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SAC ROUNDTABLE DISCUSSION

Investment Adviser Arbitration: What You Need to Know

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Ross Tulman, Trade Investment Analysis Group (OH)
Jeffrey Zaino, American Arbitration Association (NY)

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SAC: *This is the third in our series of Roundtable discussions. In each case, we have produced video podcasts of our conversations and posted them on SAC's YouTube Channel. The first two podcasts have together garnered more than 500 visits to date. This Roundtable Discussion was similarly recorded and posted on YouTube, although the recording differs in some respects from this print version. The video podcast version of this discussion is most easily accessible through a "button" link on the HomePage of SAC's Blog, This time around, our topic requires an introduction.*

The ranks of the investment advisory community have grown rapidly over the past decade. As the asset-gathering model has led to more wirehouse brokers migrating to RIA platforms, and more investors, shaken by the tech-crash and the 2008 financial crisis, have looked for professional advice as a protection against uncertain markets. Dodd-Frank in 2010 added more RIAs to the existing ranks with the requirement that hedge funds managers and other money managers become RIA-registered.

At a time when the two disciplines, RIAs and BDs, are becoming more alike, and are even being forced into a consistent regulatory regime, the situation in arbitration could not be more different. RIAs are not required, as FINRA members are, to arbitrate upon the demand of a client. Advisor representatives are not required, as are brokers signing Form U4s, to arbitrate their employment disputes. RIAs are not subject to disciplinary sanctions, if they do not timely pay Awards assessed against them in arbitration.

Perhaps 40% or 50% of RIAs employ pre-dispute arbitration agreements (PDAAs) in their client advisory agreements, as contrasted with near ubiquitous use of PDAAs among broker-dealers. And those RIAs who do utilize PDAAs do not have a developed and specialized SRO forum with oversight from the SEC. Yet, the SEC will presumably need to harmonize these two dispute resolution regimes using its Dodd-Frank Section 921 powers.

More detailed bios of our speakers appear at the end of this article. We thank our guest speakers for participating and ask readers to understand that their views, opinions, and projections are their own personally and do not necessarily represent those of the organizations with which they are associated.

FRIEDMAN: What we are going to discuss, consistent with that introduction, are the current federal and state regulatory landscape, which RIAs are able to use FINRA arbitration, the advantages and disadvantages of

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SAC Roundable Discussion
As the subject for our third SAC Roundtable Discussion, we chose to explore the use of arbitration to resolve disputes between investors and the RIAs who manage their money. This is a very different dispute environment, as our Panel explains, one where arbitration is under-utilized, where FINRA is still feeling its way, and where the AAA has initiated new procedures to assist retail investors, among other consumers........................... 1

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that forum, and similar questions about the American Arbitration Association forum, and how advisory clients fare in arbitration versus court? Finally, at the end - our favorite part - we will poll our panelists for their predictions about the next five years.

The State of Investment Adviser Arbitration Today

Our first core topic is the state of investment advisor arbitration today, and we have questions to set the background. Let me start with Ross.

The first questions, where are the cases coming from and who's administering them?

TULMAN: Most of the cases that I'm seeing involve large firms -- they're broker dealers and they're broker-dealers operating on dual platforms. That is, they have clients that have accounts that are both investment advisory accounts and brokerage accounts. And because of that, most of the IA cases I've seen are actually in FINRA. Occasionally I see some in the AAA, but because of the hybrid nature of most of these cases, they're actually in FINRA.

FRIEDMAN: Glenn, what's your take on this one?

GITOMER: George, I have seen cases against RIAs, which are pure RIAs. They tout the fact that they are independent from broker-dealers and broker-dealer products, and they use separate platforms, separate broker dealers to house their securities. It's quite clear that their decisions in managing the account are independent from the custodial broker. In those cases, just episodically, I note that sometimes there are pre-dispute arbitration agreements, and sometimes there are not.

