE CONTROL. Filing requests and subpoenas to third parties and entities, such as the state securities bureau, clearing firms, other brokers, other firms with accounts, former registered brokers on the account or assistants, NASD Regulation for documents about the brokerage firm and the phone company (they will respond to an NASD subpoena), for example, before the respondents have answered will make them take notice that you are ready, willing and able. There is also a chance that any motion to quash will be delayed, as they have not yet retained counsel.

SEND OUT NASD NOTICE TO MEMBERS THE FIRST DAY YOU CAN:

In October 1999, the NASD made available a Discovery Guide and Document Production Lists which supplements the section in the Securities Industry Conference on Arbitration (SICA) publication entitled *The Arbitrator's Manual,* and captioned "Prehearing Conference," for use in customer cases. The NASD Discovery Guide is also contained in Exhibit I to the NASD Notice to Members 99-90 and was effective as of September 2, 1999. The Discovery Guide and Document Production List provide a foundation for a system of automatic discovery for both parties related to the type of claim presented. The Discovery Guide does not preclude other relevant requests for other discovery necessary to the resolution of the issues in dispute and you can tailor an initial request. Even if you are swamped and barely have time to breath, you have time to send a letter, enclosing Notice to Members 99-90 with a cover letter indicating that the guideline is your first request.

IDEALLY, however, you should draft your first discovery request when you draft the statement of claim, ready to be served at the earliest opportunity, not only incorporating Notice to Members 99-90, but also specifying specific documents unique to your case that are required. Do not forget to ask for basic information as well: the identities and CRD records for supervisors, managers, compliance personnel and brokers' assistants and brokers' work partners.

Also, use your client as a resource, do not forget about them in this process. They may have recollections about documents or recall conversations about the brokers' habits and predilections that can really help your case. Have your client review your requests and make suggestions.

Taking an aggressive approach to the case and timeliness of your actions tells your opponent that you are adequately staffed for your caseload, know what you are doing, are able, believe in your case and will likely be well prepared for a hearing when the time comes.

PROACTIVE & SMART TIP NO. 4:
ASK FOR WHAT YOU NEED & TAKE THE HIGH ROAD

ASK FOR WHAT YOU NEED:

By all means, never forgo potentially helpful documents to be likeable, but by the same token, do not ask for what is completely irrelevant to your case. There is always a potential needle to find and certainly the more documents you have may help you connect more dots. However, if there is no question about who recommended the trade or if it was unauthorized, do not ask for every order ticket unless you need it for a specific reason, supervision issues, i.e., who approved the trade, etc.

INTRODUCE YOURSELF:

While likely the first time you will speak to your adversary is when they call you for an extension, if they do not call, call them after you send out the first document request and try to establish a professional dialogue. There is no need to make the case a personal battle or to assume that your adversary will be unreasonable.

PROACTIVE & SMART TIP NO. 3:
REVIEW THEIR RESPONSES THOROUGHLY & TRY TO MEANINGFULLY WORK IT OUT

A comprehensive review of the Respondent's initial responses and objections must be made to challenge evasive responses and/or objections. Follow up with calls and deficiency letters to seek compliance should be issued. These letters will demonstrate Claimant's efforts to cooperate with voluntary exchange of discovery and will be part of the record for the motion to compel, if necessary. Further, your initial review will likely disclose additional documents and potential witnesses, about which you need to send more requests.

BE ABLE TO ARTICULATE WHY YOU NEED THE DOCUMENT:

Whatever you are asking for, you should know why you are asking for it and be ready immediately with retorts to the defense arguments it is unnecessary. That does not mean that you simply send a letter saying "you did not send me X and your objection is invalid." You need to have a meaningful conversation with your adversary about why you need it, then confirm in writing in detail. This helps you in many ways. You get to know whether they are knowledgeable and you get to show your adversary how knowledgeable you are. You create a continuing dialogue. Defense attorneys are more willing to settle with lawyers they believe know what they were doing (and, who naturally, should have a good case).

Additionally, if Respondent states that there are no responsive documents or information, Claimant may request an affirmation from the appropriate person in the brokerage firm who has personal knowledge (i.e. the person who has conducted a physical search) must: 1) state in writing that he/she conducted a good faith search for the requested information or documents; 2) describe the extent of the search; and 3) state that, based on the search, no such information or documents exist. The affirmation is key, as you can probe people about the documents at the hearing, documents they are likely violating a rule by not maintaining, offering you an opportunity to ask for an adverse inference.

Again, follow up with telephone calls and letters regarding non-compliance, giving your adversary a fair amount of time to get back to you, so you do not give them anything to work with in your motion to compel regarding your conduct.

DON'T BE AFRAID OF MULTIPLE REQUESTS:
Also, as stated above, see if the Answer or other documents produced lead you to other relevant documents. Request them if you did not already do so. You are not limited to one request.

