Problematic Hearing Issues in Securities Arbitration:

Some Possible Approaches, Strategies and Solutions

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INTRODUCTION

It has happened to all of us: an issue or development we never expected suddenly emerges at the arbitration hearing and requires our quick response. There is little time to think, but how you respond may leave a lasting impression on the Panel and may well be the difference between winning or losing your case.

As every securities arbitration lawyer knows, no matter how carefully and diligently you prepare for the hearing, no matter how you try to anticipate opposing counsel's moves, your client's testimony and the testimony of other witnesses, the chairman's decisions, arbitrator reactions and a host of other things, an arbitration hearing is still a wild card. Anything can happen.

Although you can never plan for every eventuality, there are some issues that arise more often than not at a hearing. Others, regrettably, seem to be happening with ever-increasing frequency. Some discussed below are rare occurrences. Nevertheless, since we are all too familiar with Murphy's Law that "if it can go wrong, it will," it behooves claimant lawyers to be ready for surprises and follow the old Boy Scout motto: "Be Prepared."

I. Gamesmanship and Other Troublesome Tactics

There is an inherent conflict between the goal of an arbitration hearing and the lawyer's duty to represent his client zealously. While the hearing is designed to discover the truth, the lawyer's purpose is to win his case. Respondent's counsel often resorts to tactics designed to advance and protect the firm's interests at claimant's expense. There is a line between conduct that connotes the zealous representation of the client and conduct that is abusive, unprofessional and offensive. Increasingly, many attorneys for respondents appear willing to cross that line.

A. Motion to Dismiss/Motion in Limine

***Scenario**: After 18 long months of battling your opponent over discovery and other issues, the hearing date has finally arrived. You've worked hard on your opening statement and it's a masterpiece, designed to get the Panel's attention and sympathy and set the tone for the proceedings. The chairman calls the hearing to order and turns to you. You take a deep breath and are ready to launch into your opening. Before you can say a word, however, respondent's counsel interrupts and tells the chairman that there is an issue the Panel must address before the hearing gets underway. Respondent's counsel then presents his motion to dismiss and/or a motion in limine.*

Motions to dismiss certain or all of claimant's claims and/or motions in limine to exclude damaging evidence (e.g., SEC, NYSE or NASD disciplinary actions, settlements, fines, etc.) at the onset of the hearing are becoming increasingly common. Respondent may present its motion to dismiss for the first time at the hearing. The purpose, of course, is to "steal your thunder," distract you just before your opening statement and, most important, be the first to frame the issues for the Panel -- and in Respondent's favor.

Point out to the Panel that respondent's motion to dismiss at this time is improper and nothing more than an attempt to deprive claimant - even at the eleventh hour - of his "day in court." Deal with a motion in limine in the same way: argue that respondent only wants the evidence excluded because it directly supports claimant's position and proves the truth of his claim. Tell the Panel that, once again, respondent is trying to "hide the ball."

The best approach to dealing with these motions is to address them in advance at a pre-hearing conference. Get the Panel to order that all pre-hearing motions must be submitted by a date certain and at least several weeks in advance of the final hearing. If any motion is not submitted by that date, the Panel will not consider them at the hearing.

B. Untimely Objections

***Scenario**: Respondent's counsel raises objections one or more times during claimant's opening and/or closing statements.*

Appeal to the chairman's sense of fairness by asking him to instruct counsel to show you the same respect and courtesy that you intend to display, and to refrain from interrupting. Most panels view civility between counsel as paramount and are sensitive to this issue.

C. Testimony by Opposing Counsel

***Scenario**: During his direct and/or cross-examinations of witnesses, opposing counsel attempts to put his own spin on the case by making statements about "facts" about which there is no testimony or other evidence in the record..*

Object to this tactic as soon as it emerges to prevent it from becoming a consistent pattern. Point out to the chairman that there is no evidence or information in the record upon which opposing counsel can base his statements.