Where there are PDAAs, they typically by default designate the American Arbitration Association. We have experience in several of these cases under the AAA Consumer Arbitration Program, which will treat these arbitrations under AAA's consumer rules. There are, of course, those cases where we do have broker-dealers involved who are also serving as registered investment advisors, and in those cases, clearly FINRA is the default arbitration forum.

FRIEDMAN: Thanks. We will want to hear more from Jeff about those new consumer rules a bit later. Sal, what do you see from your side of the table?

HERNANDEZ: From what I see, the vast majority of cases are still being conducted with FINRA, as Ross said, because, more often than not, when you're dealing with an RIA situation, it's someone who is dually registered with a broker dealer. Then, the entire matter ends up in FINRA. I think, since the passage of Dodd-Frank, there's been a lot of discussion from a regulatory standpoint about what happens when we have a true independent RIA.

Should there be arbitration? Should the dispute go to court? Those are all just

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questions right now that are in a state of flux, because of the unanswered questions in the legal and regulatory landscape about the role and duties of an RIA, versus a registered rep of a broker-dealer. Obviously, that's one of the big discussions we'll have today. But, as far as where am I seeing cases coming from and who's administering them, there's no doubt it's still FINRA, first and foremost.

FRIEDMAN: That's a good segue to the next topic, which is the current state of the federal regulatory landscape. Just to review, among many things, Dodd-Frank invited the SEC to recommend a self-regulatory organization, an SRO for investment advisors. Sal, what's happening in that regard?

HERNANDEZ: Dodd-Frank was passed in 2010, and as part of Dodd-Frank -- Section 913 of Title 9 -- the SEC was required to conduct a study. One of the things SEC was tasked to evaluate was the legal and regulatory gaps in standards for the protection of retail customers relating to all types of investment advice, whether it is the pure kind of broker-dealer relationship or the fiduciary relationship between registered investment advisors and their clients.

That study was completed and submitted to Congress. It was rather comprehensive in terms of studying the differences between the applicable standards of care and evaluating the regulatory schemes between a registered rep of a broker dealer versus a registered investment advisor. It seemed as if there was momentum gathering to harmonize the two regimes and, as far as I can tell, there hasn't been much progress since then.

I think the big question will be: Is FINRA the appropriate self-regulatory organization to oversee registered investment advisors, or should a completely separate SRO be established? Right now, the answer to that question is unclear. The commentators I have read seem to think that FINRA is a logical entity to govern both. But, ultimately, Congress will need to decide this front-end question – even if FINRA is the appropriate arbitration regime, is FINRA the appropriate regulatory regime? If the answer to the latter is yes, then I would think the obvious answer would be, yes, it's also the appropriate arbitration dispute resolution system as well.

FRIEDMAN: Let's do a lightning round on the follow up question to this one.

As you know, Dodd-Frank allows the SEC to ban or regulate or limit these pre-dispute arbitration agreements for BDs. It also allows the Commission to do the same for investment advisor contracts. Let's assume the Commission acts under Dodd-Frank to regulate PDAAs in broker-dealer contracts, would you recommend they do the same thing? Take a consistent approach with RIAs?

TULMAN: Yes, I do. I think that they should do the same thing, and I think what they should do is put the RIAs in a position to offer arbitration in the broadest form possible, in as many forums as feasible -- not just FINRA or the AAA -- as many as are practically available. The reason I'm saying that is because I think, if and when the SEC acts, you will get pushback from the claimants, or claimants/plaintiffs bar, including PIABA, and the best way to deal with that is to give retail customers the widest choice available in getting their due process.

FRIEDMAN: OK, Sal, your view on that**.** Same approach? Uniform approach?

HERNANDEZ: I think it makes sense to have a uniform approach. I agree with Ross that more than one forum ought to be available to the customer so the customer can make a decision regarding the forum.

FRIEDMAN: OK, Glenn?

GITOMER: There is a real difference between, say, AAA, and FINRA, in that FINRA is a tightly-regulated entity. The forum is overseen in great detail by the SEC and its rules are all subject to SEC approval. If you were to give customers a choice between AAA, JAMS and FINRA, I don't think that the SEC can really get into overseeing the rule process and the oversight of those other entities.

