Dispute Resolution

Version: October 2018

Discovery, Abuses & Sanctions Training and Exam

Dear Arbitrator:

The following is a print version of the Discovery, Abuses and Sanctions Training. You may complete this course and exam either through this printable version (instructions below) or online, depending on your individual preference and/or computing environment. Most arbitrators will be able to review the material, and complete the enclosed exam in one hour.

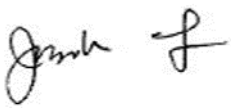
Please review the course material and complete the exam. After you complete the exam, please send it FINRA's Department of Neutral Management for grading. There is no minimum score required for the exam; **however, you must** complete **and return the exam to receive credit for the course**. We strongly recommend that you maintain a copy of your own records.

You may submit your exam to FINRA by email, fax or mail:

By Email: luis.cruz@finra.org
By Fax: FINRA Department of Neutral Management – FAX # 646-625-6020.
By Mail: FINRA
Attn: Luis Cruz – Neutral Management
One Liberty Plaza 165 Broadway, 27th Floor
New York, NY 10006

Because there is no minimum score required on the test, please do not expect a pass/fail letter from FINRA. After grading your exam, you can be assured that FINRA will update your arbitrator disclosure report to reflect your completion of the Discovery, Abuses and Sanctions Training. **Nothing further is required of you with regard to this course**.

We hope you enjoy the course.



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Additional Notice

FINRA Dispute Resolution attempts to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding concerning a rule in the Customer or Industry Code of Arbitration Procedure, the rule language prevails.

Course Objectives

The Financial Industry Regulatory Authority, Inc. (FINRA) developed a series of courses as part of its comprehensive Arbitrator Training Program. This course contains four components:

- Part I — Discovery Rules and Procedures
- Part II — Role of the Arbitrators in the Discovery Process
- Part III — Orders of Confidentiality
- Part IV — Discovery Abuse

Upon completion of all four components, you will be able to:

- Understand the Discovery Guide.
- Explain the respective duties of the parties and the arbitrator with regard to the discovery process.
- Describe why a party might request an order of confidentiality.
- Address requests for orders of confidentiality.
- Recognize and address discovery abuses.
- Understand the possible sanctions for discovery abuses.

Dispute Resolution's Mission Statement

FINRA Dispute Resolution’s mission is to have all of its constituents—the investing public, brokerage firms and their employees, and neutrals (arbitrators and mediators)—view FINRA's forum as the preeminent provider of dispute resolution services. To accomplish this goal, it is our standing pledge to provide impartial arbitrators who are dedicated to delivering fair, effective dispute resolution services.

For more on FINRA and its services, see FINRA's website.

FINRA's website:
http://www.finra.org/index.htm

Precourse Work

Before proceeding with this course, please familiarize yourself with the FINRA Code of Arbitration Procedure (Code). Advance study will enhance the learning experience. Please refer to Rules 12505-12514 of the Code for information about FINRA's discovery procedures.

FINRA highly recommends that you study and understand the Discovery Guide before beginning this training course. The Discovery Guide serves as a guide to the parties and the arbitrators to facilitate the efficient exchange of documents and information in customer cases. The Discovery Guide contains two Document Production Lists of presumptively discoverable documents: one for firms/associated persons to produce and one for customers to produce.

Rules 12505-12514:
http://www.finra.org/finramanual/rules/r12505

Discovery Guide:
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/DiscoveryGuide/index.htm

Section 1: Part I - Discovery Rules and Procedures

Part I - Discovery Rules and Procedures

This portion of the course reviews:

- Discovery Guide and Document Production Lists;
- product cases;
- electronic discovery;
- objections;
- motions to compel discovery;
- depositions and interrogatories; and
- subpoenas and orders of appearance and production.

Discovery Rules and Procedures

The timely exchange of relevant documents among the parties is vital to the fair and cost-efficient resolution of disputes. Under Rule 12505 of the Code, parties must cooperate to the fullest extent practicable in the exchange of documents and information, and to respond to discovery requests from other parties within a certain time.

When parties comply with this duty, the role of arbitrators in the discovery process is limited to resolving objections to the production of specific documents, or clarifying what documents are presumed to be relevant to the case. However, when parties fail to adhere to the Code and FINRA's procedures by ignoring discovery deadlines, making frivolous objections or failing to comply with discovery orders by the panel, arbitrators must be familiar with the Code and FINRA procedures and take an active role in managing the discovery process. Under the Code, failure to comply with discovery rules and procedures may result in sanctions, including dismissal of a claim, defense or proceeding.

Rule 12505:
http://www.finra.org/finramanual/rules/r12505

Discovery Guide

FINRA's Discovery Guide includes the Document Production Lists, which are lists of documents that are presumptively discoverable in all customer cases. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules. However, arbitrators should generally assume that a document on the relevant List should be exchanged unless the party in control of the document demonstrates a compelling reason not to produce it. The Lists do not apply in non-customer cases. (The standards for resolving discovery disputes are discussed in detail in Part II of this course.)

Although FINRA's Discovery Guide was not intended for use in simplified arbitrations (arbitrations decided exclusively on documentation, without an oral hearing), the presiding arbitrator may use relevant portions of the Guide in a manner that is consistent with the expedited nature of simplified proceedings.

Discovery Guide:
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/DiscoveryGuide/index.htm

What Must Be Produced

In customer cases, the starting point in the discovery process is the Discovery Guide, including the Document Production Lists, which is available on FINRA's website. The Discovery Guide is especially important since the majority of FINRA arbitration claims involve public customer parties. The Discovery Guide also discusses additional discovery requests, information requests, confidentiality, privileged documents and admissibility of evidence.

Parties may also request documents that are not included on the Document Production Lists under Rule 12507 of the Code. Such requests should be specific and relate to the matter in controversy.

FINRA arbitration claims change with the times, and current case filings show that many claims filed now are alleging sales practice violations regarding non-conventional investments, including hedge funds, REITs and other investments that do not trade in the broad securities markets. The types of discovery materials relating to a firm's due diligence materials, sales literature and sales training materials for non-conventional investments may extend beyond the categories of items identified in the Discovery Guide for conventional investments. While not all of these documents are specifically identified as presumptively discoverable in the Discovery Guide, they may or may not be relevant to claims and defenses.

Rule 12507:
http://www.finra.org/finramanual/rules/r12507

Product Cases

Product cases are cases in which one or more of the asserted claims center around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. For example, many investors who purchased bond funds heavily invested in subprime debt filed suitability claims after these funds declined greatly in value after the collapse of the subprime market in 2008-9.