Tell the chairman also that you have no objection to counsel taking the stand and testifying as a witness on behalf of his client.

D. Intentional Delay

***Scenario**: At the first pre-hearing conference during which the parties agreed that eight days of hearings would be necessary, the Panel scheduled five hearing dates for the first week in May and three during the second week of July. Respondent's counsel intentionally prolongs the proceedings during the first week to ensure that he has another six weeks to prepare a key witness for testimony.*

A variation of this scenario occurs when the broker's credibility is badly damaged during cross-examination and respondent's counsel purposely prolongs the proceedings so that the case cannot be concluded within the allotted time. The panel is forced to reschedule additional hearing dates months later. By this time, its memory of the broker's testimony has dimmed and your case has lost its momentum.

Resist the impulse to point out to the Panel that respondent has an unfair advantage in having additional time to prepare. Consider instead making a request to the chairman that, in view of the length of time that will have passed until the hearing resumes, you be permitted to briefly summarize previous testimony at the outset of the next hearing session.

E. Misstatements of Fact or Law

***Scenario**: Opposing counsel misstates facts or law during the hearing.*

On fact issues, object and point to the record so that the Panel is aware of the error or misstatement, and let the arbitrators decide whether it is intentional or not.

Object to misstatements or mischaracterizations of the law and explain why opposing counsel is incorrect. Be prepared to present to the Panel and opposing counsel copies of key cases or statutes that may be at issue and establish your claims.

F. Deceptive Charts and /or Graphics

***Scenario**: After filing fees, expert witness fees, witness notebooks, etc., your client can barely afford to pay for any "extras" at the hearing. The result is that the charts and graphs used to illustrate his*

damages, while accurate, have a distinctly "homemade" appearance. Respondent's exhibits are large, slick and impressive. They are also misleading.

Object to respondent's exhibits on grounds that there is no evidence in the record to support the "facts" on which they are based. Explain to the Panel that while your client's limited financial means did not afford him the luxury of fancy exhibits, they nonetheless present a true and accurate picture of what transpired in his account.

G. Improper Examination/Manipulation of Witnesses

***Scenario**: During his cross-examination of claimant, respondent's counsel repeatedly interrupts her testimony and gives her insufficient time to respond. His questions are also designed to induce incorrect inferences by the Panel.*

After opposing counsel completes his cross-examination, encourage the Panel to question your client. This will gives the arbitrators the opportunity to hear spontaneous testimony from claimant free from any improper techniques.

H. Broker Unavailable to Testify on First Day of Hearing

***Scenario**: Two brokers were responsible for the management of your client's account. You intended to call both brokers to testify on the first day of the hearing. Respondent's counsel tells you that broker #2 is not available to testify, but broker #1 is present and ready to testify. Soon after you begin questioning broker #1, he testifies that he has no personal knowledge about claimant's account and that only broker #2 managed her account.*

The purpose of this tactic of "hiding the broker" is to force you to call the claimant to testify before the broker. By having the claimant testify first, respondent has the obvious advantage of hearing her story and alerting the broker in advance so that he can better explain or contradict her testimony.

Do not allow respondent to dictate how you present your case to the Panel. Despite the fact that the broker has little, if any, knowledge about your client's account, resist the temptation to shorten your testimony of broker #1.

To prevent opposing counsel from using this tactic, at the 20-day document and witness exchange, confirm in writing with opposing counsel that you will be calling the broker for cross-examination on the first day of the hearing. If you trust respondent's counsel, you may simply want to discuss with him beforehand your intention to call the broker as your first witness and obtain his assurance that the broker will be present. The alternative is to serve an Order of Appearance on the broker.