However, I think it's a good thing to have a choice of forums. So, from a claimant's perspective, if you want a heavily regulated environment and arbitration within a very carefully defined and regulated forum such as FINRA, you can choose that. But you can also choose to go outside of that and go to a forum, which doesn't have the same level of oversight.

I think it would be a mistake to require, if AAA is available to the consumer, to have the SEC have the same type of oversight of American Arbitration Association arbitrations, as an example, as it has of FINRA. It would be the customer's choice to say, I don't necessarily care about having the SEC oversight and the promulgation of very specific rules as I would get in FINRA.

FRIEDMAN: And Jeff, I haven't spoken for AAA in quite some time, but I'm guessing that AAA is OK on choice.

ZAINO: Absolutely! Multiple choices sound like the right thing, clearly the right approach.

FRIEDMAN: Let's discuss state regulation and its potential impact on RIA arbitration. The states were given examination and regulatory power by Dodd-Frank over RIAs with assets under management of $100 million dollars or less.

Massachusetts Secretary Galvin did a survey in his state in 2013 measuring the use of arbitration in investment advisor contracts. They heard from about half of the investment advisors in the state. Almost all used written contracts. That's not shocking, but, about half used mandatory pre-dispute

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arbitration agreements, so that's an interesting development. The survey report also opined that "a clause binding an investor to arbitrate a dispute before its circumstances are established may not be in that client's best interests, nor ... consistent with the fiduciary duty owed to the client by the investment adviser." Glenn briefly, what do you hear from the states about this topic?

GITOMER: Very little, George. Here in Pennsylvania I really don't think, and in the other states that I'm familiar with, there is a lot of focus on this subject. The fact is, I think, the $100 million dollar and less threshold is making arbitrations with independent RIAs of that size much less of an issue.

FRIEDMAN: Anyone else on states?

TULMAN: My comment would be that I have had interaction with the Ohio Division of Securities over the years. I've always had a pre-dispute arbitration agreement in my contract, and I've never gotten any pushback whatsoever.

FRIEDMAN: All right, let's move down to the last couple of issues. Jeff, let's give you a chance. You've heard the American Arbitration Association mentioned a couple of times. That Galvin survey also showed that, of those RIAs that are using mandatory arbitration agreements with a specified provider, about two-thirds name the AAA, about 16% FINRA. So, AAA is apparently a big player, at least in terms of the pre-dispute arbitration agreements that are out there.

So let me start with a *voir dire*, Jeff. How many RIA cases does the AAA get in a year's time?

ZAINO: First, everyone's right with respect to FINRA doing the majority of the RIA cases. That's correct. These disputes are not currently a big part of AAA's caseload. We handle about 250,000 cases a year, and, out of that, our consumer disputes account for about 1,300 cases and, out of that, about 10 percent, 130, involve registered investment advisor-type cases. The majority of our consumer cases relate to credit cards and auto dealership-type disputes.

Now, in 2014, the AAA had over 400 securities-type cases, business-to-business disputes filed under our commercial rules that were amended in October 2013. Some of these cases involved multiple investors, registered investment advisors, and the commercial rules were applied rather than the consumer rules. In 2014, I'm happy to say, we saw a 7% increase in securities-related disputes at the AAA. We are doing pretty well also in 2015. The types of cases that we see in these areas generally allege failure to disclose risks, the making of false guarantees, unsuitable investments or fraud.

Just touching on our panel roster briefly, we have about 7,500 arbitrators across the country. And out of that group, 431 of our AAA arbitrators are experts in handling securities disputes. Our panelists must have a minimum of ten years of securities-related experience. They are all carefully vetted by vice presidents across the country and understand both our consumer and our commercial rules where these disputes are handled.

FRIEDMAN: You mentioned two sets of rules, the commercial arbitration rules, which have been around for a long, long time, and the consumer rules, which are of recent vintage. So what factors determine which set of rules applies?