Product cases are different from other customer cases in several ways, such as:

1. The volume of documents tends to be much greater.
2. Multiple investor claimants may seek the same documents.
3. The documents are not client specific.
4. The product at issue is more likely to be the subject of a regulatory investigation.
5. The cases are more likely to involve a class action with documents subject to a mandatory hold.
6. The same documents may have been produced to multiple parties in other cases involving the same security or to regulators.
7. Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant’s account.

Parties do not always agree on whether a claim centers around a product as defined above and may ask the arbitrators to make that determination. The arbitrators may ask the parties to explain their rationale for asserting that a claim is, or is not, a product case. In addition, since product cases are different from other customer cases, arbitrators may encounter certain discovery-related issues that differ from those they have seen in other arbitrations.

The Discovery Guide's Document Production Lists may not provide all of the documents parties usually request in a product case. In a product case, parties typically request documents relating to, among other things, a firm’s: creation of a product; due diligence reviews of a product; training or marketing of a product; or post-approval review of a product. Parties may ask the arbitrators to resolve disputes concerning which additional documents they must produce and the scope of the additional documents. Pursuant to the Discovery Guide, parties are not limited to the documents enumerated in the Document Production Lists.

Where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules in the Customer Code. It is possible that the producing party may object to the production on a variety of grounds.

For example, discovery in product cases is document intensive and therefore can become costly. Parties potentially may raise issues of cost and burden in this regard. If a party demonstrates that the cost or burden of production is disproportionate to the need for the documents, the Discovery Guide provides that the arbitrators should determine if the documents are relevant or likely to lead to relevant evidence. If the arbitrators determine that the documents are relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item, or determining whether another document or documents can provide the same information. The arbitrator can also refer any unresolved discovery issue to the full panel for a determination.

When considering discovery issues in product cases, it is possible that parties will make the arbitrators aware that other panels have considered and decided similar disputes. Arbitrators should be aware that prior arbitration decisions are not binding on other panels.

Parties sometimes argue that documents they are requesting were produced in another customer case or pursuant to a regulatory inquiry and, therefore, the arbitrators should order their opponent to produce the documents in their case. In this situation, the panel should consider the context of production in the other case or inquiry when deciding whether to order production in the case currently before the panel. If the prior production was to a regulatory authority, parties preserve the right to make whatever objections they deem appropriate, for example, that documents produced to regulators contain customer information that is proprietary, confidential and/or subject to privacy rights. Arbitrators should balance any arguments about the burden of reviewing and removing confidential material with the customer's need for the documents. The arbitrators may ask the parties to brief them on the law relating to production issues.

If a party objects to document production on grounds of privacy or confidentiality, the arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require confidential treatment. In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

1. Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
2. Whether there is a threat of harm attendant to disclosure of the information.
3. Whether the information contains proprietary confidential business plans and procedures or trade secrets.
4. Whether the information has previously been published or produced without confidentiality or is already in the public domain.
5. Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
6. Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

In product cases, the issue of unequal production may arise. Due to the nature of these claims, broker-dealers will generally have significantly more potential documents to produce compared to customers. Again, when determining whether to order production, arbitrators should determine if the documents are relevant or likely to lead to relevant evidence as described above.

FINRA encourages the parties to agree to the voluntary exchange of documents and information and to stipulate to various matters. As product cases are typically document intensive cases, arbitrators should encourage parties to discuss a discovery plan early on in the arbitration. When addressing parties' disputes over discovery, arbitrators should focus on narrowing requests and objections.

Discovery Guide:
http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/DiscoveryGuide/index.htm

12500:
http://www.finra.org/finramanual/rules/r12500

Electronic Discovery

The Discovery Guide provides that electronic files, such as emails and word processed memoranda, are documents within the meaning of the Discovery Guide. This means that parties are required to produce electronic files if they are responsive to an item on the Document Production Lists. While the Codes of Arbitration Procedure require parties to cooperate with each other during the discovery phase of a case, discovery disputes, including electronic discovery (e-discovery) disputes, may arise. Some e-discovery disputes involve the form of document production. Other disputes concern the sources the parties will search, and the search terms the parties will use when conducting a search for electronic documents. The arbitrators must be prepared to resolve these disputes. When resolving a dispute relating to the format for documents that parties are required to produce, the arbitrators should consider the totality of the circumstances, and they should balance any arguments about the burden of locating, reviewing, and producing e-discovery materials with the requesting parties' ability to use the documents.

Format of E-Discovery

FINRA encourages parties to discuss the form in which they intend to produce a document and to agree on the form whenever possible. There are several formats for producing electronic files. "Native format" is the form in which the electronic file was created. For example, if a party creates a document in Microsoft Word® (Word), then production in a Word document file format would be production in native format.

Parties may have reasons to convert a native document into another format–for example, to facilitate document review or to allow redactions. The most common ways to convert electronic documents are printing native documents and producing them in hard copy instead of electronically, and scanning or electronically converting native documents into a "static format," such as a "TIFF" or "PDF" format. When a party converts a native document into another format, the change may affect the document in several ways:

- Appearance
- Searchability
- Availability of metadata
- Maneuverability

Appearance: In many cases, converting a native file (such as a Word document) to a hard copy or static format document will not affect the appearance of the document–for example, if you print a Word document and produce it in hard copy, it will look the same. But that is not always the case. For example, some native files may be configured to print only certain portions of the document. A user can set the "Print Area" in a Microsoft Excel® (Excel) spreadsheet that will cause only certain rows or columns to be printed. A hard copy print-out of such an Excel spreadsheet will therefore contain less information than the native file. Similarly, a hard copy print-out of a PowerPoint presentation may not contain speaker's notes that appear in the electronic file.

Searchability: At other times, converting a native file may affect the searchability of the document. The best example is printing out a Word document and producing it in hard copy form. In its native form, the contents of a Word document can be searched electronically for key words or information. In hard copy form, the document is not electronically searchable. Static electronic formats may or may not be searchable, depending on how they are converted. A PDF or TIFF file is essentially an electronic picture of a document

and may not be searchable. But such a file will be searchable if the document image is accompanied by a data file that provides the text of the document in searchable form. This is sometimes referred to as "OCR" data, which stands for "optical character recognition." When parties refer to "OCR'ing" a document, they are referring to processing it in a specific way that will result in an "OCR" data file that accompanies an image file and renders the file searchable.

Availability of metadata: Converting a native file may also affect the availability of metadata. Metadata describes how, when, and by whom electronically stored information (ESI) was collected, created, accessed, or modified, and how it is formatted. For example, an email contains many pieces of metadata, such as the date and time it was sent, who sent it, and who received it. Other native files also contain metadata such as the network location of the electronic document, the author of the document, and the last time the document was modified. It is possible to convert a native file to a static format and keep all the metadata attached–for example, a producing party can convert emails to TIFF and produce the metadata in an associated file. It is also possible to produce some, but not all, metadata associated with a native file. In the case of a conversion, parties should confer on whether metadata is required and what metadata, specifically, should be included in a production.

