
30TH ANNUAL MEETING

DISCOVERY IN RIA ARBITRATION CASES

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DOCUMENT DISCOVERY IN RIA CASES

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I. Introduction

The discovery process involving Registered Investment Advisors (“RIAs”) involves broad areas of inquiry with many different from the tradition customer/broker-dealer disputes. The broad sweep of documents is important since RIAs owe an established fiduciary duty of care to their clients.

Initial discovery on an RIA targets documents that are common to all RIA firms. For most RIA cases, these common documents will form the core of discovery about the RIA.

Beyond the core discovery items, there will be other documents that are particular to the relationship pattern involved. The majority of cases for which special lists are appropriate fall into the following relationship patterns:

1. The investment adviser representative (“IAR”) is dually registered with a FINRA-registered Broker-Dealer and an RIA; and
2. The Respondent is a FINRA-registered Broker-Dealer that provided brokerage services to the RIA that caused the losses.

When planning discovery on an RIA, the traditional discovery requests used in customer disputes with broker-dealers are incomplete and insufficient to obtain the documents in the possession, custody, and control of an RIA. While there is some overlap, the discovery process in RIA cases involves considerably different areas of inquiry. Additionally, document maintenance requirements vary by the regulator with whom the RIA is registered. Larger RIAs are SEC-registered advisers are required to maintain additional documents than smaller state-registered advisers.

II. The RIA Discovery Guide

Delving into eight separate areas is essential to successfully proving an RIA claim. These categories can be categorized as: client-specific; regulatory disclosure; compliance; supervision; marketing; business operations; advice-related materials; and third-party relationships. The following sections and bullet points are an “RIA Discovery Guide.”¹

A. Client-Specific Documents

- Investment Advisory Agreement and updates.
- Investor (Client) Questionnaires.
- Investment Policy Statement.

¹ In cases involving RIAs before FINRA arbitration or where the parties selected the FINRA Code of Arbitration to govern their case, the FINRA Discovery Guide remains available and applicable. Further, the FINRA Discovery Guide should be considered in creating a discovery plan for an arbitration involving an RIA party.

- Account record information for the client including name, tax identification number, address, telephone number, date of birth, employment status, annual income, net worth, investment objectives, and risk tolerance.
- Account Application(s) with Custodial Broker-Dealer.
- Supporting documents (e.g., trusts, family partnerships, etc.).
- Updates to client documents.
- All written correspondence between RIA and IAR(s) and customer.
- All electronic correspondence between RIA and IAR(s) and customer including, but not limited to, email, text messages, and electronic messaging app communications.
- All written communication between the RIA and any third-parties regarding the client and/or client's account(s).
- Account Statements.
- Performance reports.
- Annual Reports.
- Fee calculations, amounts invoiced, and amounts collected.
- Written financial analysis and advice provided to client, including financial plans.
- Newsletters and blogs.
- Investment due diligence files, research reports, sales materials, performance or risk data, prospectuses, other offering documents and copies of news articles or outside research, including documents intended or identified as being "for internal use only" for the securities and products purchased and/or sold on behalf of the client.
- All notes the RIA and/or IAR made about the client, client's accounts, claims, and/or transactions including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue.
- All notes or memoranda evidencing supervisory, compliance, or managerial review of the client's account(s) or transactions therein or of the IAR assigned to the client's account(s) for the period at issue.
- All correspondence between the client and the RIA and/or IAR relating to the client's claims, accounts, transactions, or products or types of products at issue bearing indications of managerial, compliance, or supervisory review of such correspondence.
- Phone records (recordings, phone logs, and audio files).
- All writings reflecting communications between the IAR assigned to the client during the time period at issue and members of the RIA compliance department relating to the securities/products at issue and/or the client's claims, accounts or transactions.

B. Regulatory Disclosure Documents

- Form ADV, in its entirety, for the RIA.
- Annual filings with the SEC and/or state regulators.
- Responses to SEC and/or state audits, correspondence with auditors, and results of audits.
- Responses to SEC and/or state regulatory inquiries, investigations, and/or charges, and responses thereto.
- SEC filings not available on EDGAR.