I. Documents Suddenly Appear

***Scenario**: Your discovery requests to respondent, which you served nearly a year ago, asked for, among other items, the broker's notes concerning your client. In its response, respondent stated that it was unable to locate any such documents, but would produce any relevant documents it subsequently discovered. Respondent has not yet produced the notes, nor has it included the notes among its exhibits on the 20-day list. On day three of the hearing, however, respondent's counsel announces that the firm just located the broker's notes and provides you with copies. He then proceeds to introduce them as exhibits during his examination of the broker.*

Argue to the Panel that it is apparent that respondent was deliberately hiding documents and request that they not be allowed in evidence. In order to avoid being blindsided with this tactic, ask opposing counsel to provide you with an affirmation stating that no such documents exist well in advance of the hearing.

J. Arbitrator Turned Expert

***Scenario**: Several days before the hearing begins you discover that respondent, obviously unhappy with one of the arbitrators, has hired that arbitrator as an expert witness in another case, which creates a conflict in your case.*

This is a flagrant example of attempt to interfere with the arbitration process. Move to disqualify the arbitrator for prohibited *ex parte* contact with a party, and consider reporting the respondent to the NASD for subverting the arbitration hearing.

K. Rebuttal Witnesses and Evidence

***Scenario**: In order to reduce claimant's damages, respondent's counsel seeks to introduce written settlement communications during rebuttal.*

Because the NASD Code of Arbitration Procedure ("NASD Code") does not require parties to disclose exhibits and/or witnesses used in rebuttal, a common tactic to exploit this situation is to attempt to introduce damaging documents or witness testimony as rebuttal evidence. Another tactic is to present evidence of prior irrelevant and unflattering acts as rebuttal exhibits. For example, respondent may seek to present evidence of your client's divorce, bankruptcy, criminal behavior and other irrelevant prior behavior. Likewise, an undisclosed witness may appear to provide rebuttal testimony.

Arbitrators are charged with hearing the evidence. However, they have the discretion to exclude otherwise admissible evidence when its probative value is substantially outweighed by unfair prejudice. You can and should object to this type of evidence on relevancy grounds. You can also argue that it is not rebuttal evidence at all, but part of respondent's case in chief.

Since the Panel, however, is not bound or required to enforce the Federal Rules of Evidence or any state rules of evidence, in accordance with Rule 10323 of the NASD Code, it may allow the evidence to be admitted. The reality is that panels will usually give attorneys a good deal of leeway in questioning witnesses in areas that state or federal rules of evidence would prohibit. In addition, panels will often allow counsel to present evidence that would not be admissible under evidentiary rules. *See also*, "Admissibility of Evidence" in *The Arbitrator's Manual* (May 2005) at 26.

Expect that the Panel will permit damaging evidence -- even settlement discussions -- to be admitted and plan to deal with it in your closing argument. Explain why the information is irrelevant, that it was introduced for no reason other than to prejudice the Panel against your client, and suggest that respondent is acting out of desperation.

II. Witness Problems

A. Forgetful Claimant or Claimant With Sudden Recollection

***Scenario**: Your client has one of the strongest cases of any claimant you have ever represented. She has a good recollection of events and her story has been consistent from day one. Since the first time you met her, you have asked her repeatedly to tell you everything about her background and the circumstances surrounding her claim, especially things that she might believe have little or no significance to her case. She has assured you that she has held nothing back. When Respondent begins his cross-examination, however, her memory suddenly becomes shaky. Even more alarming, when she does remember, her testimony discloses events or circumstances of which you had no knowledge and that have the potential to derail her case.*

Without being too obvious, request a break in the proceedings as soon as possible to help your client relax and regain control. Assure her that she was effective on direct examination and that she should simply continue to tell her story in her own words. Remind her that she should do her best and not be intimidated by respondent's counsel.

When bad or new facts emerge during cross-examination, do not ignore or attempt to hide them. Acknowledge and explain them. Point out the possibility that claimant may have forgotten or been mistaken about some incident or detail. Be prepared to explain what seems to be a contradictory statement or discrepancy in the testimony. Support your explanation with other facts already in the record or that will be introduced into evidence.