Maneuverability: Finally, converting a native file may affect the maneuverability of a document–the user's ability to manipulate data using the native application. A good example is an Excel spreadsheet. In its native format, a user can sort and filter data and examine embedded formulas and references in an Excel spreadsheet. If the Excel spreadsheet is printed or converted to TIFF or PDF, that ability is lost.

Certain of these definitions were adapted from a glossary of terms developed by the Sedona Conference Working Group on E-Discovery. The Sedona Conference's website explains that the Sedona Conference is a non-profit research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. You may access the glossary on the Sedona Conference's website. The Conference publishes the glossary "as a tool to assist in the understanding and discussion of electronic discovery and electronic information management issues…"

glossary on the Sedona Conference's website:
https://thesedonaconference.org/publication/The%2520Sedona%2520Conference%25C2%25AE%2520Glossary

Reasonably Usable Document Production

During discovery, parties may ask the arbitrators to resolve disputes about the format for document production. A term that parties may use concerning document format is "reasonably usable." Parties must produce electronic documents in a reasonably usable format. Generally, a document that is produced in the format in which it is ordinarily maintained, or in a converted format that does not make it more difficult or burdensome for the requesting party to use in connection with the arbitration, is considered to be reasonably usable.

The reasonable usability of a document may depend on the specific needs of the parties. For example, imagine a case where the key factual issue is when an individual learned certain information. There, metadata may be very important for determining when that individual created relevant documents, and any format that does not include available metadata would not be reasonably usable. In other cases involving straightforward documents such as account statements and new account forms, metadata may not be relevant and hard copy production, without metadata, may be reasonably usable.

Reasonable usability may also depend on the relative resources of the parties. For example, customers of limited means might demonstrate that they would have difficulty producing documents in any format other than hard copy. Similarly, if reviewing documents in a certain format requires the requesting party to use specific technology, that format may not be reasonably usable if the technology is expensive or otherwise burdensome given the size of the claim, or the resources of the requesting party. If issues arise concerning

e-discovery, you may ask the parties to brief the issue. It is the arbitrators' responsibility to determine the format for document production, and to memorialize their decision in a written order of production.

The language relating to e-discovery is technical. Ask the parties to explain the terms they are using so you can fully evaluate whether the parties are producing documents in a reasonably usable format. The SEC gives guidance about e-discovery to Commission staff in its Division of Enforcement Manual.

Division of Enforcement Manual:
http://www.sec.gov/divisions/enforce/enforcementmanual.pdf

Examples of Reasonably Usable Document Production

Conversion to Hard Copy: An email in its native format is reasonably usable because a party can search it electronically. However, if a party converts the email into a hard copy document that a party cannot search electronically, then the document may not be reasonably usable. FINRA expects arbitrators to use their judgment when deciding issues relating to how parties should produce documents. If, for example, the volume of emails a party is producing is very small, the arbitrators could decide to allow a party to produce the emails in hard copy. Arbitrators may also conclude that more than one format is appropriate. For example, a native email cannot be produced with redactions. Therefore it may be appropriate to require native production for non-redacted emails, and static format production for the small subset of redacted emails.

Courts have begun addressing the issue of what is reasonably usable production. In one court case, when a defendant printed out 35,000 pages of emails to produce them in paper format rather than native format, the court ordered the party to produce the emails in native format.

Conversion to PDF: Courts have held that parties cannot convert electronic documents into a PDF format that diminishes their usefulness. In one case, when a party took documents ordinarily maintained on a server, printed them off the server, and then scanned them back into a digital format as PDF files lacking metadata and searchable text, the court ruled that the production was not acceptable. The court ordered the party to produce the documents in a reasonably usable format. In that case, if the producing party had produced PDF files with accompanying data files that provided the metadata and searchable text, the court may have reached a different conclusion.

Excel Files: One specific issue that has arisen in the FINRA forum relates to Excel spreadsheets produced in PDF format rather than in native format. When an Excel spreadsheet is produced in its native format, it can be sorted and filtered to find data. In a PDF format, this functionality is lost.

Emails: Another issue that has arisen in the FINRA forum relates to conversion of multiple page emails into separate PDF documents, diminishing the efficiency of review of those documents. Generally, in these situations, the converted documents should be determined not to be reasonably usable. In general, if an email production does not clearly identify and group together emails and their corresponding attachments, it is not likely to be reasonably usable.

The examples noted above that pertain to fact specific cases are intended to provide guidance. Arbitrators should be aware that these demonstrative examples of court decisions are not binding on arbitration panels and panels may consider relevant case law presented to them by the parties. Arbitrators must decide what is reasonably usable, including determining whether metadata is necessary in a particular case given the nature of the documents sought and whether a discovery request is reasonable in scope.

Arbitrators should balance any arguments about the burden of locating, reviewing and producing e-discovery materials with the parties' need for the documents. The arbitrators may ask the parties to brief them on the law relating to production issues.

Factors to Consider When Resolving E-Discovery Disputes

Based on the above discussion, when resolving disputes about the format for producing electronic documents, arbitrators should consider the totality of the circumstances including, among other matters, the following factors in determining whether the electronic files are in a reasonably usable format:

- For documents in a party's possession or custody, whether the chosen form of production is different from the form in which a document is ordinarily maintained;
- For documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it; and
- For documents converted from their original format, a party's reason(s) for choosing a particular form of production; how the documents may be affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by a change in the documents' appearance, searchability, metadata, or maneuverability.

The bottom line, however, is that the documents must be reasonably usable. The arbitrators should not condone production of documents in a format where they are not reasonably usable.

Document Sources and Search Terms

The parties should discuss the electronic sources they will search, and the search terms they will use, and come to agreement on both whenever possible. The sources will vary depending on the party conducting the search. For example, an investor may have, among other sources, a personal computer, an email provider, a smart phone, and a back-up service or external hard drive. A firm may have, among other sources, email servers, email archives, file servers, and databases along with the personal computers and smart phones of its employees. If a dispute arises about the sources to be searched, arbitrators should ask the party requesting a search to explain why the party believes that a particular source is likely to lead to relevant evidence. The arbitrators should consider whether the requested source is duplicative or cumulative of other sources. The parties should also agree on search terms. If they fail to come to agreement on search terms, the arbitrators should ask them to explain why they selected the particular terms in dispute. It is the arbitrators' responsibility to determine the sources and search terms for document production, and to memorialize their decision in a written order of production.

