

Fordham Law Review

Volume 63 | Issue 5

Article 6

1995

Eligibility (Six-Year) Rule

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

Recommended Citation

Eligibility (Six-Year) Rule, 63 Fordham L. Rev. 1551 (1995).

Available at: <https://ir.lawnet.fordham.edu/flr/vol63/iss5/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

DISCOVERY

Introduction

PROF. KATSORIS: We now have our third panel discussion, discovery.

At one point in the history of securities arbitration, there was very little discovery. There was clearly the potential for trial by ambush; thus, as SICA was formed, it addressed the issue to some extent. But it was only after *Shearson/American Express Inc. v. McMahon*,⁸⁵ when arbitration basically became mandatory, that the issue took on added significance.

We're now beginning, depending on who you listen to, to see in arbitration many of the problem areas of discovery that are prevalent in courtroom litigation. The issue won't go away because you can't go back to the "no discovery" practices that prevailed many, many years ago.

To discuss these issues, we have two distinguished panelists, and we'll start with Mike Stone.

Panelists

MR. STONE: To show you how well this Symposium is working, Gus, I am ceding my time to Dave Robbins who has asked to go first, and I think it's already having the effect that claimant's counsel and respondent's counsel can get along, even as to who goes first.

MR. ROBBINS: Ten years ago, when I was Director of Arbitration at the American Stock Exchange, and hearings rarely took more than a day, the discovery rules of the SROs mirrored those more innocent days. They simply said this: Prior to the first hearing session, the parties shall cooperate in the voluntary exchange of such documents and information as will serve to expedite the arbitration.

That was it. And, believe it or not, it worked because arbitration at that time, before the Supreme Court's 1987 decision in *McMahon*, rarely involved big bucks and, even more importantly, because customer attorneys didn't know much about securities industries documents.

Once all disputes were forced into arbitration by the Supreme Court, the SEC and customers' attorneys saw that without proper procedural safeguards, the arbitration process could become arbitration by ambush. While arbitrators had subpoena power before *McMahon*, documents that were ordered to be produced were usually produced at the first hearing, leaving no time for analysis. No discovery rules were in place to allow parties to prepare properly for the hearings.

85. 482 U.S. 220 (1987).

Customer-broker cases are often won or lost by documents that support or contradict a party. Some truly can be smoking guns and they can point either way. Because most orders are given and confirmed over the phone, the industry produces a great deal of documents to memorialize the transactions, to instruct brokers about accepted industry rules and procedures, and to monitor broker activity.

The need to obtain those documents in advance of substantive hearings was first urged by the SEC in September 1987, a few months after *McMahon* and a month before the stock market crash. That month, Richard Ketchum, Director of Market Regulation, wrote to James Buck, Secretary of the Exchange, and made several major recommendations to improve the process. In time, almost all those recommendations were adopted by SICA and, in turn, by the SROs.

One of the most important recommendations was this one: SICA should include within the Uniform Code rules to ensure fair and timely document production between the parties before the arbitration hearing and to allow for pre-hearing conferences and preliminary hearings for large or complex cases.

In response to the SEC's call for change, the Exchange and the other SROs enacted a well-intentioned discovery rule in mid-1989.⁸⁶ I say well-intentioned because its bark is much louder than its bite. It's still based on the rather naive premise that arbitration is a business person's forum for gentlemen and ladies where honesty and frankness are its cornerstone and where cooperation is its watchword.

Well, the discovery rules are not working effectively in today's world of securities arbitration. Before I go into the specific failings of the current discovery rules and propose the means to correct those failings, let me tell you what the rules provide.

Since 1989, the discovery rules have provided,

Number one: A procedure to seek, respond to and object to document requests and information requests. It can start as early as a month after the claim is served or when the answer is filed, whichever is earlier;

Number two: A pre-hearing exchange rule so that each side gets a ten day advance warning of what the opponent hopes to introduce on their direct case;

Number three: Pre-hearing conferences to resolve discovery problems;

Number four: Arbitrator subpoena power, enabling a party to demand production prior to the first hearings; and

86. See NYSE Rules, *supra* note 14, Rule 619, ¶ 2619; Uniform Code, *supra* note 14, § 20, at 16-18.

Number five: The power of arbitrators nationwide, and conceivably worldwide, to direct the appearance of individuals in the securities industry.

At this year's Practicing Law Institute program on securities arbitration, Bob Clemente and Deborah Masucci lamented the fact that, in an almost knee-jerk reaction, parties request pre-hearing conferences instead of cooperating in the exchange of documents. This has the effect of prolonging the process because arbitrators aren't usually selected until shortly before the hearing.

What are the practical problems with the Exchange's discovery rules, and how can they be corrected? To answer these questions, I discussed them with a number of my colleagues at the Public Investors Arbitration Bar Association ("PIABA"). I also spoke with fellow arbitrators and with my friends on the defense side.

