

StuGoldberg's
2003 PRACTICE GUIDE
to
NASD
DISCOVERY and
PRE-HEARING PROCEEDINGS

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TWO TYPES OF DISCOVERY PRE-HEARING PROCEEDINGS

Discovery of documents and information in NASD arbitrations for the twenty-first century now comes in two flavors: **automatic**—pursuant to the NASD Discovery Guide; and **requested**—in accordance with the NASD Discovery Rules. As the descriptive terms “automatic” and

“requested” indicate: the *automatic* discovery need not be requested, it is the obligation of each party to produce to the other party specified listed material on a preset time table; and the *requested* documents and information follow traditional rules of demand and production.

➤ **AUTOMATIC: NASD DISCOVERY GUIDE**

After decades of bickering back and forth about what documents a party could be compelled to produce in NASD arbitrations, the NASD Arbitration Department (renamed the NASD Office of Dispute Resolution as of July 2000), the securities industry, and attorneys from the claimant's bar came to terms concerning precisely what documents must be produced based upon the type of claim involved in the dispute. In order to avoid—to the greatest extent possible—what had become the customary pre-hearing discovery

conference's item-by-item argument, there was created a grand document called the “NASD Discovery Guide.” Delineated by type of dispute, this Guide sets forth lists of documents that must be automatically produced.

The NASD Discovery Guide is contained as Exhibit I to NASD Notice to Members 99-90 (“NTM 99-90”), and is effective as of September 2, 1999—just in time for the twenty-first century. Part I of this Practice Guide will be devoted to the NASD Discovery Guide.

➤ **REQUESTED: NASD DISCOVERY RULES**

Wholly aside and apart from the automatic production mandated by the NASD Discovery Guide, any party to an NASD arbitration can serve upon any other party an

Information Request for the production of documents and/or information. Part II of this Practice Guide, will be devoted to these NASD Discovery Rules.

➤ **PRE-HEARING PROCEEDINGS**

Mandatory document production, even if “automatic,” counts for little in the real world of securities arbitration without vigorous enforcement. This translates into the need for the application of meaningful sanctions to compel production and punish

and deter what the NASD Code refers to as “willful and intentional material failure to comply with an order of the arbitrator(s).” Hence—Part III of this Practice Guide on the subject of Sanctions.

PART I NASD DISCOVERY GUIDE

[This document is reproduced as Appendix-A to this Practice Guide.]

§1.1 NASD NOTICE TO MEMBERS 99-90

NASD NTM 99-90 Executive Summary

Executive Summary

On September 2, 1999, the Securities and Exchange Commission (SEC) approved the use of the Discovery Guide (see Exhibit I) in National Association of Securities Dealers, Inc. (NASD®) arbitration proceedings involving customer disputes with firms and associated persons. The Discovery Guide is now available to use in NASD arbitration proceedings.

The Discovery Guide, which includes Document Production Lists, provides guidance to parties on which documents they should exchange without arbitrator or staff intervention, and to arbitrators in determining which documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations.

[NASD NTM 99-90, page-687]

The most radical change in the area of NASD document production came about with the adoption of the NASD Discovery Guide as published in NASD Notice To Members 99-90 (sometimes referred to as “NTM 99-

90”). This Guide sets forth specific itemized lists of “**documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations.**”

§1.2 PUBLIC INVESTOR DISPUTES

The NASD Discovery Guide is applicable to all NASD arbitrations involving disputes between “**customers**”—read Public Investors, and “**member firms**”—read Broker-

Dealers, and “**associated persons**”—read member firm employees, e.g., registered representatives or branch office managers.

§1.3 SUPPLEMENTING ARBITRATOR’S MANUAL

NASD NTM 99-90

The Discovery Guide will be used as a **supplement** or an **addendum** to the guidance regarding discovery provided in The Arbitrator’s Manual, published by Securities Industry Conference on Arbitration (SICA), and particularly the provisions in the section entitled, “Prehearing Conference,” on pages 11 through 16.

[NASD NTM 99-90, page-687 [underscoring and emphasis added]]

The NASD Discovery Guide must be read as “supplement[ing]” the Arbitrator’s Manual published by the Securities Industry Conference on Arbitration (“SICA”). However, the specificity and comprehensiveness of the NASD Discovery Guide incorporates and expands upon virtually all of the material outlined in SICA’s Arbitrator’s Manual.

So that the reader can have available all NASD primary sources for discovery, pages 9>16 of SICA’s Arbitrator’s Manual are set forth in Appendix-B to this Practice Guide.

To add considerable strength and emphasis to the compulsory nature of the NASD Discovery Guide, consider the language of the Securities and Exchange Commission:

SEC Release 34-41833

The Discovery Guide will streamline the discovery process. By creating lists of documents that **should be produced** in all customer arbitrations as well as particular types of cases, the Discovery Guide will help expedite the discovery process and reduce the number of discovery disputes between the parties, which in turn should help lower the cost of the arbitration discovery process.

[SEC Release No. 34-41833; File No. SR-NASD-99-07 (9/2/99)]

[underscoring and emphasis added]

One of the principal reasons for adopting the NASD Discovery Guide was to interject certainty and predictability to the discovery process in securities arbitration by establishing a

clear and concise list of documents that “should be produced.” Accordingly, anything that blurs this objective should be viewed with considerable skepticism.

§1.4 DISCRETIONARY GUIDE

NASD NTM 99-90 NASD Discovery Guide I

The Arbitrator’s Manual is compiled by members of SICA as a **guide** for arbitrators, and is designed to supplement and explain the Uniform Code of Arbitration as developed by SICA. The procedures and policies described in The Arbitrator’s Manual are **discretionary** and may be changed by the arbitrators. Further, nothing in the Discovery Guide, including the Document Production Lists, precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide.

.....

The Discovery Guide, including the Document Production Lists, will function as a guide for the parties and the arbitrators; it is not intended to remove **flexibility** from arbitrators or parties in a

given case. For instance, arbitrators can order the production of documents not provided for by the Document Production Lists or alter the production schedule described in the Discovery Guide.

[NASD NTM 99-90, page-687, 689]

[underscoring and emphasis added]

In arbitration the *power of the arbitrators* is *plenary*. This concept is clearly set forth in NASD Arbitration Rule 10324 which provides: “**The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code . . .**.” Accordingly, the NASD Discovery Guide reiterates that concept by

providing that the arbitrators have discretion to change any aspect of the Guide.

However, this being said, the SEC’s strong language that holds that the documents listed in the NASD Discovery Guide “should be produced” should not be ignored except under the most extreme of circumstances.

§1.5 COMPULSORY DISTRIBUTION

To better protect the Public Investor, who might be represented by an attorney uninformed as to the practice of securities arbitration, or worse—an unrepresented customer (e.g., one who is representing him/herself, a/k/a “one who has a fool for a client”), NTM 99-90 requires

that: “**The [NASD] Office of Dispute Resolution (ODR) will provide the parties with the Discovery Guide including the Document Production Lists at the time ODR serves the statement of claim.**”

§1.6 TIME FRAME FOR PRODUCTION

NASD DISCOVERY GUIDE II(A)

A. Time Frames For Document Production and Objections

The parties should produce all required documents listed in the applicable Document Production Lists not later than thirty days from the date the answer is due or filed, whichever is earlier.

[NASD NTM 99-90, page-689]

[underscoring and emphasis added; footnotes omitted]

[a] THIRTY DAYS FROM ANSWER

Documents listed in the NASD Discovery Guide must be automatically produced “**not later than thirty days from the date the answer is due or filed, whichever is earlier.**” According

to NASD Rule 10314(b)(1): “**Within 45 Calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an . . . Answer.**” Thus, by combining these two time periods,

the Discovery Guide documents must be produced not later than two-and-a-half months from the time the

Respondent receives the Statement of Claim.

[b] EXTENSIONS OF TIME TO ANSWER

Because production pursuant to the NASD Discovery Guide is linked to the “**date the answer is due or filed,**” an extension of time in which to answer, if requested by the Respondent and granted by the Director of Arbitration, might be interpreted as delaying Discovery Guide production. This is not the

case when such documents are requested in a Request for Production made pursuant to NASD Rule 10321(b)(1), as recommended and analyzed in §2.3 of this Practice Guide. Accordingly, Claimant should always incorporate all documents listed in the NASD Discovery Guide in Claimant's Request for Production.

[c] CALENDAR DAYS

As set forth in endnote 2 to the NASD Discovery Guide: “**All time**

periods referenced herein are calendar days.”

§1.7 REDACTIONS

NASD DISCOVERY GUIDE II(A)

If a party redacts any portion of a document prior to production, the redacted pages (or ranges of pages) shall be labeled “redacted.”

[NASD NTM 99-90, page-689]

In law, “redaction” refers to the act of intentionally deleting a portion of a document. The physical process can take the form of blacking-out an item by using a dark colored marker which totally obliterates the portion “redacted”; or it can take the form of pasting a card over the area to be hidden and then photo-copying the then partially hidden document.

Redaction is most often used in situations where a Broker-Dealer is required to produce monthly brokerage statements from another customer to show that the registered representative had other customers in

the same stock, but the name of the other customer is redacted to protect that individual's privacy.

An example of permitted redaction is in churning cases wherein a Broker-Dealer must produce compensation runs for the registered representative involved in the dispute. Just such a situation is discussed in Broker-Dealer List-3 Item-2 which requires the production of: “**All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer's account(s) for the two**

months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the

action, except that the firm/ Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.”

§1.8 PRIVILEGED DOCUMENTS

NASD DISCOVERY GUIDE II(A)

A party may object to the production of any document, which would include an objection based upon an established privilege such as the attorney-client privilege.

[NASD NTM 99-90, page-689]

Privileged documents are exempt from production. The most common privilege asserted in securities arbitration/litigation against a Broker-Dealer is the attorney-client

privilege. Second most common is the attorney's work product privilege. Recently, a new privilege being asserted by Broker-Dealers is the so-called self-critical analysis privilege.

[a] ATTORNEY-CLIENT PRIVILEGE

Communications between an attorney and h/is/er client are absolutely privileged. But, as will be set forth in the following subparagraph, otherwise routine communications,

[1] ATTORNEY COMPLIANCE OFFICER

What some Broker-Dealers have attempted to do is to place an attorney into a line supervisory job, or as a compliance officer, and then claim that anything that was sent to, or generated by, that attorney is covered under the attorney-client privilege. The usual test in such situations is simple: if the job in question is one that is usually and customarily performed by a non-attorney, or if the function is one that is required for the management and supervision

conducted in the ordinary course of a brokerage business, will not become privileged solely on the basis of the fact that the brokerage employee happens to possess a law degree.

of customer accounts, a document that would not be privileged if delivered to, or generated by, such a non-attorney, will not become privileged solely on the basis that the employee is an attorney. For example, communication with the Broker-Dealer's General Counsel would typically be privileged, however, communication with the Broker-Dealer's Compliance Manager, who just so happens to be an attorney, would not.

[b] ATTORNEY'S WORK PRODUCT PRIVILEGE

The documents created by an attorney in the process of preparing for litigation are protected from discovery by the attorney's work product privilege. This privilege extends to the attorney's staff, as well as to

contract employees and/or outside experts retained to provide the attorney with information—both factual and analytical—about the issues in controversy.

[1] ATTORNEY'S REPRESENTATIVE

A typical situation wherein the product of an attorney's representative would fall under the protection from production under the attorney's work product privilege is to be found when an attorney retains an expert to prepare a statistical analysis of the

trading in the client's account. If, and only if, said retained expert is not going to be used as a witness at the hearing of the matter, the product of the expert is protected from any obligation of production pursuant to the attorney's work product privilege.

[c] SELF-CRITICAL ANALYSIS PRIVILEGE

A rather new privilege in the process of development is the so-called self-critical analysis privilege. Suffice it to say that within the scope

of NASD discovery, said privilege would not be applicable to documents specifically called for pursuant to the NASD Discovery Guide.

[d] DETERMINATION OF PRIVILEGE

Of considerable concern in any arbitration is the process by which arbitrators are to determine whether or not a challenged document is to be deemed confidential or not. One reason for the difficulty is that in securities arbitration, unlike in a jury trial, the determiner of the privilege is also the trier of the facts. As the saying goes: you can't unring a bell. If arbitrators view a questionable document and determine it is privileged, and thus non-admissible in the hearing, what good is that to the privileged party?—the arbitrators who will consider the matter on the merits have already learned about the information contained in the document determined to be privileged.

Aside and apart from the obvious methods of presenting argument as to why an identified document should be ruled privileged, in order to protect such a document from premature viewing by the arbitrators, this Practice Guide offers the following solution: let the arbitration panel appoint an individual in the nature of a "special master" to determine the question, and let the losing party bear the expense of the examination. If the parties cannot agree among themselves as to who should act in this capacity, then the arbitrators can call upon the NASD to appoint a special arbitrator in the same manner as a replacement arbitrator would be selected, or someone from the pool of NASD mediators.

§1.9 OBJECTIONS

[a] WRITTEN OBJECTIONS

NASD DISCOVERY GUIDE II(A)

If any party objects to the production of any document listed in the relevant Document Production Lists, the party must file written objections with the Office of Dispute Resolution and serve all parties not later than thirty days following the date the answer is due or filed, whichever is earlier. Objections should set forth the reasons the party objects to producing the documents.

[NASD NTM 99-90, page-689-90]
[underscoring added]

The time in which to file an objection to production pursuant to the NASD's Discovery Guide, that being "**not later than thirty days following the date the answer is due or filed, whichever is earlier,**" coincides with the time in which the objecting party has in which to produce the documents. Thus, an objecting party can wait until the last minute at which production is required, and instead of producing the document, can object to the production. What the objecting party can not do is to provide a letter saying something along the lines of "we are attempting to locate the requested

documents," or the inane answer by one PaineWebber attorney who replied that "discovery is ongoing"—duh!

The NASD Discovery Guide became effective on September 2, 1999. Accordingly, the brokerage industry and their stable of legal counsel have had over three years to get used to these production requirements. It is one sad way in which to conduct a defense to wait two and a half months from receipt of the Statement of Claim, and then say there wasn't enough time in which to gather the required documents.

[b] PARTIAL PRODUCTION

NASD DISCOVERY GUIDE II(A)

An objection to the production of a document or a category of documents is not an acceptable reason to delay the production of any document not covered by the objection.

[NASD NTM 99-90, page-690] [underscoring added]

If a party is responsible for producing twelve categories of documents, as is the responsibility of a Broker-Dealer in all cases as covered in Broker-Dealer List-1, and objects to the production of two such

categories of documents, said objecting party must make timely production of the remaining ten categories of documents about which no objection has been made.

[c] RESPONSE TO OBJECTIONS

NASD DISCOVERY GUIDE II(A)

A response to an objection should be served on all parties within 10 days from service of the written objections. Objections and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties.

[NASD NTM 99-90, page-690]
[underscoring added]

Responses to objections must be served on the objecting party, with copies to the NASD Arbitration Department, within ten days of service of the objections.

As will be more fully covered below in Part IV regarding Pre-

Hearing Conferences, responses to objections should be as detailed as possible so that the objections can form the basis of motions for production, and possibly also for the imposition of sanctions on the non-producing party.

[d] BURDEN OF PROOF

NASD DISCOVERY GUIDE II(A)

The arbitrator(s) shall then determine whether the objecting party has overcome the presumption based upon sufficient reason(s).

[NASD NTM 99-90, page-690]
[underscoring and emphasis added]

Items listed in the NASD's Discovery Guide are "**presumptively required.**" Accordingly, the objecting party has the burden of proof in establishing that: "**the objecting party has overcome the presumption based upon sufficient reason(s).**" Both the history and spirit behind the adoption of the NASD Discovery Guide

strongly suggest that the burden of proof in order to prevail in overcoming the presumption of production should be by *clear and convincing evidence*. Also, as set forth above at §1.3, the SEC has taken the clear and unambiguous position that the documents listed in the NASD Discovery Guide "*should be produced.*"

§1.10 CONFIDENTIALITY

NASD DISCOVERY GUIDE II(B)

B. Confidentiality

If a party objects to document production on grounds of **privacy** or **confidentiality**, the arbitrator(s) or one of the parties may suggest a stipulation between the parties that the document(s) in

question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator(s) may issue a confidentiality order.

[NASD NTM 99-90, page-690]
[underscoring and emphasis added]

[a] COVERING UP SYSTEMATIC FRAUD

In many instances the fraud that is discovered and proven within a given arbitration, is just the tip of the proverbial iceberg. The Broker-Dealer involved in that particular arbitration, might have been engaged in a systematic pattern and scheme to defraud hundreds or even thousands of its customers. In such situations, the very *first industry privilege*

sought by the racketeering Broker-Dealer within what said Broker-Dealer considers to be the cozy confines of trade association arbitration is a confidentiality order, whereby all documents produced in connection with that particular case must be used only for that arbitration, must be kept confidential, and must be returned after the hearing.

[b] PRO-RACKETEERING PROTECTION

While the confidentiality provision of the NASD Discovery Code is silent as to whose “privacy or confidentiality” constitutes the basis of the requested protection, reference should be made to the rules concerning redaction as already discussed at §1.7 above. When the privacy and/or confidentiality of other customers is at issue, their names and addresses can be redacted from the documents to be produced—as clearly set forth in

connection with Broker-Dealer List-3 Item-2 which permits the redaction of all information concerning other customers except for the last four digits of their account number.

A “**confidentiality order**” should never be issued to protect the “**privacy or confidentiality**” of a racketeering enterprise for the purpose of affording extra special protection in NASD arbitration that would not be extended in a civil court of law.

[c] INVITATION FOR A LAWSUIT

What is the position of the attorney who, having agreed to a confidentiality agreement in a past matter, is now representing another client who has been defrauded in the same manner by the same Broker-Dealer? If the attorney requests the production of certain documents that prior knowledge indicates are in the possession of the Broker-Dealer, or if the attorney argues to the new

arbitration panel that he or she knows certain documents are in existence because of their production in a prior arbitration, is the attorney opening him or herself up for a lawsuit on the grounds of having breached the confidentiality agreement? Recent lawsuits by Broker-Dealers against Public Investor's attorneys, would seem to reflect this standard Broker-Dealer position.

Another practical consideration is that as an attorney becomes older it becomes harder and harder to remember what he or she wants to remember, let alone trying to remember what has to be forgotten. Its one thing to remember that a given settlement number is confidential—because all settlement numbers are routinely confidential, but an entire different matter to keep in mind which remembered documents are covered by a confidentiality order and which other remembered documents have been obtained by other means. In this line, documents covered by a confidentiality agreement may at a

[d] BURDEN UPON EXPERT WITNESSES

What is the effect on an expert witness when the attorney who has retained h/im/er has executed a confidentiality agreement purporting to cover all of the attorney's employees and agents? What if the expert has also been retained by another aggrieved Public Investor involving a similar claim against the same Broker-Dealer? Can said expert be compelled to suffer *situational*

[e] MALPRACTICE INSURANCE

Any attorney who does not preserve a complete set of records concerning any representation of a client, runs the risk that said attorney's malpractice carrier will decline coverage in the event of a subsequent dispute regarding possible malpractice. It is the obligation of an attorney to retain a complete set of documents for a minimum of six years, and preferably seven years, after the termination of representation.

later point in time be acquired in a non-confidential manner. But the use of these subsequently obtained documents will subject the attorney, or worse the former client, to a lawsuit by the Broker-Dealer claiming the documents in question came from the original source that is covered by the confidentiality agreement or order.

It is in just this manner of obtaining confidentiality agreements, that Broker-Dealers will seek to exclude an entire law firm from ever representing another client involving the same type of dispute, or for that matter even representing any other clients against that Broker-Dealer.

selective amnesia when testifying in the other matter? And can said expert be compelled to commit perjury by falsely testifying that the basis of h/is/er expert opinion is not based in whole or in part on knowledge of the documents that were previously viewed but are now the subject of a confidentiality order? Remember the admonition that you can't unring a bell.

If a malpractice suit is brought against an attorney claiming negligent representation in connection with an arbitration proceeding, and the malpractice carrier requests that the attorney turn over all documents used in connection with the arbitration, it will be a poor excuse indeed for the attorney to tell h/is/er insurance company that all such records were returned to the Broker-Dealer pursuant to a confidentiality agreement or order.

