

FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES RANDALL CLAY  
(CRD No. 5748560),

Respondent.

Disciplinary Proceeding  
No. 2014039775501

Hearing Officer: CC

**CASE MANAGEMENT AND SCHEDULING ORDER**

The Hearing Officer held the Initial Pre-Hearing Conference on November 27, 2017, in accordance with FINRA Rule 9241. This Order sets the schedule and other requirements for this proceeding.<sup>1</sup>

If the parties have any questions about this order or the conduct of this proceeding, or wish to schedule a pre-hearing conference, they may contact Catherine Abrams, the Case Administrator assigned to this proceeding. Ms. Abrams' email address is Catherine.Abrams@FINRA.org, and her telephone number is (202) 728-8189.

**I. Hearing and Pre-Hearing Conferences**

**A. Hearing.** By agreement of the parties, the hearing in this disciplinary proceeding will be held **May 15 -17, 2018, in Nashville, Tennessee**. The parties jointly requested that the hearing occur in Nashville, Tennessee in light of the location of necessary witnesses. The parties will be notified of the exact location of the hearing in a subsequent notice.

**B. Final Pre-Hearing Conference.** A final pre-hearing conference will be held by telephone on **May 4, 2018, at 2:00 p.m., Eastern Time**. The parties will be notified of the procedures for participating in the final pre-hearing conference in a subsequent notice.

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<sup>1</sup> The parties also should familiarize themselves with the FINRA Rule 9000 Series—FINRA's Code of Procedure—available at [www.finra.org/industry/finra-rules](http://www.finra.org/industry/finra-rules).

**II. Pre-Hearing Schedule**

The Hearing Officer will amend this schedule only upon a showing of good cause.

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|------------|--|
| 12/15/2017 | Deadline for Enforcement to complete production of documents for inspection and copying pursuant to Rule 9251.   |
| 01/12/2018 | Deadline for Respondent to file: (A) motions relating to Enforcement's production of documents under Rule 9251; (B) requests pursuant to Rule 9252 for Enforcement to issue Rule 8210 requests for information and documents in connection with this proceeding; and (C) requests under Rule 9253 for Enforcement to produce witness statements.<br><br>Deadline for Enforcement to issue Rule 8210 requests for information and documents in connection with this proceeding (except requests to compel testimony or the production of documents at the hearing). |
| 01/26/2018 | Deadline for Enforcement to oppose Respondent's (A) motions relating to Enforcement's production of documents under Rule 9251; (B) requests pursuant to Rule 9252 for Enforcement to issue Rule 8210 requests for information and documents in connection with this proceeding; and (C) requests under Rule 9253 that Enforcement produce witness statements.  |
| 02/02/2018 | Deadline for the parties to file motions for summary disposition pursuant to FINRA Rule 9264.<br><br>Deadline for the parties to file motions for leave to permit expert testimony.  |
| 02/16/2018 | Deadline for the parties to file oppositions to motions to permit expert testimony, <sup>2</sup>   |
| 03/02/2018 | Deadline for the parties to file oppositions to motions for summary disposition.   |

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<sup>2</sup> If permission to call an expert witness is granted, the opposing side shall have seven days from the date of that order to file a motion to call a counter-expert witness. Papers filed in support of a motion to permit counter-expert testimony shall conform to the requirements for a motion to permit expert testimony. Objections to this motion shall be filed within seven days following the filing of the referenced motion.

- 03/30/2018            Deadline for the parties to exchange (but not file with the Office of Hearing Officers) proposed witness and exhibit lists.
- Deadline for the parties to exchange (but not file with the Office of Hearing Officers) proposed stipulations as to undisputed facts and the authenticity and content of documents.
- 04/13/2018            Deadline for the parties to file pre-hearing submissions pursuant to FINRA Rule 9242:
- Stipulations;
  - Pre-hearing briefs;
  - Witness lists;
  - Exhibit lists, including a list of joint exhibits; and
  - Proposed exhibits, including summary and demonstrative exhibits.<sup>3</sup>
- Deadline for the parties to file expert reports if the Hearing Officer granted leave to present expert testimony.
- 04/25/2018            Deadline for the parties to file motions for evidentiary rulings and objections to proposed witnesses and exhibits.
- Deadline for the parties to file motions for leave to present witness testimony by telephone and all other motions relating to the hearing.
- If a party's proposed exhibits include transcript designations, deadline for the opposing party to file counter-designations.
- 05/02/2018            Deadline for the parties to file oppositions to motions for leave to present witness testimony by telephone and all other motions relating to the hearing.
- 05/04/2018            Final Pre-Hearing Conference at 2:00 p.m., Eastern Time.
- 05/15/2018-  
05/17/2018            Hearing in Nashville, Tennessee.