Modifications to Electronic Files

Sometimes parties modify electronic files they receive during discovery. For example, parties might modify an Excel spreadsheet to isolate a particular column of data that they want the arbitrators to focus on, or they may add a calculation to the spreadsheet based on the existing data. Rules 12514 and 13514 provide that at least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. Pursuant to Rules 12514 and 13514, if a party intends to use at the hearing an electronic file that the party modified, the party must produce the modified document to all other parties.

For additional guidance on electronic discovery, please see the document, "Managing Discovery of Electronic Information: A Pocket Guide for Judges," published by the Federal Judicial Center.

Rules 12514:
http://www.finra.org/finramanual/rules/r12514

13514:

http://www.finra.org/finramanual/rules/r13514

Managing Discovery of Electronic Information: A Pocket Guide for Judges:
http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf

When Production Must Occur

Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, parties must either produce to all other parties all documents in their possession or control that are described in the Document Production Lists; identify and explain the reason that specific documents in the Lists cannot be produced within the required time; or object to the production of the specific documents. Parties must respond to all other requests for documents and information within 60 days from the date a discovery request was received according to Rule 12507.

Rule 12507:
http://www.finra.org/finramanual/rules/r12507

Objections

Parties may object to producing listed or requested documents or information. However, this does not mean that parties can simply ignore either the Document Production Lists or other discovery requests on the grounds that they "object" to them.

To comply with the Code, an objection must be:

- specific;
- timely; and
- in writing.

To be timely, an objection must be filed before the deadline for producing the document expires. Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time. To be specific, an objection must identify which document or part of a document it pertains to, and must explain the reasons for the objection. It is not sufficient for a party to simply object to producing any and all documents.

In addition, the fact that a party objects to the production of a specific document does not relieve it of the burden to produce documents not covered by the objection.

It is also not sufficient for a party to fail to respond to a discovery request on the grounds that no responsive information or documents exist. If no responsive information or documents exist, the party (or a person qualified to speak on behalf of the party regarding the existence of such documents), must:

- state in writing that he/she conducted a good faith search for the requested information or documents;
- describe the extent of the search; and
- state that based on the search, there are no requested documents in the party's possession, custody or control.

Motions to Compel Discovery

If the parties cannot resolve their discovery differences themselves, a party seeking a disputed document may file a motion to compel requesting the panel to order another party to produce the specific documents or information. Motions to compel discovery must be made, and will be decided, in accordance with Rule

12503. Such motions must include the disputed document request or list, a copy of any objection thereto and a description of the efforts of the party filing the motion to resolve the issue before making the motion.

FINRA compensates arbitrators in the amount of $200 to decide discovery-related motions without a hearing. For the purposes of this rule, a discovery-related motion and any replies or other correspondence relating to the motion will be considered to be a single motion. If more than one arbitrator considers a discovery-related motion, each arbitrator will receive an honorarium of $200. The panel will allocate the cost of the honoraria as part of the eventual arbitration award.

Rule 12503:
http://www.finra.org/finramanual/rules/r12503

Other Requests for Documents or Information

The Code provides that parties may request documents or other information from any party by serving a written request directly on the party. In customer cases, such requests supplement the Document Production Lists; parties in customer cases do not need to request documents listed on the Lists. Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide. In all cases, such requests should be specific, relate to the matter in controversy and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.

Arbitrators should note that, as used in the Code, requests for “information” are different from interrogatories. Requests for information are generally limited to the identification of individuals, entities and time periods related to the dispute and permitted by the Code. Such requests should be reasonable in number and not require narrative answers or fact finding. The purpose of an "Information Request" is to seek the information needed by a party to prepare its case. For example, a party might ask the name of a respondent’s supervisor during the time of the matter in dispute. The purpose of the question is to help the party determine which witnesses to call for the hearing.

On the other hand, interrogatories, which are addressed in the next section, are written questions that go to the facts and merits of a case and are generally not permitted in arbitration. These types of questions should be asked and answered by a witness at a hearing. An example of an interrogatory might be a question such as “after the investor complained to you about the stock transaction in question, did you speak with your supervisor?”

Depositions and Interrogatories

To keep arbitration as simple and efficient as possible, other discovery methods common in court, such as depositions and written interrogatories, are strongly discouraged in arbitration, and may only be used with permission from the arbitrators.

Depositions

Arbitrators should permit depositions only under very limited circumstances, such as to:

- preserve the testimony of ill or dying witnesses;
- accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- expedite large or complex cases; and

- address unusual situations where the arbitrator determines that circumstances warrant departure from the general rule.

There is a limited exception in industry cases involving statutory discrimination claims under Rule 13510.

Interrogatories

Like depositions, interrogatories are also strongly discouraged. As discussed earlier, interrogatories are lists of detailed questions that could be asked at a hearing. By contrast, information requests are simple requests for information needed to prepare for a hearing. For example, it would be permissible for a party to ask the identity of a supervisor in order to know whom to call as a witness. It would generally not be permissible to send a detailed list of questions about the supervisor's conduct.

Unless the panel determines that certain interrogatories would streamline a large or complex case, the panel would rarely grant such requests.

Rule 13510:
http://www.finra.org/finramanual/rules/r13510

Subpoenas

At times, important testimony and documents are not under the control of a brokerage firm or its employees. For such cases, Rule 12512 allows arbitrators to issue subpoenas. Under Rule 12512, only arbitrators are permitted to issue subpoenas for both parties and non-parties, whether for discovery or for appearance at a hearing. Although Rule 12512 authorizes the use of subpoenas, it also states that "to the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas."

Parties may make written motions requesting the arbitrator to issue a subpoena to a party or a non-party:

- Parties will send their requests for issuance of a subpoena to FINRA and to all parties at the same time and in the same manner. The request must be in the form of a written motion and must include a draft subpoena.

- If another party objects to the scope or propriety of the subpoena, that party must, within 10 calendar days of service of the motion, file written objections with FINRA, with an additional copy for the arbitrator, and must serve copies on all other parties at the same time and in the same manner as on FINRA.

- The party that requested the subpoena may respond to the objection within 10 calendar days of receipt of the objections.

- Once FINRA receives either all of the responses or the deadline to respond has passed, staff will forward the subpoena and the responses to the selected arbitrator for ruling.

- After considering timely objections, the arbitrator responsible for deciding discovery-related motions will rule promptly on the issuance and scope of the subpoena.

- Arbitrators will use their discretion to determine whether or not to issue a subpoena, and whether or not to limit the scope of the subpoena before it is issued.

After the requesting party receives subpoenaed documents from a non-party, the requesting party must notify all other parties within five calendar days of receipt. If another party requests copies of documents that

were received in response to a non-party subpoena, the party that requested the documents must provide the copies within 10 calendar days.

These same principles apply equally when arbitrators are reviewing challenges to subpoenas issued to third parties.