[f] SHARED DISCOVERY

Many securities frauds are perpetrated against a large number of public investors. One such fraud in which the author of this Practice Guide played a significant part was that perpetrated by Prudential-Bache Securities through one of its in-house products known as the Prudential-Bache Energy Income Limited Partnerships. In excess of 138,000 investors were defrauded out of over \$1.3 billion. To bring this particular fraud to the attention of the public, as

well as the SEC and Justice Department, the author of this Practice Guide authored a book and video entitled "Prudential-Bache's \$1.3 billion Energy Income Limited Partnership Oil Scam." Hearing Exhibits from actual arbitrations conducted by this author against Prudential-Bache were part of this book. In this regard, consider the language in one well reasoned judicial opinion:

Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.

In addition to making discovery more truthful, shared discovery makes the system itself more efficient. The current discovery process forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical. Benefiting from restrictions on discovery, one party facing a number of adversaries can require his opponents to duplicate another's discovery efforts, even though the opponents share similar discovery needs and will litigate similar issues. Discovery costs are no small part of the overall trial expense.

A number of courts have recognized that allowing shared discovery is far more efficient than the repetitive system now employed. Federal courts, for instance, have overwhelmingly embraced this practice in order to streamline discovery.

[*Garcia v. [Judge] Peeples*, 734 S.W.2d 343, 347, 56 USLW 2100, 83 A.L.R.4th 975 (Tex.,1987, Kilgarlin, J.) (underscoring and emphasis added)]

[g] SUPERCEDING PRIVILEGE

NASD DISCOVERY GUIDE II(B)

The arbitrator(s) shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege.

[NASD NTM 99-90, page-690]

The power of an arbitration panel to issue confidentiality orders stops when a privilege is involved. The issuing of a confidentiality order concerning a document protected by the attorney-client privilege does not excuse an attorney's breach of his or her obligation not to betray the secrets and confidences of the client. As discussed at length in §1.8 above, the problem for the attorney centers around how to convince an arbitration panel that a given document is

protected by the attorney-client privilege without first disclosing the contents of the document.

In §1.8[d] above, under the caption "Determination Of Privilege," a practical recommendation was put forth as to how to reach a determination concerning the issue of privilege without having to reveal the contents to the very same arbitration panel that will be deciding the matter on the merits.

§1.11 NONEXISTENCE OF DOCUMENTS

NASD DISCOVERY GUIDE II(B)

C. Affirmation In The Event That There Are No Responsive Documents or Information

If a party responds that no responsive information or documents exist, the customer or the **appropriate person in the brokerage firm** who has **personal knowledge** (i.e., the person who has conducted a physical search), upon the request of the requesting party, must: 1) state in writing that he/she conducted a good faith search for the requested information or documents; 2) describe the extent of the search; and 3) state that, based on the search, no such information or documents exist.

[NASD NTM 99-90, page-690]

[underscoring and emphasis added]

Federal law requires Broker-Dealers to retain certain records for proscribed periods of time. Accordingly, when such documents are the subject of a request for production, there is a reasonable expectation that the documents will be turned over.

When they cannot be found, an affirmation must be signed and delivered by the "**appropriate person in the brokerage firm who has personal knowledge**," about why the documents cannot be produced.

§1.12 LISTS

The guts of the NASD Discovery Guide are in its lists. There are fourteen such lists, the first two of which are applicable in all Public Investor (“customer”) v. Broker-

Dealer arbitrations, and the next dozen come into play when certain types of claims have been asserted. Here are the categories covered by these lists:

NASD DISCOVERY GUIDE LISTS

DISPUTE	BROKER-DEALER LISTS	CUSTOMER LISTS
All claims	1	2
Churning	3	4
Supervision	5	6
Misrepresentation	7	8
Negligence, and/or Fiduciary duty	9	10
Unauthorized Trading	11	12
Unsuitability	13	14

RECIPROCAL OBLIGATIONS

Virtually all production obligations imposed upon the Broker-Dealer, which obligations are not related to areas that are uniquely brokerage in nature (e.g., commission runs and supervisory reports), are also imposed upon the customer. Thus, what’s required from the Broker-

Dealer in Broker-Dealer List-1, is also required from the customer in Customer List-2. As part of the commentary for each list item wherein a reciprocal obligation exists, the location of such mirrored obligation will be set forth.

GENERAL CONSIDERATIONS

Some of the general considerations to keep in mind as to all the listed items of production, and as to why complete and early production benefits all parties to the arbitration/litigation, are: first)-the more and the earlier production is received by all sides, the earlier accurate evaluations of the case can be made so

that settlements can be realistically considered; second-production avoids “trial by ambush” at the hearing; and third)-early production can alert a litigant as to what additional documents need to be requested in a timely fashion so that scheduled hearing dates do not have to be disturbed.

[a] LIST-1: ALL CASES (BROKER-DEALER)

In every arbitration involving a Public Investor (“Customer”) and a Broker-Dealer, the Broker-Dealer

must produce the documents set forth in Broker-Dealer List-1 of the NASD Discovery Guide. Set forth below is

Broker-Dealer List-1 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-1, ITEM-1

LIST-1: DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES

FIRM/ASSOCIATED PERSON(S)

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

RECIPROCAL: Customer List-2, Item-3.

RELEVANCE: 1)-basis for compulsory arbitration if signed agreement contains an arbitration clause; 2)-sets forth information necessary for the Broker-Dealer to “know your customer” such as investment experience, financial condition, and personal situation (e.g., profession, retirement);

3)-scope of relationship (e.g., trading authorizations, powers of attorney, discretionary authorization); 4)-information forms basis for determining suitability of recommendations (i.e., “solicited” transactions); and 5)-forms basis for propriety of accounts trading in certain types of securities (e.g., options).

NASD DISCOVERY GUIDE LIST-1, ITEM-2

2) All account statements for the customer’s account(s) during the time period and/or relating to the transaction(s) at issue.

RECIPROCAL: Customer List-2, Item-3.

RELEVANCE: 1)-source for trading analysis; 2)-source for damage calculation; 3)-source for monthly equities;

4)-source for securities monthly valuations; 5)-shows patterns of trading; 6)-shows portfolio composition; and 7)-shows margin activity and related rates and expenses.

NASD DISCOVERY GUIDE LIST-1, ITEM-3

3) All confirmations for the customer’s transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant’s possession, custody, or control.

RECIPROCAL: Customer List-2, Item-3.

RELEVANCE: 1)-shows whether or not a given transaction was “solicited” or “unsolicited”, a fact that may not

be set forth on the account statements; 2)-shows exact amount of commissions and other charges incurred for the transaction; and 3)-confirmations do not contain some of the inform-

ation set forth on the order tickets (covered in Broker-Dealer List-11, Item-1.)

REQUESTED DISCOVERY: In addition to confirmations, the customer should request: "order tickets" for all transactions that are in question.

NASD DISCOVERY GUIDE LIST-1, ITEM-4

4) All "**holding (posting) pages**" for the customer's account(s) at issue or, if not available, any electronic equivalent.

RELEVANCE: 1)-demonstrates the degree of care employed on the part of the broker toward the customer's account; 2)-shows gains or losses on

completed purchases and sales; 3)-may contain other information regarding the customer, and notes of the broker.

NASD DISCOVERY GUIDE LIST-1, ITEM-5

5) All **correspondence** between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

RECIPROCAL: Customer List-2, Item-3.

RELEVANCE: 1)-ALL correspondence between the customer and the Broker-Dealer and its employees should be produced, not just those documents that one party unilaterally and subjectively judges to be "relating to the transaction(s) at issue"; 2)-demonstrates the contemporary state of mind of the author; 3)-demonstrates the information in the hands of the recipient and when such inform-

ation was so obtained; and 4)-shows what the Broker-Dealer supervisors knew and when they knew it because all correspondence must go through the Broker-Dealer's "cage" for management review;

REQUESTED DISCOVERY: In addition to "correspondence between the customer and the firm/[broker] relating to the transactions(s) at issue," all parties should request: "ALL correspondence between the parties."

NASD DISCOVERY GUIDE LIST-1, ITEM-6

6) All **notes** by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

RECIPROCAL: Customer List-2, Item-7.

RELEVANCE: 1)-establishes the all important—what did the Broker-Dealer/broker know and when did

they know it; 2)-demonstrates the contemporary state of mind of the author; 3)-demonstrates areas of concern for the customer, referenced transactions and/or products.

NASD DISCOVERY GUIDE LIST-1, ITEM-7

7) All **recordings** and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

RECIPROCAL: Customer List-2, Item-8.

RELEVANCE: [same reasons as set forth in connection with Broker-Dealer List-1, Item-6]

NASD DISCOVERY GUIDE LIST-1, ITEM-8

8) All **Forms RE-3, U-4, and U-5**, including all amendments, all **customer complaints** identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

RECIPROCAL: Customer List-2, Item-11 requires production of "all prior complaints by or on behalf of the customer involving securities matters." Forms RE-3, U-4 and U-5 are unique to the brokerage industry.

RELEVANCE: 1)-the U-4, the standard form used by Broker-Dealers in hiring a broker, contains vital information concerning the broker's education, employment history, securities licenses, disciplinary history and states in which he or she is licensed to sell securities; 2)-the U-5, the standard form used by Broker-Dealers in terminating a broker, contains vital information concerning the reasons for the termination, along with disclosures of any pending litigation or investigations into customers' complaints; 3)-Amended U-5s have to be filed by the Broker-Dealer as new circumstances arise concerning the terminated broker such as disclosures of new customer complaints, progress in internal investigations into the

terminated broker's conduct while employed; 4)-an RE-3, the standard report by a Broker-Dealer concerning litigation against the firm, discloses complaints that were filed by customers against the firm alleging wrongdoing in the customer's securities accounts; 5)-other customer complaints provides information concerning possible patterns of wrongdoing; 6)-other customer complaints can assist in obtaining witnesses to be called at the hearing; and 7)-note that what is called for is all complaints against all brokers "handling the account(s)," which would include every broker of a so-called "team" or "partnership" sharing in the management and commissions regarding the account(s). The identity of such other brokers might be contained by examining order tickets as discussed below in connection with Broker-Dealer List-11, Item-1. No redactions are permitted regarding other customers' complaints.

NASD DISCOVERY GUIDE LIST-1, ITEM-9

9) All sections of the firm's **Compliance Manual(s)** related to the **claims** alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

RELEVANCE: 1)-compliance manuals often delineate methods of risk evaluation for given products (e.g., options, limited partnerships, tax sheltered investments); 2)-defines standards of care; 3)-defines specific

methods of supervision; and 4)-carries the NASD mandate for "just and equitable principles of trade," into objective criteria for the protection of the Broker-Dealer's customers—the public investors.

NASD DISCOVERY GUIDE LIST-1, ITEM-10

10) All analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

RECIPROCAL: Customer List-2, Item-6.

RELEVANCE: 1)-contemporaneous analyses and/or reconciliations of a customer's account provide some answers to the all important question: what did the Broker-Dealer/broker know and when did they know it; 2)-analyses of an account will materially assist in reaching agreement as to the objective losses in the account and

thus assist in intelligently approaching the subject of settlement; 3)-when both side's expert witnesses create identical analyses of the trading in the account, stipulations as to these objective facts can materially shorten the time of both parties' expert witness testimony at the hearing; and 4)-as to confidentiality see §1.8[b] above of this Practice Guide.

NASD DISCOVERY GUIDE LIST-1, ITEM-11

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

RELEVANCE: 1)-what did the Broker-Dealer/broker know and when did they know it; 2)-what was the distribution of any internal review and exception and activity report; 3)-what recommendations are set forth in said

reviews and reports; 4)-what was the follow up of any such recommendations; and 5)-what criteria does the Broker-Dealer use in programming its computers to automatically generate an exception report.

NASD DISCOVERY GUIDE LIST-1, ITEM-12

12) Records of **disciplinary action** taken against the Associated Person(s) by any regulator or employer for **all sales practices** or conduct similar to the conduct alleged to be at issue.

RELEVANCE: 1)-a new broker’s prior disciplinary history, available to his or her prospective employer by the U-4 the broker submits for his or her job interview, or the broker’s previous U-5s and RE-3s which are also available prior to employment [see Broker-Dealer List-1, Item-8 for a description of these forms], provide the new firm with information as to

what additional supervision must be put in place to safeguard the firm’s customers against a repeat of the prior wrongful conduct; and 2)-any disciplinary action against a broker during the course of his or her employment should trigger a complete review of all the broker’s accounts—including the customer who is the claimant in the instant arbitration;

[b] LIST-2: ALL CASES (CUSTOMER)

In every arbitration involving a Public Investor (“Customer”) and a Broker-Dealer, the Public Investor must produce the documents set forth in Customer List-2 of the NASD Discovery Guide. Set forth below is

Customer List-2 with underscoring and emphasis added for ease of reference.

While all Broker-Dealer lists are odd numbered, all Customer lists will be even numbered.

NASD DISCOVERY GUIDE LIST-2, ITEM-1

LIST-2: DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES

CUSTOMER
 1) All **customer** and customer-owned **business** (including partnership or corporate) **federal income tax returns**, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

RELEVANCE: 1)-pages 1 and 2 of Form 1040 provides a summary of a customer’s income sources; 2)-Schedule B is for Interest and Ordinary Dividends; 3)-Schedule D is for Capital Gains and Losses; and 4)-Schedule E is for rental property and pass-through entities such as partner-

ships and subchapter S corporations; and 3)-the information contained on these tax return pages and schedules provides one of the best evidentiary sources as to the customer’s contemporaneous and immediately prior trading activity at other securities firms.

NASD DISCOVERY GUIDE LIST-2, ITEM-2

2) **Financial statements** or similar statements of the customer's assets, liabilities and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

RELEVANCE: 1)-this does not require a customer to create such statements if they are not already in existence; and 2)-loan applications

(e.g., a mortgage application if a copy was retained) contain the type of financial information covered by this item.

NASD DISCOVERY GUIDE LIST-2, ITEM-3

3) Copies of all **documents** the customer **received** from the firm/Associated Person(s) and from any entities in which the customer invested through the firm/Associated Person(s), including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence.

RECIPROCAL: Broker-Dealer List-1, Items-1>3 and 5.

RELEVANCE: 1)-this requirement calling for customer production mirrors a similar requirement calling for production by the Broker-Dealer so that the documents should be comparable; 2)-what is termed "monthly statement" in this item, is similar to what is termed "account statements" in Broker-Dealer List-1, Item-2; 3)-what is termed "opening account forms" in this item, is similar to what is termed "account opening documents" in Broker-Dealer List-1, Item-1; 4)-the Broker-Dealer must produce confirmations in Broker-Dealer List-1, Item-3; 5)-the Broker-

Dealer must produce correspondence in Broker-Dealer List-1, Item-5, but such obligation is limited to correspondence "relating to the transaction(s) at issue; 6)-the Broker-Dealer is not required to produce prospectuses and annual and periodic reports pursuant to Broker-Dealer List-1, such production must only be made in cases in which Broker-Dealer List-7 is applicable for MISREPRESENTATIONS and/or OMISSIONS, or Broker-Dealer List-9 is applicable for NEGLIGENCE and/or BREACH OF FIDUCIARY DUTY, or Broker-Dealer List-13 (Item-1) is applicable for UNSUITABILITY.

NASD DISCOVERY GUIDE LIST-2, ITEM-4

4) Account statements and confirmations for accounts maintained at **securities firms** other than the respondent firm for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

RECIPROCAL: Broker-Dealer List-1, Items-2 and 3.

RELEVANCE: 1)-if such documents are no longer in the possession of the customer, the names of the other securities firms and the identification of the brokerage accounts along with a letter of authorization to obtain the

documents should be substituted for production; and 2)-the identity of these other securities firms will in all probability already have been disclosed by the production called for in Customer List-2, Item-1 regarding tax return information and related schedules.

NASD DISCOVERY GUIDE LIST-2, ITEM-5

5) All **agreements**, forms, information, or documents relating to the account(s) at issue signed by or provided by the customer to the firm/Associated Person(s).

RECIPROCAL: Broker-Dealer List-1, Items-1.

RELEVANCE: 1)-most of the documents called for by this item have already been covered in Customer

List-2, Item-3; and 2)-other documents might include those originating from the customer such as special tax instructions or powers of attorney or letters of instruction.

NASD DISCOVERY GUIDE LIST-2, ITEM-6

6) All **account analyses** and reconciliations prepared by or for the customer relating to the account(s) at issue.

RECIPROCAL: Broker-Dealer List-1, Item-10.

RELEVANCE: 1)-much of the information called for in this item has already been supplied in the customer's tax return schedules in Customer List-2, Item-1; and 2)-

account analyses and reconciliations prepared by a customer's litigation attorney or under such attorney's direction by the attorney's representative (e.g., a non-witness expert) is not subject to production based upon the attorney's work product privilege (see §1.8[b] of this Practice Guide).

NASD DISCOVERY GUIDE LIST-2, ITEM-7

7) All **notes**, including entries in diaries or calendars, relating to the account(s) at issue.

RECIPROCAL: Broker-Dealer List-1, Item-6.

RELEVANCE: 1)-this requirement calling for customer production

mirrors a similar requirement calling for production by the Broker-Dealer in Broker-Dealer List-1, Item-6, and is relevant for the same reasons therein stated.

NASD DISCOVERY GUIDE LIST-2, ITEM-8

8) All **recordings** and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer).

RECIPROCAL: Broker-Dealer List-1, Item-7.

RELEVANCE: 1)-this requirement mirrors a similar requirement calling

for production by the Broker-Dealer in Broker-Dealer List-1, Item-7, and is relevant for the same reasons therein stated.

NASD DISCOVERY GUIDE LIST-2, ITEM-9

9) All **correspondence** between the customer (and any person acting on behalf of the customer) and the firm/Associated Person(s) relating to the account(s) at issue.

RECIPROCAL: Broker-Dealer List-1, Item-5.

RELEVANCE: 1)-this requirement mirrors a similar requirement calling for production by the Broker-Dealer in Broker-Dealer List-1, Item-5, and is relevant for the same reasons therein stated; and 2)-because this production requirement placed upon the customer calls for all correspondence "relating to the **account(s)**," while the mirror burden upon the Broker-Dealer

is limited to all correspondence "relating to the **transaction(s)** at issue," the customer should make a separate discovery request to obtain what the customer is required to produce.

REQUESTED DISCOVERY: In addition to "correspondence between the customer and the firm/[broker] relating to the transactions(s) at issue," all parties should request: "ALL correspondence between the parties."

NASD DISCOVERY GUIDE LIST-2, ITEM-10

10) Previously prepared **written statements** by persons with knowledge of the facts and circumstances related to the account(s) at issue, including those by accountants, tax advisors, financial planners, other Associated Person(s), and any other third party.

RELEVANCE: 1)-the term "previously prepared" refers to contemporaneous written statements prepared during the course of the questionable trading; and 2)-written statements prepared by a customer's litigation attorney or under such attorney's

direction by the attorney's representative (e.g., a non-witness expert) is not subject to production based upon the attorney's work product privilege (see §1.8[b] of this Practice Guide).

NASD DISCOVERY GUIDE LIST-2, ITEM-11

11) All **prior complaints** by or on behalf of the customer involving securities matters and the firm's/Associated Person(s)' response(s).

RECIPROCAL: Broker-Dealer List-1, Item-8 calls for: "all customer complaints identified in such forms, and all customer complaints of a similar nature against the [broker] handling the account(s) at issue."

RELEVANCE: 1)-this production requirement not only includes the customer's complaints to the Broker-Dealer and/or broker that are the

subject of the instant arbitration, but probably also encompass all prior complaints to Broker-Dealers and brokers in all of the customer's securities accounts both present and past; and 2)-even if this item is read in a limited fashion, the next item is unquestionably all-inclusive so as to apply to all of the customer's prior securities firm dealings.

NASD DISCOVERY GUIDE LIST-2, ITEM-12

12) **Complaints/Statements of Claim** and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions and awards entered in these matters.

RECIPROCAL: Broker-Dealer List-1, Item-8 calls for: "all customer complaints identified in such forms, and all customer complaints of a similar nature against the [broker] handling the account(s) at issue."

RELEVANCE: 1)-When this item is read in conjunction with the previous item, it is clear that the customer must produce documents regarding all controversies he or she has ever had with a Broker-Dealer/broker.

NASD DISCOVERY GUIDE LIST-2, ITEM-13

13) All documents showing action taken by the customer to **limit losses** in the transaction(s) at issue.

RELEVANCE: 1)-"mitigation of damages" is a legal concept whereby in certain circumstances a customer has the obligation to minimize damages, and cannot hold a Broker-Dealer liable for damages that could have been reasonably avoided; 2)-for example, a customer cannot learn of a right to rescind an unauthorized transaction and do nothing while

watching to see if the security will raise or fall in price, and then put the security back to the Broker-Dealer if a loss results; but 3)-there are certain statutes which arbitrators must respect that give an investor a proscribed period of time to rescind a transaction regardless of when the investor acquired knowledge of the Broker-Dealer's or issuer's wrongdoing.

