

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-28 (C05000021).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C05000021
v.	:	
	:	Hearing Officer - GAC
	:	
	:	
	:	
Respondent.	:	

**ORDER GRANTING COMPLAINANT’S MOTION FOR LEAVE TO OFFER
TELEPHONE TESTIMONY AND TO ALLOW WITNESS TO BE ASSISTED BY
(REMOTE) INTERPRETER**

The Department of Enforcement’s Complaint alleges misconduct by Respondent, _____ (“_____” or the “Respondent”), with respect to the handling of a customer’s brokerage account at Dean Witter Reynolds, Inc. (“Dean Witter”). Specifically, the Complaint alleges that Respondent violated NASD Conduct Rules 2110, 2120, and 3040 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder by making misrepresentations to the customer, effecting an unauthorized transfer to customer assets, and engaging in a private securities transaction without providing prior written notice. In his Answer, Respondent denies the allegations of the Complaint.

Enforcement has moved for leave to introduce, by telephone, the testimony of the customer witness, AM, and to allow the witness to be assisted by an interpreter. According to Enforcement, AM is a 70 year old resident of Austria who was scheduled to undergo back surgery in Austria in August or September 2000. He is not subject to the NASD’s jurisdiction.

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Respondent has opposed the motion asserting that he will be severely prejudiced if the witness is permitted to testify by telephone: he claims that AM should be required to testify in person so that the Hearing Panel may properly assess the witness' demeanor and he may be afforded an opportunity to conduct a thorough cross-examination. For the reasons set forth below, Enforcement's motion is granted.

Discussion

A. General Principles

Section 15A(b)(8) of the Securities Exchange Act of 1934 (Exchange Act) requires that the rules of a self-regulatory association "provide a fair procedure for the disciplining of members and persons associated with members."¹ Fairness in this context does not require that a respondent be afforded the full range of procedural rights guaranteed to a defendant in a criminal proceeding.² Telephone testimony satisfies the Exchange Act's fairness requirement where there is an adequate opportunity to cross-examine the witness; a respondent simply does not have an inherent right to a face-to-face confrontation of witnesses in an NASD disciplinary proceeding.³ Demeanor or "forthrightness of manner may be gauged solely by listening to . . . [the witness's] voice."⁴ Further, as a practical matter, an inability to use telephone testimony

¹ 15 U.S.C. § 78o-3(b)(8).

² See e.g., In re Howard Alweil, 51 S.E.C. 14, 17 (1992).

³ See, e.g., In re Robert E. Gibbs, 51 S.E.C. 482, 484 n.3 (1993), aff'd, 25 F.3d 1056 (10th Cir. 1994) (Table); In re David A. Gingras, 50 S.E.C. 1286, 1293 n. 20 (1992); In re Curtis I. Wilson, 49 S.E.C. 1020, 1024-25 (1989), aff'd, 902 F.2d 1580 (9th Cir. 1990) (Table). The Hearing Officer also notes that the Sixth Amendment right to a face-to-face confrontation applies only in criminal proceedings. See e.g., SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984).

⁴ In re Alderman, Exchange Act Release No. 35997, 1995 SEC LEXIS 1823 n.6 at *4 (July 20, 1995). See also Official Airlines Guide v. Churchfield Publications, Inc., 756 F. Supp. 1393, 1398 n.2 (D. Or. 1990), aff'd, 6 F.3d 1385 (9th Cir. 1993).

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would impede the NASD's disciplinary process in some cases because the NASD lacks subpoena power to compel the attendance of witnesses who are not subject to its jurisdiction.

B. Ruling

The hearing in this proceeding is scheduled to be held in Oklahoma City, Oklahoma on October 17-19, 2000. Customer AM resides in Austria and is not subject to the Association's jurisdiction. Enforcement counsel has represented that AM indicated that considering the great distance, his age and health condition, it would not be possible for AM to travel to Oklahoma City for the Hearing.

In this case, the alternative to telephone testimony is no testimony, but simply reliance on written materials with no opportunity for cross-examination by the Respondent and without the opportunity for Hearing Panel to ask questions of its own. Telephone testimony is preferable to the alternative. Cross-examination may be more difficult over the telephone, but experience shows that it may be done effectively, and that Hearing Panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses.

In addition, while AM's credibility ultimately may be highly material to the outcome of this proceeding, his physical absence is the risk that Enforcement bears by choosing not to have the witness testify in person at the Hearing. Since Enforcement bears the burden of proof, any uncertainty that the Hearing Panel may have about the credibility of the witness, because it cannot observe their demeanor, may be resolved against Enforcement and may affect the outcome of this proceeding.

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As to authentication of documents, the Hearing Officer finds that the witnesses need not appear in person for this purpose. In fact, all issues with respect to authentication of documents to be introduced in evidence should be resolved by the Parties prior to the Hearing and the procedures set forth here for telephone testimony are designed to ensure that the witness has all necessary documents.

Finally, given the fact that English is not AM's first language, it is appropriate to allow the customer to be assisted by an independent interpreter, as proposed by Enforcement.

Conclusion

Based on the foregoing, the Hearing Officer concludes that it is appropriate to allow AM to testify by telephone and that Respondent will not be unfairly prejudiced. Accordingly, Enforcement's motion for leave to introduce AM's testimony by telephone and to be assisted by an independent interpreter is GRANTED, and it is further ORDERED that:

1. Enforcement will be responsible for ensuring that functioning speakerphones are available at the hearing so that the members of the Hearing Panel, the Parties, and the court reporter may clearly hear the testimony.
2. Enforcement shall arrange to have a competent notary public available at the witness' location to swear the witness, or, alternatively, shall offer at the time each witness is called a sworn statement of the witness attesting that the testimony he will give at the hearing will be truthful.
3. Enforcement shall ensure that the witness receives, and has at the time of testifying, copies of all exhibits relating to his testimony.

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4. Enforcement shall ensure that there will be a means to contact the witness during the hearing, in the event there is a change in schedule or the witness is recalled to give additional testimony.

SO ORDERED.

Gary Carleton
Hearing Officer

Dated: Washington, DC
October 5, 2000