The problems are not insurmountable. They can be solved by two things—education and enforcement—the education of practitioners and arbitrators, and the enforcement of the discovery rules by arbitrators against parties who are violating Rule 619 with impunity.

Rule 619(a) provides that any request for documents or other information shall be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.⁸⁷ It is well intentioned, but it's not working.

Education and enforcement—with those two goals in mind, here are the six main problems with the discovery rules:

Number one: They don't list the documents that should be provided in the common customer-broker cases. Even though The Arbitrator's Manual has a suggested list,⁸⁸ it's only that, a suggestion. Most arbitrators who conduct pre-hearing conferences don't have a copy of the Manual, or, if they do, they haven't read it. It's almost treated like a limited partnership prospectus.

Without an automatic, approved list of documents, this allows an attorney, who may be more experienced than the arbitrator, to convince the arbitrator that such documents are not necessary, are privileged, are too burdensome to accumulate and produce, or are irrelevant to the issues of the case;

Number two: The current rules permit the very evil that they sought to overcome: word-processor generated, cookie-cutter, multi-paragraph document requests. The less experienced practitioner actually spends the time, and his client's money, to respond to these never-ending document requests;

87. NYSE Rules, *supra* note 14, Rule 619(a), ¶ 2619.

88. Securities Industry Conference on Arbitration, The Arbitrator's Manual 11-12 (1992).

Number three: By not defining the term "information request," the rules permit a party to submit laundry lists of interrogatories that are time-consuming, burdensome, and contrary to the purpose of arbitration;

Number four: The rules provide no guidance on how the pre-hearing conference will be conducted or the standards that will be applied by the person presiding over that conference. As a result, there is a great inconsistency in rulings, depending on the arbitrator presiding at the conference.

For example, one arbitrator may believe a brokerage firm should produce all of the other customer complaints involving that broker or that product, since a number of complaints may not only show a pattern of misconduct, but also may indicate poor supervision, since a manager who was aware of customer complaints should have imposed greater oversight over that broker.

On the other hand, another arbitrator, faced with the same request for other customer complaints, may feel that since the purpose of the present arbitration is to decide that case, it is not appropriate to hear disputed evidence from another case. That arbitrator will deny the request. There needs to be consistency;

Number five: Pre-hearing conferences, at best, only resolve discovery issues. They don't tackle the other issues that contribute to the increased time it takes to finish a case. They don't set all the hearing dates in advance. There are no stipulations of facts or stipulations of documents. There is no identification and briefing of contested issues before the hearing, and there is no discussion on the possible mediation of the case. The sole aim of pre-hearing conferences is to try to resolve discovery disputes. And it doesn't always do that;

Number six: The Exchange discovery rules don't have real, effective sanctions for non-compliance.⁸⁹ Threats of sanctions are mere window dressing and nothing more. This is pretty serious stuff, and let me emphasize, these are not just the complaints of customer attorneys. They are echoed by in-house and outside defense counsel, by arbitrators, and by tribunal administrators with whom I have spoken.

What can be done to deal with these major flaws in the system? What can be done to educate practitioners so that they get the most out of the process and to enforce the rules when parties choose to disregard arbitrator orders or to stymie the process? I recommend that the following six steps be taken as soon as possible, and that they go into effect just as fast:

Number one: Documents. The Exchange and other member organizations of SICA must have a list of categories of documents to be produced automatically by each party within a specified number of

89. See NYSE Rules, *supra* note 14, Rule 621, ¶ 2621; The Arbitrator's Manual, *supra* note 88, at 14-17.

days after the answer is filed. This list should be sent out by the arbitration department. Failure to produce the documents should result in sanctions, which I will discuss in a minute.

This document list should be keyed to the types of claims alleged in the statement of claim and in any counterclaim. The list in The Arbitrator's Manual is a start, but it doesn't go far enough. The PIABA has formed a discovery committee to propose such a list. The Securities Industry Association should do the same.

Each side's list should be submitted to SICA at its next meeting in January, and SICA should adopt a document list at that time or by its next meeting.

What should be on the automatic approved list?

For the customer, at a minimum:

- a. Missing monthly statements, confirmations, and opening account forms;
- b. Missing correspondence, prospectuses, and marketing material;
- c. All records of the broker concerning that customer's account, such as holding pages, notes of conversations, correspondence with regulators, analyses of trading activity, and internal, non-privileged memos by or to the branch manager;
- d. Relevant records of the firm concerning the customer's account, such as activity reports, commission runs, correspondence with regulators, order tickets for certain cases, manager's supervisory logs, portions of the compliance manual, and research reports concerning the securities in question; and,
- e. Regulatory records should also be on the list. That is, records concerning the broker: his U-4 or U-5, and all amendments and attachments to them, as well as internal reviews, if those reviews refer to the account in question or to similar activities of the broker.