B. Exaggerating or Lying Claimant

***Scenario**: You have emphasized many times to your client the importance of always telling the truth when testifying, regardless of what effect she may believe it will have on her case. She has assured you that she would never do otherwise. Nonetheless, on cross-examination, it is obvious to you that she is embellishing her story to such an extent that it is borderline false. She is also testifying regarding conversations that you know for a fact did not take place.*

Remember that ethical considerations require attorneys to withdraw from the representation of a client whom they know is not telling the truth. Model Rule 3.4(b) provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely." Model Rule 3.3(a)(4) prohibits lawyers from offering evidence that the lawyer knows is false.

To give your client the benefit of the doubt, request a break in the proceedings and instruct her on the dire consequences if she continues to testify falsely. Stress that respondent's counsel will be quick to detect any inconsistencies or discrepancies in her story and use those against her. *See generally* David E. Robbins, *Securities Arbitration Procedure Manual* (Fifth Ed. 2006), § 12-2.

To avoid having to withdraw as claimant's attorney in the midst of the hearing, consider pursuing settlement discussions with respondent, especially if it has previously made a settlement offer.

C. Evasive Witness

***Scenario**: Respondent's witness is deliberately evasive on issues at the very heart of your case. He evades your questions on cross-examination by going on and on with testimony that does everything but answer your questions.*

Request the chairman's help in reining in this witness. Explain how the witness is deliberately refusing to answer your questions. Point out that while you have no objection to the witness testifying at length on respondent's examination of him, you are entitled to direct and expect specific answers to your questions. Ask the chairman to tell the witness that he must answer your questions.

D. Lying Witness

***Scenario**: Respondent's witness lies during your cross-examination of him.*

If possible, use documents to prove that the witness is lying and to destroy his credibility with the arbitrators. While a witness can lie, documents never do.

If no or only a few incriminating documents are available, take his position to the extreme. Recap or summarize evidence already in the record and ask the witness if this is what he is telling the Panel and expects it to believe. For example, "Mr. Jones, are you telling this Panel that my client was willing to pay higher commissions to your firm than he way paying in the past, but never listened to any advice or recommendations you gave him, insisted on doing what he wanted regardless of your warnings, etc. and wanted to destroy his plans for financial security during retirement?"

III. Problems with Damages

A. Disappearing Damages

***Scenario**: Your client is an unsophisticated elderly investor whose damages are the result of her broker's failure to diversify a portfolio heavily laden with tech stocks, several of which are or have been the subject of pending class actions. Respondent has not raised the class action defense in its Answer. The hearing is going surprisingly well, but when your expert testifies regarding her damages, respondent objects, arguing that the damages are minimal because of the class actions.*

Argue that, since this is the first time that respondent has raised the class action defense, the firm has, in fact, waived it. More important, emphasize that the firm is neither a defendant nor a named party in the class actions, and that the litigation has absolutely nothing to do with claimant's causes of action. Be prepared with copies of the class action complaints to show how they have no relevance to claimant's claims and the issues before the arbitrators.

Tell the Panel, however, that you are willing to reduce or offset the damages sought by the amount claimant likely will receive as a result of the class action settlements. Stress that claimant is not seeking a double recovery. Since the reduction will be a minimal amount, it will only slightly reduce claimant's damages.

IV. Problems with Expert Witnesses

A. Expert Testimony Falls Short

***Scenario**: You spent a lot of time researching potential experts to testify on your client's behalf and interviewed several in person before engaging one who you were confident would be perfect. Although he is expensive, you are convinced he has the ability to explain to the Panel the merits of your client's claim. His degrees are from institutions generally regarded as among the best in the country, his publications are prolific and he was a tenured professor at a well-respected college before founding his own consulting firm. Discussions with colleagues confirmed that he is an excellent witness whose testimony has led to good awards. Unfortunately, he is not working in your case. His testimony on direct was less than you had hoped for and he is contradicting himself on cross. Respondent's counsel has also pointed out errors in the expert's charts, which you failed to catch. In short, the expert is now hurting your case instead of helping it.*

If the expert is truly critical to your case, consider relying on respondent's expert during your cross-examination of him and, in effect, using him as your witness. This is a bold move and should only be used if you are confident you can control the expert. It is extremely helpful if there are one or more documents already in evidence upon which you rely. If the expert is testifying about industry practices, you may be able to get him to admit, based on the documents, that respondent's conduct violated industry practices and standards of conduct.

