

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 08-01 (2005003437102).

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. 2005003437102

Hearing Officer – LBB

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

On December 17, 2007, Respondent filed a motion to compel production of documents that he has requested from the Department of Enforcement ("Enforcement"). The documents requested generally relate to Respondent's allegations that the Complaint in this matter was filed as part of a personal vendetta by Enforcement against Respondent, or, in his words, "NASD's deliberate destruction of an unblemished career." In general, Respondent seeks documents that, he believes, will show Enforcement's allegedly nefarious motives in filing this case and in the content of FINRA's press release announcing the filing of the Complaint.

On January 14, 2008, Enforcement filed its opposition to the motion, stating that it has produced everything that the Code of Procedure requires.¹ Enforcement represents, with support from an affidavit by an Enforcement attorney, that it has produced all documents prepared or obtained during the investigation that led to the filing of the Complaint, withholding documents only to the extent permitted by the Code of Procedure.

¹ Simultaneously with the filing of its opposition to the motion to compel, Enforcement filed a motion to strike Respondent's unclean hands affirmative defense.

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Respondent's discovery request and motion to compel are governed by Procedural Rule 9251. Rule 9251(a) requires Enforcement to produce documents prepared or obtained by FINRA staff "in connection with the investigation that led to the institution of proceedings." Rule 9251(b)(1) contains specific exceptions to the requirements of Rule 9251(a). The scope of discovery is not coextensive with the scope that would be available in a federal court under the Federal Rules of Civil Procedure. Documents might be contained in an investigative file that would not be subject to discovery in federal court because Rule 9251(a)(1) does not limit the mandatory production to relevant or material documents except by order of the Hearing Officer. It is also possible that a document might be discoverable in civil litigation in federal court but exempted from discovery by the express provisions of Rule 9251(b)(1) if, for example, documents are in the possession of the Department of Enforcement but not obtained or prepared in connection with the investigation.

Rule 9251 treats post-complaint documents differently from pre-complaint documents. Rule 9251(a)(2) requires the production of post-complaint documents only if they are obtained pursuant to a Rule 8210 request, and then only if the documents are relevant and material. The same exceptions apply to post-complaint documents as to pre-complaint documents under Rule 9251(b)(1).

If a document could otherwise be withheld pursuant to Rule 9251(b)(1) but contains "material exculpatory evidence," the document must be produced pursuant to Rule 9251(b)(2). This provision is intended to incorporate the principles of Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the Supreme Court held "that the suppression by the prosecution of evidence

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favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”²

The initial inquiry with respect to the scope of discovery is thus whether a document is was obtained by FINRA staff prior to the issuance of the Complaint in connection with the investigation, or post-complaint pursuant to a Rule 8210 Request. If a document does not fit into either category, the document is presumptively not discoverable, and the inquiry can generally end there. If a document does fit into either category, the exemptions of 9251(b)(1) must be examined. If any of the exemptions applies, the document is not discoverable unless the document is exculpatory under the Brady principles. If none of the exemptions applies and the document was obtained post-complaint pursuant to a Rule 8210 request, the document is discoverable only if it is relevant and material.

The Hearing Officer may require production of documents that are not subject to mandatory production. Rule 9251(a)(3) provides, “Nothing in subparagraph (a)(1) shall limit the discretion of the Department of Enforcement ... to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.” The Rule does not authorize a Hearing Officer to override the express discovery provisions of the Code. See OHO Order 05-34 (C9B050022) (Oct. 11, 2005).³ Rule 9251(a)(3) has been used sparingly to require the production of documents that are not explicitly subject to mandatory production under other provisions of Rule 9251, but ought to be produced to a respondent in the interest of fairness.

Respondent's motion to compel focuses on the perceived unfairness of Enforcement's conduct and the general relevance of the documents requested to the issues in this case. The

² 373 U.S. at 87. The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676 (1985).

³ Available at www.finra.org/OHO.

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main thrust of Respondent's document request and motion to compel is that Respondent wants to inquire into Enforcement's motivations in deciding to initiate this action and in determining the content of the press release that was issued in conjunction with the filing of the Complaint. Respondent does not explain how specific requests fit within the framework set forth in Rule 9251. By the very nature of the inquiry, the documents requested are generally internal documents that are exempt from production.

Enforcement represents in its opposition to Respondent's motion and its supporting affidavit that it has followed precisely the procedure outlined in Rule 9251. It represents that it examined the files and produced documents that the Rule requires it to produce, and withheld those internal documents that the Rule permits it to withhold. Respondent has advanced no reason to doubt that Enforcement's representation is accurate.