[c] LIST-3: CHURNING (BROKER-DEALER)

In arbitrations where the Public Investor (“Customer”) is complaining about churning, *in addition to* the documents required to be produced in Broker-Dealer List-1 of the NASD Discovery Guide, the

Broker-Dealer must also produce the documents set forth in Broker-Dealer List-3. Set forth below is Broker-Dealer List-3 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-3, ITEM-1**LIST-3: CHURNING****FIRM/ASSOCIATED PERSON(S)**

1) All **commission runs** relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the customer’s account(s) at issue.

RELEVANCE: 1)-the fraudulent practice of “churning” used to be determined by calculating the “turn-over rate”—the number of times the aggregate purchases can be divided by the account’s equity; 2)-since the harm is in the cost, and not the number of trades, a better way to measure churning is to calculate the “cost equity maintenance factor”—the percentage derived from dividing the aggregate costs (e.g., commissions, margin interest) by the average account monthly equity. As stated in one decision coming out of the Southern District of New York: “Turnover rate is but one possible indicium of churning. One authority

has suggested a more meaningful computation and one more readily comprehensible to investors as well: the percentage of return on the investor's average net equity needed in order to pay broker-dealer commissions and other expenses. This figure, termed ‘The Goldberg Cost Equity Maintenance Factor,’ amounts in essence to a sales load. See Goldberg, *Fraudulent Broker-Dealer Practices*, § 2.9[b][5] (American Institute for Securities Regulation, 1978). [*Jenny v. Shearson, Hammill & Co.*, 1978 WL 1115, fn-5, Fed. Sec. L. Rep. P 96,568 (S.D.N.Y., 1978, Brokerick, J.)]

NASD DISCOVERY GUIDE LIST-3, ITEM-2

2) All documents reflecting **compensation** of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer’s account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

RELEVANCE: 1)-evidence as to motive for a broker to generate an excessive amount of commissions in a particular customer's account can often be obtained by examining the broker's overall level of compensation; 2)-one measure often examined in churning cases is the percentage of compensation earned by the broker from a given customer's account as compared to the broker's overall compensation from all other customer accounts in that broker's book of business; 3)-a broker's overall com-

pensation can also be compared to a Broker-Dealer's "quota" or "production target" or similar pressure by any other name; 4)-compensation reports often show the type of products the broker was selling, with commissions broken down into categories by products; and 5)-note that the time period focuses on the "transactions(s) at issue," which in a claim for churning usually covers the entire period the account was open at that Broker-Dealer.

NASD DISCOVERY GUIDE LIST-3, ITEM-3

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

RELEVANCE: 1)-since churning is a function of generating excessive commissions for the size and character of the account, anything that would motivate a broker to increase the commissions in the account is relevant; 2)-earning a bonus if production reaches a certain level provides motive for a broker to generate excessive commissions; 3)-enjoying an incentive trip abroad if production reaches a certain level provides motive; 4)-reaching a certain "volume break-point" at which the broker's percentage "pay-out" increases, provides motive; 5)-being paid a higher percentage commission for a principal transaction from the Broker-Dealer's

own inventory, rather than an agency transaction over an exchange, provides motive; 6)-one sign of a broker generating excessive commissions is often the making of high risk unsuitable trades, because it is frequently the case that higher risk investments regularly yield higher commissions; and 7)-another sign of a broker's attempt to generate excessive commissions is when the broker recommends a mutual fund with an extraordinarily high front end fee, or a limited partnership with both high front end commissions and a back end payout to the broker during the life of the limited partnership.

[d] LIST-4: CHURNING (CUSTOMER)

In arbitrations where the Public Investor ("Customer") is complaining about churning, Customer

List-4 imposes no additional production responsibilities upon the customer.

[e] LIST-5: SUPERVISION (BROKER-DEALER)

In arbitrations where the Public Investor ("Customer") is complaining about failure to supervise, *in addition to* the documents required to be produced in Broker-Dealer List-1 of the NASD Discovery Guide, the

Broker-Dealer must also produce the documents set forth in Broker-Dealer List-5. Set forth below is Broker-Dealer List-5 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-5, ITEM-1**LIST-5: FAILURE TO SUPERVISE****FIRM/ ASSOCIATED PERSON(S)**

1) All **commission runs** and other reports showing **compensation of any kind** relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

SIMILARITY: commission runs and account compensation called for in this item regarding SUPERVISION, is similar to Broker-Dealer List-3, Items-1 and 2 regarding CHURNING, and accordingly the commentary concerning the previous items should be reviewed.

RELEVANCE: 1)-the primary motive for a broker to mismanage a customer's account is in order to generate excessive commissions; accordingly one of the most relevant

documents to examine in the regular course of supervision is commission runs and other compensations generated from the customer's account; and 2)-most major Broker-Dealers have their computers programmed to alert supervisory personnel whenever the commissions generated from a customer's account exceeds certain pre-programmed criteria and parameters. This item will be discussed in the next item under the caption Requested Discovery.

NASD DISCOVERY GUIDE LIST-5, ITEM-2

2) All **exception reports** and **supervisory activity reviews** relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all **other documents** reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

RELEVANCE: 1)-while Broker-Dealer List-1, Item-11 calls for production in every customer dispute of supervisory documents regarding the customer's account, Broker-Dealer List-5, Item-2 expands the supervisory reports to include the "Associated Person(s)"—read "broker" or "Registered representative" or "investment advisor" or whatever the name *de jour* is for the broker; and 2)-the existence of a supervisory document in which management recognizes that a problem exists in a customer's account, will lead to inquiry as to the follow-up supervisory document that addresses the resolution of the problem.

REQUESTED DISCOVERY: Many Broker-Dealers separate their exception reports into so-called "hard-copies" and "computer screens." Thus,

the firm's computer might have alerted management to examine an account, but the warning might have come in the form of a computer screen, without any paper trail being generated. Accordingly, a good discovery request would be the following: "All documents evidencing the triggers or screens employed by the firm which result in an account appearing on an exception or activity report or which otherwise triggers supervisory review. This would include documents showing the levels at which supervisory review is triggered due to, as examples, high or unusual activity levels, trading out of approved categories, concentration, commissions, dollar losses, turnover, margin calls, or unsuitable investments in an account."

NASD DISCOVERY GUIDE LIST-5, ITEM-3

3) Those portions of **internal audit reports** at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and **discussed alleged improper behavior** in the branch **against other individuals** similar to the **improper conduct alleged in the statement of claim.**

SIMILARITY: internal audit reports relating to improper behavior against other individuals called for in this item regarding SUPERVISION, is similar to Broker-Dealer List-1, Item-8 calling for all customer complaints of a similar nature against the broker regarding all customer disputes.

RELEVANCE: 1)-when an internal audit report discusses alleged improper behavior toward some custom-

ers, all customer accounts must be examined to see if they too were victimized in the same fashion; 2)-the creation of an internal audit report answers the key question: what did the supervisors know and when did they know it; and 3)-what new or strengthened supervisory procedures were implemented based upon previously recognized problems.

NASD DISCOVERY GUIDE LIST-5, ITEM-4

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a **state or federal agency** or a self-regulatory organization that focused on the **Associated Person(s)** or the **transaction(s)** at issue or that discussed alleged **improper behavior** in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

RELEVANCE: 1)-an examination report by federal or state agency (e.g., Securities and Exchange Commission, state Securities Department) puts the Broker-Dealer's supervisory personnel on notice as to the contents of said report; 2)-when an examination report focuses on a given broker, his or her supervisors must examine all of said broker's accounts; 3)-when an examination report focuses on given

transactions or specified products, management must examine all accounts in which such transactions or products have been traded; and 4)-when an examination report discusses alleged improper behavior toward other customers in a branch office, management must look into all the accounts at the branch to ascertain whether or not similar wrongdoing is in evidence in other accounts.

[f] LIST-6: SUPERVISION (CUSTOMER)

In arbitrations where the Public Investor ("Customer") is complaining about failure to supervise,

Customer List-6 imposes no additional production responsibilities upon the customer.

[g] LIST-7: MISREPRESENTATION/OMISSIONS (BROKER-DEALER)

In arbitrations where the Public Investor ("Customer") is complaining about **misrepresentations** and/or **omissions**, *in addition to* the documents required to be produced in Broker-Dealer List-1 of the

NASD Discovery Guide, the Broker-Dealer must also produce the documents set forth in Broker-Dealer List-7. Set forth below is Broker-Dealer List-7 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-7

LIST-7: MISREPRESENTATION/OMISSIONS
FIRM/ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the **transactions** or **products** at issue, including **research reports**, **prospectuses**, and **other offering documents**, including documents intended or identified as being "for internal use only," and worksheets or **notes** indicating the Associated Person(s)

reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

RECIPROCAL: Customer List-2, Item-3.

RELEVANCE: 1)-the best evidence of a misrepresentation is when the broker admits (e.g., a writing) to saying “A,” whereas a document at the Broker-Dealer that the broker should have read clearly says “B”; 2)-a broker has a responsibility to “know the product” before soliciting buy orders from his or her customers, and the broker’s failure to undertake required reading of product specific documents is proof of a failure of such responsibility; 3)-one of the best

sources of material omissions is to be found in a Broker-Dealer’s research reports, prospectuses and other offering documents that the broker did not read and/or did not convey to his or her customers; 4)-internal documents at a Broker-Dealer often define the level of risk of a given product, and whether or not such a product is compatible with the investment objectives of a given customer as such objectives are set forth in account opening documents set forth in Broker-Dealer List-1, Item-1 regarding all customer disputes.

[h] LIST-8: MISREPRESENTATION/OMISSION (CUSTOMER)

In arbitrations where the Public Investor (“Customer”) is complaining about **misrepresentations and/or omissions, in addition to** the documents required to be produced in Customer List-2 of the

NASD Discovery Guide, the Public Investor must also produce the documents set forth in Customer List-8. Set forth below is Customer List-8 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-8, ITEM-1

LIST-8: MISREPRESENTATION/OMISSIONS
CUSTOMER
 1) Documents sufficient to show the customer’s **ownership** in or control over any **business entity**, including general and limited partnerships and closely held corporations.

RELEVANCE: 1)-information set forth in a customer’s tax return, that must be produced pursuant to Customer’s List-2, Item-1 might satisfy this item; and 2)-in the absence of disclosure on the customer’s tax

return, and in the absence of any other documents, a customer’s written statement listing such ownership interests should satisfy this production requirement.

NASD DISCOVERY GUIDE LIST-8, ITEM-2

2) Copy of the customer's **resume**.

RELEVANCE: 1)-this requirement applies only to situations wherein the customer's resume is already in exist-

ence; and 2)-a customer is under no obligation to create a resume in order to satisfy this production obligation.

NASD DISCOVERY GUIDE LIST-8, ITEM-3

3) Documents sufficient to show the customer's complete **educational and employment background** or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

RELEVANCE: 1)-this is the first item requiring a customer to create a new document if such a document is

not already in existence, such as a resume that can be produced pursuant to Customer List-8, Item-2.

[i] LIST-9: NEGLIGENCE/BREACH OF FIDUCIARY DUTY (BROKER-DEALER)

In arbitrations where the Public Investor ("Customer") is complaining about **negligence** and/or **breach of fiduciary duty**, *in addition to* the documents required to be produced in Broker-Dealer List-1 of

the NASD Discovery Guide, the Broker-Dealer must also produce the documents set forth in Broker-Dealer List-9. Set forth below is Broker-Dealer List-9 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-9

LIST-9: NEGLIGENCE/BREACH OF FIDUCIARY DUTY
FIRM/ASSOCIATED PERSON(S)
 Copies of all materials prepared or used by the firm/Associated Person(s) relating to the **transactions** or **products** at issue, including **research reports**, **prospectuses**, and **other offering documents**, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

RECIPROCAL: Customer List-2, Item-3.

SIMILARITY: The documents called for in Broker-Dealer List-9 regarding NEGLIGENCE/BREACH OF FIDUCIARY DUTY is identical with those called for in Broker-Dealer List-7 regarding MISREPRESENTATION and/or OMISSIONS, and accordingly the commentary concern-

ing the previous item should be reviewed.

RELEVANCE: Since the wording of Broker-Dealer List-9 is identical to Broker-Dealer List-7, see the comments to Broker-Dealer List-7 with the proviso that what is proof of misrepresentations and omissions is also proof of negligence and breach of fiduciary duty since a violation of the former is a violation of the latter.

[j] LIST-10: NEGLIGENCE/BREACH OF FIDUCIARY DUTY (CUSTOMER)

In arbitrations where the Public Investor ("Customer") is complaining about **negligence and/or breach of fiduciary duty, in addition to** the documents required to be produced in Customer List-2 of the

NASD Discovery Guide, the Public Investor must also produce the documents set forth in Customer List-10. Set forth below is Customer List-10 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-10, ITEM-1

**LIST-10: NEGLIGENCE/BREACH OF FIDUCIARY DUTY
CUSTOMER**

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for NEGLIGENCE and/or BREACH OF FIDUCIARY DUTY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-1, and can be satisfied as therein suggested.

NASD DISCOVERY GUIDE LIST-10, ITEM-2

2) Copy of the customer's resume.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for NEGLIGENCE and/or BREACH OF FIDUCIARY DUTY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-2, and can be satisfied as therein suggested.

NASD DISCOVERY GUIDE LIST-10, ITEM-3

3) Documents sufficient to show the customer's complete **educational and employment background** or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for NEGLIGENCE and/or BREACH OF FIDUCIARY DUTY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-3, and can be satisfied as therein suggested.

[k] LIST-11: UNAUTHORIZED TRADING (BROKER-DEALER)

In arbitrations where the Public Investor ("Customer") is complaining about **unauthorized trading**, *in addition to* the documents required to be produced in Broker-Dealer List-1 of the NASD Discovery Guide, the

Broker-Dealer must also produce the documents set forth in Broker-Dealer List-11. Set forth below is Broker-Dealer List-11 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-11, ITEM-1

**LIST-11: UNAUTHORIZED TRADING
FIRM/ASSOCIATED PERSON(S)**

1) **Order tickets** for the customer's transaction(s) at issue.

RELEVANCE: ORDER TICKETS contain the following information which may not be available from any other document listed in the NASD Discovery Guide: 1)-the broker's designation of the transaction being "solicited" or "unsolicited" (monthly brokerage statements may or may not contain this information); 2)-time stamps (e.g., time written, time to cage, time wired, time executed, time confirmed), which are helpful in determining if the transaction was authorized or unauthorized; 3)-any changes to the trade, either in the

original ticket or amended tickets; 4)-the identity of the individual writing the order ticket (important if another broker or sales assistant wrote the tickets); 5)-how the broker's commission was derived (e.g., by dollar amount, fraction of a share, or discount percentage to the standard commission); 6)-manager or other supervisory approval; 7)-whether the trade is a bunched or blocked trade; 8)-how the trade was entered (e.g., market order, limit order, day order); and 9)-special instructions or directives regarding the trade.

NASD DISCOVERY GUIDE LIST-11, ITEM-2

2) Copies of all **telephone records**, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

RECIPROCAL: Customer List-2, Item-8; List-12, Item-1.

RELEVANCE: 1)-the absence of an entry in a compulsory telephone log (if any exists) reflecting a conversation between the broker and the customer on the day of, or day before, a claimed unauthorized trade will

offer some evidence as to the true nature of the trade; and 2)-more realistically, if the broker is found to have kept voluminous records of telephone calls with the customer, the absence of such a record regarding the transaction in question is noteworthy.

NASD DISCOVERY GUIDE LIST-11, ITEM-3

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer **authorized** the transaction(s) at issue.

RECIPROCAL: Customer List-12, Item-2.

RELEVANCE: 1)-a broker's claim that the customer provided the broker

with a written trading authorization and/or a power of attorney, should be accompanied by production of said document(s).

[I] LIST-12: UNAUTHORIZED TRADING (CUSTOMER)

In arbitrations where the Public Investor ("Customer") is complaining about **unauthorized trading**, *in addition to* the documents required to be produced in Customer List-2 of the NASD Discovery Guide, the

Public Investor must also produce the documents set forth in Customer List-12. Set forth below is Customer List-12 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-12, ITEM-1

**LIST-12: UNAUTHORIZED TRADING
CUSTOMER**

1) Copies of all **telephone records**, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

RECIPROCAL: Broker-Dealer List-1, Item-7; List-11, Item-2.

RELEVANCE: 1)-there may be situations, such as space travel for

astronauts, or the previous death of the claimant, where telephone contact could not have taken place on the day, or more realistically the time, claimed.

NASD DISCOVERY GUIDE LIST-12, ITEM-2

2) All **documents** relied upon by the customer to show that the transaction(s) at issue was made without his/her knowledge or consent.

RECIPROCAL: Broker-Dealer List-11, Item-3.

RELEVANCE: 1)-it is very difficult to prove a negative, let alone to produce documents to so substantiate, but a letter of complaint sent to the broker

just as soon as the unauthorized transaction was discovered does provide one excellent piece of demonstrative proof. But since the brokerage business is done for the most part verbally, such documents are rare.

[m] LIST-13: UNSUITABILITY (BROKER-DEALER)

In arbitrations where the Public Investor ("Customer") is complaining about **unsuitability**, *in addition to* the documents required to be produced in Broker-Dealer List-1 of the NASD Discovery Guide, the

Broker-Dealer must also produce the documents set forth in Broker-Dealer List-13. Set forth below is Broker-Dealer List-13 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-13, ITEM-1

LIST-13: UNSUITABILITY

FIRM/ASSOCIATED PERSON(S)

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the **transactions** or **products** at issue, including but not limited to **research reports**, **prospectuses**, **other offering documents**, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

RECIPROCAL: Customer List-2, Item-3.

SIMILARITY: The documents called for in this item regarding UNSUITABILITY is virtually identical with the documents called for in Broker-Dealer List-7 regarding MISREPRESENTATIONS and OMISSIONS, and accordingly the commen-

tary concerning the previous item should be reviewed.

RELEVANCE: 1)-what is proof of misrepresentations and omissions, and negligence and breach of fiduciary duty, is also proof of unsuitability since a violation of any of the former is also a violation of the latter.

NASD DISCOVERY GUIDE LIST-13, ITEM-2

2) Documents sufficient to describe or set forth the **basis upon which the Associated Person(s) was compensated** in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

SIMILARITY: The documents called for in this item regarding UNSUITABILITY is virtually identical with the documents called for in Broker-Dealer List-3, Item-3 regarding CHURNING, and accordingly the commentary concerning the previous item should be reviewed.

RELEVANCE: 1)-what constitutes a motive to churn an account also

constitutes a motive to sell unsuitable securities to an account; and 2)-pushing so-called “in-house dogs,” “specials of the day,” and “work-night products,” usually carry extra high rates of pay-out as evidenced by an unusually high commission to principal ratio applicable to any given transaction—hence, the motive.

[n] LIST-14: UNSUITABILITY (CUSTOMER)

In arbitrations where the Public Investor (“Customer”) is complaining about **unsuitability**, *in addition to* the documents required to be produced in Customer List-2 of the NASD Discovery Guide, the Public

Investor must also produce the documents set forth in Customer List-14. Set forth below is Customer List-14 with underscoring and emphasis added for ease of reference.

NASD DISCOVERY GUIDE LIST-14, ITEM-1

**LIST-14: UNSUITABILITY
CUSTOMER**

1) Documents sufficient to show the customer's **ownership** in or control over any business entity, including general and limited partnerships and closely held corporations.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for UNSUITABILITY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-1, and can be satisfied as therein suggested.

NASD DISCOVERY GUIDE LIST-14, ITEM-2

2) **Written documents** relied upon by the customer in making the investment decision(s) at issue.

RELEVANCE: 1)-prior production requirements upon the customer have produced “prospectuses, annual and periodic reports, and correspondence” (Customer List-2, Item-3), and

“account analyses (Customer List-2, Item-6), and such documents if relied upon in making the customer’s investment decisions should be so identified;

NASD DISCOVERY GUIDE LIST-14, ITEM-3

3) Copy of the customer’s **resume**.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for UNSUITABILITY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-2, and can be satisfied as therein suggested.

NASD DISCOVERY GUIDE LIST-14, ITEM-4

4) Documents sufficient to show the customer’s complete **educational and employment background** or, in the alternative, a description of the customer’s educational and employment background if not set forth in a resume produced under item 3.