For the brokers and the firm, the following, at a minimum:

- a. The customer's copy of everything that he or she received from the firm and from the entities that the customer invested in; that is, monthly statements, opening account forms, confirms, prospectuses, quarterly and annual reports, and correspondence. Anything that the customer could have written on that he or she received from the brokerage firm;
- b. Income tax returns for cases involving allegations of unsuitability or unauthorized trading, with special emphasis on pages one and two of Form 1040 and Schedules D and E;
- c. Records from other brokerage firms where the customer had an account; and,
- d. The customer's own analysis of trading in his account.

Number two: Word-Processor Document Requests. If the mandatory production list goes into effect, this should cut down on lengthy, additional requests. Such additional requests, however,

should be required to specify what issue or issues in the case the documents will support or contradict, and there should be a limitation on the number of additional requests, with no subparagraphs or subheadings;

Number three: Information Request Interrogatories. Requests for information should be permitted only if documents are not available and if the information requested relates to what would be in documents. Some examples are education and work background and licenses held and revoked. Testimonial requests, such as what did the broker say to the customer or what did the customer say to the broker, his wife, and his friends, should be prohibited;

Number four: Standards to Apply in Pre-Hearing Conferences. The Exchange's arbitration staff should spend quality time with the arbitrator who will preside over the pre-hearing conference *before* the conference.

Staff attorneys have to be more than glorified caterers or postal workers. They are the greatest untapped source of knowledge and guidance in arbitration today. Staff attorneys should make sure that before a pre-hearing conference is held, the arbitrator has carefully read the pleadings, drafted a chart of his own on outstanding document requests, and articulated to the attorney a standard to determine whether documents or information will be ordered to be produced or not. And that standard should be this: Is the request directly related to an issue in controversy?

Number five: Accomplishing More at Pre-Hearing Conferences. First of all, the surest way to expedite the arbitration process, resolve discovery disputes earlier, and start substantive hearings earlier is to select at least one of the arbitrators as soon as the answer is filed. That arbitrator must have a strong working knowledge of the arbitration rules and must clearly understand that a party can't develop his case if the other side drags its feet or refuses to cooperate with discovery rules.

Before the pre-hearing conference takes place, each side should be sent a checklist of issues to be discussed and agreed upon at the pre-hearing conference: document requests, stipulations of facts, stipulations on the admission of documents into evidence, and hearing dates;

Number Six: Putting the Bite Into the Bark. The Arbitrator's Manual suggests certain sanctions for non-compliance with discovery orders.⁹⁰ It's the rare arbitration panel that will even entertain arguments on sanctions, let alone enforce them.

What are the current suggested sanctions, and what should they be in order to really enforce the rules?

90. See The Arbitrators's Manual, *supra* note 88, at 15-16.

Current sanction one: Arbitrators can draw an adverse inference against the party that didn't comply with the order of production. Big deal.

Current sanction two: Arbitrators can assess adjournment fees, forum fees, and other costs and expenses, including attorneys' fees. For big firms, this doesn't mean much. For smaller firms, they simply won't pay it, and the case will proceed anyway. Few arbitrators, in any event, have the confidence in their powers to award monetary sanctions.

Current sanction three: Arbitrators may initiate a disciplinary referral. By then it's too late. The arbitration is over.

Current sanction four: Arbitrators may strike all or part of a claim or answer. They never have, and they never will, as long as these suggestions remain suggestions.

What's the answer? What's the most effective sanction? The last one: To strike all or part of a claim or answer and to prohibit absolutely a party from introducing evidence in that regard at the hearing. However, if documents in question don't relate to that party's direct case, and thus the preclusion sanction would not accomplish anything—where, for example, the firm doesn't want to turn over damaging internal marketing material, or where a customer refuses to disclose his tax returns—then the more appropriate sanction is monetary. But it has to be imposed at the time of the violation and not be a reserved decision until the end of the case. It should be paid directly to the other side and not to the SRO.

While courts have vacated awards on the ground that arbitrators refused to hear relevant evidence, courts also defer, in most instances, to the way arbitrators conduct their proceedings. If there are rules in place, and if those rules give both sides a full and fair opportunity to be heard, no court is going to overturn an award, especially if a party violated one of the rules and was sanctioned for it.

Our PIABA committee on discovery is considering the combination of automatic fines for a party's failure to produce documents on the approved list and the preclusion of evidence sanction.

One of our committee persons, Bob Uhl of Los Angeles, has recommended the appointment of permanent discovery referees who would do nothing other than hear and rule on discovery disputes, including relevancy, burden, and privilege. The appointment of such a referee would have the advantage of producing consistent rulings for those requests not covered by the automatic approved list, and, after a while, those rulings could be incorporated into amendments to the approved list.

In the end, we need to educate the parties about documents that should be produced for particular cases. We need to educate the parties and the arbitrators on the effective use of pre-hearing confer-

ences, and we need to be able to enforce the discovery rules so that arbitration doesn't degenerate into the dilatory tactics of litigation.

