

The Polygraph Examination - A Valuable Arbitration Tool

by David A. Weintraub



Securities Arbitration - once a concept foreign to most attorneys, is now a reality for many individuals whose retirement nest eggs have been decimated within the past year. For better or worse, most individual and institutional investors who do business with firms that are members of the Financial Industry Regulatory Authority (hereafter "FINRA"), are required to resolve disputes through a FINRA administered arbitration process. For most Nebraska residents, this means that their dispute will be resolved through an arbitration proceeding that will occur in Omaha. Residents of western Nebraska may be required to travel to Cheyenne, Wyoming for their hearings.

Upon recognizing that their dispute will be resolved by arbitrators, and not by a judge and jury, investors and their attorneys often wonder how the arbitral process differs from the judicial process. This article does not address all of the differences between these processes. Rather, this article will

address one area of difference, and suggest a strategy for making the difference work to the investor's advantage.

One of the key differences between the judicial process and the arbitration process is that discovery is very limited in arbitration. Depositions are rarely permitted in arbitration. Depositions are generally discouraged, but may be allowed where a party or witness is dying, or where a key witness cannot be compelled by the subpoena process to testify.¹ Thus, the final hearing is likely to be the attorney's first opportunity to confront the broker and his/her supervisor. In most cases, these two individuals will be the key witnesses, in addition to the investor/Claimant. Any edge that a party can ethically achieve is invaluable.

Pursuant to FINRA Rule 12604, Arbitrators are "not required to follow state or federal rules of evidence." Similarly, the American Arbitration Association's Commercial Arbitration Rules provide, "[c]onformity to legal rules of evidence shall not be necessary." Given that neither state nor federal rules of evidence are binding in FINRA arbitration proceedings, an arbitrator's decision to admit evidence that may otherwise be inadmissible in court, is unlikely to be the basis of a successful effort to vacate an Arbitration Award. On the other hand, a refusal to admit relevant evidence may be the basis for a successful petition to vacate an Arbitration Award.²

When arbitrators ultimately retire to deliberate and render an Award, they are often left with a simple decision: "Who do we believe, the broker or the investor?" Where there exists an important issue that can be categorized as a "he said, she said" issue, a polygraph report can be an extraordinarily valuable tool to offer to the arbitrators. At the final arbitration, parties are free to attempt to offer the testimony of polygraph examiners,

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as well as their written reports. Because rules of evidence do not apply in arbitration, it should be easier to have a polygraph examiner's testimony admitted in arbitration, than in a judicial proceeding.³

Examples of the types of issues that are appropriate for a polygraph examination in the securities context are: (1) whether the purchase of a specific security was authorized; (2) whether the sale of a specific security was authorized; (3) whether the broker represented that a specific investment had no risk; or (4) whether the broker explained the difference between mutual fund "A" shares and "B" shares. These are just examples of factual issues that may be appropriate for a polygraph examination. In order for an issue to be appropriate for polygraph purposes, it must be a "he said, she said" issue, or one that is clearly a "yes / no" issue. One accepted format for a polygraph examination is having an examinee confirm that a specific written statement is true. It is critical that the examiner be sufficiently skilled to identify the issue, and assist with framing the issue for polygraph purposes.

Assuming that the attorney recognizes the existence of an issue that is appropriate for a polygraph, the attorney must first broach the issue with the client. Some clients may believe that the attorney wants the polygraph because the attorney doubts the client's veracity. If the client believes that his or her own attorney does not believe the client, the client is likely to refuse the polygraph, or find another attorney. It is critical for the client to understand that a successful polygraph examination will be a valuable tool either at arbitration, or as part of an effort to settle a case. It is also critical that the client understand that the polygraph process is intended to be confidential. In other words, if the examination is inconclusive, or the client is deceptive, there is no reason to generate a report.

Once the attorney knows that the client is willing to submit to an examination, numerous questions exist, including, (1) choosing the appropriate examiner; (2) whether to advise opposing counsel in advance of the polygraph; (3) if opposing counsel is not advised in advance of the polygraph, deciding when to disclose the existence of the polygraph report; (4) if opposing counsel is not advised in advance of the polygraph report, whether to offer opposing counsel the opportunity to have a second examination taken by an examiner chosen by opposing counsel; and (5) when to advise the arbitrators of the existence of the report and your intended use of the report at the final hearing.

