

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A980027
v.	:	
	:	
	:	Hearing Officer - EAE
	:	
	:	
Respondent.	:	
	:	

**ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE TO
OFFER TELEPHONE TESTIMONY**

On October 13, 1998, the Department of Enforcement ("Enforcement" or "Complainant") filed a Motion for Leave to Offer Telephone Testimony ("Motion"). The Motion states that Complainant intends to call four customer witnesses of Respondent _____ ("Respondent") who are scattered throughout the United States and anticipates that each customer will testify consistent with the allegations of the Complaint.¹ The Motion further states that the witnesses will explain in greater detail their dealings with Respondent and that the customers are not subject to the jurisdiction of the NASD.

In further support of its Motion, Complainant set forth the witnesses' reasons for not attending the Hearing as follows:

¹ The Complainant alleges that Respondent made material misrepresentations and fraudulent price predictions to these same four customers to induce them to purchase certain securities. The Complainant alleges violations of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5 thereunder, and NASD Conduct Rules 2110 and 2120.

1. ____: Resides in _____. Declined to travel to the Hearing because she is leaving the country on November 12 and cited the timing of the Hearing relative to her trip and the cost of traveling to New York.

2. ____: Resides in _____. Declined to travel to the Hearing because of the cost of travel to New York.

3. ____: Resides in _____. Declined to travel to the Hearing because of professional commitments which require his physical presence.

4. ____: Resides in _____. Declined to travel to the Hearing because of family and professional commitments and also the cost of travel to New York.

On October 23, 1998, Respondent, by and through counsel, filed a Response opposing the Motion ("Opposition"). As grounds for said Opposition, Respondent states that it is standard policy of Enforcement to have witnesses testify in person and that Complainant is requesting a deviation from this standard. Respondent also argues that because the Complainant alleges a cause of action under SEC Rule 10b-5 which requires Enforcement to prove that the customers justifiably relied on Respondent's alleged misrepresentations and/or omissions, Respondent is entitled to test the expertise and sophistication of the customers by examining the trading activity in each customer's various brokerage accounts. Respondent argues that if the customers were not present at the Hearing, he would be unable to question them adequately and introduce their account statements into evidence.² Thus, Respondent suggests that he will be denied the right to introduce exculpatory evidence and his ability to defend himself will be severely prejudiced.

² Respondent also argues that the customers' physical presence is required for the mere mechanical act of introducing evidence. This simply is not true. As discussed herein, compliance with the procedures for telephone testimony set forth in this Order will ensure that each witness, as well as the Parties, receives in advance of the Hearing those exhibits that either Party intends to use for purposes of examining that witness.

The Hearing Officer finds Respondent's arguments unavailing. First, it is the policy of Enforcement to require witnesses to testify in person when they are subject to the jurisdiction of the Association. Here, Complainant has represented that the four customers are not subject to the jurisdiction of the Association and Respondent has not introduced any evidence to the contrary.

Second, effective cross-examination with respect to prior trading activity does not require the physical presence of each witness as suggested by Respondent. This Order sets forth sufficient procedures to ensure that both Parties will have an adequate opportunity to examine the witnesses and to introduce all relevant evidence notwithstanding the fact that the witnesses will testify telephonically.

Further, Complainant has demonstrated that the witnesses are located some distance from the Hearing location and also has cited the reasons they are unwilling or unable to travel to New York. In its Motion, Complainant also has set forth the legal authorities, unchallenged by Respondent, supporting its position.

The issue of whether to permit telephone testimony, especially in a case such as this involving fraudulent sales practice and alleged violations of SEC Rule 10b-5, always is a difficult one. There is no question that telephone testimony is permissible in NASD disciplinary proceedings and satisfies the fairness requirement in Section 15(A)(b)(8) of the Securities Exchange Act of 1934.³ This is especially true in NASD disciplinary proceedings since the NASD lacks power to compel the attendance of witnesses who are not subject to its jurisdiction, such as the customers who are the subject of the Motion. The inability to present relevant evidence through telephone testimony may impede NASD's disciplinary process, at least in some

³ See Motion at 3-4 and cases cited therein.

cases. On the other hand, there is an obvious "preference for the actual appearance of witnesses in NASD proceedings."⁴

In ruling on the pending Motion, the Hearing Officer has reconciled these competing considerations, the position of the Parties, the witnesses' inability or unwillingness to attend the Hearing and the reasons therefore, and the nature of the proposed testimony. Based on this analysis, the Hearing Officer has determined to allow telephone testimony. As noted previously, Respondent's concerns regarding cross-examination and the "mechanics" of introducing evidence are adequately protected by the procedures set forth in this Order.

Therefore, Enforcement's Motion is granted subject to the following terms and conditions:

1. Enforcement will be responsible for ensuring that functioning speakerphones are available at the Hearing so that members of the Hearing Panel, the Parties, and the court reporter can clearly hear the testimony.

2. Enforcement shall arrange to secure either (a) a competent notary to swear the witness, or (b) a signed declaration or affidavit attesting, under penalty of perjury, that the witness's testimony will be truthful. Copies of witness declarations and affidavits shall be filed and served five days in advance of the Hearing and the originals shall be available at the Hearing.

3. By November 2, 1998, Enforcement shall provide to Respondent a list of all exhibits about which each witness will be questioned on direct examination. Enforcement is to designate which exhibits relate to which witness.

⁴ DBCC No. 3 v. Gibbs, Complainant No. DEN-1001, NASD Discip. LEXIS 93, at *29 (August 26, 1991), aff'd, 51 S.E.C. 482 (1993), aff'd, 25 F.3d 1056 (10th Cir. 1994)(Table).

4. By November 4, Respondent shall notify Enforcement of all documents that he will use during the cross-examination of each witness. Respondent is to designate which exhibits relate to which witness. If Enforcement does not have a copy of any of the designated documents, Respondent shall provide a copy with the notice.

5. Because Enforcement will have the opportunity to preview the documents Respondent will use for cross-examination, by November 6 Enforcement shall notify Respondent of all documents it may use on re-direct examination. If such documents have not previously been produced to Respondent, Enforcement shall provide copies to Respondent with the notice.

6. Enforcement shall ensure that each witness receives, and has at the time of examination, copies of all exhibits relating to direct, cross, and re-direct examination of that witness.

7. Enforcement shall ensure that each witness will be available on the date and at the appointed time the witness is scheduled to testify. Except in extraordinary circumstances, if the witness fails to so appear, the testimony will not be rescheduled.

8. Enforcement shall ensure that there is a means to contact each witness during the Hearing in the event that there is a change in scheduling or the witness is to be recalled to give additional testimony.

SO ORDERED

Ellen A. Efros
Hearing Officer

Dated: Washington, DC
October 27, 1998