ZAINO: We have been applying the new consumer rules, effective September 2014, on investment cases when the investment is for personal use or gain and not invested on behalf of a company or a business. That's the distinction right there. The consumer rules are not used for business-to-business disputes at all.

The biggest change to the new consumer rules is that we are no longer using the consumer supplementary procedures. Now it's an actual rule set. We think standalone is much better and it defines the consumer process much better. The new rules are consistent with many of the changes in our commercial rules that were updated in 2013. However, the cost structure is different in the consumer rules and we default to a single arbitrator in the consumer rules, unless the contract provides otherwise. In the commercial rules, the default calls for three arbitrators, when the controversy involves half a million dollars or more. So there's a distinction there, too.

Another distinction between the consumer and the commercial rules concerns the rules on exchange of information between the parties. Rule 22 in the consumer rules is specifically tailored for a fast and economical process, a more streamlined process. It's worded differently than our commercial rules. Also a nice thing about the consumer rules is the consumer due process protocol that we reference in the consumer rules. It ensures a process for the registered investment advisor and the individual investor that will be fundamentally fair – an independent impartial arbitrator of high quality and competence, independent administration, and, for the consumer, a reasonable cost and a required, convenient location. These are all part of the due process protocol -- reasonable time limits, and, most importantly, access to information for both parties.

Also in 2014, we launched the consumer clause registry, where registered investment advisors and companies can register their arbitration clauses. If they haven't registered their clause before filing the case with the AAA, that's going to delay it a little bit. They must come into compliance with the due process protocol and register with the AAA registry before going forward, which is, I think. a great thing that we're now doing at AAA.

FRIEDMAN: So they can cure the defect after the case is filed?

ZAINO: That's correct.

FRIEDMAN: Thanks, Jeff. Now we're going to move on to the last bullet point,

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arbitration at FINRA. None of us here is speaking for FINRA. We did invite FINRA to participate and they declined. So, I'll ask Ross to summarize the core question, which is, under what circumstances do investment advisor disputes with clients end up at FINRA?

TULMAN: Well, the most common circumstance -- probably 95 percent of the scenarios – start with a retail customer who has accounts with a respondent who is duly registered as an investment advisor and as a broker dealer.

Quite commonly, what you will see, even if the account is primarily an investment advisory relationship -- whether using the firm's internal asset managers or asset managers from the outside -- is that almost all of these clients will have broker-dealer accounts as well. And the reason that they do that is to house certain asset classes, such as private equity fund, hedge funds, structured products, that are typically offerings, and the firms will not put those in advisory accounts, because it would result in a double dip on the fees.

So, where you have these combinations you've got a customer who does have a brokerage account, but he also has an advisory account, with a compliant ADV form and advisory contract. Those disputes, because of the dual registration, are typically winding up in FINRA arbitration. That's the vast majority of cases.

Now, I will say that, although I don't think this was supposed to happen, over the years I have seen a handful of cases of non-affiliated advisors and their clients who slipped into a FINRA arbitration when both parties stipulated to the forum, and both signed the uniform submission agreement, and for whatever reason, FINRA accepted the case. I realize that's not their policy, but I did see that happen from time to time.

FRIEDMAN: If you can hazard a viewpoint on this, what do you think is FINRA's take on investment advisor cases where dual BD-RIA registrations are not involved? Do you have any views on why they're declining those cases?

TULMAN: Yes, I do. I think there are two reasons. One is they don't have any regulatory jurisdiction over non-members. So, what are you going to do if a FINRA panel issues an Award, and there's an issue with respect to non-payment?

The other scenario is, you know, and I'm not sure how they would work this out, but if you're a non-affiliated person, investment advisor, and FINRA sees something that's egregious, whereas on the BD side they might make a disciplinary referral, they're hamstrung as to non-BDs. I don't know what they could do because they don't have jurisdiction over these people.

So other than that, I can't really see any reason why they wouldn't, but, in trying to think through what the possibilities are, I think those are two likely scenarios.

