



Discovery In FINRA Customer Arbitration Proceedings

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Discovery in FINRA Customer Arbitration Proceedings: A View From One Year After the Revised Discovery Guide

OVERVIEW

A. The FINRA client arbitration discovery process allows the parties to obtain facts and information from other parties to the arbitration in order to support their own case and prepare for the hearing.

B. Code of Arbitration Procedure Customer Disputes require parties to cooperate with each other to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration process. Code contain rules that govern the discovery process, including making discovery requests, responding to such requests, objecting to discovery requests, and arbitrator authority to issue sanctions against parties for discovery abuses.

C. Code is supplemented the Discovery Guide, including the Discovery Lists.

BACKGROUND

A. September 2, 1999 adoption of the NASD Discovery Guide, including Document Production Lists

- NASD Notice To Members 99-90
- Overview and Procedures
- Lists 1 and 2 – Presumptive
- Lists 3 through 14 – Discretionary and Case/Claim Specific

B. 2007 Revision to Discovery Guide and Document Production Lists

C. Criticism and Perceived Faults of the 2007 Discovery Guide and Lists

D. Proposed Revisions in 2009 – And FINRA's Withdrawal of the 2009 Proposed Revision

REVISION PROCESS

A. SEC Release No. 34-64166; 76 Fed Reg. 19155, April 6, 2011

- Of the 55 comments received on the initial proposal, 15 supported it with modifications, 36 opposed it, and four addressed particular aspects of the proposal without expressing a position on whether the SEC should approve the proposed changes.
- SEC found “that the revisions to the Discovery Guide [would] help reduce the number and limit the scope of disputes involving document production and other matters, thereby improving the arbitration process for the benefit of the public investors, broker-dealer firms, and associated persons who use the process.”
- SEC approved Revised Discovery Guide on Expedited Basis

B. FINRA Regulatory Notice 11-17

C. Newly Revised FINRA Discovery Guide, effective May 16, 2011

REVISED FINRA DISCOVERY GUIDE – THE MAJOR CHANGES

A. General Overview

- Decrease prior Discovery Guide's 14 document lists, 12 of which are claim-specific,

to two general lists: List 1 itemizes categories of documents to be produced by firms and List 2 itemizes documents to be produced by customers.

- Although the Revised Discovery Guide reduces the number of lists, the number of presumptively discoverable documents is expanded.

- Revised Discovery Guide emphasizes that arbitrators retain the flexibility to modify discovery by, among other things, refusing to compel the production of documents provided for in the Lists, ordering the production of documents not provided for in the Lists, or altering the schedule.

- Clarified that electronic files are considered “documents” within the meaning of the Discovery Guide.

B. Changes Related To Claimants

(i) Additional categories now presumed discoverable by claimants from firms:

- telephone logs related to the claimant’s transactions
- advertising materials sent to customers of the firm that refer to the securities and/or account types at issue or that were used to solicit and provide services to the claimant
- customer complaints filed against the associated person(s) assigned to the accounts at issue for the three years prior to the statement of claim
- an expanded scope of documents relating to the associated person’s disciplinary history
- documents evidencing trading or investment strategies utilized/recommended in the claimant’s account
- associated person’s compensation for the transactions at issue.

(ii) Categories of documents Claimants are no longer required to produce

- prior complaints involving securities matters and the firm’s response
- documents showing actions claimant took to limit losses in the transaction at issue

C. Changes Related To Firms and Associated Persons

(i) Additional categories now presumed discoverable by firms from claimants:

- research reports which claimants received from the firm
- non-confidential settlements claimants entered in civil actions involving securities matters and/or securities arbitration proceedings
- documents the claimant received related to the investments at issue
- materials received by claimant or obtained from any source relating to the transactions or products at issue
- all correspondence related to the accounts at issue (not just correspondence with the firm).

(ii) Categories of documents Firms are no longer required to produce

- holding pages
- account statements/confirmations for the claimant accounts and transactions at issue

D. The Discovery Task Force

HAS THE NEW DISCOVERY GUIDE ATTAINED FINRA’S STATED GOALS?

A. Has the Revised Discovery Guide balanced parties’ discovery needs with FINRA’s stated goal of keeping arbitration efficient and cost effective?

B. Are Arbitrators being flexible?

C. Criticism: Revised Discovery Guide is both OVER and UNDER inclusive, i.e., leading to burdensome production of irrelevant documents in some instances and to an inability to obtain necessary documents in others.

D. Is discovery practice under the Revised Discovery Guide “simpler and easier”?

E. What has been the reaction and experience of practitioners?

PRACTICE TIPS AND SUGGESTIONS

About Richard De Palma

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Richard is a partner in the firm's Business Litigation, Construction, and International practice groups. He is a trial lawyer, commercial litigator, arbitration practitioner and business/risk counselor with more than 18 years experience practicing law on an international platform. Richard currently sits on the firm's International Committee.

Richard focuses his practice on the trial and hearing of civil cases. He has particular experience representing both plaintiffs and defendants in large-exposure cases where coordination of multiple venues is involved and when preliminary relief is sought.

Richard has handled a broad range of disputes, primarily concentrated in complex domestic/international commercial, construction, banking, partnership, professional liability, insurance, trust and general litigation/arbitration matters. He represents clients in diverse industries, including accounting, information technology, domestic and international banking, financial services, insurance, manufacturing, food production and distribution, heavy civil construction, health care, cosmetics, aviation, offshore oil, natural resource/energy and mining.

Representative Matters

- Represented state-owned Chinese bank as plaintiff in multi-jurisdiction RICO/fraud case and subsequent retrial. Upon retrial, obtained verdict on RICO and fraud counts and judgment entered in amount of \$110 million.
- Represented and obtained dismissal of all claims for financial services company in two proceedings brought alleging breach of an LLC agreement, fraud and employment discrimination (age) seeking \$12 million in damages and declaratory relief as to entitlement of profits in the future.
- Represented manufacturing client in dispute over failure to deliver equipment for New York facility. Lead trial counsel in three-week jury trial on apparent authority theory, seeking damages, including lost profits for prime season. Obtained verdict of \$3.2 million for plaintiff/client.
- Represented plaintiff public company against U.S. patent law firm in connection with legal malpractice claim. Obtained settlement for client exceeding \$1.3 million.
- Represented premier international philanthropic organization as lead counsel in ICC arbitration proceeding against foreign sovereign. Obtained award for client in excess of \$1.2 million.
- Represented Colorado-based heavy civil construction company in connection with a dispute arising from an airport modernization project. Obtained settlement of \$101 million.
- Represented major international oil company in ICDR/AAA arbitration proceeding arising from \$12 million dispute over payment of Gabonese taxes on African oil operations. After full hearing, client's liability reduced by 50%.
- Represented special investment company in LLC/partnership dispute. Judgment for defendant/client after trial.
- Represented plaintiffs on breach of contract and fraud claims in dispute over failed transaction to sell wholly-owned U.S. subsidiary. Verdict of \$11 million resulting in \$7.5 million judgment for plaintiffs/clients.

Education

- Pace University School of Law, J.D., 1991, magna cum laude, Dean's List, Casenote and Comment Editor, Law Review; Moot Court - Winning Team, Best Brief, Best Oralist
- Mercy College, B.S., 1988, summa cum laude, Dean's List, Departmental Honors, Criminal Justice - Specialization: Law