Choosing the Appropriate Examiner

As a threshold matter, the Nebraska examiner should be licensed as required by R.R.S. Neb. § 81-1914 (2008). Second, they should also be members of the Nebraska Association of Polygraph Examiners. Third, one should hire an examiner with

appropriate certifications and affiliations, with organizations such as the American Polygraph Association, the Backster School of Lie Detection⁴, the Defense Academy for Credibility Assessment⁵, the American College of Forensic Examiners⁶, the American Association of Police Polygraphists⁷, or the FBI. The examiner should also utilize a current, recognized computer system, such as those manufactured by Axciton Systems Incorporated⁸ or Limestone Technologies.⁹ Fourth, the examiner's qualifications will ideally have previous judicial certification. Fifth, one should consider whether to retain one examiner to administer the test, and another examiner to opine on the method employed by the first examiner. Finally, it makes sense to ask the examiner for their historical testing statistics. It is not uncommon for an examiner's test results to reflect deceptive responses with frequencies as high as 85%.

Whether to Advise Opposing Counsel in Advance of the Polygraph

In *Securities and Exchange Commission v. Kopsky*, 2008 U.S. Dist. LEXIS 93609 (E.D. Mo. 2008), the Court granted a Motion in Limine, excluding polygraph testimony of an individual accused of insider trading. Among the factors considered by the Court was the *ex parte* nature of the polygraph examination - the SEC was not notified in advance that the examination would take place. The Court was concerned that as a result of the *ex parte* nature of the examination, the examinee did not need to be concerned about the negative consequences of the examination.

Kopsky instructs any litigator in the Eighth Circuit to consider advising opposing counsel in advance of any polygraph examination. In connection with a FINRA arbitration, and perhaps an American Arbitration Association arbitration as well, the litigator may not need to be as concerned with the niceties contemplated by *Kopsky*. Because neither federal nor state rules of evidence apply in arbitration, it is reasonable to argue that advising opposing counsel is not only not required, but contrary to the underlying principles of arbitration. These principles are premised on the notion of streamlining the dispute resolution process. Just as your client is not required to sit for a deposition, the client should also not be required to indulge opposing counsel with their presence at an examination. Because FINRA rules require that any arbitration exhibit or witness be disclosed 20 days before the final hearing, opposing counsel is free to have the broker or relevant person submit to their own polygraph examination. If the investor's attorney is concerned that 20 days is insufficient notice, it would be reasonable to provide opposing counsel with more time, if only to eliminate the argument that insufficient time existed for the broker's polygraph to be taken.

If the Eighth Circuit litigator rejects the "friendly examiner theory" seemingly approved by the *Kopsky* court, one should

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be prepared to present statistical evidence rejecting the significance of the ex parte nature of an examination.

Whether to Submit to a Second Examination

Assuming that opposing counsel was not provided with advance notice of the polygraph examination, one must decide when to disclose the existence of the polygraph report, the examiner's name, as well as the name of any expert who may opine on the methods employed by the examiner.¹⁰ In *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989), and more recently in *United States v. Gilliard*, 133 F.3d 809 (11th Cir. 1998), the Eleventh Circuit held that when polygraph evidence is offered for the purpose of corroborating a witness's testimony, three prerequisites must be met. First, the opposing party must be given reasonable notice that polygraph evidence will be offered at trial. Second, the opposing party must be given a reasonable opportunity to administer a second polygraph examination covering substantially similar questions. Third, the polygraph examiner's testimony must be otherwise admissible under the Federal Rules of Evidence governing corroborating testimony. Even if all elements are satisfied, the court is still permitted to exclude polygraph related evidence.¹¹ Polygraph evidence remains subject to a traditional Daubert analysis.¹²

Given that neither the Federal Rules of Evidence nor state rules of evidence govern FINRA arbitrations, the arbitration attorney is faced with deciding whether to attempt to satisfy the *Piccinonna / Gilliard* requirements. In most cases, the litigator does not want their own client subjected to a second examination. Though not required in arbitration, given the strong possibility that arbitrators will be hostile to the polygraph concept, it is reasonable to offer the opposing party an opportunity to have the second examination administered. Certain rules should accompany any such offer. First, and most important, questions during the second examination must be identical or substantially similar to questions posed during the first examination. Second, the opposing attorney may not be present during the examination. The only people who should be present during an examination are the examiner and the examinee. Because the examiner will be asking the examinee to identify all medications currently taken, the attorney must be certain that their client is comfortable disclosing this information both during the initial examination, and during any subsequent examination.

Past Precedent for Polygraphs in Arbitration

Polygraph evidence has been permitted by FINRA arbitrators on at least one occasion. In a 1998 Florida arbitration, a

panel of Tampa arbitrators, citing *Piccinonna*, admitted both a polygraph report and the polygraph examiner's testimony.¹³ This author is aware of at least three other instances since 1990 where polygraph evidence was not permitted in FINRA arbitrations. Because of the lack of a complete record in any of the cases where the evidence was excluded, or the one case where it was permitted, it is impossible to determine whether the opposing party was ever given advance notice of the initial examination, or whether they were ever given an opportunity to administer a second examination.