FRIEDMAN: Here's something for folks to check out on the FINRA website. There is a special submission agreement that the parties execute in these independent RIA cases -- again, cases where there isn't a dual registered BD involved. Under limited circumstances, FINRA will take the case. It has to be a post-dispute agreement to arbitrate between the non-member and its client. There are several warnings given, as Ross pointed out. FINRA has no enforcement authority against a non-complying investment advisor. Parties have to agree that the Awards are published. The opportunity is there, though, and it's certainly worth taking a look at.

What do the Parties Want?

I think it's time to move on to our next topic, which is, what do the parties want? We're going to ask the main participants here to weigh in. I'll call on each of you, but I also want speakers to react to the AAA rules and which rules or which forum might be more appropriate.

Let me start with factors that are important to RIAs. I'll ask Sal to address that -- and while you're addressing that, certainly cover what factors in the AAA's rules make them attractive, or, for that matter, not attractive.

HERNANDEZ: Thanks, George. Certainly, I think, in order to answer the question of what factors do you consider in deciding to advise an RIA to utilize a pre-dispute arbitration agreement or not, you have to ask, who are the RIA's clients?

I mean, if the clients of the RIA are larger institutional-type clients, or clients with substantial assets, that RIA may want to remain outside of arbitration. That's because there are more procedures at their disposal. There's more expansive discovery. There's no question there can be depositions. There are motions to dismiss under FRCP Rule 12. There's an extensive summary judgment procedure. To the extent you are going to trial, you have a motion *in limine* practice to vet out evidentiary issues. Not all of these mechanisms are necessarily available in arbitration.

And so you have to ask, who are the clients of the RIA? Now, there are also a number of reasons why an RIA may want to utilize a pre-dispute arbitration agreement. It is faster. I agree with Jeff's comments wholeheartedly. Also, discovery is more streamlined. There's much less likelihood for the use of depositions. And while there's still a dispositive motion practice, with the exception of timeliness motions, I have not seen it utilized that much, and not successfully.

There's no jury, of course. The cost is much less. And when you're dealing with relatively small matters, less than $25,000 in dispute, the AAA consumer rules even offer documents only procedures where essentially the parties submit the matter "on the papers," and then the arbitrator decides. Under R-29 of the AAA's new consumer rules, that process is available. These are the things that are attractive to an RIA in deciding whether to use a pre-dispute arbitration agreement. But then, of

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course, depending on who the clients are, the RIA may still want to remain outside of arbitration.

FRIEDMAN: OK, let's look at this from the customer's viewpoint. Glenn, I guess that's a two-part question. First, litigate or arbitrate, and if arbitration, where?

GITOMER: George, I always prefer arbitration because in arbitration you don't have all the defense mechanisms that Sal has iterated at length -- and which cause extreme delay in getting the case resolved. I've had judges sit on motions for six months or longer, an incredible expense that is oftentimes crushing for the claimants.

I also find that arbitration is almost always the fairest and most expeditious way of resolving a case. As far as forum, I practice a lot both in FINRA, and more recently in AAA. I haven't had any securities experience in any other forum, but I think FINRA and AAA each have distinctive advantages, and I like them both. FINRA, of course, has very structured and well-established rules. They have a fairly decent arbitration pool in various jurisdictions.

What I like about AAA, first of all, because the cases I take are mostly based on individuals, they come under the consumer rules. All the consumer has to do is pay a $200 dollar filing fee. The other hearing session fees are borne by the RIA that has required the customer to submit to the AAA forum. That's very favorable. Clearly the expense of filing in FINRA is not that high, but the fee structure at AAA is a big advantage.

The arbitration pool in AAA is very good. I've had very good experience with the arbitrators that have been appointed. Parties select from a small pool of arbitrators with substantial securities experience. I have found that the arbitrators that have been appointed in my AAA cases are also FINRA arbitrators, and they are among the better, more experienced, and I believe the ones that will give a very fair shot to both sides. They tend to be very experienced attorneys in knowing how to run arbitration.

