

My name is Richard Lewins, and I am an attorney whose practice centers on representing investors in claims against broker-dealers, brokers and investment advisors. I have represented almost 300 clients in the past 15 years, and currently serve on the Board of Directors of the Public Investors Arbitration Bar Association (“PIABA”).

As a general proposition I support the position espoused by the President of PIABA in his comment letter on behalf of the Association. I recognize that while this iteration of the Discovery Guide is far from perfect, on par it is better than no Guide or the Guide as it currently stands.

I want to stress two points: (1) it cannot be overstated how disadvantaged customers are in the current state of arbitration. They are in a hostile forum, not of their choosing; they are not being heard or judged by a jury of their peers; and more times than not they are put on trial under the guise of defense. Many sections/list items that they are required to produced as “presumptively discoverable” underscores this last point.

Most cases boil down to suitability/misrepresentation and/or omission. These are actions and determinations that are made at a specific time; a time at which if the broker has done their job correctly, they should already have the information necessary to support the recommendation. However, the current and proposed Discovery Guide take the approach that the time of the filing of the claim is the time to make that determination. Financial wherewithal, sophistication, experience, other investments and the like are all items the broker should know at the point of purchase/recommendation. Making that information presumptively discoverable after the fact in essence gives the broker a “quasi-put” as a defense.

Point (2) is that no matter what the Guide says, if non-compliant/abusing parties (usually the Respondent firm/broker) are not made to feel the effects of their non-compliance/abuse in the form of real monetary sanctions, then all of this is just rearranging deck chairs on the Titanic. What good is having more presumptively discoverable documents and information if the Respondents can wrap themselves in the warm blanket of, “we ain’t gonna give it to you so what are you gonna do about it!” Until arbitrators are instructed to levy meaningful sanctions for abuse and non-compliance, then this Guide and the ones to follow will have no meaningful positive impact on the process.