B. Problematic or Hostile Expert

***Scenario**: Respondent's expert has made a number of excellent points during his testimony on direct, which threaten to derail your case.*

Be prepared to take whatever the witness will give you. During your cross-examination, point out areas in which the expert has no expertise or experience. Focus your questions on any prejudice, bias or interest the expert may have in testifying for respondent. Challenge his assumptions. Probe his methodology and emphasize possible problems with his approach.

C. Expert's Limited Availability to Testify

***Scenario**: Your expert witness is so well-regarded that he is booked to testify at hearings and mediations many months in advance and has only one or two days to spend on your client's case. You were aware of his scheduling conflicts and planned to have him testify on the third day of the hearing. Unfortunately, his testimony in another case is taking much longer than expected and the earliest he can appear at your hearing is two days later. The expert was the last witness you had planned to call.*

The only solution to this problem is to plan for it beforehand. Be prepared to adjust the order in which you call witnesses and always have alternative witnesses available.

V. Problems with Panel

If you encounter a problem with one or more of the arbitrators, it is essential that you do everything possible to ensure that the record accurately reflects the problem. As difficult as it may be to do so, you must raise any objection concerning an arbitrator during the hearing itself. The harsh reality is that failure to make the appropriate objections or proffers at the hearing could well result in a complete waiver of any rights you may have to vacate an adverse award.

A. Panel Limits or Refuses to Accept Relevant Evidence

***Scenario**: Claimant's Statement of Claim includes causes of action for negligence, failure to supervise and respondeat superior liability. During your cross-examination of the branch manager, you attempt to introduce evidence establishing that there were previous instances of the manager's failure to supervise the broker. Your purpose is to show that there was a pattern of negligent conduct by the broker and the firm's supervisory failures. Respondent's counsel objects on relevancy grounds and the Panel strictly limits the evidence on the broker's background.*

Acknowledge the ruling, but explain to the Panel that you would like to offer a proffer of what the evidence will show. Most arbitrators will permit you to make the proffer. During your proffer, you will be able to essentially "get into evidence" the information that you were prevented from introducing. If, after hearing your proffer, the Panel still rules that the evidence is irrelevant, you will have effectively preserved your objection on the record. This is important in the event you receive an adverse award and decide to file a motion to vacate.

See also discussion above, Rebuttal Witnesses and Evidence.

B. Chairman or Arbitrator Rushes You

***Scenario**: The Chairman tells you to "move along" before you are ready or otherwise tries to rush you.*

Above all, be diplomatic, tactful and take extreme care not to offend the arbitrator. Tell the Panel that you understand there are only a limited number of hearing sessions and that you appreciate the arbitrators' desire to expedite the proceedings.

At the same time, explain that this case is extremely important to claimant, that he has waited a long time for this arbitration and that these hearing sessions are his only chance to "have his day in court." Mention also your obligation as a lawyer to ensure that he has as fair and complete a hearing as possible. Tell the Panel that you will do your best to move as quickly as possible, but that you need additional time to complete your direct examination, cross, etc.

C. Arbitrator Failure to Disclose.

***Scenario**: It is day six of a six-day hearing. During the morning break you receive a phone call from a friend saying that while doing some Internet research on a matter unrelated to your case, she*

came across a website that mentioned one of your Panel members. You check out the website and discover that the arbitrator had worked briefly for a subsidiary of respondent three years earlier. You reexamine the member's Arbitrator Disclosure Report and find no mention of this under his employment background. Until now, you had a good feeling about this arbitrator, who has displayed no indication as to how he will rule at the hearing's conclusion.

