

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C05050008

Hearing Officer – SW

**ORDER GRANTING RESPONDENT'S MOTION
FOR PRODUCTION OF DOCUMENTS PURSUANT TO RULE 9253**

On January 6, 2006, Respondent filed a motion for entry of an order compelling the Department of Enforcement ("Enforcement") to produce all witness statements in accordance with NASD Procedural Rule 9253.

On January 25, 2006, Enforcement responded that, in compliance with Procedural Rule 9253(a)(1), it had produced all transcripts and recordings of oral statements given by the witnesses in this proceeding. These documents were transcripts of investigative testimony.

In addition, Enforcement represented that it did not possess any written statements or notes covered by Procedural Rule 9253(a)(2). As to certain staff interview notes that were not produced to Respondent, Enforcement contended that they did not constitute "substantially verbatim" records, and they therefore were not covered by the Rule.

The Hearing Officer agrees that Rule 9253(a)(1) is the NASD analogue to the Jencks Act, 18 U.S.C. 3500(e)(2), and requires production of a "substantially verbatim recital of an oral statement made by" the witness. Conversely, notes that are not

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-17 (C05050008).

substantially verbatim accounts of what the witness stated need not be produced pursuant to Rule 9253(a)(1).¹

However, Rule 9253(a)(2) also requires NASD staff to produce written statements made or adopted by staff members, if they relate to the subject matter of those persons' testimony. The Notice to Members 00-56 (2000) explains that the language of Rule 9253(a)(2) means that the portions of routine examination or inspection reports, internal employee communications, and any other internal documents that outline the substance of (and any conclusions regarding) oral statements made by persons who are not employees of NASD are required to be produced under the Rule if evidence of those statements is to be offered by the staff during a disciplinary hearing.

In his motion, Respondent moved for production of all documents that meet the requirements of Rule 9253, but he did not specify any particular documents that he claims were improperly withheld. Accordingly, the Hearing Officer cannot assess whether there were any documents withheld that should have been produced. Nevertheless, Respondent is entitled to all materials that fall within the scope of Rule 9253. Thus, to the extent that Enforcement intends to call NASD staff to testify at the Hearing about conversations reflected in the staff member's notes, Enforcement is ordered to produce such notes to Respondent no later than February 13, 2006.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
February 7, 2006

¹ See, Palermo v. United States, 360 U.S. 343, 350 (1959).