For the reasons set forth above, and explained below with respect to the individual requests for production, Respondent's motion to compel is denied with respect to each category of documents sought. The record supports Enforcement's argument that it has followed the Code of Procedure, produced what it is required to produce, and withheld only those documents that it is permitted to withhold. Respondent has not shown that fairness requires production pursuant to Rule 9251(a)(3). Respondent seeks the type of internal documents that will rarely, if ever, be discoverable, even under the Federal Rules. Respondent has not shown a substantial need for the documents, and supports the motion largely by speculation as to what the documents might contain.⁴

Respondent also complains that Enforcement has refused to submit a privilege log, listing the documents withheld from production and explaining the basis for Enforcement's refusal to

⁴ This Order does not address the validity of Respondent's unclean hands defense, and no implication with respect to the legal or factual validity of the defense is intended.

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produce. Contrary to the requirements of the Federal Rules of Civil Procedure, the NASD Code of Procedure presumptively does not require the submission of a privilege log. Rule 9251(c) requires the submission of a “withheld documents list” only pursuant to a motion, which “shall be based upon some reason to believe that a Document is being withheld in violation of the Code.” Respondent has not shown that there is any reason to believe that Enforcement is withholding any documents in violation of the Code. Accordingly, Respondent has not shown that there is any reason to require Enforcement to submit a privilege log, and the motion is denied with respect to Respondent’s request to compel Enforcement to submit one.

Each of Respondent’s individual requests is reproduced below, with the disposition of the request and a brief explanation of the reason for the disposition.

Rulings on Individual Document Requests

1. Any and all notes by FINRA employees (including attorneys) reflecting any contact that any such employees had with [Respondent’s] clients from the start of FINRA’s investigation up to the present.

Disposition: The request is denied pursuant to Rule 9251(b)(1)(B), which permits the Department of Enforcement to withhold a document if it is “an internal memorandum, or other note or writing prepared by an Association employee that shall not be offered in evidence.” By its terms, this request calls for the production of notes prepared by Association employees, which must be produced only if the notes are Brady or Jencks documents.⁵ Enforcement has

⁵ A respondent who files a motion pursuant to Rule 9253 is entitled to production of statements by prospective witnesses pertaining to their direct testimony, which are “a substantially verbatim recital of an oral statement ... recorded contemporaneously,” as defined in 18 U.S.C. 3500(e)(2) (Jencks Act material). If Enforcement has notes of statements by witnesses but the notes are not “substantially verbatim recitals,” Enforcement is not required to produce them. See Palermo v. United States, 360 U.S. 343, 350 (1959). Respondents who file a Rule 9253 motion are also entitled to production of any “contemporaneously written statement made by [a] ... staff member during a routine examination or inspection about the substance of oral statements” by a non-FINRA person, if Enforcement calls either one as a witness, and the prior statement “directly relates” to the witness’s testimony. Respondent has not filed a motion pursuant to Rule 9253, so its reference to Jencks is not directly relevant to the motion to compel.

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represented that it has produced all such notes that might be considered Brady or Jencks materials.

2. Any and all correspondence between FINRA, on the one hand, and [Respondent's] clients, on the other hand.

Disposition: Enforcement represents that all such documents have been produced.

Accordingly, the motion is denied with respect to this request.

3. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) of all communications *leading up to* and pertaining to FINRA's July 11, 2007 Press Release ("FINRA's Press Release"). [Emphasis in Respondent's motion.]

Disposition: Enforcement objects to this request because it seeks internal documents, and represents that all "external" documents responsive to this request and any documents producible under Brady have been produced. The internal documents may be withheld pursuant to Rule 9251(b)(1)(B). Accordingly, the motion is denied with respect to this request.

Enforcement also argues that the documents are irrelevant and may be withheld pursuant to Rule 9251(b)(1)(D) if the Hearing Officer so orders. Because Enforcement has produced all documents other than those that it is expressly permitted to withhold, it is unnecessary to decide whether such documents may be withheld as irrelevant.

4. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) of all communications that came into existence on or after July 11, 2007 pertaining to the FINRA's Press Release.

Disposition: This request relates entirely to post-Complaint documents. Respondent is entitled to such documents only to the extent they are obtained pursuant to a Rule 8210 request and then only to the extent they are relevant, material, and not protected by Rule 9251(b)(1).

The only post-Complaint Rule 8210 request that has been issued was a request to the Respondent

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with respect to Respondent's affirmative defenses. To the extent that any documents may have been obtained from other sources, Rule 9251 does not require their production.

5. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) addressing whether or not FINRA Rule 2830 applies to *individual registered representatives*, as opposed to *member firms*. [Emphasis in Respondent's motion.]

Disposition: To the extent that the request calls for any document that is prepared or obtained by FINRA staff in connection with the investigation, if the document is "an internal memorandum, or other note or writing prepared by an Association employee that shall not be offered in evidence," the request is denied pursuant to Rule 9251(b)(1)(B). Enforcement has represented that it has produced all documents that were prepared by or obtained by the staff in connection with the investigation that are not protected by Rule 9251(b)(1)(B). Accordingly, the request is denied with respect to documents prepared or obtained by the staff in connection with the investigation.