- Records of disciplinary action taken against the RIA and/or IAR by any regulator (state, federal or self-regulatory organization) or employer for all sales practice violations or conduct similar to the conduct alleged.

C. Compliance Documents

- Internal compliance procedures and periodic compliance reviews and reports.
- Records of securities held by RIA firms when acting as principal.
- Continuing education seminars, training seminars for Investment Advisor Representative(s).
- Publications, bulletins, memoranda and notices regarding regulatory notices and requirements.
- Ethics manual.
- Compliance manual (sometimes termed Policies and Procedures manual).

D. Supervisory Documents

- Supervisory manual.
- Documents evidencing supervision of IAR (including reviews of branch, e-mails, advice, trading, custody, outside business activities, etc.).
- Customer complaints and responses thereto.
- Resumes/CVs of investment advisor representatives.
- Cross-reference holding pages of all client holdings.
- Internal communications with IARs pertaining to the client or related practices.
- Documents identifying supervisor of IAR.
- All exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents produced to review for activity in the client's accounts or in which the claims, transactions, products or types of products at issue are referenced or listed.
- Organizational chart of RIA.
- Branch office audits.
- Logs evidencing that the client was provided requisite disclosure documents (e.g., Form ADV parts 2a and 2b, and form CRS).
- A record of all agreements pertaining to the relationship between the IAR and the RIA, summarizing the IAR's compensation arrangement or plan with the firm.
- Identifications of rep's social media and message board handles (Twitter, Reddit, Seeking Alpha)

E. Marketing Documents

- Promotional brochures and investment style marketing materials.
- Sales brochures.
- Archived RIA website (current and historic).
- Archived social media (LinkedIn, Facebook, et al.).

F. Business-Related Documents

- Advisory fee billing software manuals.
- Compliance and supervision software manuals.

- Account management software manuals.
- Errors and omissions liability insurance policies.
- Officers and directors' liability insurance policies.
- RIA entity formational documents, including bylaws, articles of organization, and meeting minutes.

G. Advice Related Materials

- Evidence that private placements have been notice-filed with SEC as exempted securities.
- Due diligence on advice generally including, but not limited to, investments and strategies.
- Due diligence on advice to the client including, but not limited to, the use of electronic analysis (financial plans, Monte Carlo projections, hypotheticals, etc.) prepared for the client, whether provided to the client or not.
- Minutes of the RIA's Due Diligence committee meeting(s) discussing and approving the investment(s) at issue for offering to clients.
- Minutes of any and all RIA committee meetings discussing the investment(s) at issues.

H. Agreements with Third-Parties

- The RIA Money Manager Contract.
- Mutual fund selling agreements.
- Broker-dealer account agreements.
- Buy-in agreements with mutual funds.
- Buy-in agreements with money managers.
- Variable annuity marketing agreements.
- All other third-party agreements, directly or indirectly pertaining to advisor's services to client.

III. SPECIAL SITUATION DISCOVERY LISTS

There are two special situations where a broker-dealer may be involved with an IAR. The first situation is where the IAR is registered with an unrelated broker-dealer. This is seen in situations where the registered representative is registered with an independent firm without an RIA subsidiary or related company and the broker-dealer has approved the registered representative's outside business activity to act as an RIA. The second situation is where the IAR is registered with a related broker-dealer.

In both instances, the broker-dealer may be a party or potential third-party source of documents. In either situation, List 1 of the FINRA Discovery Guide should be a consideration to obtain discovery from the broker-dealer (whether as an adverse party or through third-party discovery orders to produce or subpoenas).