The FINRA pool tends to draw more from people who have an interest in the securities field. It tends to be a little bit broader, but again, it's generally a fair pool. The promptness of the hearing in both forums is very, very important.

I think AAA's consumer rules, as Jeff has pointed out , are very, very effective in moving the cases along. Their arbitrators are educated as to the importance of a prompt hearing. There is flexibility in the rules, and this pertains both to the conduct of a hearing and what kind of discovery will be permitted. How many depositions and if depositions are permitted is largely left to the discretion of the parties, but, ultimately, to the arbitrator in AAA. A lot of the rules in AAA are not as carefully defined as they are in FINRA, but, generally, the folks who run the AAA securities arbitrations are fair-minded and knowledgeable attorneys who know how to run the process.

I think, with respect to the administration of the process, AAA has the flexibility not to be subject to very tight SEC oversight, so it is a little bit more flexible in dealing with certain issues. Again, I find both forums to be very favorable. I practiced very frequently in FINRA for many, many years and now more frequently in the AAA.

FRIEDMAN: Now for the expert's perspective. Ross, same core question, litigate or arbitrate, and if arbitrating, where would you go?

TULMAN: My strong preference is for arbitration. I've been in arbitration for 26 years. I think it's a fair process. Having been in a fairly large number of cases in both state and federal court, I don't really see much benefit to anybody in litigating, except maybe for the attorneys working on the cases. It's really an awful process for the plaintiffs and for the defendants, at least from my perspective.

In terms of where do you go, I agree with almost everything that Glenn said. I don't have any experience at all with consumer arbitration rules through AAA. All of my experience has been in commercial rules. So what I would say is, comparing the commercial rules to FINRA, there are some trade-offs.

The cost is astronomically higher in the AAA, relative to FINRA. The flip side of that is, if you have a very large, complex case, perhaps that case can bear the burden of the cost. Smaller cases, though, I don't think so. I don't know exactly how the consumer rules work out, because, again, I haven't had any experience with them, at least not yet.

Quality of the arbitrators: I think generally the quality of the arbitrators is good in both forums. FINRA has, I would say, a little less consistency than the AAA. In my experience, the AAA arbitrators operating under the commercial rules are absolutely the finest arbitrators I've encountered. They're very dedicated people. I have nothing bad to say about them; everything is good.

My last point is that the AAA does tend to be more like a court proceeding. Depositions, which you never get in FINRA, are very common. I wind up writing a lot of reports that look like Rule 26 reports, so it's not quite the "cowboys and Indians" scenarios that you get in a regular FINRA arbitration.

FRIEDMAN: Jeff, I just want to circle back to one point on the costs. If a case is filed under the consumer rules, as I understand it -- I should know, I'm on the panel and took the AAA training -- the fees are much lower. Is that correct?

ZAINO: Yes, much lower. As Glenn mentioned, the consumer pays $200 dollars for any of the types of arbitration -- the "desk" arbitration, in-person or telephonic with a single arbitrator, or an in-person or telephonic with three

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arbitrators. It's still only $200 dollars for the consumer.

For the business, the investment advisor, has a filing fee for "desk" arbitration of $1,500 and then the arbitrator's compensation is $750 for the one day. For the in-person with one arbitrator, or telephonic, the business would pay a $1,500 filing fee, and the arbitrator would get $1,500. So it is minimal, relative to the commercial fee schedule. And then with the three arbitrators, the filing fee goes up just slightly to $2,000; the arbitrator compensation stays the same at $1,500. But, as was just mentioned, there's a big price difference in comparison to the commercial rules of the AAA.

2020 Foresight

FRIEDMAN: Now, on to our third group of questions. These aren't really questions, but topics. I'm going to ask each of the panelists to weigh in succinctly on where they think we're going to be five years from now. Some of the issues you might touch upon include: Is FINRA going to be handling IA disputes? Should it? Should AAA, for that matter. What else might happen? What changes are needed?