I hope the claimants' bar and the defense bar can work together on these serious, but solvable problems.

MR. STONE: First, I appreciate this opportunity to address this Symposium. Unlike Caite, I do not have to give a disclaimer at this point, although since my boss is here, I do have to watch what I say.

My good friend David Robbins has provided us with a very good review of the history of discovery in the arbitration process at the SROs, a solid analysis of Rule 619,⁹¹ a critique of the problems associated with the rule, and suggested changes to those rules.

In reviewing David's presentation, one might conclude that there is very little left for me to discuss. In fact, when I previewed his outline last week, I felt at first that most of the areas concerning discovery would be covered quite thoroughly. But in preparing for the Symposium, I realized that there are larger issues that need to be addressed—issues that are deeply imbedded in the theory behind and the purpose of arbitration. To understand why the discovery process is only a microcosm of the problems that we are now facing in arbitration, it is necessary to consider first the well-defined tension between claimants' and respondents' bar.

Claimants, as you've already heard, argue that in order to prosecute their cases, it is necessary for respondents to produce a vast array of documents, that is, all possible documents, materials, and information that could have any impact on the pending case. Respondents, as I am sure you will hear from some of my colleagues after I finish my presentation, will argue—and I have argued on many occasions—that it is quite difficult and costly to dredge up all of the documents requested from the bowels of national and international brokerage firms. This conflict is inherent in the litigation process and cannot, in my opinion, be resolved by simply amending the Exchange's discovery rules.

Although this Symposium is a worthwhile forum to discuss these issues, it will be difficult to resolve such issues because the real combatants—I think somebody said earlier "gladiators"—are the attorneys, and they are rarely willing to limit their objections or conform discovery to the philosophy underlying the arbitration process.

I would like, therefore, to take a more global view of the discovery process rather than to focus solely on Rule 619 and its inherent defects. Although given the opportunity, of course, I will not pass up such opportunity to make some suggested modifications to Rule 619.

The correct place to start, I believe, in this discussion is to ask the following question: What is the purpose of arbitration? My answer is quite simple, and I think I agree with my good friend on the other side of the table, Boyd Page, that it's really an attempt to avoid the court

91. NYSE Rules, *supra* note 14, Rule 619, ¶ 2619.

system, its delays, complicated procedures, and the time-consuming, extensive discovery process that even the litigators among us have come to abhor.

I believe that the rules relating to arbitration, the framework under which we are working, have become much more complicated. Discovery in arbitration is both extensive and time-consuming. Our primary goal is to provide a mechanism that will allow for—and I almost quote Boyd Page without knowing he was going to say it—a fair and speedy resolution of a client's dispute with a brokerage firm, a solution that seems even more difficult to obtain today.

Not only do I find routinely thirty page demands for production of documents, each with many sub-paragraphs, but I also find that I must produce the kitchen sink and even some of the fixtures. This is the problem, and the time and effort that firms must go through to comply with those demands is unbelievable. Some day I would like to have a member of claimant's bar spend some time with us as we try to gather documents in response to a detailed and complicated discovery request. It is relatively simple for the claimant to turn over a small grouping of documents that are easily found; whereas, the time and effort that respondents have to put into the discovery process is much more burdensome.

We now find that we're getting requests for depositions and interrogatories that are making the entire arbitration process more complicated. The admonition in the rules to "cooperate to the fullest extent practicable"⁹² is honored more in the breach. Pre-hearing conferences are now routine, as are most matters related to discovery. Doesn't this have the smell, the touch, the feel of litigation? It sure does to me.

Now we must focus the entire process, especially discovery, on our ultimate goal, which is to resolve quickly the client's claim. Has he or she been wronged by the account executive or the firm? We must get away from the extraneous issues that are complicating the process. Those issues include: litigation for litigation's sake, posturing by attorneys for later arbitrations that claimants' attorneys may be involved in with the respondent firm, eliminating non-compensatory claims such as punitive damages, and streamlining the discovery process.

I believe that the real concern of the client is seeking to recover his or her monetary loss—not the extraneous issues introduced into the proceedings, such as punitive damages, attorneys' fees, treble damages, and other issues that we have to deal with.

Let me provide one example—and I think David has alluded to it—that we face every day of the week in discovery. Do you allow discovery of other customer complaints relating to that account executive?

92. Uniform Code, *supra* note 14, § 20(a), at 16.

David has well articulated those issues. I would like to discuss my view of those issues.

Yes, you could argue, and I think it is argued, that there is some relevance to those complaints. But from the other side of the ledger, what are we introducing into this arbitration? Other client complaints require almost a mini-trial on those issues. The arbitrations will become even more complicated. In my judgment—and I don't mean to cast aspersions on any people on the other side of the table who prosecute client claims—it seems we find counsel really trolling for new clients, new clients who will help him in other cases. We've actually seen that happen.

Accordingly, I would like to make some additional suggestions. My suggestions are not too different from those David suggested. They are an attempt to simplify the process of discovery.

