

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. CAF040079

Hearing Officer – DRP

**ORDER GRANTING ENFORCEMENT'S
MOTION TO OFFER TESTIMONY VIA TELEPHONE**

On January 30, 2006, the Department of Enforcement filed a motion seeking leave to offer the testimony of five customer witnesses via telephone during the disciplinary hearing scheduled to commence on May 2, 2006 in Chicago. On February 13, 2006, Respondent filed its opposition to Enforcement's motion.

According to Enforcement, the proposed witnesses reside in different parts of the country and are unable or unwilling to travel to Chicago for personal or professional reasons.¹

In opposition, Respondent asserts that the credibility of customer witnesses is vital, that "live testimony is necessary for credibility determinations," and contends that its ability to cross-examine the witnesses will be unfairly limited if they are permitted to testify via telephone. Respondent urges that its need to confront the witnesses in person outweighs their objections based on personal convenience and contends that allowing the witnesses to testify by telephone violates Respondent's due process rights.

¹ RT, who is 75 years old, lives in Michigan and recently underwent triple bypass surgery; RM, who is 63, resides in Texas and has childcare responsibilities for her granddaughter; JB is a small business owner in Pennsylvania; RC recently started a new job as an accountant in Nebraska; and DS has professional obligations as a company executive in Pennsylvania.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-21 (CAF040079).

In all cases, hearing panels and parties would prefer to have witnesses testify in person; however, telephone testimony is often a practical necessity, because NASD has no power to compel the attendance of witnesses who are not subject to the NASD's jurisdiction. Such is the case here. Thus, the alternatives to telephone testimony are no testimony from these customer witnesses at all, or presentation of their evidence by written declaration, with no opportunity for Respondent to cross-examine, or for the hearing panel to ask questions of its own.² Telephone testimony is preferable to either of these alternatives. Cross-examination may be more difficult over the telephone, but it can be done effectively, and hearing panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses' demeanor.

Telephone testimony is a familiar and well-accepted part of NASD disciplinary proceedings and has been approved on numerous occasions by the SEC. Contrary to Respondent's assertions, there is nothing inherently distinctive about this hearing that renders telephone testimony inappropriate. The Hearing Officer concludes that Respondent will not be unfairly prejudiced and rules that the out-of-state witnesses may testify by telephone.

Thus Enforcement's motion is granted with respect to witnesses RT, RM, JB, RC and DS, subject to the following conditions:

1. On or before April 21, Enforcement shall file a declaration from each witness testifying by telephone that the testimony she or he will give at the hearing will be truthful.
2. Enforcement shall ensure that each witness has, at the time of testifying, copies of all exhibits that relate to that witness's direct testimony, as well as any exhibits that

² The Hearing Officer has discretion to admit such declarations, even if they would not be admissible in a judicial proceeding, because Rule 9145 provides that "[t]he formal rules of evidence shall not apply in a proceeding under the Rule 9000 Series."

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Respondent may designate for possible use on cross-examination. Respondent must provide any such exhibits on or before April 21.

3. Enforcement shall ensure that each witness will be available by telephone during a period of time when it is reasonable to expect that the witness will be called to testify, so that the hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: March 8, 2006
Washington, DC