RELEVANCE: 1)-this requirement calling for customer production when the claim is for UNSUITABILITY, is identical to a requirement when the

claim is for MISREPRESENTATION and/or OMISSION in Customer List-8, Item-3, and can be satisfied as therein suggested.

§1.13 PLEADING FOR DISCOVERY

The above analysis of the fourteen discovery production lists that make up the NASD Discovery Guide, demonstrates that the categories of documents that a claimant can request pursuant to that NASD guide is dependant upon the claims asserted in the Statement of Claim. Likewise, the asserted claims will also bring about a reciprocal obligation upon the claimant. Keeping an eye open for favorable avenues of discovery will affect the nature of claims that will be asserted—as well it

should. The form of the pleading will dictate the nature of the discovery, at least pursuant to the NASD Discovery Guide. This is what is herein referred to as “Pleading for Discovery.”

Set forth below is a brief chart—termed Specific Claim Discovery—showing the six different types of claims, and a thumbnail sketch of the categories of discovery that will be imposed upon the Broker-Dealer/broker and the Public Investor (“Customer”) for each.

SPECIFIC CLAIM DISCOVERY

DISPUTE	BROKER-DEALER LISTS	CUSTOMER LISTS
Churning	commission runs>A/C compensation>RR basis of compensation>RR	no additional items
Supervision	commission runs>A/C exception reports>A/C, RR supervisory activity>A/C, RR internal audit reports>branch fed, state, SRO reports	no additional items
Misrepresentations and/or Omissions	research reports, prospectus other offering material	ownership of businesses resume or education and employment history
Negligence, and/or Fiduciary duty	[same as for Misrepresentation]	[same as for Misrepresentation]
Unauthorized Trading	order tickets telephone records docs re authorization	telephone records docs re no knowledge or consent
Unsuitability	research reports, prospectus other offering material basis of compensation>RR	ownership of businesses docs relied upon for mak- ing investment resume or education and employment history

CUSTOMER’S PRODUCTION:

Pleading additional claims results in little if any additional production obligations upon the customer. The claims of churning and supervision carry no additional discovery burdens for the customer whatsoever. Claims of misrepresentation/omissions and negligence/breach of fiduciary duty require the customer to produce information regarding ownership of businesses (probably already disclosed in the customers tax returns pursuant to List-2, Item-1), and the information contained in a resume or its equivalent is probably no more than the broker already knows about the customer. A claim of unauthor-

ized trading requires the production of the customer’s telephone records and documents to support the allegation of no prior knowledge or consent, disclosures that the customer might well have already made in the statement of claim. A claim of unsuitability requires the customer to produce a resume or basic educational and employment information, ownerships in businesses, and documents relied upon for the making of the investment at issue.

None of these additional discovery burdens are substantial compared to the benefit of the increased production obtainable from the Broker-Dealer.

BROKER-DEALER PRODUCTION—OBJECTIVE CLAIMS

Unlike the customer whose additional production burdens are light when additional claims are alleged, the production burdens upon the Broker-Dealer are substantial.

CHURNING: Most knowledgeable public investor attorneys have learned through hard and painful experience to avoid bringing claims for churning except under the most favorable circumstances and on behalf of the most unsophisticated clients, because the issue of control is too difficult to prove. But if such a claim is alleged, the customer receives a good deal of additional discovery at no obligation to make any reciprocal production. What the customer gets are: commission runs for the account, compensation reports for the broker, and descriptions of the broker's basis of compensation.

In the bad old days prior to the adoption of the NASD Discovery Guide, the Broker-Dealer used to fight tooth and nail to avoid having to turn over this information, with all too often favorable rulings from arbitration panels. Now with this information called for in the NASD's own production guide, Broker-Dealers are faced with an almost insurmountable burden of proof in evading production.

UNAUTHORIZED TRADING: This is the least subjective claim mentioned in the NASD Discovery Guide. A given transaction was authorized or it was not. If alleged, the Broker-Dealer must produce expanded telephone records, documents regarding authorization, but most importantly—order tickets.

BROKER-DEALER PRODUCTION—SUBJECTIVE CLAIMS

Virtually every customer matter involves relatively subjective aspects of: lack of supervision, misrepresentations and/or omissions, negligence and/or breach of fiduciary duty, and unsuitability. If an account is churned or subject to unsuitable securities, such conduct could have been prevented by adequate supervision—the absence of which constitutes both negligence and breach of fiduciary duty. In addition, churning and unsuitability also take place within the context of misrepresentations of the false information given to the customer, and omissions of true information.

A claim of lack of supervision produces discovery of commission

runs for the account, and the all important exception and supervisory reports regarding both the account and the broker, internal audit reports for the branch, and governmental reports of examinations.

A claim for negligence and/or breach of fiduciary duty, as well as for misrepresentations and/or omissions, requires the Broker-Dealer to produce all research reports, prospectuses and other offering material concerning the investments at issue. A claim for unsuitability, besides the above items, adds disclosure of the broker's basis of compensation.

Supervision claims do not require an individual respondent.

PART II NASD DISCOVERY RULES

§2.1 NASD Discovery Rules

While Part I of this Practice Guide on NASD discovery, consisting of §§1.1>1.13, dealt with the NASD Discovery Guide with its attendant discovery lists, Part II will now deal with what the NASD Discovery Rules refer to as “**Requests for Documents and Information**” or just “**Information Requests.**” Thus, while enumerated documents on the NASD Discovery Guide list are supposed to be turned over without request, any party may serve upon another party an information request for additional documents, or as will be suggested herein, a party may serve an information request reiterating that the documents on the appropriate lists should be produced according to both: a)-the NASD

Discovery Guide; and b)-the information request. Why this redundancy? Because by asking for items twice, it makes it doubly difficult for the party upon whom the request is made to claim ignorance or forgetfulness regarding its production responsibilities; and more importantly, the time constraints pursuant to an Information Request can be more stringent than under the NASD Discovery Guide because while the Director of Arbitration can grant an extension of time in which to file an Answer—thus extending the time to produce documents pursuant to the NASD Discovery Guide, such an extension cannot extend the time to produce documents pursuant to an information request.

§2.2 FULLEST COOPERATION [a] DUTY TO COOPERATE

NASD Rule 10321(a)

10321. General Provisions Governing Pre-Hearing Proceedings
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(a) Requests for Documents and Information

The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration.

While in all too many instances this command to “**cooperate to the fullest extent practicable**” is honored more in the breach than in compliance, such command is the basis for the imposition of sanctions discussed in Part V of this Practice

Guide, wherein the arbitration panels’ and courts’ treatment of the subject of failure to exchange duly requested documents and information, and the sanctions that can be and have been imposed for such misconduct, will be examined.

[b] SPECIFICITY**NASD Rule 10321(a) [con't]**

Any request for documents or other information 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.

[1] FORM OF NON-LISTED REQUEST

As to items listed in the NASD Discovery Guide ('Listed Items'), no specificity need be employed because the burden of proof is upon the party objecting to production to show by clear and convincing evidence why the SEC's injunction that such documents "should be produced" should not apply in the given matter [see §1.9[d] and §1.3 above].

A good practice to follow in requesting non-listed documents and

information is to set forth the following information regarding each and every specific request: 1)-a detailed description of the document or information by both technical name and purpose; 2)-the paragraph and/or claim in the Statement of Claim or the Answer to which it relates; 3)-the issue to which it applies; and most importantly, 4)-the reasons why such document or information is being requested.

[2] ANTICIPATING PRODUCTION ORDER

Since in many instances a Customer's information request will be either ignored or objected to by the Broker-Dealer, a good practice to follow is to write the information request in a form that anticipates a production order from the arbitration panel. To best accomplish this result, each item in the information request should be clearly numbered with an appropriate descriptive heading. In this manner, when the inevitable pre-hearing conference is conducted, and the arbitration panel orders production, such order can take the form of specifying which enumerated para-

graphs must be satisfied. The most desirable panel order is one in which the arbitrator conducting the pre-hearing conference places his or her initials next to the item that has been ordered to be produced, and then faxes said order to the tribunal administrator for distribution to the parties, or better yet simply faxes the order to the respective counsel.

It should be here stressed that arbitration panels, especially in particularly contentious matters, can save a lot of time by faxing orders directly to counsel.

[3] DEADLINE FOR PRODUCTION

If an order to produce is obtained, the arbitration panel should always be asked to set a deadline for

production, and then write said deadline on the order.

§2.3 DOCUMENT PRODUCTION AND INFORMATION EXCHANGE

[a] PRODUCTION REQUEST

NASD Rule 10321(b)(1)

(b) Document Production and Information Exchange

(1) Any party may serve a written request for **information** or **documents** ("**information request**") upon another party 45 calendar days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration.

The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.

[underscoring and emphasis added]

[1] CLAIMANT'S TIMING

The Claimant may serve his or her information request at the earlier of the following two events: first, 45 days after the Statement of Claim is served upon the Respondent; or second, when the Answer is filed. A

better practice is to serve the information request as soon as it is learned that the Statement of Claim has been served, with the following early service statement:

INFORMATION REQUEST EARLY SERVICE STATEMENT

NASD Rule 10321(b)(1) permits the service of this Information Request "45 calendar days or more after service of the Statement of Claim . . . or upon filing of the Answer, whichever is earlier." Since you were served with the Statement of Claim on ___/___/2000, you may consider this Information Request served upon you 45 days thereafter, or when you file your Answer, whichever is earlier.

[2] EXTENSIONS TO ANSWER

NASD RULE 10314(b)(1) provides that the information request may be served 45 days after service of the Statement of Claim or when the Answer is filed, whichever is earlier. While the NASD Director of Arbitration has the power to give the

Respondent(s) an extension of time in which to file their answer, such extension does not effect the date upon which the Statement of Claim was served, and thus the date upon which the 45 days begins to run.

[b] SATISFACTION**NASD Rule 10321(b)(2)**

(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service.

[underscoring added]

The only entity that can extend the time in which to answer an information request is the “**requesting party**,” and not the Director of Arbitration. Accordingly, even though the Director can extend the time in which the Respondent has to file its answer, the Director cannot extend the time in which the Respondent must answer the Claimant’s information request.

Thus, in situations where the Director of Arbitration has granted an extension to file an Answer, the production deadline under an information request pursuant to NASD Rule 10321(b)(1) can be earlier than pursuant to the NASD Discovery Guide which calls for production: “**not later than thirty days from the date the answer is due or filed, whichever is earlier**”.

[c] OBJECTION**NASD Rule 10321(b)(2) [con’t]**

Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.

When filing an objection to an information request pursuant to NASD Rule 10321(b)(2), keep in mind the requirement in NASD Rule 10321(b)(1) that: “**The parties shall endeavor to resolve dis-**

putes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.”

[d] RESPONSE TO OBJECTION**NASD Rule 10321(b)(3)**

(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.

If the form of the non-listed request is as detailed as recommended in §2.2[b][1] of this Practice Guide, little if any response to an objection

will be needed other than to simply refer to the reasons set forth in the request.

§2.4 FORM OF PRODUCTION

In almost every securities dispute, a Broker-Dealer has the ability to produce literally tens of thousands or even hundreds of thousands of pages of “document production,” in such a way as to bring to mind the old saying about how hard it is to find a needle in a haystack. Those of us who have practiced in the securities arbitration field for any appreciable

[a] “BATE STAMPED”

All documents that are produced in arbitration/litigation should be numbered sequentially—as can be done with a “Bate Stamp” which sequences to the next number every time the rubber stamp is struck on a document. By employing this method, if there is a dispute at the arbitration hearing as to whether or not a

[b] LIST REFERENCED

Since such care was expended in listing all documents in the NASD Discovery Guide, production should be cross referenced to the List number

[c] LEGIBILITY

There are times when a Broker-Dealer will produce documents that are so illegible that they cannot be read by the Public Investor's expert witness. The excuse often heard in such situations is that the reproduction was made from microfiche and is the best copy available. How very strange that the Broker-Dealer's expert witness was able to prepare an analysis of the customer's account using the very same information that was unreadable on the copy produced for the customer. In one such matter

amount of time can provide horror stories about the proverbial truck that pulled up with cartons upon cartons of documents, the vast majority of which were totally worthless to the issues in dispute, and non-responsive to specific document requests. It is with this experience in mind that the following suggestions are offered.

given proffered document was produced prior to the hearing, the bate stamp number can resolve the issue even before it arises. Otherwise, if there are tens of thousands of pages of unnumbered production, it is virtually impossible to locate any given document on the spur of the moment.

and Item number. With Bate Stamping, this should not involve any substantial burden on a producing party.

in which the author of this Practice Guide was the attorney for the claimant, the arbitration panel permitted the claimant to call to the witness stand the Broker-Dealer's employee that was responsible for making hard copies from the firm's microfiche files. It turned out that there were two copy machines—one that made very poor illegible copies for the claimant's attorney, and the other that made rather better readable copies. The arbitrators were not amused by this revelation.

§2.5 INFORMATION v. INTERROGATORIES

The “information request” should not be confused with the civil practice of using so-called “Standard

Interrogatories.” This is made abundantly clear in the NASD Discovery Guidelines:

NASD DISCOVERY GUIDE V

V. Information Requests

Like requests for documents, parties may serve requests for information pursuant to Rule 10321(b). Requests for information are generally limited to **identification** of **individuals**, **entities**, and **time periods** related to the dispute; such requests should be reasonable in number and not require exhaustive answers or fact finding.

Standard interrogatories, as utilized in state and federal courts, are generally not permitted in arbitration.

[NASD NTM 99-90, page-691]
[underscoring and emphasis added]

[a] IDENTIFICATION

An “**information request**,” as that term is used in securities arbitration, is designed to elicit information concerning the “**identification of individuals, entities, and time periods related to the dispute**.” For example, in an arbitration where there is a claim of lack

of supervision concerning solicited options transactions, an information request might contain a question requesting the identification of the Broker-Dealer’s SROPs and CROPs (options supervisors) that were employed by the firm during the relevant time periods.

[b] INTERROGATORIES

The term “**information request**,” as that term is used in securities arbitration, is not a term to be confused with civil interrogatories, and that is exactly what is stated in

the NASD Discovery Guide: “**Standard interrogatories, as utilized in state and federal courts, are generally not permitted in arbitration.**”

§2.6 DEPOSITIONS

NASD DISCOVERY GUIDE VI

VI. Depositions

Depositions are strongly discouraged in arbitration. Upon request of a party, the arbitrator(s) may permit depositions, but only under very limited circumstances, such as: 1) to preserve the **testimony of ill or dying** witnesses; 2) to 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; 3) to

expedite large or **complex cases**; and 4) to address unusual situations where the arbitrator(s) determines that circumstances warrant departure from the general rule. Balanced against the authority of the arbitrator(s) to permit depositions, however, is the traditional reservation about the overuse of depositions in arbitration.

[NASD NTM 99-90, page-691]
[underscoring and emphasis added]

[a] **STRONGLY DISCOURAGED**

As succinctly stated in NASD NTM 99-90: **“Depositions are strongly discouraged in arbitration.”** Underpinning virtually every serious discussion in favor of arbitration, are the three claimed benefits of expedition, less disruption, and cost effectiveness. The use of depositions in arbitration is antithetical to all three claimed benefits. Depositions lengthen rather than expedite the resolution of a dispute;

they create disruption for both the parties and the deponents; and the practice can be every bit as costly as the hearing itself. The financial burden of depositions also falls unequally between the parties, in that the party with the most financial resources—read large Broker-Dealers—can destroy the average Public Investor under costs that can easily run in excess of the amount in controversy in court reporter costs alone.

[b] **EXTRAORDINARY CIRCUMSTANCES**

Only under extraordinary, or as the NASD Discovery Guide refers to it as **“very limited circumstances,”** are depositions permitted, such

as the typical situation where a deposition is needed to preserve the testimony of a dying witness or party.

[c] **CROSS-EXAMINATION**

Any deposition in aid of arbitration must be conducted in accordance with the usual and customary rules regarding such a discovery

device, such as notice to opposing counsel and the opportunity of opposing counsel to cross-examine the deponent.

§2.7 **ADMISSIBILITY**

NASD DISCOVERY GUIDE VII

VII. Admissibility

Production of documents in discovery does NOT create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

[NASD NTM 99-90, page-691]

Required pre-hearing document production, and the admissibility of such documents at the hearing, are two separate issues. A ruling that

certain documents must be produced prior to a hearing, is no guaranty that they will be admitted into evidence at the arbitration hearing.

[a] EVIDENTIARY RULES—taking it “for what it’s worth”

NASD RULE 10323

EVIDENCE

The arbitrators shall determine the **materiality** and **relevance** of any evidence proffered and shall **not be bound by rules governing the admissibility of evidence.**

[underscoring and emphasis added]

One of the most systemic, difficult and unresolved problems in securities arbitration concerns the evidentiary rules that will apply at a hearing. While NASD Rule 10323 clearly states that “**The arbitrators . . . shall not be bound by rules governing the admissibility of evidence,**” the litigators who will be representing the parties in the arbitration come into the hearing room clueless as to how the Chairperson will treat evidentiary questions. Will the Chair impose the Federal Rules of Evidence? or the State Code of Evidence? or will the Chair simply treat each contested matter on an *ad hoc* basis?

In over three decades of representing Public Investors in various SRO (e.g., NASD, NYSE, ASE, PSE) and AAA securities arbitrations, there has rarely been an instance where the author of this Practice Guide has been unsuccessful in obtaining the admission of a tendered piece of evidence. One practice favored by this author is to file a “Comprehensive Statement of Claim,” in which all the

evidence referred to in the text of the Statement is attached to the pleading and made a part thereof. In this way, when the arbitrators acknowledge the pleadings of the parties and announce that all such pleadings are taken into evidence as “Arbitrators’ Exhibit 1,” the evidentiary portion of the Statement of Claim is formally in evidence.

From a practical standpoint, with all parties to a securities arbitration having the right to refer to and append extensive exhibits to their pleadings, both original and amended, and often exercising this right, the best practice during a hearing is for the arbitrators to treat evidentiary submissions liberally, and then to simply “take it for what it’s worth.” Another reason favoring this liberal approach to evidentiary inclusion is that since the determiners of inclusion are the same arbitrators that will decide the matter on the merits, the arguments heard pro and con to the introduction of a proffered document is the mental equivalent of receiving the document into evidence.

§2.8 UNLAWFUL SUBPOENAS—CONTEMPT

In most securities arbitrations the Broker-Dealer will seek to obtain documents and information from third parties—such as other Broker-Dealers and financial institutions—regarding the activities of the Public Investor. If a subpoena is used for this purpose, it is called a “Third-Party Subpoena,” and if the subpoena calls for the production of documents, it is called a “*subpoena duces tecum*.”

Third-Party Subpoenas for pre-hearing production of documents can be issued: in all states—by a Court; in many states—by an arbitrator(s); and in some states—by an attorney of record. In the state of New York, the issuance of Third-Party Subpoenas is governed by NYCPLR 3120(b) which provides that the Courts are the only entity that can legally issue such process. Nevertheless, it is often the

practice for New York based General Counsel of Broker-Dealers to issue so-styled “*subpoenas duces tecum*” to obtain pre-hearing documents from third-parties.

When such attorneys issue unlawful subpoenas in connection with securities arbitrations, that attorney, as well as the Broker-Dealer, is acting at one and the same time: in violation of the rights of the other party; and in a contemptuous fashion toward the arbitration tribunal. In such situations, appropriate remedies include: the filing of a Supplemental Statement of Claim for Abuse of Process, following the procedure for filing amended pleadings as set forth in NASD Rule 10328; and a motion to the arbitration panel for monetary sanctions for attorney's fees to quash such illegally issued subpoenas.

PART III PRE-HEARING EXCHANGE

§3.1 PRE-HEARING EXCHANGE

Three decades ago, in the more innocent days of securities arbitration, there was no such thing as pre-hearing exchanges. Rather, the parties obtained arbitrator's subpoenas requiring each other to produce documents at the beginning of the first day of what was more often than not a one-day

arbitration. Now the modern rules, in addition to rather liberal production pursuant to the NASD Discovery Guide (Part I hereof) and to NASD Discovery Rules (Part II hereof), also provide for a twenty-day pre-hearing exchange of documents the parties intend to use at the hearing..

[a] SUBJECT FOR PRE-HEARING CONFERENCE

While the “**Pre-Hearing Exchange**” does not take place until twenty days prior to the hearing, and thus comes at a point in time considerably after the initial pre-hearing conference, the subject is dealt with in

Part III of this Practice Guide because some aspects of the Pre-Hearing Exchange need to be addressed at the initial pre-hearing conference so as to avoid the need for an expensive additional conference.

