

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT EDWARD LOFTUS
(CRD No. 1357423),

Respondent.

Disciplinary Proceeding
No. 2013037575801

Hearing Officer — MAD

ORDER DENYING RESPONDENT'S MOTION TO COMPEL

I. Background

The Department of Enforcement (“Enforcement”) filed the Complaint in this matter on July 15, 2016. The Complaint alleges that Respondent deposited checks drawn on his personal checking account into his brokerage account at member firm Wells Fargo Advisors (“Wells Fargo”), his then-employer, when he knew or should have known that he lacked sufficient funds to cover the checks, in violation of FINRA Rule 2010. On August 11, 2016, Respondent filed an Answer.

On August 31, 2016, and November 16, 2016, Enforcement provided discovery to Respondent, pursuant to Rule 9251.¹ Contained within its August 31, 2016 discovery production were two Microsoft Outlook meeting invitations scheduling calls between Enforcement and representatives of Wells Fargo that took place on April 5, 2016 and April 21, 2016 (the “April Calls”).² When making its discovery production, Enforcement withheld documents relating to the April Calls, specifically Enforcement’s handwritten notes taken during the calls (“Enforcement’s Call Notes”).³

On November 8, 2016, Respondent filed a motion to compel Enforcement to produce documents regarding the April Calls, including all of Enforcement’s notes concerning those calls. Respondent’s motion also requested that Enforcement identify: (1) the request that led to the calls; (2) the subject matter of the calls; and (3) the substance of the calls. Enforcement filed its opposition to Respondent’s motion on November 22, 2016. It argues that the motion should be denied because: (1) Enforcement has met its discovery obligations under FINRA Rule 9251;

¹ See Declaration of Megan P. Davis (“Davis Declaration”) in support of Enforcement’s Opposition, ¶ 3.

² Davis Declaration, ¶ 9.

³ Davis Declaration, ¶ 10.

(2) Respondent has failed to demonstrate his entitlement to the documents sought; and (3) the motion exceeds the scope of Rule 9251. Enforcement supported its opposition with a declaration from Senior Regional Counsel Megan P. Davis, one of Enforcement's attorneys of record in this proceeding.

II. Applicable Law

FINRA Rule 9251 establishes the outside limits of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal courts under the Federal Rules of Civil Procedure. Pursuant to FINRA Rule 9251(a), Enforcement is obligated to allow respondents to inspect and copy non-privileged "Documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings."⁴ Notwithstanding this obligation, Enforcement may withhold any documents protected by FINRA Rules 9251(b)(1) and (b)(2), which include: documents subject to attorney-client privilege; attorney work product; internal reports, memoranda, notes, or other writings prepared by FINRA staff that shall not be offered as evidence; documents that would reveal an enforcement technique or guideline, the identity of a source, or an action under consideration by a regulator; and documents prohibited from disclosure by federal law.

Enforcement's ability to withhold otherwise discoverable documents is limited by FINRA Rule 9251(b)(3), which requires Enforcement to produce any document it withheld pursuant to Rule 9251(b)(1) if it contains "material exculpatory evidence." In a FINRA disciplinary proceeding, "material evidence" is evidence relating to liability or sanctions that might be considered favorable to the respondent's case, which, if suppressed, would deprive the respondent of a fair hearing.⁵ Another constraint on Enforcement's right to withhold documents is Rule 9253, which requires Enforcement to produce certain types of "witness statements." Rule 9253(a)(1) requires Enforcement to produce any document containing a substantially verbatim transcription of a statement made by a potential witness, where the transcription was made contemporaneously with the making of the statement. Rule 9253(a)(2) requires Enforcement to produce a contemporaneously written statement made by Interested FINRA Staff during an exam or inspection about the substance of oral statements made by a non-FINRA person if either person is called as a witness and the statement for which production is sought directly relates to that person's testimony.

III. Discussion

The documents at issue are Enforcement's Call Notes, the handwritten notes taken by Enforcement's counsel. Respondent argues that Enforcement's Call Notes fall within

⁴ The term "Interested FINRA Staff" is defined in Procedural Rule 9120(t)(1).

⁵ See OHO Order 12-04 (2010023367001), at 2-3 (Aug. 30, 2012), http://www.finra.org/sites/default/files/OHODecision/p229424_0_0.pdf; OHO Order 07-29 (2005001919501), at 7 (July 13, 2007), http://www.finra.org/sites/default/files/OHODecision/p037091_0_0.pdf

Enforcement's discovery obligations under Rule 9251. He asserts that these documents are relevant and material to this proceeding, and that he "is entitled to know the information FINRA Enforcement learned as part of the investigation of him."⁶

At the outset, Rule 9251(a) does not contain a relevance or materiality requirement. Documents within the scope of the Rule must be produced regardless of whether they are relevant or material,⁷ unless the Rule authorizes Enforcement to withhold them. Therefore, the determinative issue is whether Enforcement was required to produce them under Rule 9251.

In its opposition, Enforcement addressed the issue of privileged and internal documents relating to its communications with counsel and personnel at Wells Fargo. Enforcement correctly points out that it is not required to produce non-materially exculpatory work product, internal memoranda or other notes or writings prepared by FINRA employees that shall not be offered into evidence. In the Davis Declaration, Enforcement counsel represented that the Enforcement's Call Notes (1) do not contain "material exculpatory evidence"; (2) are attorney-work product prepared by her in anticipation of commencing the above-captioned disciplinary proceeding; (3) are fragmentary and do not contain substantially verbatim statements of potential witnesses recorded contemporaneously with the making of the statements; (4) were not created contemporaneously during a routine examination or inspection about the substance of oral statements made by a non-FINRA person; and (5) will not be offered into evidence. Based on the representations in the Davis Declaration, Enforcement's Call Notes are exempt from production.

IV. Order

Respondent's motion to compel is denied.

SO ORDERED.

Maureen A. Delaney
Hearing Officer

Dated: November 30, 2016

⁶ Resp't's Mot. to Compel, at 4.

⁷ If Enforcement seeks to withhold documents on the grounds that they are irrelevant "or for other good cause," it must obtain leave to do so under Rule 9251(b)(1)(D).