A. SPECIAL LIST 1: THE INVESTMENT ADVISER REPRESENTATIVE (“IAR”) IS DUALY REGISTERED WITH A FINRA-REGISTERED BROKER-DEALER AND AN RIA

In some cases, broker-dealers will allow their registered representatives to work for unaffiliated RIAs. Whether affiliated or not, the broker-dealer should maintain all of the following documentation relevant to its registered representative’s investment advisory activities:

- Outside Business Activities approval.
- Basis for determining that the fee program was appropriate (NASD Notice to Members 03-68).
- Client file (new account form, IRA application, options, margins, etc.).
- Client statements.
- Agreements
 - Between RIA and Broker-Dealer and
 - Between RIA and Client.
- Payments/compensation between RIA and Broker-Dealer.
- Compensation from client account (including trailers, etc.).
- Supervision by Broker-Dealer supervisors of IAR.
- Supervision of account (risk management, options, trading, AML, etc.).
- Exception reports
 - List of all reports that can be generated;
 - The reports that were generated and who reviewed them;
 - All exception reports generated specifically for client’s account(s);
 - Communications with the client;
 - Letters;
 - Calls (recordings, call logs and audio files); and
 - E-mails.
- FINRA correspondence, including responses to audits, 8210 letters, responses to requests regarding customer complaints and AWC matters.
- IAR’s other Outside Business Activities, disclosure documents given to the RIA, and all approvals, denials, or other RIA generated documents related to the IAR’S Outside Business Activities.

B. SPECIAL LIST 2: THE RESPONDENT IS A FINRA REGISTERED BROKER-DEALER THAT PROVIDED BROKERAGE SERVICES TO THE RIA THAT CAUSED THE LOSSES

C.

Broker-dealers like Schwab, Fidelity and Interactive Brokers offer brokerage services for RIAs, and are sometimes named as respondents/defendants for their roles in the alleged bad acts.

- Initial due diligence on RIA when onboarding.
- Client file (new account form, IRA application, options, margins, etc.).
- Client statements.
- Agreements
 - Between RIA and Broker-Dealer and
 - Between RIA and Client.
- Payments/compensation between RIA and Broker-Dealer.
- Supervision of RIA (institutional services).
- Supervision of account (risk management, options, trading, AML, etc.).
- Exception reports

- List of all reports that can be generated;
- The reports that were generated and the persons in the RIA responsible for reviewing them; and
- All exception reports generated specifically for client's account(s).
- Communications with the brokerage firm custodialing the client's assets, pertaining to the client or related practices of the RIA.
- Communications with the client
 - Letters;
 - Calls (recordings, call logs and audio files); and
 - E-mails.
- FINRA correspondence, including responses to audits, 8210 letters, responses to requests regarding customer complaints and AWC matters.

IV. NON-DISCOVERY DOCUMENT AVAILABILITY

- Filings found on the SEC's EDGAR database (e.g., Reg. D, 13f and 13g filings).
- Bulletin board postings (e.g., SeekingAlpha and Reddit).
- Review notes from regulators, including FINRA's Brokercheck, and states' corporate filings, plus securities and insurance regulators.
- The IAR's published books and writings.
- The IAR's other professional credentials to review (including ones that may have been withdrawn or revoked).
- If the IAR is insurance licensed, research the various states in which the IAR was licensed.
- The RIA and/or IAR court records.
- The RIA and/or IAR may own other business entities (related and otherwise).
- Published works (magazine articles, books).
- Quotes and interviews.

V. DISCUSSION OF KEY DOCUMENTS

A. FORM ADV

The registered part of a "registered" investment adviser is the filing and maintenance of standardized disclosure documents that are common to every RIA, collectively known as "Form ADV". Those documents can be found publicly at the Investment Adviser Public Disclosure ("IAPD") website, <https://adviserinfo.sec.gov/>. ADV disclosures are required to be updated annually, along with periodic updates to reflect material changes. RIAs are required to provide the current disclosures directly to the client at the outset of the relationship, and then to provide (or at least offer) the updates. The publicly available sources for the Form ADV do not provide public access for prior (archived) versions. It is therefore necessary to request that the RIA produce each complete Form ADV for the time period at issue, as well as any evidence that the documents were provided to the client.