First, there should be a refinement of the list of discoverable documents that is included in The Arbitrator's Manual. But the focus should be on which documents are appropriate for what type of cases. I don't believe there is much argument that many of the documents on that list need to be turned over. A requirement, however, to turn over every confirmation issued for an account in every case—when the cost and expense of gathering those documents are well understood—should be eliminated.

Second, it seems to me to be unfair to have a list of positive documents and not have a list of "negative documents." What is it that *shouldn't* be turned over? What documents should not be required in arbitration?

I would like further restrictions on depositions. We have found that claimants' counsel harass us by seeking depositions of senior management, in many cases, our CEO and President. Do they need to testify in these cases? Those individuals know nothing whatsoever about the individual client's complaint.

Third, I am very concerned about the third-party discovery process permitted in arbitration because this process is now being used for improper purposes, such as seeking to obtain the names of other prospective clients. I think we need to have this issue further explored.

I agree fully with David that the continuation and enhancement of the educational programs is a must. I think our arbitrators need to be educated. I think it's important to all of us.

Finally, I am not against exploring the possibility of appointing special magistrates or people who have experience in dealing with discovery matters. I am not yet convinced that's the answer, but I'm willing to explore it because I do agree that consistency does allow the parties—both claimants and respondents—to understand where the discovery process will lead in a particular case or proceeding.

Because this Symposium is an attempt to vet these important issues concerning arbitration, I would urge that we view each of them in a larger context to determine whether we are really getting to our goal: a simple, fair, speedy resolution of the clients' complaints.

Moreover, I urge each of the individuals present to provide input because I don't believe that attorneys, like myself, have all the answers. Business people—some of you who are outside the litigation process—can frequently give better answers because it is businessmen and women who are sitting on the arbitration panels, ultimately resolving these disputes.

PROF. KATSORIS: Thank you, Mike. We can open it up now for comments.

Discussion

MR. BECKLEY: Perhaps, in deference to David's list of documents, I didn't notice anything on his mandatory list that would move from the branch up to the region.

Many of the cases that the plaintiff's bar is involved in now involve sales programs, whether they are programs on wrap accounts, partnerships, or the use of a particular strategy by several brokers in the branch. Many times these types of program sales will end up with a big stack of switch letters on a regional compliance manager's desk, or a large number of exception runs. There are a lot of documents that could have been included in this mandatory list that were not.

I think the industry's response really demonstrates a deep philosophical problem confronting all of us. The individual claimant is only interested in his case and only interested in getting a fair result. The industry must necessarily, and each house must necessarily, think of this arbitration process in a global sense and look at it as yet another expense item. So, while the industry may be thinking of arbitration as a simple, quick, easy and, hopefully, fair approach, which will minimize expenses to the firm and the industry, the individual customer, who is now required to go into arbitration, is going to do the best he can to make this arbitration like litigation and get as much as he can get to verify his claim.

The only way to get rid of this dichotomy and the only philosophical way to eliminate this dichotomy is to make arbitration optional. If it is optional, then we can simplify the discovery. Yes, we can make it shorter. Yes, we can compress the number of documents you can get. But if it's going to be mandatory, it's the only shot the claimant has. It's the only place he can vindicate his claim, and if he must go to arbitration, then arbitration, of course, must look like litigation.

MS. MASUCCI: One of the things that we really should focus on when we talk about arbitration is the cost. One of the concerns that

we have for the parties is that the process is becoming very expensive for them.

We've seen a number of cases where the attorneys' fees end up being higher than the recovery that the parties receive in the arbitration award. A substantial portion of that cost is associated with the amount of time and expense associated with discovery. Anything that can be done to streamline the discovery process will only help make the process work better.

Not every case needs the amount of discovery that occurs. I think there needs to be a lot of study about what really is relevant to each case. The current system has a lot of tolerance for experimentation in many areas. We shouldn't be building in a lot of rules that become inflexible, create more of a monster than we really want, and also raise the cost. I think that should be on everybody's mind.

MR. KREBSBACH: I never feel the answer is to make arbitration more like the litigation process. I would like to get back to the picture that Michael alluded to.

If you look at what's going on in the country right now, you realize that the big picture is that the litigation system is failing; interest groups on both sides make that argument. One of the main reasons that litigation is failing is there is too much discovery.

So, I would be very reluctant to say that the way to conclude any discovery problem in arbitration is to make it much more like litigation, which has already failed. I think there is a lot of merit to some of the points that David raised. To the extent we can come up with solutions to narrow issues, to narrow discovery requests, and to get the things resolved up front, I think we'll all be better served.

MR. CELLA: If there is one forum that a public customer can go to, it's arbitration. To make out his case he has to go to where the paper is, and he doesn't have the paper. He's got customer statements, but the paper trail on whether his claim is justifiable generally lies with the respondent. So, there is no alternative for a public customer but to seek those documents or chain of documentation that bear on the issues.