[b] TRIAL BY AMBUSH

The philosophy behind a pre-hearing exchange is to avoid so-called "trial by ambush," wherein critical documents are produced for the first time at the hearing to the surprise of the ambushed party.

It is this philosophy that should encourage and lend support for the practice of attaching extensive docu-

mentation to the pleadings as described in §2.7[a] above when the subject of evidentiary rules was examined.

Avoiding trial by ambush is also the reason why this Practice Guide was so specific as to the exact "Form of Production" which was the subject discussed in §2.4 above.

§3.2 SPIRAL BOUND BOOKS**NASD Rule 10321(c)****(c) Pre-Hearing Exchange**

At least twenty (20) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession they intend to present at the hearing and shall identify witnesses they intend to present at the hearing.

It is the practice of the author of this Practice Guide to deliver the Public Investor's pre-hearing exchange in the form of a spiral bound book with all exhibits indexed

in the front and tabbed alphabetically. For a discussion as to the request to the arbitration panel to require the Broker-Dealer to do likewise, see §4.4[a][3] below.

§3.3 EXCLUSION SANCTION**NASD Rule 10321(c) [con't]**

The arbitrators may exclude from the arbitration any documents not exchanged or witnesses not identified.

To highlight this provision, it is good practice to include a request for

such a panel order in any pre-hearing conference.

§3.4 CROSS-EXAMINATION DOCUMENT EXCLUSION**NASD Rule 10321(c) [con't]**

This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

This exclusion for “**copies of documents . . . which parties may use for cross-examination or rebuttal,**” is misused to bring about one of the greatest abuses in the NASD arbitration process. Since the Claimant/Public Investor presents his or her case first, there is scarcely a Respondent document that cannot be introduced during the cross-examination of the Public Investor’s witnesses. This potential for abuse, of introducing documents during cross-examination as a method of evading pre-hearing exchange responsibility, should be brought to the panel’s attention during the pre-hearing conference, and appropriate relief should be requested, as is the recommendation contained in the Model Pre-Hearing Requests set forth at the end of this Practice Guide.

It is noteworthy that the revised 1999 Commercial Arbitration Rules of the AAA provide in Rule 23 that: “At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to

submit at the hearing.” There is no distinction for documents to be used in the party’s case in chief or those to be used for purposes of cross-examination.

Of course, there are documents that a party does not contemplate using, but because of a surprise in a witness’s testimony the decision is made to use the document in cross-examination. Such documents can never be required to be turned over as part of a pre-hearing exchange. And such situations can routinely be expected to come up at least as frequently as once or twice in every decade or two. But the practical reality of today’s securities arbitration is that virtually all attorneys who represent Broker-Dealers know full well that they are going to use certain documents for cross-examination, especially when a document is going to be used as part of the cross-examination of the claimant or of the claimant’s expert witness—the identity of whom has been known to the opposing counsel for months in advance.

PART IV

PRE-HEARING CONFERENCE

§4.1 SELECTION OF PRESIDING PERSON

NASD Rule 10321(b)(4)

(4) Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this Rule or to a selected arbitrator under paragraph (e) of this Rule.

[underscoring added]

[a] TRIBUNAL ADMINISTRATOR

NASD Rule 10321(d) mentioned in the above boxed rule, refers to a situation when the: **“Director of Arbitration shall . . . appoint a**

person to preside.” This person is on the staff of the NASD Department of Arbitration, and regardless of what the title, is a tribunal administrator.

[b] SELECTED ARBITRATOR

NASD Rule 10321(e) mentioned in the above boxed rule, refers to a situation when the: **“Director of Arbitration may appoint a single member of the arbitration panel to decide all unresolved issues under this Rule.”** [See §4.3 below] Importantly, this single arbitrator,

who must be a public member in a Public Investor v. Broker-Dealer dispute: **“may elect to refer any issue under this Rule to the full panel,”** a practice more often followed than not, especially in matters that show the potential to be hotly contested.

§4.2 CONFERENCE WITH ADMINISTRATOR**[a] TELEPHONE CONFERENCE CALL****NASD Rule 10321(d)(1) and (2)****(d) Pre-Hearing Conference**

(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled.

The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside.

The pre-hearing conference may be held by telephone conference call.

The presiding person shall **seek to achieve agreement** among the parties on any issue which relates to the pre-hearing process or to the hearing, including but not limited to exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulation of facts, identification and briefing of contested issues, and any other matters which will expedite the arbitration proceedings.

(2) Any issues raised at the pre-hearing conference that are not resolved may be referred to a single member of the arbitration panel for decision.

[underscoring and emphasis added]

The pre-hearing conference herein contemplated in NASD Rule 10321(d), is one conducted by the

“presiding person,” read tribunal administrator.

[b] SEEKING AGREEMENT

The tribunal administrator, or “presiding person” as that term is employed above: “**shall seek to achieve agreement among the parties**” This mandate to seek agreement is one of persuasion and not power. Thus, the presiding person can use his or her experience and persuasive powers to convince the

parties that it is in their own best interests to reach agreement on as many issues as possible before burdening the arbitration panel with unreasonable positions. But, such presiding person has no power to issue orders on substantive matters effecting the arbitration.

[c] WRITTEN AGENDA—STIPULATIONS

As with any pre-hearing conference, be it before a tribunal administrator or the arbitration panel, a

written agenda should be filed prior to the hearing.

[d] PROPOSED WRITTEN AGREEMENTS

The aforesaid written agenda to be employed in the tribunal administrator situation, wherein voluntary agreements between the parties is the object, the written agenda should contain draft proposed agreements and stipulations. In this fashion, if an agreement or stipulation is reached between the parties, said agreement or

stipulation can be initialed by the presiding person and thus memorialized.

There are few things in arbitration more counter-productive than arguments among counsel as to exactly what was agreed upon and stipulated to during such a pre-hearing conference before a tribunal administrator.

§4.3 CONFERENCE WITH ARBITRATOR**NASD Rule 10321(e)****(e) Decisions by Selected Arbitrator**

The Director of Arbitration may appoint a single **member of the arbitration panel** to **decide** all unresolved issues under this Rule. In matters involving public customers, such single arbitrator shall be a public arbitrator, except that the arbitrator may be either public or industry when the public customer has requested a panel consisting of a majority from the securities industry.

Such arbitrator shall be authorized to act on behalf of the panel to issue **subpoenas**, direct **appearances of witnesses** and **production of documents**, set **deadlines for compliance**, and **issue any other ruling** which will expedite the arbitration proceedings.

Decisions under this Rule shall be made upon the papers submitted by the parties, unless the arbitrator calls a hearing.
The arbitrator may elect to refer any issue under this Rule to the full panel.

[underscoring and emphasis added]

[a] ARBITRATOR OR PANEL

Once the pre-hearing conference is conducted before the “presiding person”—read tribunal administrator—as provided for in NASD Rule 10321(d), and the parties have reached agreements and stipulations to as many items as can be mutually agreed upon, the next step is for the Director of Arbitration to: **“appoint a single member of the arbitration panel to decide all unresolved issues under this Rule.”** The single member of the arbitration panel will in all likelihood be the Chairperson of

the panel. In *Public Investor v. Broker-Dealer* disputes, the chairperson must be a public arbitrator as distinct from the industry arbitrator; and in an ever increasing number of such cases, the chairperson is also an attorney. While it is within the power of the single arbitrator to: **“elect to refer any issue under this Rule to the full Panel,”** non-dispositive motions, such as discovery issues, are usually decided by the single public arbitrator.

[b] LAW OF THE CASE

When the single arbitrator, or full panel, has rendered a decision on any matter, such decision becomes the so-called “law of the case.” Any such decision, be it one issued by a single arbitrator or the entire panel, can be

the basis to seek sanctions for non-compliance. As set forth in NASD Rule 10321(e), what issues from the arbitrator/panel are **“decisions”** and **“rul[ings]”**, that are legally binding.

[c] WRITTEN AGENDA

As with any pre-hearing conference before an arbitrator or the full panel, a written agenda should be filed prior to the hearing. This Practice Guide contains just such a recommended agenda at the back entitled “Model Pre-Hearing

Requests.” Do not take it for granted that the tribunal administrator has delivered your written agenda to all the arbitrators in sufficient time for them to study it prior to the pre-hearing conference—check on it.

[d] PROPOSED WRITTEN ORDERS

The aforesaid written agenda should also contain proposed orders. In this fashion, if an order is given,

said order can be effortlessly initialed by the arbitrator in charge and thus memorialized.

[e] INITIAL PRE-HEARING CONFERENCE SCRIPT

NASD arbitrators are given an "Initial Pre-Hearing Conference Script" ("IPHCS") from which they can conduct the initial conference, most often telephonically, with all the

parties counsel and the tribunal administrator in attendance. This Initial Pre-Hearing Conference Script is set forth in Appendix-C of this Practice Guide.

§4.4 MODEL PRE-HEARING REQUESTS

The management of both the pre-hearing and hearing stages of an arbitration are almost totally at the discretion of the arbitration panel. The extent to which binding procedures can be established early in the pre-hearing process, is the extent to which the preparation of the matter for hearing, and the hearing itself can be conducted in an orderly, efficient and cost-effective manner.

Set forth below are some of this author's recommendations concerning pre-hearing requests, with the up-front acknowledgement that virtually every attorney is different as to the way he

or she likes to prepare for and conduct a hearing. In other words, the below set forth suggestions are only one litigator's preferences based upon over three and a half decades of representing public investors in securities arbitrations.

Following this discussion, at the end of this Practice Guide there will be a form entitled "Pre-Hearing Motion To Establish Arbitration Procedures" which will provide the arbitrator/panel with the opportunity to order that one or more or all of the requested procedures be adopted for a given matter.

[a] PRE-MARKING EXHIBIT BOOKS

One highly disruptive and time consuming practice in an arbitration

proceeding is a party's not having its documents in order and pre-labeled.

[1] FIND-THE-DOCUMENT/EXHIBIT

Another disruptive and time consuming practice is when the parties and arbitrators must constantly play the game of "Find-the-Documents/Exhibit." When an arbitration hearing has fifty or so documents/exhibits from each side, a not exces-

sive number in many securities arbitrations, it is unnecessarily difficult and disruptive to find any particular document/exhibit among a sprawl of documents/exhibits on a table containing one set for each arbitrator and each party.

[2] AEROBIC ARBITRATION

In one arbitration conducted in Dallas, Texas in which the author of this Practice Guide represented the Public Investor, the Respondent Broker-Dealer brought its documents/

exhibits encased in twenty-six three-inch loose-leaf books, and then gave each arbitrator and Claimant a complete set of the twenty-six books. When it came time for the Broker-

Dealer to conduct an examination of one of its witnesses, or a cross-examination or one of Claimant's witnesses, the announcement was made by its attorney before each question: "Gentleman, go to book 16, exhibit 37," or whatever. At the end of each day of this arbitration, this author would object to turning the proceeding into what he coined an "Aerobic Arbitration," and would make a motion to the Panel to order the Broker-Dealer to choose the documents it intended to use the following day, or at least as many as could be easily contemplated, and place them in a single book.

[3] EXCHANGING HEARING EXHIBIT BOOKS

There is not a single good reason for waiting until all the parties are physically at the hearing to exchange their Hearing Exhibit Books. There are a multitude of obvious good reasons for the parties to make their exchange of Hearing Exhibit Books

Regrettably, all these motions were denied, and not surprisingly the arbitration turned out to be a 37-day marathon.

During Claimant's closing argument, considerable pains were taken to point out to the arbitration panel that the total volume of documents presented during the 37-day hearing by the Broker-Dealer did not fill up a single volume of its twenty-six loose-leaf books.

The Broker-Dealer's totally unreasonable approach to presenting its exhibits, undoubtedly contributed to a multi-million dollar verdict in favor of the Claimant.

prior to the hearing. Because the normal pre-hearing exchange takes place 20-days prior to the hearing, that is the latest date at which the Hearing Exhibit Books should also be exchanged.

[b] ANTICIPATED CROSS-EXAMINATION DOCUMENTS

As discussed above in §3.4 "Cross-Examination Document Exclusion," it is unfair to require the Claimant to produce all the documents that he or she will employ in his or her case, but permit Respondent to evade production by the rather unobvious device of introducing all such documents during cross-examination or on rebuttal. To remedy this situation, a request should be made to the arbitration panel to require Respondent to produce all documents reasonably anticipated to be introduced at the hearing, whether or not on direct or cross-examination.

This procedure will not hinder Respondent from introducing any document in cross-examination or rebuttal if said document could not have been reasonably anticipated to be offered prior to the hearing. But if three and a half decades of personal participation in securities arbitrations by the author of this Practice Guide is any indication, there is rarely any document that a Broker-Dealer uses in cross-examination that it did not plan to use prior to the hearing. Let's face it, the prison record of the opposing party's expert witness IS going to be employed in cross-examination.

NASD Rule 10321(c), dealing with the "Pre-Hearing Exchange," states: "This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal." [underscor-

ing and emphasis added] Do arbitrators have the power to totally disregard or severely interpret an NASD arbitration rule? Yes, NASD arbitrators are given such plenary power:

NASD Rule 10324

Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings

The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

[underscoring and emphasis added]

When it comes to the pre-hearing exchange exclusion for documents reasonably anticipated to be used in cross-examination or rebuttal, the arbitrators can either take on the matter head-on and issue an order that

such exclusion is not applicable to the instant arbitration, or the arbitrators can simply decide to interpret the word "may" in the exclusion to be unavailable to documents reasonably anticipated to be introduced.

[c] CONTROVERTED DOCUMENTS

Arguing about the authenticity of a document at an arbitration hearing is a total and unnecessary waste of time when such document has been exchanged by the offering party to the objecting party weeks, and in some instances months or even years, prior to the hearing. Any party should have the right to present any document to an opposing party at any time before

forty-days prior to the hearing, and demand to have that opposing party file any objection as to the authenticity of the document twenty days after presentation. All exhibits attached to a pleading, as well as documents turned over as part of an itemized production, should be deemed offered for authenticity.

[d] OPENING STATEMENT

To avoid quibbling as to the amount of time a party will take for their opening statement, it is a simple matter to clear this up during a pre-hearing conference. The same is true for the use of demonstrative exhibits

during the opening statement, be they presented in the form of large poster boards or through the use of Power-Point presentations from the latest lap-top computers.

[e] CLOSING ARGUMENT ORDER

To avoid surprise at the end of the hearing when closing arguments are to be presented, it is good practice to establish such order during the pre-

hearing conference. The NASD's normal practice is set forth in a new rule:

NASD Rule IM-10317

In response to recent questions concerning the order of closing argument in arbitration proceedings conducted under the auspices of the National Association of Securities Dealers, Inc., it is the practice in these proceedings to allow **claimants to proceed first** in closing argument, with **rebuttal argument being permitted**. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.

[underscoring and emphasis added]

It is frequently the situation wherein the claimant desires to proceed first, and reserve a portion or the whole of claimant's closing argument for rebuttal. But there is a danger to this reservation. In such situations, if the respondent waives its closing argument, the respondent can then object to claimant delivering the "rebuttal" portion of his or her closing argument on the grounds that since respondent has waived its closing argument, there is nothing to rebut.

So that the claimant can protect against being thus blind-sided, in situations where the claimant desires to reserve a portion or the whole of claimant's closing argument for rebuttal, the claimant should announce: "Claimant is reserving [a portion] or [the whole] of claimant's closing argument for rebuttal or after respondent announces it has no intention of delivering a closing argument—whichever comes first.

[f] EXPERTS AT THE HEARING

It used to be the old practice to exclude all witnesses at the beginning of the hearing. Then the practice became standard to permit experts to remain in the hearing room because of their on-going assistance to counsel, and the recognition that a well seasoned expert will rarely gain any advantage by listening to what he or she has probably already heard scores of times in previous arbitrations.

A full time employee of a Broker-Dealer who because of hands-on activity over the Public Investor's account during the relevant time period, or who was in a supervisory position, and who will be a fact witness in the hearing, is not considered an expert witness for the purposes of this paragraph.

It is good practice to clear this up during the pre-hearing conference.

[g] CORPORATE REPRESENTATIVE

A Broker-Dealer is permitted to have one so-called "corporate representative" in the hearing room during the entire hearing. But this practice should not be abused by the Broker-Dealer designating all expected Broker-Dealer affiliated witnesses and

employees as "corporate representatives," and then rotate them in and out of the hearing room during the entire course of the arbitration. One such individual throughout the arbitration hearing is all that was contemplated.

[h] FOUR HOUR HEARING SESSIONS

NASD arbitration hearings are exceedingly expensive. This is one of the central criticisms of the process. NASD Rule 10332 concerning the Schedule of Fees for Customer Disputes provides that every hearing session of four hours or less is charged as a full session.

often travel from one end of the country to the other to appear. The necessity of having them return to a hearing site can be prohibitively expensive. The expenses of court reporters are often keyed in some fashion to the number of days of the hearing. Not the least of the overall expense is the hearing room itself, often rented from a hotel or other conference facility by the day.

Regrettably, it is the rule (in the colloquial sense) rather than the exception that parties to securities arbitrations are lucky to receive a five-and-a-half hour hearing day, when what is being paid for is an eight hour day. The third of three arbitrators all too often ambles into the hearing room at 10:00 a.m. Lunch is too often closer to one-and-a-half hours, than to one hour. Breaking for the day is too often before 5 p.m.

An eight hour hearing day can often reduce an arbitration by an entire day or more, and in many instances it can obviate the necessity of having to reconvene after the end of a contiguous two or three day hearing. Accordingly, an efficient manner in which to conduct a securities arbitration is that there be two sessions per day, the first running from 9 a.m. to 1 p.m., and the other from 2 p.m. to 6 p.m. A little advance logistical planning can go a long way in finishing lunch within the one hour time block.

What arbitrators are sometimes unaware of is the economics of presenting a matter in arbitration. Expert witnesses often charge by the day. Parties, their counsel, and fact witnesses as well as expert witnesses

[i] ESTABLISHING ARBITRATION PROCEDURES

The above recommendations set forth in this §4.4 "Model Pre-Hearing Requests," have all been condensed into a "Pre-Hearing Motion to Establish Arbitration Procedures" set forth at the back of

this Practice Guide. Each attorney can decide which of these recommendations will be requested from the arbitration panel—all, none, or a selection.

PART V SANCTIONS

Arbitration rules and panel orders, not backed up by *meaningful* sanctions for breaches thereof, are no better than the proverbial toothless tiger. The NASD Discovery Guide, and the instant Practice Guide, provide the public investor with significant protections, one of the most important of which is the focused discovery rules contained in the NASD Discovery Guide with its specific lists of required document

production. To be effective, such discovery protections must be vigorously enforced by arbitration panels. While the NASD rules provide adequate sanctions, the courage of the arbitrators coupled with their desire to do justice, should insure that these sanctions are employed for “willful and intentional material failure to comply with an order of the arbitrator(s) . . .”

§5.1 DISMISSAL SANCTION

NASD Rule 10305(b)

10305. Dismissal of Proceedings

(b) The arbitrators may **dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with an order** of the arbitrator(s) **if lesser sanctions have proven ineffective.**

[underscoring and emphasis added]

The most drastic power of NASD arbitrators to enforce their orders lies in NASD Arbitration Rule 10305(b), the so-called “dismissal sanction.” The dismissal sanction is conditional upon two predicate acts: first)-**VIOLATION OF ORDER**-there must have been a “**willful and intentional material failure to comply with an [arbitration panel’s] order**”; and second)-**DISREGARD OF SANCTIONS**)-the violation must be one of a repeated nature that takes place after “**lesser sanctions have proven ineffective.**”

Practically speaking, if a party violates discovery procedures such as

the automatic discovery production required pursuant to the NASD Discovery Guide, or production requests pursuant to the NASD Discovery Rules, the aggrieved party should follow a three step procedure: step#1)-**PANEL’S FIRST PRODUCTION ORDER**)-obtain a panel’s First Production Order requiring production by a time certain; step#2)-**PANEL’S SECOND PRODUCTION ORDER**)-if production is not made by the deadline set forth in the panel’s First Production Order, bring on a motion for monetary sanctions for the failure to comply with the panel’s first order, along with a motion for the panel’s Second Pro-

duction Order requiring production by a time certain; and finally step#3)-**DISMISSAL SANCTION**)- if production is again not made by the deadline set forth in the panel's Second Production Order, bring on a motion for the implementation of the dismissal sanction.