Concerns about confidentiality and privilege might also be raised regarding subpoenas issued to non-parties. Pursuant to Rule 12512, a non-party may file an objection to a subpoena served upon the non-party. The arbitrator may set up a conference call with a non-party and the parties to discuss the non-party's objection to the subpoena. Staff advises the non-party and the parties of the arbitrator's decision. Non-parties also may ask the arbitrators to resolve questions concerning who pays the costs incurred as a result of producing subpoenaed documents.

Unlike orders of appearance for FINRA members, subpoenas may only be issued within geographic limits set by local or state law. For example, in some jurisdictions, you cannot compel the attendance of a witness living or working more than 40 miles from the hearing location.

Third-Party Subpoenas to Regulatory Authorities—Documents with Personal Confidential Information (PCI)

Third-party subpoenas to regulatory authorities present unique situations. These subpoenas often seek documents that may contain personal confidential information (PCI) about customers who are not parties to the arbitration. PCI includes Social Security numbers, brokerage, bank or other financial account numbers and taxpayer identification numbers. Regulatory authorities may have difficulty complying with such subpoenas because of the presence of PCI and may object to the subpoenas.

If a regulatory authority objects to a subpoena because the responsive documents contain PCI, arbitrators may be asked to resolve the dispute. Arbitrators may, in no particular order:

- issue protective orders to limit the use of PCI;
- suggest parties enter into confidentiality agreements;
- require a party to redact PCI; or
- modify the scope of the subpoena.

Rule 12512:
http://www.finra.org/finramanual/rules/r12512

Orders of Appearance and Production

Rule 12513 permits an arbitrator to order the appearance of any person employed or associated with any member of FINRA—even nonparties—or the production of any documents in the possession or control of such persons. In general, the process used to order an appearance of a witness or production of documents is the following:

- The requesting party drafts an order and sends it to FINRA staff with copies to all parties to the arbitration.

- The order of appearance or production of documents is treated like a motion under Rule 12503. The responding party(s) must submit a response within 10 days of receipt of the motion, unless the moving party agrees to an extension or the Director or panel determines otherwise. Parties have five days from the receipt of a response to a motion to reply to the response unless the responding party agrees to an extension of time, or the Director or the panel decides otherwise. Once FINRA either receives all responses or the deadline to respond has passed, FINRA staff will forward the request

and the responses to the arbitrator for signature.

- The arbitrator promptly rules on the order and returns it to FINRA.
- FINRA returns the signed order of appearance or production of documents to the requesting party who is responsible for serving it on the person named therein, as well as providing copies to all parties to the arbitration.

You'll analyze an order of appearance in a manner similar to a request for production of documents. When you receive a request for an order of appearance or production, balance the likelihood of the testimony or documents leading to relevant evidence against the burden to the individual who must appear.

In most instances, arbitrators should issue orders, instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons.

Unless the panel directs otherwise, the party requesting the appearance of witnesses by or the production of documents from non-parties under Rule 12513 shall pay reasonable costs of appearances and/or production.

Rule 12513:
http://www.finra.org/finramanual/rules/r12513

Rule 12503:
http://www.finra.org/finramanual/rules/r12503

Test Yourself

The Discovery Guide was designed to help facilitate the exchange of documents among the parties in public customer cases. How does the Guide endeavor to accomplish this objective?

Answer

To facilitate document exchanges, the Guide encourages the parties to discuss and agree on the exchange of documents. Absent party agreement, the Guide provides Document Production Lists indicating which documents the parties shall exchange and when to exchange them.

Test Yourself

Under what circumstances might a deposition be acceptable?

Answer

The deposition of an essential witness may be appropriate to:

- preserve the testimony of ill or dying witnesses;
- accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- expedite large or complex cases; and
- address unusual situations where the arbitrator determines that circumstances warrant departure from the general rule.

There is also a limited exception in industry cases involving statutory discrimination claims under Rule 13510.

Test Yourself

Parties may object to producing listed or requested documents or information. List the three things required of such an objection.

Answer

Parties may object to producing listed or requested documents or information. To comply with the Code, an objection must be specific, timely and in writing.

Section 2: Part II - Role of Arbitrators in the Discovery Process

Part II - Role of Arbitrators in the Discovery Process

This portion of the course reviews:

- the Initial Prehearing Conference;
- discovery prehearing conferences; and
- the standards for deciding motions to compel.

The Initial Prehearing Conference

Ideally, arbitrators play a limited role in the discovery process. In practice, however, arbitrators often must take an active role in managing discovery by setting discovery schedules, deciding discovery disputes, and, when appropriate, sanctioning parties for failing to comply with discovery orders.

Generally, the first contact arbitrators have with parties and with the discovery process occurs at the Initial Prehearing Conference (IPHC). The purpose of the IPHC, which usually takes place by telephone, is primarily to schedule hearings and to address preliminary matters, including discovery.

During the IPHC, the arbitrators refer to the IPHC Script (Script) provided by FINRA. Among other things, the Script directs the arbitrators to remind all parties that they should review carefully the Discovery Guide and Document Production Lists, which can be downloaded from FINRA's website. The Script also reminds the panel to ask the parties to describe their progress in the discovery process, and to remind the parties of their duty to cooperate in the exchange of documents and information.

During the IPHC, the panel should also establish a discovery schedule with specific discovery cut-off dates, as well as deadlines for compliance, or for filing objections and responses. Even though the Code and the Discovery Guide provide deadlines for responding to discovery, it is helpful for the parties to know the exact dates of discovery deadlines for their case.

In setting discovery deadlines, or cut-off dates, the arbitrators should be very clear when referring to deadlines for making discovery requests, or for responding to them. (Sometimes the panel will need to set both.) Failing to do so can cause confusion. FINRA recommends that the arbitrators set cut-off dates for requests and responses that allow due time for the resolution of objections and disputes before the scheduled exchange of hearing exhibits. If any motions to compel discovery have been filed, but not yet responded to, the panel should also set a deadline for the response.

To coordinate discovery scheduling, arbitrators should have their current calendars/schedules at hand containing all case-related dates, including previously scheduled evidentiary hearing dates.

Preparing for the Prehearing Discovery Conference

The Code authorizes the appointment of one member of a three-person panel to decide all unresolved discovery issues on the panel’s behalf. The chairperson is usually selected to serve in this capacity. If a conference call is needed, the selected arbitrator must be prepared to effectively resolve or help facilitate party resolution of outstanding discovery issues. Before the discovery conference, the selected arbitrator should review:

- the filed claims, answer and other pleadings to refresh the arbitrator's recollection about the facts of the case;

- the Scheduling Order to ensure that the arbitrator is cognizant of all prior decisions or party agreements made at the Initial Prehearing Conference;
- the Discovery Guide, if the case involves a public customer party;
- the parties' motion papers (including exhibits and/or any previously exchanged document requests and responses contained therein). These materials should help the selected arbitrator decide all outstanding discovery issues. They also will help the arbitrator make other decisions that may facilitate the evidentiary hearings, including early identification and premarking of documentary exhibits and the scheduling of testimony;
- Rules 12505–12511 of the Code; and
- the procedures and guidelines contained in the Arbitrator's Guide.