Form ADV consists of three “Parts,” each with additional schedules and supplements where necessary.²

Part 1A consists of disclosures about the RIA’s business practices, ownership, control persons, and the Investment Adviser Representatives (“IARs”). Supplementing Part 1A, where necessary, are Disclosure Reporting Pages (“DRPs”) which disclose disciplinary events about the firm’s personnel.³ For larger RIA firms with multiple employees and locations, the form ADV is often an “Umbrella Registration.”⁴

Part 1B are questions asked by state securities regulators, and are only applicable if the RIA is registered with a state securities regulator.⁵

Part 2A is a Plain English brochure of Part II of the adviser’s Form ADV, describing the RIA’s services and disclosures.

Part 2B is a Plain English brochure that describes the IAR in the same way that the 2A brochure describes the RIA. Small RIAs do not have to produce 2B brochures for their IARs if the 2A and 2B forms would be materially identical.

Part 3 is the Form CRS (“Relationship Summary”). Since June 30, 2020, SEC-registered RIAs are required to give their retail investor customers Form CRS.⁶ Form CRS is meant to provide a brief summary of the RIA-customer relationship in plain English. “The relationship summary is intended to inform retail investors about: the types of client and customer relationships and services the firm offers; the fees, costs, conflicts of interest, and required standard of conduct associated with those relationships and services; whether the firm and its financial professionals currently have reportable legal or disciplinary history; and how to obtain additional information about the firm.”⁷ For dual-registrants, their Form CRS will include both their brokerage and investment adviser practice information.

RIAs must update their Form ADV each year, within 90 days of the end of the firm’s fiscal year.⁸ For a multi-year advisory relationship, this means there are multiple Form ADVs.

² FORM ADV (Paper Version) Uniform Application For Investment Adviser Registration and Report Form By Exempt Reporting Advisers <https://www.sec.gov/about/forms/formadv-instructions.pdf> (last visited Aug. 15, 2021).

³ Id. at 2.

⁴ Id. at 5.

⁵ Id. at 2.

⁶ Id. at 3.

⁷ Securities And Exchange Commission, Form CRS Relationship Summary; Amendments to Form ADV, Release Nos. 34-86032; IA-5247; File No. S7-08-18 at p. 1. <https://www.sec.gov/rules/final/2019/34-86032.pdf>. Last visited Aug. 16, 2021.

⁸ Id. at 3.

Out-of-cycle updates of Form ADV are required when an IAR is added or removed, there are disclosable disciplinary events, changes in investment strategies or philosophies, or if the disclosures in Part 2B brochure becomes *materially* inaccurate.⁹

B. CUSTOMER COMPLAINTS

RIAs are subject to public disclosure requirements for customer complaints which are available on the Investment Adviser Public Disclosure (IAPD) website.¹⁰ These complaints can reveal supervisory issues with the firm, IAR, products, due diligence and/or strategies used by the RIA.

C. RIA FINTECH AND REG TECH

The emergence of Fintech and Regtech software has made the transition from the traditional retail securities brokerage relationship to that of a Registered Investment Advisor relationship easier, simpler, and efficient. Individual RIAs now manage books of business well in the hundreds of millions of dollars for an individual RIA out of the privacy of their home offices, given the incredible functionality and ease of operation of this emergent software in this arena.

Wholesale categories of documents and information formerly kept on paper records, such as cross-reference holding pages, position pages, account reviews, account rebalancing, sector concentration, individual position concentration, due diligence files, account notes, and client contact notes and correspondence are now routinely formatted in these software programs and require specific demands that the RIA firm generate printouts of these various categories of documents and information from their software programs.

D. CONTRACTUAL RELATIONSHIPS WITH BROKER-DEALERS AND OTHER THIRD-PARTIES

Registered Investment Advisory firms enter into contractual relationships with FINRA registered broker-dealers, clearing firms and other third-parties. These documents can include custodial agreements, clearing broker agreements, soft-money agreements, indemnification/hold-harmless agreements, independent contractor-type agreements, agreements to maintain books and records, 12b-1 fee splitting, insurance policies, coverages, and contractual relationships with other third-party money managers, analysts, and support-type services.