A practical reality that must be taken into consideration by arbitrators, is that there are some types of claims that cannot be proven without production by a Broker-Dealer.

§5.2 "LESSER SANCTIONS"

While NASD Rule 10305, the so-called "dismissal sanction" discussed in the previous section of this Practice Guide--§5.1, provides for dismissal of a claim or defense in cases of willful, intentional and material disregard of arbitration orders "if lesser sanctions have

Claims involving market manipulation are just such claims. In those situations the only effective sanction for noncompliance with production orders is the dismissal of the defense to liability—as was done by one arbitration panel in the NASD arbitration and then upheld on appeal to the United States District Court for the Southern District of New York (as will be discussed and cited at §5.4 below).

proven ineffective," nowhere in the NASD Rules are those "**lesser sanctions**" discussed. However, NASD Discovery Guide VIII does expound on the plethora of sanctions available in NASD securities arbitrations:

NASD DISCOVERY GUIDE VIII

VIII. Sanctions

The arbitration panel should issue sanctions if any party fails to produce documents or information required by a **written order**, unless the panel finds that there is "substantial justification" for the failure to produce the documents or information. The panel has wide discretion to address noncompliance with discovery orders. For example, the panel may make an adverse inference against a party or assess adjournment fees, forum fees, costs and expenses, and/or attorneys' fees caused by noncompliance.

In extraordinary cases, the panel may initiate a disciplinary referral against a registered entity or person who is a party or witness in the proceeding or may, pursuant to Rule 10305(b), dismiss a claim, defense, or proceeding with prejudice as a sanction for intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.

[NASD NTM 99-90, page-691]

[underscoring and emphasis added, footnotes omitted]

An economic reality that must be taken into consideration by arbitrators, is that in all too many instances it may be cost effective for a Broker-Dealer to put off the hearing of a substantial claim by stonewalling production and thereby incurring the imposition of minor adjournment and forum fees. In such situations, the

imposition of substantial fees on the stonewalling party, payable to the opposing party, might be the method needed to obtain production. Arbitrators should not shy away from the imposition of sanctions such as a fine of \$1,000 a day, or some higher amount, until the production order has been satisfied.

§5.3 THE CONFERENCE EXCUSE

NASD DISCOVERY GUIDE III

III. The Initial Prehearing Conference

To maximize the efficient administration of a case by the arbitration panel, the Office of Dispute Resolution staff will schedule an initial prehearing conference in which the arbitrator(s) usually participates. The initial prehearing conference gives the arbitrator(s) and the parties an opportunity to organize the management of the case, **set a discovery cut-off date**,

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At the initial prehearing conference, the arbitrator(s) should **order time limits for discovery** that will allow the scheduling of hearing dates within a reasonable time and address all outstanding discovery disputes. If the exchange of properly requested documents has not occurred, the arbitrator(s) should order the production of all required documents, including those outlined in the Document Production Lists (see Section II. above), within 30 days following the conference.

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The Office of Dispute Resolution recommends that the panel set a cut-off date during the initial prehearing conference for **service of discovery requests**, giving due consideration to time frames that permit timely resolution of objections and disputes prior to the scheduled exchange of hearing exhibits pursuant to the NASD Code of Arbitration Procedure.

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[underscoring and emphasis added, footnotes omitted]

[a] EXCUSE NOT TO PRODUCE

Some law firms, employing disreputable and delaying tactics, have seized upon the wording in this NASD Discovery Guide regarding the pre-hearing conference as being a

time to “set a discovery cut-off date,” and being a “conference for service of discovery requests,” as an excuse for disregarding their other automatic discovery obligations pursuant to this

very same Discovery Guide and NASD Rule 10321(b)(1) discussed in Parts I and II of this Practice Guide. Such disreputable tactics brings to mind the adage that the manner in

which a party litigates its disputes is more often than not a mirror as to the manner in which it conducted its business that brought about the instant arbitration/litigation.

[b] BAD FAITH OBSTRUCTION

It is obviously not the intention of the above quoted material from NTM 99-90 to condone a breach of the document production rules of NASD arbitration. Such bad faith

obstruction should be noted by the arbitrators, and some form of sanctions should be forthcoming from the panel.

§5.4 FLEXIBLE SANCTIONS

NASD arbitration panels have a variety of meaningful sanctions to punish and deter willful and intentional material failures to comply with their orders.

wherein the Public Investor's claims were nonsuited in their entirety, an individual respondent was nevertheless hit with substantial monetary sanctions for his failure to comply with the panel's document production orders:

The most obvious sanction is monetary. In one NASD arbitration,

Respondent Bernstein is liable and shall pay to the Claimant the sum of **\$50,000.00 in sanctions** as a result of Respondent Bernstein's failure to comply with the Chairperson's order to Mr. Bernstein to furnish a response to the Claimant's First Request to Respondents for Production of Documents and Other Information not later than October 1, 1998. Said order was memorialized in a letter dated September 8, 1998 from NASD Regulation, Inc. staff to all parties and arbitrators.

[*Goldklang v. Maidstone Financial, Inc.*, NASD# 98-01132, 1998 WL 1179017 (underscoring and emphasis added)]

Another NASD arbitration that resulted in the imposition of meaningful monetary sanctions for a violation of production obligations came about

within the context of a Broker-Dealer v. Broker-Dealer matter where the issue was the theft of employees:

Claimant RJA filed a Motion for Sanctions against Respondent Smith Barney for failure to produce certain discovery documents which the panel has granted. Respondent Smith Barney is hereby found liable and shall pay to Claimant RJA the amount of **\$25,000.00**. The panel determined that an **award of sanctions against Smith Barney** is appropriate in light of the panel's belief that Smith Barney's in-house legal

department failed to make a diligent effort in responding to certain legitimate discovery requests of RJA. The panel specifically found that such failure was not the fault of Smith Barney's counsel in this matter but, rather, the fault of Smith Barney's in-house legal department. The panel believes that Smith Barney's legal department made only nominal efforts to locate the information by relying solely on the efforts of a paralegal who was required to search computer records which were improperly coded in order to identify documents when the attorneys of the legal department independently knew of the existence of such documents.

[*Raymond James & Associates, Inc. v. Smith Barney Shearson, Inc.*, NASD#95-05555, 1997 WL 282282 (underscoring and emphasis added)]

In another NASD arbitration, the single arbitrator crafted an “adverse inference” so broad that it was the equivalent of both a dismissal of a

defense as to liability, as well as a dismissal of disputation as to the calculation of damages:

The arbitrator will make an **adverse inference** regarding the documents that Hunter was ordered to and refused to produce. As a result of this adverse inference, the arbitrator will assume that the **documents, if produced, would support Claimant's claims and allegations and would disprove and fail to support Hunter's defenses.** In addition, the arbitrator will assume that the documents would provide a legal basis for the arbitrator's award of the monetary sanctions set forth in paragraph number three (3) below and would provide a legal basis for each and every aspect of the arbitrator's decision and award in this case, including the award of attorney's fees set forth in paragraph number four (4) below.

.....

Respondent Hunter is also found liable and shall pay to Claimant the further amount of \$3,000.00 for reimbursement of Claimant's costs and expenses incurred in attempting to obtain the production of documents and the enforcement of the arbitrator's order of production.

Respondent Hunter is also found liable for attorney's fees pursuant to the adverse inference sanction described above . . .

..

[*Teixeira v. Hunter International Securities, Inc.*, NASD#96-02581, 1997 WL 380900 (underscoring and emphasis added)]

The one federal court decision in which one of the questions on appeal concerned the power of an NASD arbitration panel to dismiss a defense based upon the Broker-Dealer's willful and intentional material failure to comply with the panel's

discovery orders, a dismissal which cost the respondents a multimillion dollar award of compensatory damages plus a quarter million dollars in attorney's fees, came down squarely in favor of the arbitrators' power:

Entry of the Default Judgment

Petitioners [respondents below] were precluded from cross examining any witnesses on liability issues, and they were not required to offer witnesses to support their claims. The Panel did not exceed its authority, because pursuant to §10305 of the NASD Code, "arbitrators may dismiss a . . . defense . . . with prejudice as a sanction for willful and intentional failure to comply with an order by the arbitrator(s) if lesser sanctions prove ineffective." In this case, the Panel extended the time period for petitioners to produce documents from December 19, 1997 to December 31, 1997. Having received no documents, the respondents filed for sanctions that the Panel granted on January 14, 1998. By January 21, 1998, no documents had been produced, and the Panel awarded second sanctions on January 23, 1998. The February 8, 1998 order stemmed directly from the previous ineffective sanctions by the Panel in hope of compelling the petitioners to product [sic] documents. Therefore, the Panel did not exceed its authority in striking all defenses as to liability in its February 8 order.

[*Tacher v. Parsons*, slip opinion 98 CV 4482, S.D.N.Y., 5/5/2000, Mishler, J, upholding in part, *Parsons v. Kensington Wells Inc.*, NASD#96-05310, 1998 WL 1178858 (underscoring and emphasis added)]

NASD DISCOVERY GUIDE

NASD Notice to Members 99-90

[NASD NTM 99-90, page-687]

NASD Regulation Announces New Discovery Guide To Be Used In Arbitration Proceedings

Executive Summary

On September 2, 1999, the Securities and Exchange Commission (SEC) approved the use of the Discovery Guide (see Exhibit I) in National Association of Securities Dealers, Inc. (NASD®) arbitration proceedings involving customer disputes with firms and associated persons. The Discovery Guide is now available to use in NASD arbitration proceedings.

The Discovery Guide, which includes Document Production Lists, provides guidance to parties on which documents they should exchange without arbitrator or staff intervention, and to arbitrators in determining which documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations.

Questions/Further Information

Questions regarding this Notice to Members may be directed to Gary Tidwell, Director, Neutral Management, Office of Dispute Resolution, NASD Regulation, Inc. (NASD Regulation SM), at (212) 858-4352; or Eric Moss, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-8982.

Discussion

The Discovery Guide will be used as a supplement or an addendum to the guidance regarding discovery provided in The Arbitrator's Manual, published by Securities Industry Conference on Arbitration (SICA), and particularly the provisions in the section entitled, "Prehearing Conference," on pages 11 through 16.

The Arbitrator's Manual is compiled by members of SICA as a guide for arbitrators, and is designed to supplement and explain the Uniform Code of Arbitration as developed by SICA. The procedures and

policies described in The Arbitrator's Manual are discretionary and may be changed by the arbitrators. Further, nothing in the Discovery Guide, including the Document Production Lists, precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide.

The Discovery Guide consists of introductory and instructional text, and 14 Document Production Lists. It is intended for use by arbitrators in customer arbitrations only. These lists include the following (parenthetical references refer to the party from whom documents are sought):

List 1: Documents To Be Produced In All Customer Cases (Firm/Associated Person(s))

List 2: Documents To Be Produced In All Customer Cases (Customer)

List 3: Churning (Firm/Associated Person(s))

List 4: Churning (Customer)

List 5: Failure To Supervise (Firm/Associated Person(s))

List 6: Failure To Supervise (Customer)

List 7: Misrepresentation/Omissions (Firm/Associated Person(s))

List 8: Misrepresentation/Omissions (Customer)

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List 9: Negligence/Breach Of Fiduciary Duty (Firm/Associated Person(s))

List 10: Negligence/Breach Of Fiduciary Duty (Customer)

List 11: Unauthorized Trading (Firm/Associated Person(s))

List 12: Unauthorized Trading (Customer)

List 13: Unsuitability (Firm/Associated Person(s))

List 14: Unsuitability (Customer)

The Office of Dispute Resolution (ODR) will provide the parties with the Discovery Guide including the Document Production Lists at the time ODR serves the statement of claim. The document production requirements in the first two Document Production Lists, "List 1, Documents To Be Produced In All Customer Cases: Firm/Associated Person(s)," and "List 2, Documents To Be Produced In All Customer Cases: Customer," would apply in virtually all cases involving member-customer or associated person-customer disputes, unless the arbitrator, in the exercise of discretion, determines that some or all of the documents in the relevant Document Production Lists should not be produced. For cases in which allegations of churning, failure to supervise, misrepresentation/omissions, negligence/breach of fiduciary duty, unauthorized trading, or unsuitability are stated, additional Document Production Lists (e.g., Document Production Lists 3 and 4 - Churning) provide additional guidance. If a Document Production List is applicable, the Discovery Guide is drafted to guide the arbitrator to order production, unless in the exercise of discretion, the arbitrator believes that there is good cause not to order production.

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DISCOVERY GUIDE

For NASD arbitrations, the Discovery Guide supplements the section in the Securities Industry Conference on Arbitration ("SICA") publication entitled The Arbitrator's Manual, and captioned "Prehearing Conference," found on pages 11 through 16, regarding public customer cases.

I. The Need for New Discovery Procedures

Discovery disputes have become more numerous and time consuming. The same discovery issues repeatedly arise. To minimize discovery disruptions, the NASD Regulation Office of Dispute Resolution has developed two initiatives to standardize the discovery

process: early appointment of arbitrators to conduct an initial prehearing conference and document production lists (Document Production Lists).

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

The Discovery Guide and Document Production Lists are designed for customer disputes with firms and Associated Person(s).^{1/} The Discovery Guide also discusses additional discovery requests, information requests, depositions, admissibility of evidence, and sanctions. The Discovery Guide, including the Document Production Lists, will function as a guide for the parties and the arbitrators; it is not intended to remove flexibility from arbitrators or parties in a given case. For instance, arbitrators can order the production of documents not provided for by the Document Production Lists or alter the production schedule described in the Discovery Guide. Further, nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. In fact, the Office of Dispute Resolution encourages the parties to agree to the voluntary exchange of documents and information and to stipulate to various matters. The fact that an item appears on a Document Production List does not shift the burden of establishing or defending any aspect of a claim.

II. Document Production Lists

The Office of Dispute Resolution will provide the parties with Document Production Lists (attached to the Discovery Guide) at the time it serves the statement of claim in customer cases. The arbitrators and the parties should consider the documents described in Document Production Lists 1 and 2 presumptively discoverable. Absent a written objection, documents on Document Production Lists 1 and 2 shall be exchanged

by the parties within the time frames set forth below.

The arbitrators and parties also should consider the additional documents identified in Document Production Lists 3 through 14, respectively, discoverable, as indicated, for cases alleging the following causes of action: churning, failure to supervise, misrepresentation/omission, negligence/breach of fiduciary duty, unauthorized trading, and unsuitability. For the general document production and for each of these causes of action, there are separate Document Production Lists for firms/Associated Person(s) and for customers.

NASD Rule 10321 provides that the parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration process. As noted, nothing in the Discovery Guide precludes parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide.

A. Time Frames For Document Production and Objections

The parties should produce all required documents listed in the applicable Document Production Lists not later than thirty days^{2/} from the date the answer is due or filed, whichever is earlier. If a party redacts any portion of a document prior to production, the redacted pages (or ranges of pages) shall be labeled "redacted." A party may object to the production of any document, which would include an objection based upon an established privilege such as the attorney-client privilege. If any party objects to the production of any document listed in the relevant

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Document Production Lists, the party must file written objections with the Office of Dispute Resolution and serve all parties not later than thirty days following the date the answer is due or filed, whichever is earlier. Objections should set forth the reasons the party objects to producing the documents. An

objection to the production of a document or a category of documents is not an acceptable reason to delay the production of any document not covered by the objection. A response to an objection should be served on all parties within 10 days from service of the written objections. Objections and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties. The arbitrator(s) shall then determine whether the objecting party has overcome the presumption based upon sufficient reason(s).

B. Confidentiality

If a party objects to document production on grounds of privacy or confidentiality, the arbitrator(s) or one of the parties may suggest a stipulation between the parties that the document(s) in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator(s) may issue a confidentiality order. The arbitrator(s) shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege.

Objections to the production of documents, based on an established privilege, should be raised in accordance with the time frame for objections set forth above.

C. Affirmation In The Event That There Are No Responsive Documents or Information

If a party responds that no responsive information or documents exist, the customer or the appropriate person in the brokerage firm who has personal knowledge (i.e., the person who has conducted a physical search), upon the request of the requesting party, must: 1) state in writing that he/she conducted a good faith search for the requested information or documents; 2) describe the extent of the search; and 3) state that, based on the search, no such information or documents exist.

III. The Initial Prehearing Conference

To maximize the efficient administration of a case by the arbitration panel,^{4/} the Office of Dispute Resolution staff will schedule an initial prehearing conference

in which the arbitrator(s) usually participates.^{5/} The initial prehearing conference gives the arbitrator(s) and the parties an opportunity to organize the management of the case, set a discovery cut-off date,^{6/} identify dispositive or other potential motions, schedule hearing dates, determine whether mediation is desirable, and resolve any other preliminary issues.^{7/} During the initial prehearing conference, the arbitrator(s) and the parties should schedule hearing dates for the earliest available time, consistent with the parties' need to prepare adequately for the hearing.

Prior to the initial prehearing conference, each arbitrator should become familiar with the claims and defenses asserted in the pleadings filed by the parties. At the initial prehearing conference, the arbitrator(s) should order time limits for discovery that will allow the scheduling of hearing dates within a reasonable time and address all outstanding discovery disputes. If the exchange of properly requested documents has not occurred, the arbitrator(s) should order the production of all required documents, including those outlined in the Document Production Lists (see Section II. above), within 30 days following the conference.

IV. Additional Discovery Requests

The parties may request documents in addition to those identified in the Document Production Lists pursuant to Rule 10321(b). Unless a longer period is allowed by the requesting party, requests should be satisfied or objected to within 30 days from the date of service of the document request. A response to an objection should be served on all parties within 10 days from service of the written objections. Requests, objections, and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties.

A party may move to compel production of documents when the adverse party (a) refuses to produce such documents or (b) offers only to produce alternative documents that are unacceptable to the requesting party. The Office of Dispute Resolution will provide the chairperson of the

panel with the motion, opposition, and reply, along

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with the underlying discovery documents the parties have attached to their pleadings. The chairperson should determine whether to decide the matter on the papers or to convene a prehearing conference (usually via telephone). In considering motions to compel, particularly where non-production is based upon an argument asserting an established privilege, such as the attorney-client privilege, the arbitrator(s) should always give consideration to the arguments set forth by both sides, particularly as to the relevancy of the documents or information. The arbitrator(s) should carefully consider such motions, regardless of whether the item requested is on any of the Document Production Lists. If in doubt, the arbitrator(s) should ask the requesting party what specific documents it is trying to obtain and what it seeks to prove with the documents.

V. Information Requests

Like requests for documents, parties may serve requests for information pursuant to Rule 10321(b). Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require exhaustive answers or fact finding.

Standard interrogatories, as utilized in state and federal courts, are generally not permitted in arbitration. Unless a longer period is allowed by the requesting party, information requests should be satisfied or objected to within 30 days from the date of service of the requests. A response to an objection should be served on all parties within 10 days from service of the written objections. Requests, objections, and responses should be filed with the Office of Dispute Resolution at the time they are served on the parties. A party may move to compel responses to requests for information that the adverse party refuses to provide. The Office of Dispute Resolution will provide the chairperson of the panel with the

motion, opposition, and reply, along with the underlying discovery documents the parties have attached to their pleadings. The chairperson should determine whether to decide the matter on the papers or to convene a prehearing conference (usually via telephone).

VI. Depositions

Depositions are strongly discouraged in arbitration. Upon request of a party, the arbitrator(s) may permit depositions, but only under very limited circumstances, such as: 1) to preserve the testimony of ill or dying witnesses; 2) to 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; 3) to expedite large or complex cases; and 4) to address unusual situations where the arbitrator(s) determines that circumstances warrant departure from the general rule. Balanced against the authority of the arbitrator(s) to permit depositions, however, is the traditional reservation about the overuse of depositions in arbitration.

VII. Admissibility

Production of documents in discovery does NOT create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

VIII. Sanctions

The arbitration panel should issue sanctions if any party fails to produce documents or information required by a written order, unless the panel^{8/} finds that there is "substantial justification" for the failure to produce the documents or information. The panel has wide discretion to address noncompliance with discovery orders. For example, the panel may make an adverse inference against a party or assess adjournment fees, forum fees, costs and expenses, and/or attorneys' fees caused by noncompliance. In extraordinary cases, the panel may initiate a disciplinary referral

against a registered entity or person who is a party or witness in the proceeding or may, pursuant to Rule 10305(b), dismiss a claim, defense, or proceeding with prejudice as a sanction for intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.