Scheduling Order
http://www.finra.org/file/iphc-scheduling-order

Discovery Guide
http://www.finra.org/arbitration-and-mediation/discovery-guide

Code
http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096

Arbitrator's Guide
http://www.finra.org/arbitration-and-mediation/arbitrators-guide

Conducting the Prehearing Discovery Conference

At the conference, the selected arbitrator should follow these procedures:

Make Preliminary Introductions

- Identify the participants (parties, attorneys, other individuals listening to the call).
- Ask the participants to identify themselves each time before they speak.
- Read the case name and number.
- State that the panel is a body of neutral arbitrators who are not employees of FINRA.

Address the Issues

- Ask the party requesting the prehearing conference to explain the issue. Parties may ask the arbitrator to issue subpoenas, as permitted by applicable law, order the production of documents or witnesses, issue other orders that may expedite the arbitration and order the deposition of essential witnesses.
- Ask for the positions of the other party or parties, giving the moving party an opportunity to respond.
- Ask questions—as necessary—to identify and clarify the issues.
- Provide all parties with an opportunity to respond.

Make Rulings

- If the prehearing conference involves discovery issues, be specific and provide a reasonable timetable for compliance, including dates and places for the exchange of information or documents.
- Reread and confirm the panel's rulings with the parties (make sure all parties understand it fully).
- Be polite, but firm when delivering your order. Do not allow the parties to debate an issue once you have ruled.
- Document the panel's ruling in a prehearing order (the panel may request parties' counsel to submit a draft order for adoption or modification).

- Inform the parties of the maximum fee that the panel can assess for each prehearing session.
- Ask whether there are any other issues prior to concluding the prehearing.
- If the full panel is participating and wish to confer privately—either during the conference or after the parties have finished their presentations—make sure all the parties are off the phone before discussing the issues. Verify with the conference operator that only the arbitrators are connected to the call.

Follow-Up

- Send a copy of the written order, preferably typed, to the assigned FINRA staff person by fax or email for distribution to the parties.

Standards for Deciding Motions to Compel Discovery

The first question to ask in deciding whether to compel discovery of a disputed document is whether it is relevant or might lead to the discovery of relevant evidence.

There is no simple bright-line test for determining whether a document is relevant to a dispute, or whether production of a disputed document should be ordered. The arbitrator must decide the issue based on the facts and circumstances of a particular case. However, there are some basic principles to keep in mind.

- In customer cases, arbitrators should assume that, all things being equal, documents listed on the Document Production Lists are relevant and should be produced. The party objecting to produce such documents must show a compelling reason not to produce them.

- The Document Production Lists are only intended to provide guidance about what is generally relevant in such cases. Each case is different, and some things that are central to one customer case may be peripheral or irrelevant to another.

To help you decide whether a document is relevant, arbitrators should ask the party seeking it why it is needed, how it will be used, and whether the information sought is available in any other form.

The fact that a document is relevant for discovery purposes to help a party prepare its case does not necessarily mean that it is admissible at the hearing. Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may object to the introduction of any document as evidence at the hearing to the same extent that a party can raise any other objection at an arbitration hearing. Under Rule 12604 of the Code, arbitrators decide what evidence to admit; they are not required to follow state or federal rules of evidence.

Rule 12604
http://www.finra.org/finramanual/rules/r12604

Weighing the Relevance Against the Burden

A party may object to producing a document because of the cost or burden of production. If the party demonstrates that the cost or burden of production is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item, or determining whether another document can provide the same information.

The selected arbitrator can refer any unresolved discovery issue to the full panel for a determination, if the arbitrator believes it will promote full and fair hearings.

Decisions Reserved for the Full Panel

On occasion, the arbitrator authorized to decide all unresolved discovery issues on the panel's behalf may be asked to resolve an issue that goes beyond straight document production. Although the selected arbitrator has important powers, the arbitrator may not make dispositive (final settlement or determination) decisions and certain nondispositive decisions.

If, while serving as the arbitrator assigned to decide unresolved discovery issues, a party makes a request for a dispositive decision or one of the following nondispositive decisions, the arbitrator should remind the parties that only the full panel has the authority to make such rulings.

The nondispositive decisions which may be decided **only** by the full panel include:

- accepting or rejecting proposed amendments to claims or counterclaims after the panel is appointed;
- consolidating arbitration proceedings or severing claims;
- excluding from evidence documents or witnesses that are part of a party's presentation that were not exchanged or identified at least 20 calendar days before the first scheduled evidentiary hearing date;
- taking action to enforce compliance with orders to produce documents or witnesses, including sanctions and barring the presentation of facts or defenses not included in timely filed answers;
- admitting or excluding evidence at the hearing;
- changing the time or location of the second or subsequent hearings; and
- adjourning hearings.

Test Yourself

What procedure should you follow as the selected arbitrator at a Prehearing Discovery Conference if a party complains that a document was not produced as ordered according to the discovery schedule?

Answer

You should permit the alleged noncomplying party to explain why the document was not produced. If the reason justifies the noncompliance, give the party a chance to produce the document. If the reason does not justify the noncompliance, refer the matter to the full panel for appropriate actions or sanctions.

Test Yourself

What types of issues can you decide as the selected to act on behalf of the panel for purposes of discovery?

Answer

As the selected arbitrator, you may:

- issue subpoenas, where permitted by law;
- order the production of documents or witnesses;
- issue other orders that may expedite the arbitration, as permitted by applicable law; and
- order the deposition of essential witnesses who are:
    - physically unable to attend the evidentiary hearing, or

- physically able to attend but unwillingly to do so, and cannot be ordered to attend.

Test Yourself

Can a party object to producing a document because of the cost or burden of production?

Answer

Yes. If the party demonstrates that the cost or burden is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of the requested item or determining whether another document can provide the same information.

Section 3: Part III - Orders of Confidentiality

Part III - Orders of Confidentiality

This portion of the training is devoted to issues concerning orders of confidentiality in Arbitration—a subject often tied to discovery. Upon completion of the second portion of this course, you will be able to:

- describe why a party might request an order of confidentiality;
- address requests for orders of confidentiality; and
- differentiate between confidentiality and privilege.