These relationships should be disclosed on Part 2A of the Form ADV if they may or affect the advice the Investment Advisor provides the client.

E. BROKER-DEALER DUE DILIGENCE AND APPROVALS RECORDS

Many RIAs enter into contractual and promotional relationships with brokerage firms whereby they become approved money managers for customers of FINRA member firms. This process generates documents and information relating to the relationships and can include all categories of documents associated with the vetting process which broker-dealers maintain with these continuing relationships.

⁹ Id. at 4

¹⁰ <https://adviserinfo.sec.gov/>

F. DOCUMENTS AND INFORMATION IDENTIFYING RIA CONTROL PERSONS

SEC Form ADV identifies the control persons of an RIA firm. This information can be useful in identifying individual respondents in RIA claims and claims involving officer, executive, and control person liability. However, the designated roster of control persons specified on a Form ADV lists only those officers, executives, and control persons as of the date of the Form ADV. There may be other individuals who may have acted as officers, executives, and/or control persons during the time period at issue, but whose names no longer appear in the current Form ADV, thus seeking the firm's prior Form ADV filings is necessary to identify key witnesses and parties.

In addition, corporate filings, articles of incorporation, and organizational charts of the RIA may exist throughout the contested time period and provide relevant information to identify witnesses and possibly other responsible parties.

G. THE INVESTMENT ADVISORY AGREEMENT (CLIENT AGREEMENT)

RIAs managing client monies are required to enter into a written contractual relationship with their customers. The client agreement is an important source for assessing contractual representations of investment and management style, client investment objectives and standards of care presumably associated with the RIA/client relationship.

H. PROFESSIONAL LIABILITY INSURANCE AND ERRORS AND OMISSIONS POLICIES

There is no requirement that RIAs maintain liability insurance coverage. Nonetheless, many RIAs maintain liability insurance coverage for various categories of civil claims. State and federal court discovery procedures almost uniformly mandate the disclosure of insurance coverages in liability cases and reluctance on the part of an RIA firm to disclose insurance coverages may be addressed the relevant discovery rules requiring the production of this information.

I. CORRESPONDENT BROKER-DEALER ACCOUNT PLATFORM AGREEMENTS IN CONTRACTUAL RELATIONSHIPS

RIA firms, including independent RIA firms and RIA firms affiliated with broker-dealers, maintain contractual agreements with broker-dealers evidencing the contractual terms of their platforming agreement for client accounts and churning activity. These agreements and all ongoing updates, as well as the internal compliance and supervisory procedures associated with RIA platform relationships, are essential discovery items as they will reveal the division of supervision and compliance responsibilities, the existence of key reports and documents, and the use of software to manage the compliance, supervision, and client account responsibilities.

J. INVESTMENT ADVISORY FEE CALCULATIONS AND RELATED SOFTWARE FUNCTIONALITY

Investment advisory fees are typically taken through quarterly automatic withdrawals of monies from customer accounts. Few firms opt for quarterly billing anymore. It is important to assess the accuracy and legitimacy of periodic cash deductions from client accounts and how they are calculated. Some firms' fee arrangements afford them the ability to charge an investment advisory fee on the basis of total assets under management. The "total assets" calculation may tend to incentivize an investment adviser to leverage customer accounts with excess margin borrowing to enhance the fees which can be charged based upon *total* assets under

management, as opposed to net assets under management less the margin debit balance in the customer account.

K. PAYMENTS MADE BY RIAs TO BROKER DEALERS AND OTHER THIRD-PARTIES NOT REFLECTED ON RIA CUSTOMER ACCOUNT STATEMENTS

There are oftentimes money flows between RIAs, the broker-dealers through whom they platform customer accounts and/or third-party vendors (e.g., mutual funds, private placement vendors, market makers and other financial institutions) with cash payments for any number of cloaked or described services they might contend or otherwise package. These payments may influence the provision of financial advice or service to the client. Exploring the existence of these money flows is necessary to determine if the RIA breached its fiduciary obligations to its clients by putting its own interests first.