Although, Rule 10321(a) of the NASD Code of Arbitration Procedure provides that "the parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration"; this requirement is seldom followed. Claimant must be attentive and determined to compel complete responses from the Respondent and prevent Respondent from prolonging arbitration by engaging in a protracted discovery process.

PROACTIVE & SMART TIP NO. 2:
GENERALLY, ARBITRATORS ARE BUSY PEOPLE: ONLY FIGHT FOR WHAT'S NECESSARY, BE BRIEF & ORGANIZED

Discovery disputes have become more prevalent amongst parties in arbitration and if they cannot be resolved, the early assistance of the arbitrators is essential. Most discovery disputes are resolved either on written submission to the arbitrators and/or at a pre-hearing conference.

An arbitrator appointed to preside at a prehearing conference is authorized by the Uniform Code to act at that time on behalf of the entire panel in issuing subpoenas, directing appearances, ordering the production of documents and information, setting deadlines and issuing any other order that may serve to expedite the process and permit any party to develop the case fully.

Arbitrators are technically, "volunteers."[5] They often have their own lives, careers, families and problems. The last things arbitrators want to sift through are a long and laborious motion to compel. Even less appealing to an arbitrator is the angry and accusatory attorney.

Passion about your case can be well received and helpful, pointed fingers and accusations are never well received. If you are going to accuse your adversary of something, it better be well documented. Since arbitrators hate bickering, as it only adds to the stress they are involved with in their lives, the real danger with getting angry and accusatory too often is that you, as the attorney, will lose credibility. If you lose credibility, you easily can lose their attention and believe in what you say the law is that the arbitrators should follow, as well as can spill over to your client. Vice versa, if you show clear thinking, a reasonable attitude and good reason skills, your credibility will help your client.

CAREFULLY DRAFT YOUR MOTION TO COMPEL:[6]

Given that many arbitrators are usually engaged in other occupations while serving on the panel, it may be beneficial to list disputed discovery requests in a table form. A sample table is attached hereto.

The table may be an exhibit to a letter summarizing your case and addressing how you have tried to work it out. Letters should have short paragraphs and not blocks of text. Preferably, the table will also be short, as you will have worked out and narrowed the disputed items. Likewise, at the pre-hearing stage and in conference calls, you again get to plead your case and earn credibility with the panel, as well as gauge their responsiveness to substantive arguments and facts.

---

[5] Personally, I will try to avoid at all costs having "professional arbitrators" that sit on cases to earn a living or supplement retirement.

[6] Note: By this time, you should have long-complied with your obligations, voluntarily sending documents pursuant to Notice to Members 99-90 and any other non-objectionable requests. You do not want to give your adversary any room to raise objections to your conduct.

PROACTIVE & SMART TIP NO. 1:
CAREFULLY POSITION YOUR CASE TO EXPOSE RESPONDENT TO SANCTIONS FOR NON-COMPLIANCE

Subsequent to the issuance of an order for the production of documents or information, the arbitrators may be advised that the party to which the order was directed has not complied with its terms. Pursuant to the Arbitrator's Manual, arbitrators have wide discretion in addressing such noncompliance. Position your case so you can take the "high road" and documented your reasonable follow up and the many chances you have given your adversary to comply, through exhibits of letters, as well as through exhibits showing the documents exist in manuals and the rules that require your adversary to maintain the same.

The arbitrators may draw an adverse inference against any party who did not comply with the order; assess adjournment fees; forum fees; or other costs and expenses, including attorneys' fees, caused by noncompliance; initiate a disciplinary referral in the instance of noncompliance by a member firm or associated person of a member firm; or take other appropriate action to expedite the proceedings or assist any party to develop fully its case. In extraordinary cases the arbitrators may dismiss a claim, defense, or proceedings with prejudice as a sanction for willful or intentional failure to comply with an order of the arbitrators, if lesser sanctions have proven ineffective.

Arbitrators may not be aware of the extent of their power to sanction non-compliance or may be reluctant to exercise that authority because of concern that they will be perceived as partial toward one party over another.

As mentioned above, the NASD Press Release dated July 19, 2004, illustrates that the NASD is willing to censure and fine securities firms for failing to comply with their discovery obligation and as part of the settlement, each firm has agreed to establish a written procedure requiring review, at the management level of the firm, of any instance where an arbitration panel has sanctioned the firm for discovery violations and of instances where the firm is required to produce documents in response to a motion to compel filed in an arbitration. These procedural documents could themselves be useful in a sanction motion and it should be suggested to the panel that they should review those procedures to determine if they have been followed in deciding sanction issues.

CONCLUSION

No one approach can be right in every case. The style of a particular attorney plays a role. Moreover, each case can take a life and character of its own. The above is offered as a model practice in your typical case. Arbitration is still an easily manipulated game. Putting your own typical procedures in place can help you gain control of your case and keep it through the hearing, while attempting to foster a professional and strong reputation.

Jenice L. Malecki, Esq.