Discovery and Orders of Confidentiality

As stated in the Discovery Guide, if a party objects to document production on grounds of privacy or confidentiality, the arbitrator or one of the parties may suggest a stipulation between the parties that the document in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator may issue a confidentiality order. In cases where it is appropriate, ideally the parties will agree on a stipulation, as described above. This relieves the arbitrator from having to decide whether to issue a confidentiality order that may not be acceptable to all parties involved.

When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require confidential treatment.

In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

- Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
- Whether there is a threat of harm attendant to disclosure of the information.
- Whether the information contains proprietary confidential business plans and procedures or trade secrets.
- Whether the information has previously been published or produced without confidentiality or is already in the public domain.
- Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice. Keep in mind that securities arbitration is closely regulated by the Securities and Exchange Commission. The former SEC Director of Enforcement, William R. McLucas, has stated: "[P]rivate [securities] actions will continue to be essential to the maintenance of proper investor protection." Therefore, it might not be in the best interest of the process to declare the entire proceeding confidential.
- Whether there are any legal or ethical issues which might be raised by excessive restrictions on the parties.

These are just some of the factors to consider before issuing a confidentiality order that has not been agreed to by all parties to an arbitration proceeding.

Privileged Documents

Parties often object to the production of documents on the grounds that they are privileged.

Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege or the attorney work produce doctrine. The arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including attorney work product.

Like all objections, objections based on privilege must be timely, specific and in writing. Parties may not simply fail to respond to discovery on the grounds that a document is privileged. If a party challenges another party's claim of privilege, the arbitrator must determine whether or not a privilege exists based on the facts and circumstances of the particular case.

Concerns about confidentiality and privilege might also be raised regarding subpoenas issued to non-parties. Pursuant to Rule 12512, a non-party may file an objection to a subpoena served upon the non-party. The arbitrator may set up a conference call with a non-party and the parties to discuss the non-party's objection to the subpoena. Staff advises the non-party and the parties of the arbitrator's decision. Non-parties also may ask the arbitrators to resolve questions concerning who pays the costs incurred as a result of producing subpoenaed documents.

Test Yourself

What are some factors to consider before issuing an order of confidentiality?

Answer

Before issuing an order for confidentiality the arbitrator should consider the following factors:

- Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
- Whether there is a threat of harm attendant to disclosure of the information.
- Whether the information contains proprietary confidential business plans and procedures or trade secrets.
- Whether the information has previously been published or produced without confidentiality or is already in the public domain.
- Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
- Whether there are any legal or ethical issues which might be raised by excessive restrictions on the parties.

Test Yourself

If a party challenges another party's claim of privilege, what must the arbitrator determine?

Answer

Parties may not simply fail to respond to discovery on the grounds that a document is privileged, e.g., attorney-client privilege or work product doctrine. If a party challenges another party's claim of privilege, the arbitrator must determine whether or not a privilege exists based on the facts and circumstances of the particular case.

Section 4: Part IV - Discovery Abuse

Part IV - Discovery Abuse

This portion of the course reviews:

- how to recognize discovery abuse;
- what steps FINRA is taking to address discovery abuse; and
- what arbitrators can do to address discovery abuse.

Discovery Abuse

Discovery abuse can mean a lot of different things, but, in a nutshell, it occurs when a party intentionally fails to comply with or repeatedly ignores discovery rules or orders, or otherwise undermines the discovery process, in a way that materially interferes with the fair and efficient resolution of the dispute.

Discovery abuse is a serious problem that can cost parties time, money and ultimately jeopardize the ability of arbitrators to reach a fair and equitable decision on the merits of a case. Unfortunately, it has become more prevalent in FINRA arbitrations, a trend which suggests that some parties believe that it is a routine and acceptable part of arbitration strategy. It is not.

FINRA has taken steps to reverse this trend. FINRA issued a *Notice to Members* to remind participants of their duties in the discovery process, and the possible consequences of failing to comply with those duties. FINRA has also initiated a process of reviewing all allegations of discovery abuse for possible disciplinary review.

FINRA is hopeful that these steps will reduce discovery abuse. In the end, it is the arbitrators who can best control discovery abuse in FINRA arbitrations.

Notice to Members:
http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_003073.pdf

Steps FINRA Is Taking to Address Discovery Abuse

FINRA has become increasingly aware of instances in which parties are not complying with their duty to cooperate in the exchange of documents requested by parties or listed on applicable Document Production Lists within the specified time.

In 2003, FINRA issued a *Notice to Members (03-70)* reminding firms and their associated persons of their obligation to comply with FINRA discovery rules and procedures for production of documents and materials in arbitration claims.

The *Notice to Members* reminds parties that noncompliance with their duty to cooperate in the discovery process—to voluntarily turn over documents listed on the Document Production Lists, or requested by other parties under the Code of Arbitration Procedure—is not an acceptable part of arbitration strategy. Failure to comply with discovery rules and procedure may result in sanctions. Possible sanctions include: assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an

adverse inference against a party; assessing postponement and/or forum fees; assessing attorneys' fees, costs and expenses; and dismissal of a claim, defense or proceeding.

Notice to Members:
http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003073.pdf

Managing Discovery Abuse

Arbitrators have two main tools for addressing discovery abuse. They can issue sanctions against any party, and they can make disciplinary referrals at the end of a case for abuse by FINRA firms and associated persons.

Sanctions

Arbitrators may issue sanctions pursuant to Rules 12511 and 12212 if any party fails to cooperate in the exchange of documents and information as required under the Code, unless the panel determines that there is "substantial justification" for the failure to produce the documents or information, or frivolously objects to the production of requested documents or information.

Unless prohibited by applicable law, sanctions may include, but are not limited to:

- assessing monetary penalties payable to one or more parties.
- precluding a party from presenting evidence;
- making an adverse inference against a party;
- assessing postponement and/or forum fees; and
- assessing fees, costs and expenses, or attorneys' fees caused by noncompliance.

The panel may dismiss a claim, defense or arbitration with prejudice—meaning that the claim cannot be filed or raised again—for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective. The panel may also initiate a disciplinary referral.

If assessing monetary penalties, arbitrators must instruct parties to make them payable to one or more parties. Monetary penalties should not be made payable to FINRA as FINRA is not a party to the arbitration.

12511:
http://www.finra.org/finramanual/rules/r12511

12212:
http://www.finra.org/finramanual/rules/r12212

Examples of Sanctions

Here are some examples of sanctions that have been imposed by arbitrators:

- A panel found that a party intentionally concealed documents, delaying the discovery process. The panel assessed the party over $10,000 in sanctions and $2,500 in attorney's fees.

- A panel awarded a party over $7,000 due to another party's failure to cooperate in the discovery process.
- A panel awarded a party $2,750 in attorney's fees as a sanction for another party's failure to provide discoverable material.