L. DUE DILIGENCE FILES

Given that RIA firms are acting in a fiduciary capacity, there is a profound obligation to engage in thorough due diligence and continued monitoring of securities selected for customer accounts. Some RIA firms consider themselves special situation experts versed in finding and selecting investment opportunities for customer accounts, with the same positions being purchased across the board in the accounts of many customers. In circumstances where concentrated positions in customer accounts have sustained devastating and disproportionate losses, the discovery of these due diligence files may go towards ascertaining the extent to which an RIA performed its fiduciary obligations for the client.

This is all the more essential in circumstances where positions in thinly traded companies are involved. The area of inquiry includes the extent to which the investment advisor was involved with any Form 13D filings with the SEC and other filings related to concentrated positions in individual securities.

M. CRM SOFTWARE AND DOCUMENTS AND INFORMATION EVIDENCING PERIODIC REVIEW OF HOLDINGS IN CUSTOMER ACCOUNTS

One of the most important areas of discovery is ascertaining the extent to which an RIA firm engaged in prudent, periodic assessment of client holdings and asset allocations to assure that they are in line with the stated investment objectives or investment policy statement of a customer account. Recent years have seen the emergence of a number of very effective client relationship management software programs. Additionally, documents and information memorializing client in-person meetings and teleconferences relative to the status of an account and its holdings can likewise provide essential information when assessing RIA account management.

N. INVESTMENT ADVISORY AFFILIATES OF BROKER-DEALERS

Virtually all of the top 30 broker dealer wire houses have formed their own separate investment advisory subsidiaries or affiliates created in large part to stem the flow of customer accounts to independent RIAs offering fee-based account management services. Some of these affiliate entities are structured in a franchise format whereby franchise owners actually own an individual office in either the broker dealer format, the investment advisory format or both. Discovery of these franchise and correspondent agreements can identify additional parties, the types of services exchanged between the entities, and the respective obligations which may exist in these relationships.

O. RESULTS OF PERIODIC SEC AND STATE REGULATOR RIA OFFICE AUDITS

The SEC and state regulators conduct periodic audits of RIA firms, as well as audits conducted pursuant to specific events of alleged customer victimization. In this regard, all such audits, reviews, recommendations, and related correspondence exchanged between the RIA and regulator(s) are essential items to seek in the discovery phase of claims against RIA firms.

P. DOL FIDUCIARY RULE (PROHIBITED TRANSACTION EXEMPTION 2020-02)

With the US Department of Labor's ("DOL") new Fiduciary Rule,¹¹ RIAs must also comply with DOL regulations pertaining to investment advice given to ERISA plan assets and IRAs, including:

- Acknowledge fiduciary status in writing;
- Disclose services and material conflicts of interest;
- Adhere to Impartial Conduct Standards;
- Adopt policies and procedures prudently designed to ensure compliance with Impartial Conduct Standards and to mitigate conflicts of interest;
- Document and disclose specific reasons that any rollover recommendations are in the retirement investor's best interest; and
- Conduct an annual retrospective compliance review

These documents are necessary to define the scope of the relationship and services and compare them to the services provided by an RIA to its client where a retirement account is at issue.

VI. THIRD-PARTY SUBPOENAS TO PRODUCE DOCUMENTS

Subpoenas in aid of arbitration if properly fashioned can be an effective tool to access essential witnesses, documents and information.

The procedural mechanisms to compel the appearance of witnesses and production of documents and information in arbitration proceedings can require considerable patience. Unlike FINRA arbitration proceedings where member firms and associated persons are subject to discipline for failing to cooperate in the discovery process, there is no similarly effective internal mechanism induce RIA firms and their advisers to cooperate with the discovery process in the arbitration context. The only remedy to enforce an arbitrator-ordered subpoena is pursuit of state (where available) or federal court-venued proceedings to compel compliance.¹² The turnaround time on such discovery-related filings with the whole submission, deliberation and decision process could easily take up to a year's time or more.

