

The Ten Commandments of Cross-Examination in FINRA Hearings



By: Pete McElligott

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Decades ago, Irving Younger gave us the Ten Commandments of Cross-Examination. If you have not seen it, do a quick search for the impassioned presentation and you will not be disappointed. As an experienced trial lawyer, Professor Younger developed these Commandments from his experience in dozens jury trials. Drawing on my own experiences trying cases in a different forum, I'd like to offer some amendments to Professor Younger's original Commandments when used in a particular setting: FINRA arbitration hearings.

Most disputes between investors, financial advisors, and broker-dealers are resolved in arbitration under the guidance of the self-regulatory body called the Financial Industry Regulatory

Authority ("FINRA"). Like other arbitral forums, FINRA has its own set of procedural rules known as the FINRA Code of Arbitration Procedure.

The FINRA Code has some significant differences from federal and state rules of civil procedure. First, the FINRA Code severely limits dispositive motions. There are no motions for summary judgment. While parties can bring motions to dismiss in limited circumstances, those motions are infrequently granted. Second, discovery is significantly limited. Parties generally cannot conduct depositions or request interrogatories. This causes a great deal of uncertainty and makes preparing for cross-examination more difficult.

With these differences in mind, let's review Professor Younger's Ten Commandments (in bold below) and modify them for FINRA arbitration hearings.

1. Be Brief. This is good advice in any forum, but especially FINRA hearings. With limited discovery and very little motion practice, each additional question is a venture into the unknown. Make your critical points and get out. This is particularly true when cross-examining investors. Little can be gained from humiliating (or trying and failing to humiliate) an investor alleging they lost money because of bad advice.

2. Use Plain Words. This commandment is particularly important in FINRA arbitrations, which may involve complex financial products that need to be boiled down. Simplify as much as possible, especially when cross-examining investors

3. Use Only Leading Questions. Even when you do not know the answer, leading questions limit surprise answers and witness explanations.

4. Be Prepared (a.k.a. never ask a question you do not know the answer to). In FINRA, it is very hard to avoid this because you never know what a witness is going to say. Depositions and interrogatories allow the parties to flush out what the opposing side is going to say at trial. Without them as part of discovery, there are inevitably going to be some surprises at a FINRA hearing. When those surprises happen, be prepared to take advantage (the testimony may be a good surprise), to limit damage, or to move on.

5. Listen. This commandment is even more important in FINRA hearings because of the uncertainty of answers. If a witness provides an unexpected answer, you have to listen so you can follow up with leading questions that limit damage or circle back to your ultimate point.

6. Do Not Quarrel. If the statement is so absurd the arbitrators recognize its absurdity, follow this rule. If not, tread carefully. Without the benefit of depositions to practice answering questions under oath, effective cross-examiners can push and prod novice, over-confident witnesses so they lose credibility in front of the arbitrators.

7. Avoid Repetition. Often times, the arbitrators are experienced with FINRA rules and regulations, the nature of the issues, and the investment products

involved. At the same time, repetition can be a useful tool in FINRA hearings because repetition shows that a witness's actions were not a mistake.

8. Disallow Witness Explanation. Sometimes this cannot be avoided. Arbitrators are often lax in holding witnesses' feet to the fire. Don't fret. Follow up on explanatory statements by limiting the explanation to a simple point.

9. Limit Questioning. This advice holds up equally in FINRA hearings and jury trials. Don't give the witness a chance to escape by asking one question too many.

10. Save for Summation. Although tempting, avoid the final question that ties your case together. Instead, use cross-examination to establish building blocks that you can use for the foundation of closing argument when you have more time to prepare. This is especially true in FINRA hearings where attorneys generally have more latitude to be argumentative.

As Professor Younger stated, these are not suggestions. "They are Commandments! You must comply with them." If you do not comply, you (or your clients in a FINRA arbitration hearing) will regret it.

BIO: Pete McElligott is an attorney at Anthony Ostlund Baer & Louwagie P.A. He regularly represents businesses and individuals in FINRA arbitrations and in state and federal courts. He can be reached at pmcelligott@anthonyostlund.com, or (612) 492-8233.