It appears that the request is not limited to documents "prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings." To the extent that the request calls for pre-Complaint documents that were not prepared or obtained by Interested Association Staff in connection with the investigation, Enforcement has no obligation to produce such documents, and the request is denied. As noted above, there have been no post-Complaint Rule 8210 requests except one directed to the Respondent. Because there are no post-Complaint documents obtained by a Rule 8210 request, the request is denied with respect to such documents.

To the extent that there may exist internal documents that might be responsive to this request but are not covered by Rule 9251(a), Rule 9251(b)(1)(B) supports a FINRA policy of generally not producing such documents. See discussion of Rule 9251(a)(3) above, citing OHO

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Order 05-34 (C9B050022) (Oct. 11, 2005). Internal memoranda and notes concerning the interpretation of a rule are generally not discoverable, would shed little or no light on the factual issues in this case, and are generally not admissible. See OHO Order 07-29 (2005001919501) at 6-8 (July 13, 2007).⁶ Accordingly, Respondent's request is denied with respect to any such documents.

6. All documents reviewed by James S. Shorris pertaining to FINRA's Complaint against [Respondent] prior to making the following statement in FINRA's Press Release:

“NASD will vigorously challenge all conduct that impermissibly compromises a broker's objectivity, especially when retirement money is at stake,” said James S. Shorris, NASD Executive Vice President and Head of Enforcement. “In this case, [Firm S] approved [Respondent's] improper arrangement to receive directed brokerage commissions from mutual fund company portfolio transactions while advising his retirement plan clients to invest in this same mutual fund company's securities. This violation of NASD's rules governing mutual fund compensation, when coupled with the failure to disclose to the firm's clients the terms of his financial arrangement, made for an intolerable situation.”

Disposition: To the extent Mr. Shorris may have reviewed documents “prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings,” but not exempted from discovery by Rule 9251(b)(1)(B), Enforcement has represented that the documents have been produced. To the extent Mr. Shorris may have reviewed documents that were not “prepared or obtained by Interested Association Staff in connection with the investigation,” the Department of Enforcement has no obligation to produce such documents. Accordingly, the motion is denied with respect to this request.

⁶ Available at www.finra.org/OHO.

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7. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) that support FINRA's following statement in FINRA's Press Release:

“In this case, the fund company directed brokerage specifically for the benefit of an individual broker – a first.”

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request.

8. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) that support FINRA's following statement in FINRA's Press Release:

“NASD Rules prohibit registered firms from granting a participation in directed brokerage to sales personnel.”

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request.

9. All writings (including, but not limited to, correspondence, interoffice memos, notes, drafts, etc.) that support FINRA's following statement in FINRA's Press Release:

“[Respondent] failed to disclose that he was receiving substantial additional compensation from the fund company and misled clients regarding his remuneration and fee directed commissions.”

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request.

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10. All documents that support FINRA’s statement in FINRA’s Press Release that [Respondent] “misled clients.”

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, for pre-Complaint documents, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

11. All documents that support FINRA’s decision not to bring an enforcement action against [Firm M] or its personnel relating to its directed brokerage arrangement with [Firm S].

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Such documents would also be exempt from disclosure pursuant to Rule 9251(b)(1)(A) and (C). Additionally, the reasons for the decision not to bring an enforcement action against [Firm M] or its personnel are irrelevant and evidence concerning that decision would not be admissible.

12. All documents that discuss whether or not [Firm M’s] July 3, 2002 check in the amount of \$20,807.32 (the “Check”) was made payable to [Firm S] or to Innovative Employee Benefit Program (“IEBP”).

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

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13. All documents that support FINRA's position that [Respondent] concealed or attempted to conceal from [Firm S] his receipt and/or cashing of the Check.

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

14. All documents that support or suggest that any client of [Respondent] was in any way financially impacted by the matters complained of by FINRA in its July 11, 2007 Complaint against [Respondent].

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

15. All documents not previously made available to [Respondent's counsel] that support or tend to support the allegations made by FINRA in its July 11, 2007 Complaint against [Respondent].

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

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16. All documents not previously made available to [Respondent's counsel] that discredit or tend to discredit the allegations made by FINRA in its July 11, 2007 Complaint against [Respondent].

Disposition: Enforcement represents that all documents required to be produced by Rule 9251(a)(1) but not protected by Rule 9251(b)(1)(B) have been produced. Accordingly, the motion is denied with respect to this request. To the extent that this request includes post-Complaint documents, the request is denied for the reasons discussed above with respect to Request 4.

Conclusion

For the reasons set forth above, Respondent's motion to compel is denied in its entirety.

SO ORDERED.

Lawrence B. Bernard
Hearing Officer

Dated: February 15, 2008
Washington, DC