¹¹ Prohibited Transaction Exemption 2020-02, *Improving Investment Advice for Workers & Retirees*, December 18, 2020.

¹² See, 9 U.S.C. § 7.

VII. DOCUMENT DISCOVERY IN FINRA, AAA, AND JAMS

The procedure for asking for the production of documents and information in an arbitration varies by the rules selected by the parties or mandated by a pre-dispute arbitration agreement.

In an arbitration proceeding with an RIA, it is possible to see FINRA, JAMS, or AAA rules selected regardless of the arbitration provider.

FINRA's discovery rules are the closest to self-executing, requiring the production of documents and information pursuant to the FINRA Discovery Guide, and permitting additional discovery requests for production and requiring at least the serving of responses without the need to seek the arbitrator or panel's permission to do so.

With AAA and JAMS arbitration rules, the document discovery process is dependent on the consent or voluntary participation of the parties or by order of the arbitrator.

A. THE FINRA CODE OF ARBITRATION PROCEDURE

FINRA'S Code of Arbitration Procedure allows for discovery of documents and information in two layers. The first layer is the Discovery Guide documents which are considered presumptively discoverable¹³ and governed by Rule 12506. The second layer is case-specific requests for production of documents and information propounded by a party. The FINRA Discovery Guide should be considered as only the start of document discovery.

Rule 12506 Document Production Lists¹⁴

Within 60 days of the date the answer to the statement of claim is due, the parties must "Produce to all other parties all documents in their possession or control that are described in Document Production Lists 1 and 2..."¹⁵ and/or "[o]bject as provided in Rule 12508 and serve this response on all parties and file this response with the Director."¹⁶

In the context of a FINRA arbitration case involving an RIA, there may be documents responsive to List 1 of the FINRA Discovery Guide in the possession, custody, and/or control of the RIA. However, List 1 of the FINRA Discovery Guide was designed for disputes between a customer and FINRA Broker-Dealers and their Associated Persons. As a result, some documents may bear different titles or otherwise not exist in the possession of the RIA.

¹³ "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." FINRA Discovery Guide (2013) (<https://www.finra.org/arbitration-mediation/discovery-guide>) Last visited Jul 31, 2021.

¹⁴ FINRA Code of Arbitration Procedure (<https://www.finra.org/rules-guidance/rulebooks/finra-rules/12000>) Last visited Jul. 31, 2021.

¹⁵ FINRA Code of Arbitration Procedure Rule 12506(b)(1)(A).

¹⁶ FINRA Code of Arbitration Procedure Rule 12506(b)(1)(C).

Rule 12507 Other Discovery Requests¹⁷

“Parties may also request additional documents or information from any party by serving a written request on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute... [s]tandard interrogatories are generally not permitted in arbitration.”¹⁸

“[D]iscovery requests may be served... 45 days or more after the Director serves the statement of claim....”¹⁹ Responses to discovery requests are due 60 days after the date of the Request(s).²⁰

Under the FINRA Rules, a party can propound requests for production of documents without obtaining either the consent of the opposing party or permission from the arbitrator or panel. The RIA Discovery Guide provided herein may form the basis of many Rule 12507 requests for production.

B. AAA COMMERCIAL RULES²¹

AAA Commercial Rules R-22

The AAA Commercial Rules leave document discovery in the hands of the arbitrator and parties. There is no set standard for the making or responding to document discovery requests. Instead, under R-22(b), the arbitrator may on “application of a party or on the arbitrator’s own initiative...” “(iii) require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party’s possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues...”

Key to this Rule is the phrase “relevant and material to the outcome of disputed issues.” The Commercial Rules appear to set a higher threshold than the “reasonably calculated to lead to admissible evidence” standard in federal courts and many state courts. The AAA Commercial Rules address issues of electronic discovery,²² the obligation to update discovery productions,²³ and leaves the resolution of discovery disputes and enforcement of orders to the arbitrator.²⁴

¹⁷ Id.

¹⁸ FINRA Code of Arbitration Procedure, Rule 12507(a).