Rule 10312 of the NASD Code requires an arbitrator to disclose, among many other things, "[a]ny existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias." Under this standard, the arbitrator's failure to include his past employment with respondent's a subsidiary is a failure to disclose.

Keep in mind that the Arbitrator Application, which every NASD arbitrator must complete, requires the disclosure of certain material information under oath regarding employment history, business relations, educational background and other relevant information that the NASD has determined is relevant and material to qualify an applicant as an NASD arbitrator. The NASD requires arbitrators to update their disclosure information periodically and it may also request additional specific information for disclosure. The NASD then uses this information to prepare an Arbitrator Disclosure Report, which it provides to the parties as part of the arbitrator selection process.

When the NASD asks an arbitrator to serve on a panel, he must complete an Oath of Arbitrator, which includes answering additional disclosure questions on an Arbitrator Disclosure Checklist, affirming that he is not disqualified to serve under the NASD Disqualification Criteria and that his Arbitrator Disclosure Report is complete and accurate. Because complete and honest disclosure is a continuing obligation, each arbitrator on a panel must affirm to the parties -- both at the first pre-hearing conference and at the beginning of the final arbitration hearing -- that he has made all required disclosures. Only then are the parties asked to accept the panel.

See also Code of Ethics for Arbitrators in Commercial Disputes, which is incorporated in and made a part of the NASD Arbitrator Application, and "Duty to Disclose Conflicts" in *The Arbitrator's Manual* (May 2005) at 2, which states: "If the arbitrator does not believe a conflict exists, but rather some association with the parties, counsel, and/or witnesses may be questioned, the arbitrator must disclose the association. When in doubt, disclosure should be the rule."

In view of the fact that an arbitrator's failure to disclose material information requires vacatur of an arbitration award under Section 10(a)(2) of the Federal Arbitration Act ("FAA") -- "evident partiality or corruption in the arbitrators"-- consider discussing your concerns with your NASD case administrator, particularly if you sense that the panel will rule against claimant.[1] In the event that the panel does render an adverse decision, the fact that you raised this issue before the hearing concludes may be helpful in prevailing on a motion to vacate the award.

D. Disinterested Arbitrator

Scenario*: You could not help but notice that one of the arbitrators seemed disinterested and somewhat distracted during your opening statement and claimant's testimony. By the close of day two of the hearing and the several questions the arbitrator has asked, it is obvious to you that he is not following the proceedings.*

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[1] Actual partiality need not be shown. The FAA imposes "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *See Commonwealth Coatings Corp. v. Continental Cas. Co*., 393 U.S. 145, 149 (1968); *Positive Software Solutions, Inc. v. New Century Mtg. Corp*., 2006 WL 52276 at *6 (5th Cir. 2006); *Ormsbee Development Co. v. Grace*, 668 F.2d 1140, 1150 (10th Cir. 1982). *See also Schmitz v. Silveti*, 20 F.3d 1043, 1047 (9th Cir. 1994).

Without attacking the arbitrator, consider discussing your concerns with the NASD administrator responsible for your case. Do not be judgmental, but raise the possibility that the arbitrator may be ill or otherwise unable to continue to serve on the panel. If the arbitrator is elderly, question whether the hearing days are too long or tiring for him and whether the hearing should proceed.

If your comments fall on deaf ears, make sure to keep a written record of your observations, which may not be readily apparent on the NASD tape or hearing transcript. In the event you receive an adverse award and decide to file a motion to vacate, the record of your observations during the hearing will be important evidence, which may make the difference in prevailing on your motion.

E. Biased or Prejudicial Arbitrator

***Scenario**: You are not surprised that, based on his questions, the industry arbitrator on your Panel appears to be favoring respondent. As the hearing progresses, however, his leaning toward respondent seems to be more and more like an obvious bias.*

If the arbitrator's bias or prejudice is obvious, try to ensure that everything evidencing his untoward conduct is put on the record by objecting whenever necessary. *See also* discussion above, Arbitrator Failure to Disclose.