If we do this podcast again in 2020, what are we going to be talking about? I'll ask Glenn to weigh in first on that.

GITOMER: I think the most important thing going forward will be choice. As we've mentioned, FINRA will take these cases. I've asked my opposing counsel to agree to post-dispute arbitration agreements when they're not FINRA members. There will be choice, I believe, whether it all comes under FINRA's jurisdiction or not.

I think it's important to continue to have a selection of forums available to handle these matters. I think as well there is going to be a greater impetus towards SRO regulation of the RIAs and it makes much greater sense to do that under the umbrella of FINRA, rather than building an entire new house from scratch.

FRIEDMAN: Thank you. Sal?

HERNANDEZ: I agree with Glenn. It seems to be a good prediction that FINRA would be handling IA disputes on more of a formal basis, and not necessarily through the guidelines that FINRA released a couple of years ago. That could be easily established, even before there's further "harmonization" – to use a word from the Dodd-Frank study -- between the fiduciary standard of an RIA, which is more stringent than the analogous standard of a registered rep. So that's my prediction, especially since we're going to see, and are already seeing, more dual licensed RIA/ registered reps, and more pure RIAs -- completely independent, fee-based type advisors.

FRIEDMAN: Thanks. Ross?

TULMAN: I think FINRA is going to go where their members go, and the members are clearly moving to the IA platform. They're doing this to capture a more consistent revenue stream because of the continuing fee structure. And they're also doing it -- they're going to have to do it -- to keep their producers from migrating to fee-based platforms elsewhere, which has been happening for quite a while.

So, FINRA's going to face a choice. Either they're going to adjust and arbitrate the issues that their members are involved in, or they're going to get out of the arbitration business. If they try to keep this thing focused on the transaction-based broker dealer, I just don't think in five years there's going to be much of that business left, at least not from the retail standpoint. Now, member firms and institutional investors, that's a different issue. That transactional side will still exist, but for consumer arbitration, I think FINRA will definitely migrate to the IA platform.

FRIEDMAN: Jeff, what are your thoughts on this?

ZAINO: Well, I'm optimistic. We're seeing some growth here at AAA, but I hope FINRA, AAA and other administrative agencies continue to get the word out about the advantages of ADR. There are so many advantages now. We discussed a lot of them today. I also believe the new AAA consumer rules and the registry are going to go a long way to making people feel comfortable using the ADR process.

FRIEDMAN: OK, I'm going to call on myself. I haven't weighed in on too much of substance, but predicting the future is too much fun. People can't say I'm wrong, for sure. They can just disagree, unless they claim to be from the future.

First, in five years, *someone* will be the SRO for investment advisors. I just think it would be untenable for ten years to elapse from the enactment of Dodd-Frank for that issue not to be addressed. The fiduciary issue will be addressed as well. Those are not difficult predictions to make. I agree with what I've heard about the migration to the RIA model. It's continuing to happen.

As regards arbitration, I do think AAA and FINRA will still be administering RIA arbitrations, but FINRA will be handling arbitrations on a more formal basis. By that I mean, the SRO issue is going to be resolved. And whether FINRA is the SRO or some other entity is, I think FINRA is uniquely positioned to actually administer the arbitrations for the RIA SRO.

It's not shocking or unusual for FINRA to be the arbitration forum for different SROs. There are actually several SROs that provide for FINRA to handle their member arbitrations. So, no matter how the SRO issue works out, I think FINRA is going to end up doing the arbitrations, as it currently does for others. And there'll be some harmonization between the current rules that really are set up for BD cases and cases involving registered investment advisors.

All that'll be worked out, so when we get together in 2020 we'll be able to talk about what's happened. Those are my thoughts for the future.

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SAC Roundtable Discussion *cont'd from page 7*

I see our time is up. I want to thank our panel and *SAC* for a stimulating program. I know we could have taken another hour to go through all the issues, but great job, Glenn, Jeff, Ross and Sal!