¹⁹ FINRA Code of Arbitration Procedure, Rule 12507(a)(2).

²⁰ FINRA Code of Arbitration Procedure, Rule 12507(b).

²¹ American Arbitration Association, Commercial Arbitration and Mediation Procedures, Rules Amended and Effective October 1, 2013. <https://adr.org/sites/default/files/Commercial%20Rules.pdf>. Last visited Jul. 31, 2021.

²² American Arbitration Association, Commercial Arbitration and Mediation Procedures, R-22(b)(iv).

²³ American Arbitration Association, Commercial Arbitration and Mediation Procedures, R-22(b)(ii).

²⁴ American Arbitration Association, Commercial Arbitration and Mediation Procedures, R-23.

C. AAA CONSUMER RULES²⁵

AAA Consumer Rules R-22

The AAA Consumer Arbitration R-22 provides a much skinnier arbitrator-controlled discovery process. R-22(a) provides, “[i]f any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct (1) specific documents and other information to be shared between the consumer and business.” On its face, the AAA Consumer Rule R-22 excludes third-party documents (e.g., the agreement between the RIA and broker-dealer) that may be relevant to how and why the RIA and/or IAR served the client as they did.

R-22(c) limits discovery to just R-22(a) unless the “...arbitrator determines further information exchange is needed to provide for a fundamentally fair process.”

The scope of document requests under the AAA Consumer rules is left to either the parties’ agreement or the arbitrator’s control.

D. JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES

JAMS Comprehensive Rules Rule 17

The JAMS Comprehensive Arbitration Rules and Procedures split the difference between FINRA and AAA by directing a good faith “...voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information (“ESI”)) relevant to the dispute or claim.”²⁶ The time frame for the initial exchange is short, just 21 calendar days after all pleadings have been received.²⁷ The arbitrator is given the discretion to “...modify these obligations at the Preliminary Conference.”²⁸

JAMS Rule 17 imposes an on-going production obligation on the parties. “As they become aware of new documents or information... all Parties continue to be obligated to provide relevant, non-privileged documents to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged”

²⁵ American Arbitration Association, Consumer Arbitration Rules, Rules Amended and Effective September 1, 2014. <https://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf>. Last visited Jul. 31, 2021.

²⁶ JAMS Comprehensive Arbitration Rules & Procedures, Rule 17. <https://www.jamsadr.com/rules-comprehensive-arbitration/#Rule-17> Last visited Jul. 31, 2021.

²⁷ Id.

²⁸ Id.

E. JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (CLAIMS LESS THAN \$250,000)

JAMS Streamline Rules Rule 13

For claims less than \$250,000, the JAMS Streamlined Arbitration Rules & Procedures apply. Under the Streamlined rules, “[t]he Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information (“ESI”)) relevant to the dispute or claim.”²⁹ The time frame for the initial exchange is even shorter, just 14 calendar days after all pleadings have been received.³⁰

Any discovery sought beyond the initial voluntary exchange is left to the arbitrator. “The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.”³¹

The Streamlined Rules also impose an on-going duty of production. “As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents.”³²

F. CONCLUSIONS ABOUT REQUESTING DOCUMENTS IN RIA CASES

Know the rules before making the discovery plan! The FINRA Code of Arbitration Procedure contemplates and allows written requests for production of documents. AAA leaves all the control to the arbitrator and/or party agreement. JAMS splits the difference with a voluntary production of documents, and leaves the rest to the arbitrator. Ultimately at a non-FINRA arbitration provider, developing a discovery plan prior to or at the initial scheduling conference with the arbitrator is a key requirement to requesting the documents necessary for trying an arbitration case involving an RIA.

²⁹ JAMS Streamlined Arbitration Rules & Procedures, Rule 13(a). <https://www.jamsadr.com/rules-streamlined-arbitration/#Rule-13>. Last visited Jul. 31, 2021.

³⁰ Id.

³¹ Id.

³² JAMS Streamlined Arbitration Rules & Procedures, Rule 13(b).