WHAT ARBITRATORS WANT TO HEAR AND SEE

A practitioner's greatest task is to simplify the issues to such a degree and to present it in such an assured and articulate fashion that you are able to convince three strangers that your cause is just and that they should award what your client wants. The reality in securities arbitration is that all parties - customers, brokers and firms - have their own burdens of proof. Fear that the arbitration panel will "get it wrong" and decide for your adversary compels practitioners to keep asking this question throughout the case: What do they expect of me and what do they want to hear from my clients?

- Demeanor and Professionalism - FINRA arbitrators do not get paid enough to put up with bad behavior. For that matter, neither do arbitrators at the American Arbitration Association ("AAA"). Build a relationship with them during your case, since they are looking for signs of integrity, accuracy, precision and brevity. Be forthcoming and prepared, so that your presentation reveals the facts the arbitrators need to know. Strike a balance between the formality of a legal proceeding and the more informal setting of arbitration. Take your cue from the arbitrators, who set the tone for the arbitration.
- Pleadings - State clearly what you want from the arbitrators. You don't want them to calculate anything, whether you represent the claimant-customer or whether, as a defense attorney, you are arguing about the customer's failure to mitigate damages in a timely manner. The pleadings are not evidence, so be prepared to introduce witnesses and documents at the hearing to establish each of the claims or defenses raised in the pleadings. The pleadings are your opportunity to get their attention. Tell them a logically presented story. Any time there are facts which are not in dispute, identify them for the arbitrators. Use headings to help the arbitrators see your major points and to organize your presentation.

  It is easy for experienced arbitrators to pick up on boilerplate pleadings. That will generally stop them from reading further. Many practitioners are advocates of letter formatted pleadings. In this format, practitioners summarize their client's position at the outset, explain how the relationship between the parties was established and then, in a customer's Statement of Claim, explain how that trust relationship was allegedly breached. In the process, the pleadings tell a fact-driven story so the arbitrators can follow what happened. Don't exaggerate or overstate claims or defenses. It will give your adversary an opportunity to shift the focus from your strong points to your weak ones.
  Send drafts of your pleadings to your client and, where appropriate, to your expert witness. Since your pleadings are the roadmap for the presentation of your case at the hearing, instill in your clients and experts the fact that their testimony is expected to be consistent with the assertions and defenses contained in those pleadings.
  Discovery - The basic test of disclosure, is whether the information sought is 'material and necessary' to claims or defenses asserted in the action, to issues raised in the pleadings. Broad fishing expeditions are discouraged or disallowed by arbitrators. To determine the fairness and reasonableness of contested

discovery issues (which are usually decided on the papers by the Chair alone), these factors are often considered:
Degree of intrusion in searching for documents requested.
Jurisdiction of the Chair to order discovery in case of non-parties.
Relevance of documents requested.
Option to limit the time frame or otherwise restrict the scope of the request.
Arbitrators appreciate seeing how the attorneys attempted to resolve outstanding discovery disputes on their own and that they did not wait until shortly before the hearings to seek the Panel's assistance. It is my observation that arbitrators will order the production of any document that is related to the customer, to the broker, to the investment product and to the transactions at issue. That being the case, practitioners are well-served to resolve those requests before approaching the Panel.

- Opening Statements - Arbitrators want to hear a narrative that puts the parties in the context of their dispute. After all, the dispute is but a brief moment in time in their otherwise busy and often accomplished lives. Keep this in mind when giving your Opening Statements to three arbitrators who have already read the pleadings, who have taken part in the Initial Prehearing Conference, and, who may have already dealt with the attorneys on discovery issues.

  It is my experience that Opening Statements are listened to a lot closer than Summations. Your primary goal is to remind the arbitrators what you wrote in your Statement of Claim or Answer and, if you are the customer's attorney, deal at that point with material points of disagreement raised in the Answer by summarizing what the arbitrators will be hearing.
  Point out the key documents, the witnesses who will appear and what their testimony will show. Explain where the parties differ on the issues or the facts so that the arbitrators can see, at the outset of the hearings, what you are asking them to decide.

- Evidentiary Objections - If objections are made at all, they should be limited to improper, immaterial and irrelevant testimony or documents. Before making them, try hard to remember that arbitrators are not jurors, that they have read the pleadings, that there is a good chance that "they get it" and that they can usually distinguish, on their own, probative from prejudicial evidence. As a result, they tend not to sustain objections that seek to keep proposed evidence from becoming admissible evidence.

  In addition, "speaking objections" (i.e., where you give your own unsworn testimony or signal your client what to say) are offensive and will cause the arbitrators to think less of you.
  Be respectful but be firm in why you are making the objection, again, putting it in context. It gives you the opportunity to focus the arbitrators on the primary issues of the case. Before making the objection, be mindful of the fact that when you are done, your adversary with have the opportunity, in response, to repeat points from her Opening Statement or preview her Summation.

- Closing Argument - What do arbitrators want in a summation? Most won't admit it, but they don't want to hear one. Nevertheless, they expect parties to use this opportunity to present the essence of their argument with clarity, insight and a firm overview of the evidence that was produced in the hearing that supports each claim or defense raised. It is imperative that the party seeking a monetary Award give a clear oral and written statement of damages and explain the method of calculation. A good summation has the opportunity to sway those arbitrators who have not already made up their minds (although most already have by that time).

  http://www.securitieslosses.com/PracticeAreas/WhatArbitratorsWanttoHearandSee.asp

  David E. Robbins wrote the Securities Arbitration Procedure Manual used nationwide by law schools, law firms and brokerage firms.