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DOCUMENT PRODUCTION LISTS

LIST 1: DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES^{9/} FIRM/ASSOCIATED PERSON(S)

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all

customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

10) All analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

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LIST 2: DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES
CUSTOMER

1) All customer and customer-owned business (including partnership or corporate) federal income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

2) Financial statements or similar statements of the customer's assets, liabilities and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

3) Copies of all documents the customer received from the firm/Associated Person(s) and from any entities in which the

customer invested through the firm/Associated Person(s), including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence.

4) Account statements and confirmations for accounts maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

5) All agreements, forms, information, or documents relating to the account(s) at issue signed by or provided by the customer to the firm/Associated Person(s).

6) All account analyses and reconciliations prepared by or for the customer relating to the account(s) at issue.

7) All notes, including entries in diaries or calendars, relating to the account(s) at issue.

8) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer).

9) All correspondence between the customer (and any person acting on behalf of the customer) and the firm/Associated Person(s) relating to the account(s) at issue.

10) Previously prepared written statements by persons with knowledge of the facts and circumstances related to the account(s) at issue, including those by accountants, tax advisors, financial planners, other Associated Person(s), and any other third party.

11) All prior complaints by or on behalf of the customer involving securities matters and the firm's/Associated Person(s)' response(s).

12) Complaints/Statements of Claim and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions and awards entered in these matters.

13) All documents showing action taken by the customer to limit losses in the transaction(s) at issue.

[NASD NTM 99-90, page-694]

LIST 3: CHURNING FIRM/ASSOCIATED PERSON(S)

1) All commission runs relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer's account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

LIST 4: CHURNING CUSTOMER

No additional documents identified.

LIST 5: FAILURE TO SUPERVISE FIRM/ ASSOCIATED PERSON(S)

1) All commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than

one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

LIST 6: FAILURE TO SUPERVISE CUSTOMER

No additional documents identified.

[NASD NTM 99-90, page-695]

LIST 7: MISREPRESENTATION/ OMISSIONS FIRM/ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a

party, the firm/Associated Person(s) must provide any documents identified on the list.

LIST 8: MISREPRESENTATION/OMISSIONS CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer's resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

LIST 9: NEGLIGENCE/BREACH OF FIDUCIARY DUTY FIRM/ ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

LIST 10: NEGLIGENCE/BREACH OF FIDUCIARY DUTY CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer's resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

LIST 11: UNAUTHORIZED TRADING FIRM/ASSOCIATED PERSON(S)

1) Order tickets for the customer's transaction(s) at issue.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

LIST 12: UNAUTHORIZED TRADING CUSTOMER

1) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

2) All documents relied upon by the customer to show that the transaction(s) at issue was made without his/her knowledge or consent.

LIST 13: UNSUITABILITY FIRM/ASSOCIATED PERSON(S)

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume,

type of product sold, nature of trade (e.g., agency v. principal), etc.

**LIST 14: UNSUITABILITY
CUSTOMER**

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Written documents relied upon by the customer in making the investment decision(s) at issue.

3) Copy of the customer's resume.

4) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 3.

[NASD NTM 99-90, page-697]

Endnotes

^{1/} NASD Regulation may develop separate Document Production Lists for intra-industry disputes.

^{2/} All time periods referenced herein are calendar days.

^{3/} Section II.B. is also applicable to additional discovery requests and information requests (see Sections IV. and V.).

^{4/} The panel consists of three arbitrators in most cases. Claims between \$25,000 and \$50,000 may proceed with a single arbitrator. Claims under \$25,000 are decided by a single arbitrator, generally on the pleadings.

^{5/} In some instances, the parties may opt out of the initial prehearing conference. To opt out, parties must supply the following information to the Office of Dispute Resolution by the specified deadline:

- a minimum of four sets of mutually agreeable hearing dates;
- a discovery cut-off date;
- a list of all anticipated motions with the motion due dates, opposition due dates, and reply due dates provided;

- a minimum of four dates and times for any proposed prehearing conferences to hear motions; and

- a determination whether briefs will be submitted and, if so, the due date for submission.

^{6/} The Office of Dispute Resolution recommends that the panel set a cut-off date during the initial prehearing conference for service of discovery requests, giving due consideration to time frames that permit timely resolution of objections and disputes prior to the scheduled exchange of hearing exhibits pursuant to the NASD Code of Arbitration Procedure.

^{7/} The arbitrators should direct one of the parties to prepare and forward to the Office of Dispute Resolution, within 48 hours, a written order memorializing the results of the prehearing conference, approved as to form and content by the other parties. When motions are heard at the initial prehearing conference, the panel may order the parties to submit the order with a stipulation as to form and content from all parties.

^{8/} As with other rulings, an arbitration panel's ruling need only be by majority vote; it need not be unanimous.

^{9/} Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 10322). In addition, the arbitration chairperson may use the Document Production Lists as guidance for discovery issues involving non-parties.

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THE ARBITRATOR'S MANUAL
SECURITIES INDUSTRY CONFERENCE ON ARBITRATION ("SICA")

[SICA Arbitrator's Manual, page-9]

Prehearing Conference

The Uniform Code provides that the parties shall cooperate in the voluntary exchange of documents and information to expedite the arbitration. The staff will monitor compliance with the rule and will schedule a prehearing conference to resolve remaining issues. Once a prehearing conference has been scheduled, an SRO staff member or an

[SICA Arbitrator's Manual, page-10]

arbitrator will be appointed to help resolve the discovery issues as well as any remaining questions.

An arbitrator appointed to preside at a prehearing conference is authorized by the Uniform Code to act on behalf of the entire panel in issuing subpoenas, directing appearances, ordering the production of documents and information, setting deadlines, and issuing any other order that may serve to expedite the process and permit any party to develop its case fully. This includes the ability to issue orders for the production of witnesses for depositions when deemed appropriate by the arbitrators and where it is impossible to compel the attendance of the person to be deposed. Access to depositions should be granted to preserve the testimony of ill or dying witnesses, or of persons who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to attend the hearing, as well as to expedite large or complex cases, and in other situations deemed appropriate by the arbitrator. Balanced against this ability, however, is a traditional reservation about the overuse of depositions in arbitration.

The effective use of discovery tools such as depositions rests in the careful exercise of judgment by the arbitrators. Care should be taken to avoid unnecessary expense or burdens to the parties and to avoid

unnecessary delay. It is appropriate for arbitrators to consider whether the witness will be able to appear at the arbitration hearing, the necessity of preserving the witness's testimony, and other factors that bear on the efficiency and fairness of the proceeding.

Prehearing conferences to resolve discovery disputes are becoming more numerous and time consuming. The same is-

[SICA Arbitrator's Manual, page-11]

issues repeatedly arise. The following documents frequently have been produced by parties or ordered produced by arbitrators, where relevant, in other cases. This list is neither exhaustive nor are all of the documents necessary to every case. Consideration should be given to the type of controversy and the issues involved in a particular case. Before ordering that a party produce a particular document, you should weigh a party's ability to fully develop his/her case against the reasonableness of the burden to produce the document. You may limit, as appropriate, the time periods of the documents covered by your order to the relevant time periods in the case. You may request that the full panel be convened to decide prehearing issues. Some arbitrators desire to make these decisions with the benefit of the expertise of their colleagues who will be rendering the final decision.

A. Customer Cases
From the Firm

(1) RE-3s, U-4s and U-5s of registered representatives (RRs).

(2) Relevant parts of Compliance Manual.

(3) Client agreements and opening account documents.

(4) RR's holding pages for customer and/or product.

(5) Commission run of RR's.

(6) Correspondence with regulators.

(7) Exception reports (i.e., activity concentration printouts).

(8) Order tickets.

(9) Marketing materials.

(10) Other customer complaints of a similar nature.

(11) Redacted copy of holding pages of other customers in the same product.

[SICA Arbitrator's Manual, page-12]

(12) Any analysis or account reconciliation prepared by the firm.

(13) Notes or recordings made by the firm.

From Customers

(1) Income tax returns (can be limited to Form 1040 pages I and 2 and Schedules D and E).

(2) Customer copy of account statements.

(3) Statements for accounts at other brokers.

(4) Any analysis or account reconciliations prepared by the customer.

(5) Notes or recordings made by the customer.

(6) Correspondence by claimant with the brokerage firm or financial consultant.

B. Employment Cases [omitted]

As arbitrators, presiding at prehearing conferences or when called on to decide discovery disputes, you should always give

[SICA Arbitrator's Manual, page-13]

consideration to the arguments put forth by both sides, as well as the relevancy of the documents or information, and not simply grant a request for the production of a document because it is listed above nor deny the request because it is not listed here.

If a party objects to document production on grounds of privacy or confidentiality, you may suggest a stipulation between the parties that the document(s) in question will not be disclosed and/or not used

in any manner outside of the arbitration of the particular case or issue a confidentiality order.

In addition, the arbitrator should, to the fullest extent possible, encourage the parties to:

(1) mutually exchange documents and information,

(2) enter into stipulations,

(3) agree to the joint submission of premarked exhibits,

(4) narrow the issues in dispute,

(5) identify witnesses and the subject of their testimony, and

(6) identify documents to be used at the hearing.

The arbitrator should consider whether briefs or legal memoranda on an issue are desirable and, if so, establish a schedule for their submission. In addition, the parties may ask the arbitrator if telephone or affidavit testimony will be allowed at the hearing.

The arbitrator may also consider other issues raised by the parties, such as consolidation, severance, or the location of the hearing. The arbitrator may refer these or any other issues raised to the full panel for resolution.

If the prehearing conference is based on written submissions, the arbitrator

[SICA Arbitrator's Manual, page-14]

may request additional information from the parties. The arbitrator should communicate his or her request to the staff, which will notify the parties. If the prehearing conference is to be conducted by telephone, the arbitrator will be advised by the staff of the date and specific time scheduled for the conference. Prior to the conference, the staff will provide the arbitrator with any written submissions pertaining to the preliminary issues/disputes to be resolved. The arbitrator should be fully familiar with all submissions before the prehearing conference begins.

On completion of the prehearing conference, the arbitrator should advise the staff of his or her decision on the preliminary issues, the stipulations, and any other matters.

When stipulations are entered into by the parties, the staff will advise the full panel of the stipulations prior to the first hearing. The staff will record the results of the prehearing conference and submit it for signature to the arbitrator and/or the parties where appropriate.

Arbitrators' Power to Issue Orders

An arbitrator may be requested to issue a subpoena directing the appearance of a witness and/or the production of documents. This request will be communicated to the arbitrator with the subpoena and any other relevant materials.

The arbitrators may also direct the appearance of an employee of any member firm of an SRO and direct that a member firm produce any documents in its possession or control. Accordingly, arbitrators may consider using an Order of Production or Appearance in lieu of a subpoena if the party being directed to produce is a member or person associated with a member. Failure to

[SICA Arbitrator's Manual, page-15]

honor an order of an arbitrator may subject a member or person associated with a member to disciplinary action.

The arbitrator should read all the materials supplied as well as the pleadings in the case before executing the subpoena. The arbitrator should consider the propriety and relevance of the materials requested as well as the timeliness of the subpoena request. It is the obligation of the party requesting a subpoena to serve it in accordance with the law. The person on whom the subpoena is served must have a reasonable opportunity to comply with or contest the subpoena.

An arbitrator may decline to issue a subpoena that he or she feels is inappropriate or that has been requested in an untimely manner, thereby delaying the proceedings.

Subsequent to the issuance of a subpoena or order for the production of documents or information, you may be advised that the party to which the order was directed has not complied with its terms.

Arbitrators have wide discretion in addressing such noncompliance. For example, you may make an adverse inference against the party that did not comply with the order; assess adjournment fees, forum fees, or other costs and expenses, including attorneys' fees, caused by noncompliance; initiate a disciplinary referral in the instance of noncompliance by a member firm or associated person of a member firm; or take other appropriate action to expedite the proceedings or assist any party to develop fully its case. In extraordinary cases the arbitrators may strike all or part of a claim or response. Prudent use of the discovery procedures is designed to reduce the prejudice to parties unable to obtain voluntary production of documents

[SICA Arbitrator's Manual, page-16]

and information without imposing undue costs. Arbitrators should generally not allow parties to reargue the merits of the original order when resolving such compliance disputes.

Initial Pre-Hearing Conference Procedure

The Arbitration Panel should be prepared for the conference call approximately one half hour before the scheduled call. Please note that the Script that will be read to the parties is in regular type face. Information in italic type face is intended to clarify points for the arbitrators and does not need to be read to the parties.

The Initial Pre-Hearing Conference procedures set forth below may, in the discretion of the arbitrators, be varied to allow all parties a full and fair opportunity to present their respective positions. The NASD Regulation, Inc. Office of Dispute Resolution staff member, if present, or the Arbitration Panel chairperson, will initiate the following:

A. **Introduction of the Arbitrators:** I would like to begin by introducing the Arbitration Panel to the parties.

B. I would now like to elicit the names of the attorneys of record. I will also ask one of the attorneys to volunteer to memorialize the dates we all agree to in this discussion and fax this memorandum to the NASD Regulation, Inc. Office of Dispute Resolution within 48 hours. This need not be a formal order. If no one volunteers to prepare the memorandum, I will assign this task to one of the attorneys.

C. I want to reconfirm to the parties any disclosures previously made by any arbitrator(s). (*Any additional disclosures by any arbitrator(s) should be made to the parties at this time.*)

D. I would now like oral confirmation by all of the parties that they accept the Arbitration Panel's composition.

E. **Oath of Arbitrators:** I would like the arbitrators to confirm that they have executed an oath and that they submitted the executed oath to the NASD Regulation, Inc. Office of Dispute Resolution.

F. I will now acknowledge and identify the papers submitted by the parties and received by the Arbitration Panel. These papers include: (*list documents*)

G. **Mediation:** I want to make sure that the parties are aware that NASD Regulation, Inc. Office of Dispute Resolution now has a mediation program available to the parties. If you are interested, please contact an Office of Dispute Resolution staff member for more information.

H. **Selection of Hearing Dates:** I will now begin with scheduling hearing dates for this matter. I want to remind the parties that it is better to err on the side of too many hearing dates to avoid delay in the arbitration process.

1. I would first like to know whether the parties have selected mutually agreeable hearing dates for consideration by the Arbitration Panel.

a. (*If yes, discuss the dates with the Arbitration Panel.*)

b. (*If no, continue by requesting the parties' availability for the hearings, on a month by month basis, until sufficient dates have been selected.*)

During the initial Pre-Hearing Conference, hearing dates are to be set despite a party's failure to prepare for the selection of hearing dates.

I. **Discovery Cut-Off Date:** I would like to hear from the parties regarding the establishment of a discovery cut-off date. Please be aware that a due date means the documents are to be received at the NASD Regulation, Inc. Office of Dispute Resolution by 5:00 P.M. on this date. (*Discuss. Determine if there are any discovery issues that will need to be addressed or outstanding motions. Please set a discovery cut-off date and create a discovery plan for the parties. This will help avoid discovery delays and hearing postponements.*)

J. **Motion Inquiry:** I would like the parties to address whether there is a need for a Pre-Hearing Conference or to have a motion resolved on the pleadings concerning discovery or other motions at this time. (*If a*

Pre-Hearing Conference for discovery or other motions is required, please schedule. Note that discovery motions are traditionally handled by the Chairperson alone. Dispositive motions must be decided by the entire Arbitration Panel and there must be a hearing with a record on any dispositive motion. The Arbitration Panel should decide whether motions will be considered "on the pleadings" or at a Pre-Hearing Conference. Please keep in mind the additional costs to the parties resulting from Pre-Hearing Conferences. If no motions need to be scheduled, skip to "L.")

K. Motion Pleadings Deadlines: As a motion needs to be considered, the Arbitration Panel needs to establish deadlines for the submission of motion pleadings. *(Discuss. If motions need to be considered, deadlines must be established for the submission of the parties' motion pleadings. For example, the parties may inform you that they need the Arbitration Panel to decide a motion to preclude an answer not timely filed. The Arbitration Panel should decide whether any submissions have been filed and whether the issue can be decided based on the submissions filed. If no pleadings were filed, the Arbitration Panel should establish deadlines for the filing of the motion, the opposition, and a reply. In addition, it is suggested that all submissions be received by the NASD Regulation, Inc. Office of Dispute Resolution at least 10 calendar days before the Pre-Hearing Conference, so that documents may be forwarded to the chair or Arbitration Panel.)*

L. Arbitration Briefs: The Arbitration Panel needs to address whether the parties intend to submit arbitration briefs, and if so, set the deadline for submissions of the briefs to the NASD Regulation, Inc. Office of Dispute Resolutions. *(Discuss.)*

M. Party-Arbitrator Communication: I would like to remind the parties that you may not communicate with the Arbitration Panel except when in the presence of all parties, counsel or representatives, and that all correspondence and pleadings must be sent to

the NASD Regulation, Inc. Office of Dispute Resolution for distribution to the Arbitration Panel.

N. Financial Matters: I would like to advise that the Arbitration Panel may order that additional session deposits be made by the parties pursuant to Rule 10205(a) or 10332(a) of the Code of Arbitration Procedure.

O. To expedite delivery of the award to the parties upon conclusion of the arbitration hearing by the NASD Regulation, Inc. Office of Dispute Resolution, the Arbitration Panel directs that the parties' counsel (or the parties if they are not represented) deliver to the staff person administering this case a draft summary of the parties' case at least 10 business days before the first scheduled day of the hearing on the merits. This summary should not be longer than three double-spaced paragraphs and should merely set forth a summary of the submitting parties' claim or defense of the claim. Instead of a typed version, the summary may be submitted on a 3-1/2 inch computer diskette. The Arbitration Panel will have final editorial authority of this summary as it will be included as part of the ultimate award issued in this matter in the event the case goes to a hearing.

P. Conclusion: Are there any other matters that need to be addressed at this time? *(If no):* This concludes the initial Pre-Hearing Conference. NASD Regulation, Inc. Office of Dispute Resolution staff will be in contact with you to confirm the dates and deadlines established today. Speaking for the Arbitration Panel, I would like to thank you for your time and cooperation. The parties are asked to disconnect from the line at this point and the Arbitration Panel is to remain on the line.

Q. Executive Session regarding additional session deposits: *Push *0 on the phone to connect with the MCI operator. Confirm that only the arbitrators are on the line. Discuss whether to assess additional hearing session deposits pursuant to Code of Arbitration Procedure Rule 10205(a) or 10332(a).*

PRE-HEARING MOTION TO ESTABLISH ARBITRATION PROCEDURES

**PUBLIC INVESTOR'S
PRE-HEARING MOTION
TO ESTABLISH ARBITRATION PROCEDURES**

NASD# _____

Public Investor _____

Broker-Dealer _____

To maximize the orderly, efficient and cost-effective manner in which the above captioned arbitration hearing can be conducted, the above captioned Public Investor moves this Arbitration Panel for the adoption of the following items.

As to those items agreed to by the Arbitration Panel, the Public Investor requests that the Chairperson of the Panel affix his or her initials where indicated at the end of each requested item.

1)-**PRE-MARKING ARBITRATION EXHIBIT BOOKS:**

A)-**CLAIMANT'S HEARING EXHIBIT BOOK:** The Claimant's arbitration exhibits, other than those attached to the Statement of Claim, shall be bound together in Claimant's Hearing Exhibit Book. Said book shall contain a table of contents, with a column on the right for the arbitrators to initial documents taken into evidence. All documents shall be separated by alphabetical tabs

B)-**RESPONDENT'S HEARING EXHIBIT BOOK:** The Respondent's arbitration exhibits, other than those attached to the Answer, shall be bound together in Respondent's Hearing Exhibit Book. Said book shall contain a table of contents, with a column on the right for the arbitrators to initial documents taken into evidence. All documents shall be separated by numbered tabs

[see StuGoldberg's 2003 Practice Guide §§3.2 and 4.4[a][1], [2]]

so ordered

2)-**EXCHANGE OF HEARING EXHIBIT BOOKS:** Twenty days prior to the arbitration, the parties shall exchange their Hearing Exhibit Books. It constitutes an unacceptable practice to avoid this responsibility by a statement in the nature of: "all documents already exchanged or to be exchanged may be presented at the hearing." What is here called-for is a physical exchange of a Hearing Exhibit Book.

[see StuGoldberg's 2003 Practice Guide §4.4[a][3]]

so ordered

PRE-HEARING MOTION TO ESTABLISH ARBITRATION PROCEDURES

3)-**ANTICIPATED CROSS-EXAM DOCUMENTS**: The Hearing Exhibit Books shall contain all documents *reasonably anticipated* to be introduced at the hearing, whether or not on direct or cross-examination or on rebuttal. This requirement calls for more documents that is otherwise provided for in the NASD's Arbitration Procedures.

