



Financial Services Employment Arbitration Q&A

The Unique Role of Expert Witnesses in FINRA Employment Arbitrations

By Eric M. Steinert and Cameron A. Smith

Part II: Expert Q&A

To further explore the issues raised in [Part I](#), we have added a short interview with the well-regarded securities-industry expert Jay Rosen, Chairman and Founder of Capital Forensics, Inc. In response to our questions, Mr. Rosen provides some valuable perspective drawn from his over 35 years of experience in the securities industry. Mr. Rosen provides analysis and expert testimony in the areas of suitability, supervision, compliance, fiduciary duty, money management, investment advisory, branch management, employment disputes, surveillance, anti-money laundering projects, regulatory investigations, and ERISA-related matters, as well as transactional analysis. He has been retained as an expert in over 350 litigation proceedings.

What trends have you seen over the years in the use of experts in FINRA arbitrations?

Rosen: The utilization of experts has increased substantially since FINRA made the determination that industry arbitrators are no longer required on Panels. As a result of that decision, experts who understand and can evaluate the issues at hand are now more valuable than ever. Generally, experts with experience in the industry and actual testifying experience are sought after, however, each attorney gives these factors their own weighting. Nowadays, an expert with general industry experience is often paired with an expert with specific product experience such as structured products or options.

What trends have you seen in the use of expert testimony in employment cases?

Rosen: The brokerage business has such a high degree of regulation and record keeping that it becomes imperative for the attorney to have someone who clearly understands the standards of the industry as it relates to the particular case. This also allows the attorney to direct and/or evaluate the economics of the broker's past earnings, future possibilities, and the basic value of his/her business. Most importantly, an expert allows the attorney to communicate with a panel of arbitrators and earn their trust since some of those arbitrators came from the industry and will recognize the quality of the testimony. Not only should the testimony be logical and consistent with industry standards but it should be geared toward removing any negative bias the panel may have through credible and insightful testimony.

What is important as far as effectively using experts in FINRA employment arbitrations?

Rosen: The foundation of the testimony should be based upon the facts of the case, and tailored towards the arbitrators and their background so the level of communication is appropriate. The expert should be able to evaluate the claimant's effectiveness as a broker as well as the larger business trends.

How much weight do you think panels give experts in employment arbitrations?

Rosen: It is a difficult question to answer as it depends upon the specific issues of the case. As in any type of case, barring any bias, a good expert should carry a lot of weight with the arbitrators.

What are some mistakes you've seen in the use of experts in employment cases?

Rosen: One mistake which is common in all arbitrations is to have the expert come to the hearing for only his or her testimony and not sit through the entire case. The plaintiff's bar has suggested attorneys should look for experts who only come to hearings for their testimony, or what they refer to as a "cameo appearance." That makes it easy to ask questions about what the expert does not know about the case, thereby diminishing any credibility they might have. The high quality of the expert's industry background and litigation experience are both prerequisites. You not only need to know the answer to the question, but also how to deliver that answer in a clear, easily understandable and compelling way.

Another mistake is that experts will exaggerate the amount of economic damages owed to their client, which causes them to over-reach in front of the arbitration panel.

What advice can you offer for FINRA practitioners who are considering retaining experts in FINRA employment arbitrations?

Rosen: In FINRA arbitrations, the arbitrators will have established certain bias by the time the case is turned over to the respondent. You and your expert should be trying to identify that bias and plan a strategy to overcome or block it through expert testimony. The expert has to be there to hear the claimant's case to understand and develop that sense of what the arbitrators are concerned about. His or her credibility with the panel will help bring the case to a positive resolution.

What tools are available to help prevail in employment cases?

Rosen: The tools you will need to prevail include data and data analysis. Generally, we are talking about valuations, projections, and timelines. Keep them simple and develop them in such a way that anyone can understand the message.

Another tool is the analysis of the arbitrators – dig deep and know everything about them to try and select the very best panel possible. Analyze the arbitrators' Disclosure Report and award history and don't hesitate to request further information about potential arbitrators before submitting your strike list.

Mock arbitrations are another useful tool in employment cases. If you have the appropriate case, a mock arbitration can offer insight into the decision process as well as valuable intelligence on what the outcome may be if the case goes to arbitration. Once your final panel has been selected, some vendors can use their database of arbitrators to create a "Mock Panel" with very similar backgrounds, occupation, and award history.

Lastly, mediation can be a useful and cost-effective tool for resolving a case. Mediation is an informal and flexible dispute resolution process. One of the benefits of mediation is that it allows people to control the outcome, even if the final decision does not result in a settlement of the matter.

Conclusion

Experts play a unique role in FINRA employment arbitrations, which differs in many significant ways from civil litigation. Hopefully, [Part 1](#) of this article and the Q&A with Jay Rosen have provided a helpful overview in understanding the role of expert witnesses in FINRA employment arbitrations.

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