Other Uses of Polygraphs

Using polygraph reports during mediation proceedings can have a significant impact. It is reasonable to not provide any advance notice of one's intent to show a polygraph report to a mediator. In the world of securities arbitration, more often than not, litigators use evaluative mediators, rather than facilitative mediators. Accordingly, depending upon the mediator's views of the reliability of polygraphs, the impact of a favorable polygraph can be significant upon the mediator's evaluation of the case. Likewise, if the issue is sufficiently narrow, and boils down to whether the fact finder will believe the client versus the broker, presenting the polygraph to the broker who is present at the mediation can be dramatic. There is nothing preventing the litigator from challenging the broker to submit to the identical examination. In all likelihood, the broker will not accept the challenge. Furthermore, state law may preclude an employer from forcing an employee to submit to a polygraph.


Because rules of evidence do not apply in arbitration, the arbitration attorney may also consider attaching the polygraph report to the initial Complaint or Statement of Claim. The response will in all likelihood be a Motion in Limine. Assuming that the arbitration attorney is willing to have their client sit for a second examination, a down side to this strategy is antagonizing an arbitrator who may be hostile to the polygraph concept. However, one will have conveyed the point that their client does not fear the process. The other obvious down side is the risk that the client fails the second examination. Because this risk clearly exists, the attorney must be very certain that the choice of the initial examiner was sound, and the examiner is confident that the client would fare well upon second examination.

Conclusion

Polygraphs can be a valuable tool for any civil litigator. Whether the polygraph is ultimately admitted into evidence by a court or by arbitrators, a positive result will at a minimum give the opposing party pause. Because one is limited in any polygraph examination as to the number of questions upon which a client is examined, the attorney should always be concerned



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whether a decision to not examine a client on a particular issue will convey a message that the attorney fears the results on the question not asked of the client. One must clearly be judicious about the use of polygraphs. They are not appropriate for every client, or for every case. Furthermore, if a client's polygraph results are unfavorable or inconclusive, the attorney would not want that information disclosed. There always exists some risk, albeit minimal, that the opposing party will learn of the polygraph. 

Endnotes

- ¹ FINRA Discovery Guide, Section VI, provides, "Depositions are strongly discouraged in arbitration. Upon request of a party, the arbitrator(s) may permit depositions, but only under very limited circumstances, such as: 1) to preserve the testimony of ill or dying witnesses; 2) to accommodate essential witness who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing; 3) to expedite large or complex cases; and 4) to address unusual situations where the arbitrator(s) determines that circumstances warrant departure from the general rule. Balances against the authority of the arbitrator(s) to permit depositions, however, are the traditional reservation about the overuse of depositions in arbitration."
- ² R.R.S. Neb. § 25-2613 (2008); 9 U.S.C. §10.
- ³ Pursuant to Nebraska law, polygraph evidence is generally not

admissible. *Sturzenegger vs. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406, 2008 Neb. LEXIS 130 (NE 2008). In the Eighth Circuit, polygraph evidence is highly disfavored, but not *per se* inadmissible. *Securities and Exchange Commission v. Kopsky*, 2008 U.S. Dist. LEXIS 93609 (E.D. Mo. 2008).

- ⁴ <http://www.backster.net/about.asp>
- ⁵ <https://www.daca.mil/home.asp>
- ⁶ <http://www.acfei.com/>
- ⁷ <http://www.policepolygraph.org/>
- ⁸ <http://www.axciton.com/>
- ⁹ <http://www.limestoneetech.com/index.php>
- ¹⁰ If the polygraph results were negative or inconclusive, the examiner will not be asked to generate a report. Disclosure of the examination will, accordingly, not be an issue.
- ¹¹ In *United States of America v. Henderson*, 409 F.3d 1293 (11th Cir. 2005), while acknowledging that polygraph evidence could be admitted for the purpose of corroborating a witness's testimony, the Court affirmed the trial court's decision to exclude polygraph evidence. See also *The Cincinnati Insurance Company v. Cochran*, 2005 U.S. Dist. LEXIS 32916 (S.D. Ala. 2005).
- ¹² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993). In *United States v. Evans*, 469 F. Supp. 2d 1112; 2006 U.S. Dist. LEXIS 57148 (M.D. Fl. 2006), the court stated, "even if a party seeks to introduce polygraph evidence consistent with *Piccinonna*, the evidence must also satisfy Rule 702 and *Daubert*."
- ¹³ *Yazek v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, NASD Case No. 97-03153.