[see StuGoldberg's 2003 Practice Guide §§3.4 and 4.4[b]]

so ordered

4)-**CONTROVERTED DOCUMENTS**: At any time prior to forty days prior to the hearing, any party may serve upon the other party any document with a demand for an admission of authenticity. All exhibits attached to a pleading, as well as documents turned over as part of an itemized production, should be deemed offered for authenticity. If the receiving party does not object to the authenticity within twenty days of receipt, the document is deemed authentic.

[see StuGoldberg's 2003 Practice Guide §4.4[c]]

so ordered

5)-**EXCLUSION SANCTION**: Pursuant to NASD Rule 10321(c), any document not exchanged or witness not identified in accordance with the above four orders or other pre-hearing exchange requirement, will be excluded from the arbitration hearing of this matter.

[see StuGoldberg's 2003 Practice Guide §3.3]

so ordered

6)-**OPENING STATEMENT-_____MINUTES**: The Public Investor requests the above set forth minutes in which to present the Public Investor's opening statement. During such opening statement, Demonstrable Exhibits may be used, with the understanding that such exhibits are not evidence.

[see StuGoldberg's 2003 Practice Guide §4.4[d]]

so ordered

7)-**CLOSING ARGUMENT ORDER-_____MINUTES**: The Public Investor requests the above set forth minutes in which to present the Public Investor's closing argument. During such closing argument, Demonstrable Exhibits may be used, with the understanding that such exhibits are not evidence. Pursuant to NASD Rule IM-10317, the Public Investor/claimant seeks to present his or her closing argument first,

PRE-HEARING MOTION TO ESTABLISH ARBITRATION PROCEDURES

reserving any portion thereof or the whole for rebuttal or after the respondent declines to present any closing argument. The Public Investor requests the panel's flexibility to increase the length of closing argument should events at the hearing make such extension desirable.

[see StuGoldberg's 2003 Practice Guide §4.4[e]]

so ordered

8)-**EXPERTS AT THE HEARING**: All expert witnesses, other than fact witnesses regularly employed by any party, shall be permitted to remain in the hearing room during all aspects of the arbitration.

[see StuGoldberg's 2003 Practice Guide §4.4[f]]

so ordered

9)-**CORPORATE REPRESENTATIVE**: One, and only one, corporate representative shall be permitted to remain in the hearing room during all aspects of the arbitration.

[see StuGoldberg's 2003 Practice Guide §4.4[g]]

so ordered

10)-**TWO FOUR HOUR HEARING SESSIONS**: To the extent possible, it is requested that both the morning and afternoon hearing sessions last for the full four hours. The morning session commencing at 9 a.m. and going until 1 p.m., and the afternoon session commencing at 2 p.m. and going until 6 p.m.

[see StuGoldberg's 2003 Practice Guide §4.4[h]]

so ordered

[end]

PUBLIC INVESTOR’S FIRST INFORMATION REQUEST

**PUBLIC INVESTOR’S
FIRST “INFORMATION REQUEST”**

- 1)-NASD# _____
- 2)-Public Investor _____
- 3)-Broker-Dealer _____
- 4)-Service of Statement of Claim (“DATE”) _____/_____/2000
- 5)-“Service” Public Investor’s First Information Request—DATE+45 days.
- 6)-Production Due—DATE+75 days.

EARLY SERVICE STATEMENT

NASD Rule 10321(b)(1) permits the service of this Information Request: **“45 calendar days or more after service of the Statement of Claim”** Since you—Broker/Dealer—were served with the Statement of Claim on the date set forth above (“DATE”), you may *deem* this Information Request served upon you 45 days thereafter.

NASD Rule 10321(b)(2) provides that: **“information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service.”** Accordingly, the requested documents are due 45+30=75 days after the Statement of Claim was served upon you (“DATE”).

By this Public Investor’s First Information Request, the Public Investor requests that you produce two categories of documents: first)-the items listed in the NASD Discovery Guide for the lists circled below; and second)-the Additional Documents listed in this Public Investor’s First Information Request:

PUBLIC INVESTOR’S FIRST INFORMATION REQUEST

DISPUTE	NASD DISCOVERY GUIDE	PUBLIC INVESTOR ADDITIONAL DOCS
All claims	1	A
Churning	3	B
Supervision	5	C
Misrepresentation	7	D
Negligence, and/or Fiduciary duty	9	E
Unauthorized Trading	11	F
Unsuitability	13	G

1)-INSTRUCTIONS:

[a] **DELIVERY**: The documents requested herein are to be delivered to the law offices of the attorney for the Public Investor.

[b] **SUPPLEMENTATION**: This and future Requests are continuing in character and nature, and Broker/Dealer shall supplement their responses when additional documents are located or are created.

[c] **BATE STAMPING**: All production should be "bate stamped" or otherwise marked in sequential order.

[d] **IDENTIFICATION**: All production should be identified as to the number of the Request or subpart thereof in answer to which it is being produced, be it pursuant to the NASD Discovery Guide or this Public Investor First Information Request for additional documents.

[e] **CLAIM OF PRIVILEGE**: As to each document (or portion thereof) that Broker/Dealer declines to produce on the ground of privilege, Respondent shall identify the nature of the privilege being claimed and provide the following information in its objection as to each such document: i)-type; ii)-general subject matter; iii)-date; iv)-author; v)-addresses and recipients; and vi)-where not apparent, the relationship between the author and addresses and recipients.

[f] **DESTROYED DOCUMENT**: If any document required to be produced by this or future requests has been destroyed, identify such document by: i)-author; ii)-addressee and other recipients; iii)-date; iv)-subject matter(s); v)-number of pages; vi)-attachments; vii)-date of destruction; and viii)-reason for destruction; ix)-person destroying the document.

[g] **INTERPRETATION**: As used in this First Information Request, and any additional request, words are intended to have their ordinary meaning. To aid in responding to this First Information Request, definitions for some of the terms used herein are set forth below.

2)-DEFINITIONS

[a] **DOCUMENT**: The word "document" shall mean any kind of written, typewritten, printed, recorded, computer produced, computer stored, computer retrievable, tape recorded or graphic materials, however produced or reproduced or stored. Some examples of the types of materials that should be considered documents for purposes of this Information Request include: accounts, advertisements, advertisements, analyses, articles, bills, brochures, brochures, calendars, canceled checks, circulars, commentaries, computer printouts, computer retrievable files even if the computer file is off premises, computer stored files, consultants opinions and reports, contracts, deposit slips, diaries, drawings, drawings, e-mails, expert opinions and reports, graphs, graphs, invoices, journals, ledger sheets, letters, manuals, maps, meeting records, meeting summaries, memoranda, microfiche, microfiles, minutes, motion picture films, notebooks, notes, opinions and reports of consultants, pamphlets, photographs, photographs, plans, press releases, projections, publications, purchase orders, recordings of

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telephone conversations, recordings of the Public Investor's voice, reports, reports, sketches, stickums, subscription agreement, summaries of any requested document, tape recordings, tax returns, telegrams, telephone conversation recordings, telephone conversation records, telephone conversation summaries, telexes, video films, W-9, withdrawal slips, and any other business records relating to the subject matter to which this Information Request refers. You should produce the originals (or legible copies thereof), non-duplicate originals, copies, drafts and/or any other writings now in the possession, custody or under your control, your agents, employees, attorneys, accountants and all other persons acting on your behalf.)

[b] **BROKER/DEALER.** "Broker/Dealer," "You" and "Your" shall mean the Broker/Dealer against which the Public Investor is claiming in this arbitration, and/or the individual Broker (e.g., "registered representative" or "investment advisor" or however this individual(s) who personally handled the Public Investor's account is identified), and shall include your agents, attorneys, accountants, representatives, or any other persons acting for or on your behalf.

[c] **BROKER.** "Broker" shall mean the individual Broker who personally handled the Public Investor's account (e.g., "registered representative" or "investment advisor" or however this individual(s) is identified by Broker/Dealer).

[d] **BROKERAGE ACCOUNT:** "Brokerage account" and "Account" shall mean the Public Investor's account or accounts with Broker/Dealer.

[e] **RELEVANT TIME PERIOD:** The "relevant time period" is that period of time commencing on the date any new account document was executed or the first trade in the brokerage account took place whichever is earlier, and terminating on the date of the last transaction in the brokerage account.

[f] **SECURITY:** "Security" or "securities" shall include but not be limited to stocks, bonds, options, options contracts, commodities, and all types of derivative products.

[g] **AND/OR:** The words "and," "or" and "and/or" are intended to be interpreted synonymously and to encompass both the conjunctive and the disjunctive.

[h] **NOUNS:** All nouns contained herein should be interpreted in both the singular and the plural, male and female.

LIST-A)-ADDITIONAL DOCUMENTS—ALL CLAIMS

[1] **CORRESPONDENCE:** ALL correspondence, exchange of documents, brochures, or proposals or investment plans between the parties before, during or after the brokerage account was opened and closed. This request includes, but is not limited to so-called "happiness letters" and "negative response letters".

[2] **BROKER INFORMATION:**

i)-**PERSONNEL FILE:** The complete personnel file of the broker, however the file is denominated. If there is a file at the branch level and one at the headquarters level in New York or wherever, this request covers all files.

ii)-**RESUMES:** All resumes, biographies or curriculum vitae's ("CV"), letter heads, and business cards of Broker for the relevant time period.

iii)-**NYSE 342.30:** If Broker/Dealer is a member of the New York Stock Exchange, the annual compliance report that Broker/Dealer is required to prepare pursuant to NYSE Rule 342.30 relating to the Broker for the relevant time period.

iv)-**DEPARTURE:** All documents relating to the departure or termination of Broker from employment at Broker/Dealer, if such an event has taken place.

v)-**COMMISSION SPLITTING:** All documents showing commission splitting between Broker and any other individual whether or not said other individual was/is an employee(s) of Broker/Dealer during the relevant time period.

vi)-**PERFORMANCES:** All tape or video recordings or electrical or mechanical recordings or transcriptions thereof of Broker discussing investments either within the Broker/Dealer or to clients, potential clients or other individuals.

vii)-**INDEMNIFICATION:** All documents evidencing indemnification agreements by and between Broker/Dealer and Broker, including but not limited to joint defense agreements, and agreements to provide legal counsel to Broker in connection with this arbitration or any other litigation/arbitration now ongoing, closed or threatened or contemplated.

viii)-**QUALIFICATIONS:** All documents showing the qualifications and licenses held by Broker and any other employee who performed duties with respect to the brokerage account.

ix)-**CONTINUING EDUCATION:** Materials and documents demonstrating Broker/Dealer's compliance with the continuing education requirements of the NASD by Broker/Dealer with respect to Broker.

x)-**ANNUAL BUSINESS QUESTIONNAIRES:** All Annual Business Questionnaires submitted by Broker to Broker/Dealer during the time the brokerage account was open.

[3] **NAMED PARTY INFORMATION:** If the Public Investor's pleading names other employees of the Broker/Dealer as parties to this arbitration, Broker/Dealer shall produce the same type of documents set forth in the previous item regarding "Broker Information."

[4] **PUBLIC INVESTOR INFORMATION:**

i)-**RECORDINGS OF PUBLIC INVESTOR:** Any and all voice and/or picture recordings of Public investor (e.g., tape recordings, motion picture, video picture).

ii)-**TELEPHONE RECORDS:** Telephone records internal and/or from the service provider of each out-going call and each incoming call to or from

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Broker/Dealer and/or Broker, and to or from the Public Investor, at the office or residence of either, whether via a local or an (800) or regular long distance number and regardless of which office of Broker/Dealer the calls were made to or from.

iii)-**CUSTOMER PREFERENCE PROFILE**: All documents relating to the Public Investor: (i) investment objectives; (ii) investment experience; (iii) income; (iv) assets; (v) financial planning; (vi) trading restrictions and trading limits; (vii) withdrawal instructions; (viii) retirement plans; and so-called "Customer Preference Profiles".

[5] **ORDER TICKETS**: The order tickets for each trade in the brokerage account from the first through the last transaction. Include the backside of any order ticket if manually prepared and if any additional information is printed or shown on the reverse thereof; if no relevant information is on the reverse side of the order ticket, include ten such tickets for examination. If orders were placed electronically for all or any portion of the brokerage account trading, produce the original record as first printed out by the firm with respect to each trade in the account.

[6] **CUSTOMER AGREEMENT APPROVALS**: Both the branch and the headquarters' copy of each customer agreement signed by the Public Investor and countersigned by the Broker/Dealer and/or any employee or agent thereof (e.g., for a "Customer Option Agreement," a copy of each one signed and/or approved (by stamp or initials) by the BOM (branch office manager) ROP (registered options principal), SROP (Senior Registered Options Principal) and/or CROP (Compliance Registered Options Principal).

[7] **MARGIN**: Copies of any and all documents pertaining to margin calls and any and all margin information regarding the brokerage account.

[8] **REQUIRED APPROVALS**: All documents indicating managerial or supervisory approvals or authorizations for the purchase, sale or transfer of any security in the brokerage account for which approval is required under Broker/Dealer's or NASD guidelines and policies.

[9] **INTERNAL INVESTIGATIONS**: Documents evidencing any and all internal investigations by the Broker/Dealer of the Broker, as that term is used in NASD Notices to Members 95-21.

[10] **DISCIPLINARY TRANSCRIPTS**: A copy of the transcript, if any, of any and all disciplinary proceedings against the Broker, and a copy of any order or agreement regarding same.

[11] **EXPERT INFORMATION**: Resume, U-4s U-5s and RE-3s (if applicable), curriculum vitae or other written credentials of any expert Broker/Dealer or its attorney(s) intends to call at this arbitration hearing, or any expert consulted in connection with this arbitration or the brokerage account, including any copies of reports prepared for Broker/Dealer by said expert including drafts of such reports as well as any notes, summaries and/or narratives by said expert regarding any issues pertaining to the brokerage account and/or this arbitration. In addition, any charts and graphs prepared for any such expert.

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[12] **DISCOUNTS**: All documents relating to policies or procedures relating to discounts on commissions for clients in general and for the Public Investor in the brokerage account.

[13] **LOSSES**: All documents to support the defense, if raised, by Broker/Dealer that the Public Investor caused the losses in the brokerage account.

[14] **SOLICITED TRANSACTION(S)**: All documents that show that any transaction(s) in the brokerage account was solicited by Broker or any other employee of Broker/Dealer.

[15] **DISCRETIONARY TRANSACTION(S)**: All documents that show that any transaction(s) in the brokerage account was the result of Broker's or Broker/Dealer's exercising discretionary authority (e.g., written or verbal discretionary authority, written or verbal power of attorney, contractual rights such as in situations concerning sell-offs to satisfy margin calls).

[16] **HEARING DOCUMENTS**: Copies of all documents Broker/Dealer intends to introduce into evidence, or otherwise use in any fashion, at the hearing. This request specifically includes documents anticipated to be used for purposes of cross-examination.

LIST-B)-ADDITIONAL DOCUMENTS--CHURNING

[1] **COMPUTER TRIGGERS**: All documents evidencing the triggers or screens employed by the Broker/Dealer which result in an account appearing on an exception or activity report or which otherwise triggers supervisory review based upon high or unusual activity levels, high or unusual commission levels, turnover rates, commissions as a percentage of account equity, and/or Cost/Equity Maintenance Factors.

LIST-C)-ADDITIONAL DOCUMENTS--SUPERVISION

[1] **COMPUTER TRIGGERS**: All documents evidencing the triggers or screens employed by the Broker/Dealer which result in an account appearing on an exception or activity report or which otherwise triggers supervisory review. This would include documents showing the levels at which supervisory review is triggered due to, as examples, high or unusual activity levels as set forth in List-B Item-1 above, trading out of approved categories, concentration, commissions, dollar losses, margin calls, or high risk investments in an account.

[2] **COMPLIANCE MATERIALS**: Compliance manuals of whatever name, such as: procedure manuals, branch office operations manuals, on-line trading operation manuals, on-line trading procedure manuals, registered representative sales manuals, training manuals, manager supervisory manuals in effect during the relevant time period.

[3] **SUPERVISORY CONTACTS**: All documents evidencing that Broker/Dealer's supervisory personnel contacted Broker and/or any other employee of Broker/Dealer and/or the Public Investor and/or any other individual

regarding the brokerage account activity during the relevant time period (e.g., manager's file).

[4] **QUALIFICATIONS**: All documents showing the qualifications and licenses held by any individual who had supervisory responsibility regarding the brokerage account (e.g., branch office manager, branch operations manager, branch compliance officer, and if an options account the ROP, SROP and CROP).

LIST-D)-ADDITIONAL DOC'S—MISREPRESENTATIONS/OMISIONS

[1] **BROKER'S TRADING**: Copies of monthly account statements for all personal and family accounts of Broker.

LIST-E)-ADDITIONAL DOCS—NEGLIGENCE/FIDUCIARY DUTY

[1] All documents set forth is List-C regarding SUPERVISION, and List-G regarding UNSUITABILITY.

LIST-F)-ADDITIONAL DOCUMENTS—UNAUTHORIZED TRADING

[1] **BROKER'S TRADING**: Copies of monthly account statements for all personal and family accounts of Broker.

LIST-G)-ADDITIONAL DOCUMENTS—UNSUITABILITY

[1] **BROKER'S TRADING**: Copies of monthly account statements for all personal and family accounts of Broker to the extent that there are any purchases or sales of the investments at issue in this case.

[2] **DUE DILIGENCE—BROKER**: All documents evidencing that the Broker conducted independent due diligence of the securities at issue, including but not limited to: all literature, brochures, books, documents, newsletters, and any other educational document, that Broker used or referred to in order to make investment recommendations for the investments traded in the brokerage account.

[3] **RECOMMENDED LIST**: All documents, which would show that the securities that were traded in the brokerage account were or were not on the Broker/Dealer's "recommended list" by whatever designation such a "list" is known (e.g., in monthly newsletters to brokers listing "securities of the month"). Also provide documents that establish the dates when these securities were added and/or deleted from such "list".

[4] **OPTIONS**: When a claim is made regarding the unsuitability of options trading (e.g., as a security that should not have been in the brokerage account, specified transactions, concentration, strategies), produce the following documents:

[i] **TRAINING**: Written evidence of any course or study of options on the part of Broker at any time during Broker's life through to the date of the last trade in the brokerage account.

[ii] **LICENSES**: All documents reflecting Broker's possession of a license(s) regarding options, including primary and supervisory licenses.

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[iii] **EDUCATIONAL MATERIALS AVAILABLE**: A copy of the title pages of each book and/or article on options in the personal office or home of Broker available to said Broker during the relevant time period.

[iv] **EDUCATIONAL MATERIALS READ**: A copy of the title pages of each book and/or article on options that the Broker read during the relevant time period.

[v] **SOPHISTICATION—BROKER**: All documents evidencing that the Broker was knowledgeable and/or sophisticated in the area of options both prior to and during the activity in the brokerage account.

[v] **PERSONAL EXPERIENCE**: All documents evidencing that Broker had any personal experience trading in options for his own or a family member's account at any time in Broker's life.

[vi] **OTHER OPTIONS CLIENTS**: All account statements for other of Broker's clients who were trading options during the relevant time period. As set forth in the NASD Discovery Guide concerning List-3, Item-2 concerning churning: "The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction."

[vii] **ADVERTISING**: All documents that identified Broker as an individual having expertise in options, or available to deal with clients' accounts containing options (e.g., internal availability lists of brokers who can answer questions about options upon a Broker/Dealer's receipt of a cold call, business cards, letterheads, lectures on options, newspaper and any other form of advertisement).

[viii] **PROGRAMS**: All documents evidencing any option trading programs, systems or analysis employed by Broker and/or given to the Public Investor.

[ix] **PROFITS**: All documents that Broker may have shown the Public Investor or any other client in which Broker showed what profits Broker and/or any of Broker's clients made or could make trading or recommending options.

[x] **ANALYSIS**: All documents that Broker used in aiding Broker in Broker's analysis of what options strategies and/or specific transactions to recommend.

[xi] **ROP/SROP/CROP FILES**: Complete ROP/SROP/CROP file in connection with brokerage account, including any internal notes, memos or letters to or from Broker or in any way pertaining to the Public Investor's options trading

[xii] **SUPERVISION**: All documents evidencing notification, consent, approval, help, monitoring or any other input by Broker's superiors with respect to the options trading and/or strategy undertaken in the brokerage account.

[end]

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“L-1/1”=NASD Discovery Guide, List-1, Item-1;

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