It is not to say that some claimants that are experienced ask for documents that are unrelated and that becomes an issue to be resolved. But paper is devastating the world's forests, as we know. It won't stop in arbitration. It can't. This is not the simple proposition of purchasing a security over-the-counter under an elm tree from some chap, and then it's his word against ours. This is very sophisticated.

Because we have one system, the lawyers on both sides have transported into it, per force, a discovery procedural attitude that exists in judicial litigation. I'm afraid unless the arbitrators, who are charged with the responsibility to hear the disputes, act knowledgeably and then follow with an order that must be obeyed, the problems that

claimants' and respondents' counsel encounter will continue, if not get worse.

MS. SHOCKMAN: If you do not allow a thoroughly great amount of paper discovery, you really do deprive a claimant of the opportunity to prove his case in many situations. You narrow the case down to the claimant coming in and telling his story of what he remembers, and the broker coming in and telling her story. So often, however, the broker, who is in the sales business, and who is in the business in which the panel is likely to be, is going to be a witness who is much better able to articulate his side of the story.

If you're going to give a claimant a fair opportunity to present his case, he has to be able to get the paper background of what happened, and often he needs to find other customers who had the identical thing happen to them, so he can have them come in and say the broker told them the same thing, and so on.

In the court system it's well established that you can bring those types of witnesses in. Unless you're permitted to discover them and bring them into the arbitration proceedings, you're cutting the claimant's case down to being able to say what he remembers, his word against the broker's word, and you really are depriving him of the fair opportunity to bring his case.

I would also like to say, on some of the discovery-type issues, the firms raise the issue of the efficiency of arbitration when it suits them, and they let that issue go to the wayside when it does not.

Clearly, the firms have had repeated cases brought against them. For example, in the limited partnership situation, where they could have created databases of documents and made the production much less expensive, and that has been done in other industries, they didn't try to do that. They did not try to cut their costs. They just raised the issue as one that should prevent the claimants from getting documents. So, sometimes the issue of efficiency and expediency is raised when that really isn't the issue involved.

MR. PELOSO: I have several comments. The trouble I have with David's suggestion that a discrete list of documents should always be produced is that it doesn't recognize that each case has got to be different, so I don't think that's a good idea, although I can see why it was suggested. In the final analysis, the question of what should be produced in any given case is going to be a matter of arbitrator discretion.

The second problem I have is whether the arbitrators correctly evaluate what standard should be applied to award production. I think there is a tendency on the part of arbitrators to err on the side of, say, give it to them, and that happens all of the time. In doing that, the arbitrators don't always recognize things like privilege. Often, the arbitrators are not lawyers. They are not always sensitive to privilege issues and to the dilemma that a lawyer faces when he's directly sub-

ject to sanctions to produce, even for inspection, a document that he claims is subject to the attorney-client privilege. He is faced with the potential dilemma of violating the Code of Professional Responsibility on the one hand, or having his client sanctioned on the other.

In my mind, the real question is not whether there should be discovery—certainly there should be discovery, document discovery—but the question is really what standards are the arbitrators using to order discovery? Do they have a tendency just to order discovery and err on that side?

And thirdly, are they giving proper consideration to the law that would preclude one party from giving discovery?

MR. LIPNER: I echo some of what Ted says. We shouldn't just try to make arbitration more like litigation. But arbitration and litigation share something, and that's that they are both involved in dispute resolution and hopefully an attempt to discover the truth. One of the things that arbitration shares with litigation is that the plaintiff or claimant has the burden of proof. And it seems to me that if there are documents that exist that would aid the plaintiff in his case, they should be produced, and the same exists for the defense.

While we can talk about how there are abuses on both sides, and I think this is one case where abuses do abound on both sides, I tend to find that discovery issues become a game that really pollutes the arbitration scene because there is no effective mechanism for resolving the discovery disputes, getting the case on for trial, and putting in the hands of both parties the ability to go ahead and try their case and get to the truth.

It seems to me that the problem isn't the fact of discovery. While the fact of discovery—the existence of document exchanges—and the burden on people to have to come forward with documents is burdensome on both sides, it may not be as costly for that eighty-year-old lady to find her 1985 tax returns as it is for Dean Witter to find confirmation slips or order tickets from 1985. It doesn't change the fact that it is equally burdensome for her to do so. As the plaintiff, she should take on that burden because if it's relevant, she should go ahead and produce the document. The same is true for the defense.

The question that comes before us isn't whether discovery is a good idea. The question is how can we manage it better within the scope of what we're trying to do: to provide an efficient method of dispute resolution. When we look at the courts, we see that they have been grappling with these problems for many years, and they have made some changes in the last few years.

Now, even I know when I go to federal court, I'm not going to be able to take twenty depositions in forty days. The magistrate will limit me. Even I know that there is going to be an objection to serving one hundred interrogatories. He will limit me.