FACULTY BIOS:

George H. Friedman is an ADR consultant and *SAC* Board of Editors member. He retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. Before that, he held a variety of positions of responsibility at the American Arbitration Association, most recently as Senior Vice President from 1994 to 1998. For the last 19 years, George has been an adjunct professor of law at Fordham Law School, teaching arbitration. He serves as Chairman of the Board of Directors of Arbitration Resolution Services, Inc. and is the principal of George H. Friedman Consulting, LLC. He is also on the AAA's national panel of arbitrators. George holds a JD from Rutgers Law School.

Glenn Gitomer is chairman of McCausland, Keen & Buckman's litigation practice, primarily focused on representing investors who assert claims against the financial services industry. Currently, Glenn is on FINRA's National Arbitration and Mediation Committee. He is a former PIABA Director and a graduate of Indiana University's Robert H. McKinney's School of Law, and New York University.

Salvador M. Hernandez is a partner at Riley Warnock & Jacobson, PLC., where he regularly represents and counsels clients through complex civil litigation in the state and federal courts, as well as in the FINRA Arbitration forum. He is a graduate of Vanderbilt University's School of Law and Princeton University, and is a member of the Tennessee Bar.

Ross P. Tulman is Senior Partner of Trade Investment Analysis Group in Columbus, Ohio, providing expert witness services to counsel engaged in securities arbitrations and litigations. Ross has been an active participant in the dispute resolution process for more than 25 years and has testified in both state and federal court and in arbitrations before FINRA, and other SRO fora, including AAA and JAMS. He serves as an arbitrator for FINRA and the NFA. He is a state-registered investment advisor, a member of SAC's Board of Editors, occasionally serves as a mediator, and is an active member and past officer of the Securities Experts Roundtable. Mr. Tulman earned his BA in English from Emory University and an MBA in Tax and Finance from Xavier University.

Jeffrey T. Zaino is Vice President of the Commercial Division of the American Arbitration Association in New York. There, he oversees the administration of the large complex commercial caseloads, user outreach, and the Panel of Commercial Neutrals in New York. He's been with the American Arbitration Association for some 25 years. Jeff's a graduate of Western New England University School of Law.

EDITOR'S ADDENDUM: *While FINRA was not a participant in our Roundtable discussion, the staff at FINRA Dispute Resolution did respond to questions we posed about a situation we did not cover fully in our dialogue: the custodial broker-dealer (BD) and the independent registered investment advisor (RIA). Here are our questions and the staff's responses:*

Question:

What would be FINRA's response when a customer names a broker-dealer in a claim that's aimed at the conduct of a non-member RIA on the broker-dealer's custodial platform? What if the customer names the RIA? What if the BD third-party claims against the RIA?

Response:

1. FINRA Rule 12200 requires FINRA registered brokerage firms and associated persons to arbitrate at the request of a customer. Thus, whether or not there is a pre-dispute arbitration clause in the customer agreement, FINRA registered brokerage firms and associated persons are required to arbitrate at FINRA at the request of a customer.
2. FINRA would accept cases between non-member Registered Investment Advisors (RIA) and their customers on a voluntary post-dispute basis when there is also a FINRA registered brokerage firm or associated person named as a party to the case. These cases would be distinguished from disputes solely between customers and non-member RIAs (which claims could be resolved on a voluntary post-dispute basis under the special procedures described here: http://www.finra.org/arbitration-and-mediation/guidance-disputes-between-investors-and-investment-advisers-are-not-finra.)
3. In this scenario, FINRA would accept the third party claim on a voluntary post-dispute basis (since there is also a FINRA registered brokerage firm or associated person named as a party to the case).

Question:

Would it matter to FINRA's response if a court were to order the RIA to arbitrate at FINRA? Let's say that the court finds the customer is a party to a pre-dispute agreement with the RIA or that the customer is an intended third-party beneficiary of an agreement to arbitrate between the custodial BD and the RIA?

Response:

FINRA would comply with a court order directing non-member RIAs to arbitrate at FINRA.