



Break-Out Session - Track D: Litigating Customer Disputes

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I. When Not to Compel Arbitration.

A. The case for keeping your case in Court.

1. Quality of the Judge and the Claims.
 - a. Diligence re likelihood of prevailing pursuant to dispositive motion.
 - (i) Fed. R. Civ. P. 12(b)(6)
 - (a) Has the Plaintiff adequate pleaded claims;
 - (b) Statute of Limitations and Statute of Repose at issue under Federal and State Securities Laws;
 - (1) Can you eliminate certain claims from the pleading that will make it worthwhile to avoid arbitrating any remaining claims.
 - (i) Fed. R. Civ. P. 56
 - (a) Are the claims of the nature that you can anticipate prevailing on summary judgment;
 - (b) Fed. R. Civ. P. 56(f)
 - (1) Will the Judge require substantial discovery prior to granting a Motion for Summary Judgment.
 - (ii) Fed. R. Civ. P. 56
 - (a) Are the claims of the nature that you can anticipate prevailing on summary judgment;
 - (b) Fed. R. Civ. P. 56(f)
 - (1) Will the Judge require substantial discovery prior to granting a Motion for Summary Judgment.
2. Changing costs of arbitration.
 - a. Likelihood of Litigating through the Arbitration Hearing.
 - (i) FINRA Rule 12504 eliminated the ability to bring a motion to dismiss in most cases.
 - (a) Exceptions:
 - (1) Claims previously released through settlement (FINRA Code of Arbitration Procedure 12504(a)(6)(A)
 - (2) Moving party not associated with account, security, or conduct at issue (FINRA Code of Arbitration Procedure 12504(a)(6)(B)

B. The Case for compelling arbitration.

1. Complexity of securities related claims.
 - a. If you stay in court, your claims may ultimately be decided by a jury, which may be less prepared to decide a complex security claim.

- b. Without depositions, customer claimant is less likely to truly understand defenses or learn how a party will testify at the hearing.
2. Reduced discovery costs.
 - a. No depositions and no interrogatories reduces the costs of discovery.

II. Selecting the Optimal Arbitration Panel.

A. Sources for Information.

1. FINRA Disclosure.
 - a. Provided with Arbitrator Rosters (See FINRA Code of Arbitration Procedure Rule 12400 et seq.)
2. FINRA Reported Decisions.
 - a. Available at finraawardsonline.finra.org.
3. Client Diligence.
 - a. Confer with your client to determine level of diligence
4. Firm Diligence.
 - a. Maintain information re past panels, claims asserted, and results achieved.
5. General Searches.
 - a. Publicly available information available through google and social media can be effective tools for getting a better picture of the panel participants.

B. Additional Considerations Re Background of the Panel.

1. Background of the panel.
 - a. Experience with similar issues.
 - b. Age.
 - (i) Older =
 - (a) more likely to be rule based
 - (b) less likely to grant a large award
 - (ii) Younger =
 - (a) More reliant on technology
 - (b) More likely to expect customers to be independently aware of products

- c. Geography.
 - (i) Small town = generally less likely to give big award
- d. Legal Training or not?
- 2. Likelihood to make an independent decision.
 - a. Important to determine from prior awards whether a particular panel member is an independent thinker
 - b. Avoid followers

your Panel

- (i) Analysis of your Panel composition.
 - (a) Attorneys appointed to your panel?
 - (b) Prior experience in FINRA arbitrations and types of claims previously adjudicated.
 - (c) Industry-member on your panel (FINRA Code of Arbitration Procedure Rule 12402)
 - (d) Impact of a Claimants Selecting Optional All Public Panel Option (FINRA Code of Arbitration Procedure Rules 12400-12401, and 12403).

III. Presenting Your Case to the Panel during Pre-Hearing Motions and Briefs.

- A. Arguing your case during discovery.
 - 1. Subpoenas (FINRA Code of Arbitration Procedure Rule 12512):
 - a. The requirement of a written motion to have a subpoena issued provides an opportunity to frame the legal issues for the panel prior to the hearing. (FINRA Code of Arbitration Procedure Rule 12512(B).
 - 2. Order to Non-Party FINRA Members (FINRA Code of Arbitration Procedure Rule 12513)
 - a. The Requirement of a written motion to have an order issued to a non-party member firm provides an opportunity to frame the legal issues for the panel prior to the hearing.
- B. Pre-Hearing Briefs – optional?
 - 1. Balance between tipping your hand to opponents and education the panel.
 - a. Considerations relating to the quality of

IV. Litigating Against Sympathetic Parties.

- A. Seeking fees on behalf of large corporate client.
 - 1. Fee provision in a contract.
 - 2. Statutory authority permitting fee award.
 - 3. Court Sanctions.
- B. Strategies for positioning your case in light of a sympathetic client.
 - 1. Consider forum – with a sympathetic client, stronger emphasis on avoiding jury trial – arbitrate these claims.
 - 2. Continual focus on legal issues; minimization of the players;
 - 3. In either forum, ask for relief despite disparate size and sophistication between the parties;
 - a. For example, asking for fees against a sympathetic client with weak claims may not result in fees but may increase likelihood of a complete defense award.

About Cory Braddock

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Cory Braddock is based in Snell & Wilmer's Phoenix office where he is a member of the firm's Commercial Litigation and Securities Litigation and Investigations Practice Groups. His practice focuses on complex commercial litigation with a particular emphasis on securities and financial services institution litigation in both federal and state courts, FINRA arbitration proceedings, general commercial litigation matters and tax controversy litigation.

Cory's securities practice draws from his substantial experience in the brokerage industry where he was a producing broker (Financial Representative) with Fidelity Investments (Series 7, 65, life agent) and a branch manager with Scottrade (Series 24). While in the brokerage industry, he obtained, and still maintains, his Certified Financial Planner designation. Cory has defended a number of financial institutions, including retail banks, credit unions, insurance companies, broker-dealers, investment advisors, financial planners, brokers, insurance agents and unlicensed persons against claims involving alleged breach of fiduciary duty, negligence, unauthorized trading, churning, suitability, selling away, failure to supervise, claims under the Securities Act of 1934 (Rule 10b-5 claims), the Investment Advisors Act of 1940 and under Arizona's State securities fraud statutes.

Cory's general commercial litigation practice includes the representation of national banks, state credit unions, third-party ACH processors, real estate developers, Title Companies and individuals in federal and state court and in arbitration proceedings. He has been successful in obtaining dismissal at the motion to dismiss stage on numerous occasions. Cory has also been successful at trial, both as lead counsel and as a supporting member of a litigation team. Specifically, he successfully prosecuted, including conducting direct examination, cross examination and delivering closing arguments, in a Section 1983 claim that resulted in a federal court jury verdict in favor of his client and included an award of punitive damages. Also, Cory actively participated as a member of the litigation team that obtained one of the largest jury verdicts in the history of the State of Arizona. He has also prepared briefing for, and argued in, the Ninth Circuit Court of Appeals.

Cory's tax controversy practice focuses on representing non-profit organizations, universities and businesses in state and local tax matters including litigation relating to the property tax exemptions, property tax valuation and compliance with Arizona's unclaimed property statutes.

Professional Recognition and Awards

- Pro Bono Attorney of the Year, Snell & Wilmer (2008)

Education

- Brigham Young University (J.D., cum laude, 2006); Moot Court; Research Assistant for Professor Stanley D. Neeleman
- Brigham Young University (B.A., Business Management, 1993)