



HOW TO OBTAIN CRITICAL DOCUMENTS IN A FINRA ARBITRATION

September 02, 2020

The FINRA rules are short, to the point, and different from the Rules of Civil Procedure with which most counsel are familiar. There is also not much readily-accessible “precedent” interpreting them. So, if you are litigating in the financial industry and are preparing to hammer out an intra-industry dispute before a FINRA Panel, here are seven essential rules to keep in mind:

1. **There are no Interrogatories.** FINRA Rule 13506 provides that “Requests for Information” are “generally limited to identification of individuals, entities and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or factfinding.” If this left any doubt, the rule then clarifies: “Standard interrogatories are generally not permitted[.]”

2. **Requests for Documents are fully available, however.** The same rule (FINRA Rule 13506) states that “[p]arties may request documents . . . from any party by serving a written request on the party.” In practice, document requests can be roughly as extensive as would be allowed under the Rules of Civil Procedure, so long as the proponent makes a coherent case for the connection between the documents sought and genuine issues in the case.

3. **The claimant and respondent can get discovery from non-parties—especially if they are FINRA members or associate persons.** FINRA Rule 13513 authorizes the FINRA Panel to also direct the production of documents by, or the appearance of, any non-party FINRA member or associated person “without the use of subpoenas.” So, if another broker-dealer that is not a party to the dispute has relevant documents or information, these documents are discoverable. This may be most common when individual broker-dealers/investment advisors switch brokerage firms. The investment advisor may be in a dispute with only one of the firms, but both firms are likely to have key documents. Documents can be obtained—by either side—from the firm that is not party to the dispute. There is a substantial process for acquiring an order to produce under this rule, however, and everyone gets a say before an order to produce is effective—

including the non-party. It is important to act early to make sure there is sufficient time to get through that process.

4. You can file a motion to compel. FINRA Rule 13509 explicitly authorizes the filing of a Motion to Compel. Make every reasonable effort to resolve the dispute first—but if the other side truly will not produce responsive materials, file a motion that draws a coherent nexus between the documents sought and genuine issues in the arbitration. Just as in court, this should result in an order to produce from the Panel. For the best chance of success, avoid overbroad discovery requests and make certain that each request is justified by the connection between the documents sought and the issues in the arbitration. Rule 13509 is not specific about the standard for judging the motion; but in practice, the motion will likely be judged under the law of the relevant jurisdiction.

5. You can seek attorneys' fees. Some litigators fear that (unlike a court) discovery cannot truly be compelled by a FINRA Panel. This is not correct. There are several options for dealing with an intransigent opponent. The FINRA Rules do not specifically discuss attorneys' fees in connection with Motions to Compel discovery; but Rule 13212 generally authorizes "monetary penalties" as "sanctions" for "failure to comply with any provision of the code[.]" including "attorneys' fees, costs and expenses." And, FINRA Rule 13511 expressly states that such sanctions may be applied for "failing to comply with the discovery provisions of the Code," or "frivolously objecting to the production of requested documents or information."

6. You can seek an adverse inference order. FINRA Rule 13212 also authorizes litigants to ask the panel to draw an adverse inference against the opposing party for "failure to comply with any provision of the Code, or any order of the panel[.]" If a party is withholding or destroyed documents, the panel can therefore infer that the destroyed documents would have been unfavorable to him. Rules 13511 and 13212 authorize a FINRA Panel to "[p]reclude a party from presenting evidence," "initiate a disciplinary referral at the conclusion of the arbitration," and/or "dismiss a claim, defense, or arbitration with prejudice" as sanctions in certain circumstances.

7. You can request a forensic inspection of records. Perhaps the approach with the highest upside for the arbitration itself is to request an order for a forensic inspection of the opposing party's files, computers, phones and/or cloud email accounts. To successfully move for this relief, it helps to be able to demonstrate that documents exist but are not being produced. This is where Rule 13513 becomes critical. Production orders to non-parties may result in the production of some documents that the opposing party should also be producing, but is not—and this may demonstrate that the opposing party is not meeting its obligations. Obtaining a forensic inspection can be game-changing if the opposing party was withholding relevant documents and hoping to run out the clock on discovery. Of course, a FINRA Panel will want a strong showing before issuing such an order. Contrary to what some counsel to FINRA arbitrations believe, the FINRA Rules do provide determined litigators with adequate tools for discovery. Because discovery-related requests and motions are sometimes decided by the panel as a whole, you must prepare to convince a majority of the panel to prevail. (See FINRA Rule 13503(d)(3): "Discovery-related motions are decided by one arbitrator . . . [but] [t]he arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party.") Thus, it is especially important to make an aggressive but

tailored case for documents or discovery-related penalties. To benefit fully from these discovery tools, the best strategy is to demonstrate a tight fit between the discovery you are seeking and key issues in the arbitration.

If you have any questions or would like to discuss further, please contact [Craig Warner](#).

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