For more information about sanctions, refer to the following:

- Discovery Guide;
- Arbitrator's Guide;
- *The Neutral Corner*, "National Adjudicatory Council Affirms Sanctions" (June, 2002 edition);
- *The Neutral Corner*, "Proactive Arbitrators Keep the Case Moving" (October, 2003 edition);
- *The Neutral Corner*, "NASD Launches Initiative to Curb Discovery Abuse" (December, 2003 edition);
- *The Neutral Corner*, "Role of Arbitrators in Discovery" (Volume 2, 2008);
- *Notice to Members* *03-70*, and

Discovery Guide:
http://www.nasd.com/ArbitrationMediation/Arbitration/DiscoveryGuideforArbitrationProceedings/index.htm

Arbitrator's Guide:
http://www.finra.org/arbitration-and-mediation/arbitrators-guide

The Neutral Corner:
http://www.finra.org/arbitration-and-mediation/neutral-corner-vol-1-2015

Notice to Members:
http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003073.pdf

Disciplinary Referrals

Failure to comply with the Code, or with the discovery orders of the arbitrators, may constitute a violation of FINRA's just and equitable principles of trade. Because FINRA has no jurisdiction over parties who are not registered with FINRA, disciplinary referrals can not be made against such parties.

Arbitrators should follow these guidelines when drafting disciplinary referrals:

- Provide as much detail as possible in writing. Whenever possible, arbitrators should note the specific act(s) that caused the panel to determine referral was appropriate (i.e., the firm ignored repeated warnings, or a comment was made in a prehearing conference implying the firm's intent not to produce).
- Discuss, objectively, why the activity or behavior appears to violate FINRA rules. If the panel becomes aware of a specific rule violation, the referral should include a reference to the rule.
- Explain what factors stood out from normal practice.

- If the activity occurred in the distant past, discuss why the panel believes it may be ongoing or could occur again in the future.

A copy of FINRA's disciplinary referral form can be viewed on FINRA's website.

disciplinary referral form:
http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009516.pdf

Test Yourself

What is discovery abuse?

Answer

Discovery abuse occurs when a party intentionally fails to comply with or repeatedly ignore discovery rules or orders, or otherwise undermines the discovery process, in a way that materially interferes with the fair and efficient resolution of the dispute.

Test Yourself

List possible sanctions an arbitrator may direct for a party's failure to comply with the Code or a panel's discovery order?

Answer

Possible sanctions, outlined in Rule 12212 of the Code, include:

- assessing monetary penalties payable to one or more parties;
- precluding a party from presenting evidence;
- making an adverse inference against a party;
- assessing postponement and/or forum fees; and
- assessing fees, costs and expenses, or attorneys' fees caused by noncompliance.

The panel may dismiss a claim, defense or arbitration with prejudice—meaning that the claim cannot be filed or raised again—for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective. The panel may also initiate a disciplinary referral.

Test Yourself

What guidelines should arbitrators follow to draft an effective disciplinary referral?

Answer

Referrals should:

- Provide as much detail as possible in writing. Whenever possible, arbitrators should note the specific act(s) that caused the panel to determine referral was appropriate (i.e., the firm ignored repeated warnings, or a comment was made in a prehearing conference implying the firm's intent not to produce).

- Discuss, objectively, why the activity or behavior appears to violate FINRA rules. If the panel becomes aware of a specific rule violation, the referral should include a reference to the rule.

- Explain what factors stood out from normal practice.

- If the activity occurred in the distant past, discuss why the panel believes it may be ongoing or could occur again in the future.

Section 5: Conclusion

Summary

Having completed this course, you should be able to:

- Understand the Discovery Guide.
- Explain the respective duties of the parties and the arbitrator with regard to the discovery process.
- Address requests for orders of confidentiality.
- Recognize discovery abuses and understand the possible sanctions for discovery abuses.

Next Steps

To test your understanding of the course material, please take the assessment associated with this course. You can access the assessment by following these instructions:

- click the exit button in the top right hand corner to close the course window;
- go to the Learning History tab;
- launch the assessment; and
- click the Next arrow button to start the assessment.

After answering all of the questions, select the Next button and view your results. Thereafter, FINRA will update your Arbitrator Disclosure Report to reflect that you have completed this course. You must complete the assessment to receive credit for the course.

FINRA Dispute Resolution
Discovery, Abuses & Sanctions Training Exam

Name: _____ Arbitrator ID#: A_____

After reviewing the course, you must complete and submit the following exam. **There is no minimum score required for the exam; however, you must submit it to receive credit for completing the course**. Upon completion of the course and exam, FINRA will automatically update your disclosure profile to reflect that you completed the course.

CLEARLY mark your answer.

Include your name and arbitrator ID# on EVERY page.

When you have completed the exam, please FAX your pages to FINRA – Neutral Management Department at 646-625-6020 or email to luis.cruz@finra.org.

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1. Scheduling dates for discovery production is an important activity during the Initial Prehearing Conference?

   TRUE FALSE

2. FINRA's Discovery Guide, including the Document Production Lists, serves as a guide for the parties and the arbitrators, allowing them to retain their flexibility in the discovery process.

   TRUE FALSE

3. The arbitrator selected to make discovery decisions on behalf of the three-person panel is authorized to take appropriate actions to enforce compliance with orders to produce documents or witnesses.

   TRUE FALSE

4. A request for information is just another way of asking for interrogatories

   TRUE FALSE

5. If the panel determines that a disciplinary referral is a justified sanction, the referral should be in writing and as detailed as possible; indicate the specific act(s) that caused the panel to determine referral was appropriate; and be made as soon as possible after the case concludes.

TRUE FALSE

6. Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine.

   TRUE FALSE

7. The Code makes clear that, absent a written objection, or an agreement by the parties to the contrary, parties must exchange documents listed on the Document Production Lists within the specified time frames.

   TRUE FALSE

8. All documents on the Document Production Lists in the Discovery Guide will be appropriate for every customer case.

   TRUE FALSE

9. If the panel determines that the noncompliance with an order of the panel is material and intentional, and prior warnings or sanctions have proven ineffective, it may dismiss a claim, defense, or proceeding "with prejudice."

   TRUE FALSE

10. Under the Code, the panel may issue any of the following sanctions:

    I. Assessing monetary penalties payable to one or more parties.
    II. Precluding a party from presenting evidence.
    III. Making an adverse inference against the noncomplying party.
    IV. Assessing postponement and/or forum fees.
    V. Assessing attorneys' fees, costs and expenses.
    VI. Initiating a disciplinary referral of a noncomplying FINRA firm—or of a person associated with a firm—at the conclusion of an arbitration.
    VII. Dismissing a claim, defense or arbitration with prejudice for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

    TRUE FALSE