The notion is that we could sit down with the arbitrator, or sit down amongst the parties, and set up some limits at the beginning before discovery dates get placed. We're going to ask for twenty sets of documents. We're going to ask for five interrogatories. We're going to have depositions. There should be one on each side.

If we can set up that kind of discovery plan before we get into the contests about which document is or is not relevant, we can move forward in getting this resolved faster. I think we can learn from the litigation system, and maybe a magistrate system is another thing we can look at because it is working in the litigation system to make the process of discovery less odious.

MR. STONE: Just a couple of comments. I think my presentation suggested and agrees that there is a need for discovery, and so we have not suggested a cut off of all document production.

I think the comparison of a claimant who must find four tax returns over a period of time and a brokerage firm searching for documents, hundreds or thousands of documents—there can be no comparison there. So, yes, it may be “difficult” for the claimant to recapture her two tax returns in question, but I'll measure up what clients have to produce against what the brokerage firm has to produce—there can be no comparison.

Then, I take objection to one premise you stated, Seth. Maybe legally a claimant has the burden of proof, but I think when you come into an arbitration with a client who has lost money, I think the burden is balanced. I think the brokerage firm has an equal obligation to prove that they didn't do anything wrong, and that has now permeated the arbitration process.

I think the purpose and the concept here is for both sides to get out what they need to, at least that is what this Symposium is intending to do, and I think what the outcome will be is really to try to have a meeting of competing interests.

I disagree with Jim, and I disagree with Peter. Arbitration was not supposed to recreate litigation. It never was, and it never will be. It's a method of resolving a client's dispute fairly, speedily, and in a cost effective manner for all involved. When we get away from that concept, we miss the bottom line.

PROF. KATSORIS: Having heard from the gladiators on both sides, I would like to interject with a different perspective, the point of view of the arbitrator. Most of my experience in this area has been as a public member of SICA and as a public arbitrator, where I've been involved in about two hundred cases.

Arbitrators ultimately are the ones that decide the issues of discovery, the evidence, and finally come to a conclusion on the case. I see the romance of some rigid rules, but frankly you could have all the rules you want. If I am sitting as an arbitrator, I'm going to make my own decision. So, the rules, even if they are allegedly cast in stone,

are there solely to facilitate. So, you have to be very, very careful in making them too rigid before you begin infringing on the arbitrator's role.

A tax return on an unauthorized trade, or something like that, may not be important. It may not have anything to do with it. So, it's going to be very difficult, I think, to set these rules in stone.

On the issue of sanctions, David, you mentioned you've never seen preclusion, but you hit it right on point. In one experience I had in a very, very difficult case, we (all three arbitrators) had a discovery hearing early on. The music began, the waltz started very slowly, but we had an all-day hearing, and we specifically ruled on about two dozen discovery issues.

The trial date was set for about five months thereafter, and the arbitrators blocked out a continuous two week period for the actual trial because of the unique circumstances of the case. It was also emphasized at that time that it was important, for a variety of reasons, that the trial begin on time.

Months after the discovery rulings, and only one week before the first hearing date, we received complaints, for the first time, that all documents had not been exchanged, and an adjournment was requested by *one* of the parties.

In view of the history of that case, we ruled that the arbitration hearing would proceed the following week, as scheduled, and unless all documents required in the previous discovery ruling were produced immediately, the panel would entertain a motion for the preclusion of such related evidence at the first hearing date.

By the end of that week, a few days before the first hearing date, we were notified that the case had been settled.

Unfortunately, many arbitrators don't realize the important and significant role they play over the fair resolution of the case. I think that's an area that Peter Cella will discuss at the December 5th session on arbitrator training.⁹³ We must educate our arbitrators as to what they can do and what they can't do. They must be told that they have awesome power that, of course, has to be exercised justly. Some arbitrators only know about the written complaint and answer before them, and they are merely given superficial instruction in the basics of arbitration, but that is not enough.

To emphasize the imperative role in long and complex cases of a forceful, fair, innovative, and knowledgeable trier of the fact—be it an arbitrator or a judge—I would like to draw an analogy to a testimonial given to Judge Milton Pollack on his recently being awarded the Stein Award on Ethics,⁹⁴ wherein it was noted how he saved the Southern District of New York years of litigation by establishing

93. See *infra* pp. 1682-85.

94. Describing Judge Polack's efforts, Dean John D. Feerick said:

ground rules for the global resolution of lawsuits against Michael Milken and Drexel.

I would also like to emphasize the importance of consensual agreement. As an arbitrator, I like nothing better than to have two attorneys who know what they are doing come to me with what they can agree to and what they cannot agree to. Where the attorneys cannot agree, of necessity, you leave it to the arbitrators for resolution. If you needlessly fight about everything, justice is not served in the long run.

MR. EPPENSTEIN: Well, Professor, let's remember a few things. Number one, arbitration is war. Cases settle. If they don't settle, they get tried. If you have to try the case for the claimant, you do the best you can.