See discussion above, Arbitrator Failure to Disclose. *See also* Canon I(D) of the Code of Ethics in *The Arbitrator's Manual* (May 2005), which provides, in relevant part: "After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family, or social relationship, . . . that is likely to affect impartiality of that might reasonably create the appearance of partiality or bias."

F. Arbitrator *Ex Parte* Communications

***Scenario**: As you enter a restaurant with your client during a lunch break, you notice that respondent and his counsel are also dining there. While at your table, you glance in their direction and see one of the arbitrators engaged in an animated conversation with respondent's branch manager. The conversation lasts several minutes.*

Although the NASD Code does not address *ex parte* communications, it is clear that such communications are generally prohibited in NASD arbitrations. While some arbitrators may be under the impression that *ex parte* communications represent only those types of conversations involving the subject matter of the case, the NASD's arbitrator training materials define such communications as follows: "[e]x parte communications include any discussion between an arbitrator and a party, a party representative, or a witness when the other parties are not present. These communications include pleasantries exchanged in the elevator, hallway, or rest room." *See* the *NASD Arbitrators' Manual* and the NASD's "Top Ten Standards of Good Practice at Arbitration Hearings" (available on NASD's website), which states that participants in NASD arbitrations "should not engage in conversations with arbitrators in the absence of the other party(ies)."

Whether the arbitrator was actually seated at respondent's table or simply passing by, the *ex parte* communication was improper. *See*, however, *The Arbitrator's Manual* (May 2005) at 22, which seems to suggest that brief, strictly casual conversations may not rise to the level of an *ex parte* communication.

While filing a motion to recuse the arbitrator for his *ex parte* communication with respondent is probably too drastic an approach, counsel should keep a written record of the event, which may lay the groundwork for a motion to vacate the award.

G. Replacement Arbitrators

***Scenario**: It is Friday afternoon and your hearing is scheduled to begin next Tuesday. At 3 o'clock you receive a fax from the NASD advising you that one of your Panel members has withdrawn and a new arbitrator is replacing him. The new member's Arbitrator Disclosure Report indicates at least one item in his background that concerns you. You also note that he has a history of approximately 30 arbitration awards. To research the questionable background item and review his past awards will take considerable time and effort. You had planned to spend the weekend and Monday meeting with your client and doing last-minute work on your case.*

Consider carefully the pros and cons of going forward with the replacement vs. adjourning to investigate his background further, or objecting on grounds that the arbitrator may be disqualified.

In the event that your investigation reveals nothing to suggest that the arbitrator has a clear conflict or is otherwise disqualified from serving, you have the option to proceed with only two arbitrators, however, most experienced securities arbitration lawyers would be reluctant to proceed on that basis. To allay your concerns about the replacement arbitrator, you may also want to submit a voir dire questionnaire to the NASD for the replacement to complete. If opposing counsel is agreeable, you may wish to submit a joint voir dire questionnaire.

H. Violations of NASD Policies and/or Procedures

***Scenario**: At the close of the first day of the hearing, the chairman demands that you provide him with a list of witnesses so that he can determine how long claimant's case will take. He does not make a similar demand to respondent's counsel.*

The chairman may not realize that, in his effort to move the proceedings along to ensure the case will conclude within the days allotted for the hearing, he is treating you unfairly. Suggest to the chairman that he will get a more accurate sense of how long the case will take by obtaining witness lists from both parties.

CONCLUSION

The scenarios and strategies outlined above are just a few examples of the problems that can and, more often than not, do arise during securities arbitration hearings. Because each arbitration hearing is unique, there is no hard and fast rule or "right" answer on how best to respond to these issues. What works in one hearing may be disastrous in another.

Use the approaches suggested above judiciously and consider carefully the consequences of whatever action you take. Common sense and your own instincts on what will work best in a particular case in front of a particular panel should dictate the solution you reach.

Be aware. Be alert. Most important, be prepared.