

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,		
	Complainant,	Disciplinary Proceeding No. C3A030050
v.		Hearing Officer – SNB
	Respondent.	

**ORDER GRANTING MOTION FOR LEAVE
TO OFFER TELEPHONE TESTIMONY**

On August 20, 2004, the Department of Enforcement filed a motion seeking leave to offer the testimony of SF, a customer witness, by telephone at the hearing in this matter. During the Final Pre-Hearing Conference in this matter, Respondent stated his opposition to Enforcement's motion.

Telephone testimony is a familiar and well-accepted part of NASD disciplinary proceedings, and has been approved on numerous occasions by the SEC. Although Hearing Panels, as well as the parties, prefer to have witnesses testify in person, in many instances telephone testimony is a practical necessity, because the NASD has no power to compel the attendance of witnesses who are not subject to the NASD's jurisdiction. Even if the witness is subject to NASD jurisdiction, however, telephone testimony may be appropriate if the witness's testimony is not central, or is not in serious dispute, and to require the witness's attendance at the hearing would impose substantial costs or inconvenience.

In this case, Enforcement asks leave to offer telephone testimony of a customer who lives and works in Montreal, Quebec, Canada. He will testify as to cause three of the Complaint,

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which alleges that the Respondent engaged in unauthorized transactions in the customer's account. Enforcement represents that the customer is unable to leave his medical practice and travel to Denver to appear in person. Enforcement expects that his direct examination will take less than 30 minutes.

In opposition, Respondent argues that, considering the serious charges made by Enforcement, it is important that the witness testify in person, so that Respondent can effectively cross-examine the witness.

The customer cannot be compelled to attend the hearing, however, because he is not subject to the NASD's jurisdiction. Therefore, the alternatives to telephone testimony are no testimony from the customer at all, or presentation of the customer's evidence by written declaration, with no opportunity for Respondent to cross-examine, or for the Hearing Panel to ask questions of its own. Telephone testimony is preferable to either of these alternatives. Cross-examination may be more difficult over the telephone, but experience shows that it can 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' demeanor. Therefore, the Hearing Officer concludes that it is appropriate to allow the customer to testify by telephone, and that Respondent will not be unfairly prejudiced.

Therefore, Enforcement's motion is granted, subject to the following conditions:

1. Enforcement shall provide for the record the sworn statement that it has obtained from the witness attesting that the testimony he will give at the hearing will be truthful.
2. Enforcement shall ensure that the witness has, at the time of testifying, copies of all exhibits that relate to the witness's direct testimony, as well as any exhibits that

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Respondent may designate to Enforcement, no less than seven days prior to the commencement of the hearing, for possible use on cross-examination.

3. Enforcement shall ensure that the witness will be available by telephone during a block of time when it is reasonable to expect that the witness will be called to testify at the hearing, so that the hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.
4. Enforcement shall be responsible for ensuring that an operable speakerphone is available for use at the hearing.

SO ORDERED

Sara Nelson Bloom
Hearing Officer

Dated: August 25, 2004