Often times arbitration means economic survival for their customers and our clients. The respondents, we know, are going to argue that the claimant has the burden of proof, and if we don't have the documents, which are in the hands of the broker-dealers, to help prove our case, the claimant shouldn't be entitled to recover.

While I'll agree that the issues usually turn on credibility of witnesses in securities arbitrations, the arbitrators, as you know, look for the documentary evidence that will support what each witness is saying or that would be used in cross-examination against those witnesses.

In these times of crushing caseloads and spiraling litigation costs, which often combine to delay or, indeed, deny justice, Judge Pollack is widely recognized and universally acclaimed as a model of innovative, practical, and expeditious adjudication.

.....
Judge Pollack's extraordinary qualities and abilities are perhaps best illustrated by the global resolution he engineered of lawsuits against Michael Milken and Drexel Burnham Lambert, the crowning achievement of a long and distinguished career. In the wake of the law enforcement initiatives that led to their demise, Milken, Drexel, and others were besieged by scores of private lawsuits brought on behalf of hundreds of thousands of investors seeking billions of dollars in damages. These disparate cases from a multitude of different jurisdictions were consolidated before Judge Pollack. Thanks to his mastery of the subject matter, his tenacity, his forcefulness, and his fairness, all of them were received by way of settlement. I understand that there was a sense of incredulity among those involved that such an enormous volume of litigation involving so many different parties and so much money could be disposed of so efficiently by mutual agreement.

The value of Judge Pollack's successful efforts to resolve the Drexel and Milken litigation is incalculable. At the most basic level, the settlement means quick and certain compensation to claimants. Beyond that, the settlement will relieve the courts of what would have surely been years of extraordinary complex and costly litigation. Finally, for all those who decry the dismal state of our legal system, the settlement serves as an inspiring illustration of what can be accomplished when innovative procedural rules are applied in a creative, intelligent, and even-handed way.

John D. Feerick, Remarks, *Judge Pollack Awarded Stein Prize*, *The Advocate*, Nov. 8, 1994, at 1, 3.

So, what we're talking about here is discovery, not necessarily to be compared with and joined with evidence. We're talking about discovery. I'm in favor of broad discovery for both sides. Unfortunately, I see multiple discovery abuses that I would like to see an end to.

First of all, the complaint that records just can't be found, I find often happens with the most meaningful ones. Often I find important production at the hearings, when witnesses will slip and say, "There is a document on the file in the computer," and it hasn't yet been produced. Unfortunately, we also get documents produced that are altered, or that are redacted. We find documents are produced in illegible fashion. We find document requests are used to intimidate and harass claimants.

I would like the industry to join in with some of the suggestions made, which I think are fair and reasonable for everyone. Because we're in the system of dispute resolution, let's try to work to get some meaningful rules out of it and put some punch to the rules that do evolve.

PROF. KATSORIS: Ted, I was well aware that you were talking about discovery and maybe the arbitrators, as Dave points out, should be brought in right at the beginning. They are going to try the case, so they should rule on the discovery. They should rule on many of these issues right up front.

MR. EPPENSTEIN: Good suggestion. And we usually ask for a panel to be empaneled well before we think the hearings will be held for that purpose.

PROF. KATSORIS: Do you have any comment on that, Mike?

MR. STONE: I have no objection to a panel being appointed earlier. One of the problems we run into now is that a person is appointed, and that person is ruling on discovery requests before either side has an opportunity to determine whether they would object to that arbitrator.

Except for that issue, I have no problem with the selection of arbitrators at anytime in the proceeding. But we should not put the cart before the horse, having somebody making determinations who may be objectionable, either on a peremptory challenge or on a challenge for cause.

MS. MASUCCI: That's why I indicated earlier that I believe the rules are flexible enough to respond to a lot of these concerns without additional rule making.

At the request of a group of plaintiff and defense attorneys, the NASD has been experimenting with an alternative process for arbitrator and hearing date selection as a pilot program in specific cities. The normal process used today is to select a hearing date and then the arbitrators. The experiment is intended to facilitate the resolution of discovery problems early in the process. Under the pilot, arbitrators

are selected right after the issue is joined, that is, when the answer is received. After the parties have accepted the panel, we then select a hearing date, as well as a backup prehearing conference date, that could be used to resolve discovery if it's necessary.

We're testing this through the end of the year, at which point we're going to be evaluating whether this method is more effective in resolving discovery disputes and responding to the complaints that parties have, versus the process we use now.

On the issue of selecting arbitrators, in over eighty-nine percent of the cases, arbitration panels are selected more than ninety days prior to the hearing, so from the SRO point of view, we're trying to respond to the demands of the parties to appoint panels earlier and faster. That doesn't always answer all of the problems.

Again, it's the flexibility inherent right now in the processing that's making that work.

PROF. KATSORIS: No further comments? Any questions of the panelists? I'm glad we "resolved" the issue of discovery.