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<sup>3</sup> Filings that do not comply with the requirements set forth in this Order may be rejected.

### **III. General Requirements for Motions and Other Papers**

#### **A. Method of Filing and Service**

All papers shall be served and filed by email unless a party lacks the capability to send and receive emails or the filing exceeds 80 pages in length. All papers filed by email shall be sent in Portable Document Format (PDF) to [OHOCASEFILINGS@FINRA.ORG](mailto:OHOCASEFILINGS@FINRA.ORG).

Documents that are filed by email must be received by 11:59 p.m. (Eastern Time) on the due date.<sup>4</sup> The subject line of the email shall include the case name and the title of the filing. The Office of Hearing Officers' electronic filing system will generate a confirmation of receipt.

If the papers to be filed either exceed the size limit for filing by email or a party lacks the capability to file papers by email, the papers shall be filed by first-class mail or one of the other methods specified in Rule 9134.<sup>5</sup>

#### **B. Signatures on Documents Filed in PDF Format**

A document filed by email that is dated and has a scanned image of a handwritten signature shall satisfy the requirements of Rule 9136(b) and shall be deemed to have been signed by the party, the party's attorney, or the party's authorized representative for all purposes under Rule 9137. Unless otherwise ordered by the Hearing Officer, the filing party shall maintain all original signed documents filed by email until final disposition of the case and the expiration of all appeal opportunities.

#### **C. Format of Pleadings**

All pleadings filed with the Office of Hearing Officers must comply with the requirements of FINRA Rule 9136, except that (1) the body of each pleading shall be in Times New Roman 12-point font, double-spaced, and (2) footnotes shall be in Times New Roman 10 or 12-point font, single-spaced.

Except for motions for summary disposition under Rule 9264, or as otherwise ordered by the Hearing Officer, motions and oppositions shall not exceed ten double-spaced pages (exclusive of pages containing a table of contents, table of authorities, or addenda). Pleadings

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<sup>4</sup> After the specified due date, the parties may not file motions, oppositions, or other papers without first moving for an extension of time. Any party requesting an extension of time must: (1) discuss the extension request with all other parties; (2) include in the request proposed alternative dates; and (3) take steps to ensure, to the extent possible, that the alternative due dates are agreeable to all parties.

<sup>5</sup> The mailing address for filing papers with the FINRA Office of Hearing Officers is:

FINRA Office of Hearing Officers  
1735 K Street, N.W.  
Washington, D.C. 20006

and other documents filed in paper format must be double-sided. If documents are filed in three-ring binders, the binders must not be wider than three inches.

The parties shall not file motions or other pleadings in letter format. The parties shall not send copies of their correspondence with other parties to the Office of Hearing Officers.

**D. Meet and Confer Requirement**

**Motions must include a certification that the moving party has made a reasonable, good faith effort to meet and confer with all other parties to resolve each issue in the motion informally. Motions that do not contain this certification may be rejected.**

**E. Replies**

A moving party may not file a reply to any opposition to a motion without the Hearing Officer's permission.

**F. Oral Argument**

Motions usually will be decided based on the papers the parties file without oral argument. A party may request oral argument in a motion or opposition

**IV. Requirements for Specific Motions**

**A. Motions to Allow a Witness to Testify by Telephone or Videoconference**

Motions seeking leave to offer live testimony by telephone or videoconference shall, at a minimum, address the following points: (1) the identity of the witness; (2) the witness's location; (3) a summary of the witness's expected testimony; (4) the efforts made by the sponsoring party to secure the witness's attendance at the hearing; (5) the reason the witness is unable to appear in person; and (6) whether the witness is subject to FINRA's jurisdiction.

**B. Motions for Permission to Offer Expert Testimony**

A party may not present expert testimony, including expert testimony by FINRA staff, unless the Hearing Officer has granted the party permission.

A party seeking permission to offer expert testimony must establish that the proposed expert's opinion will help the Hearing Panel understand the evidence or determine a fact in issue. Motions for leave to permit expert testimony must include: (1) the name of the proposed expert; (2) a statement of the expert's qualifications; (3) a summary of each of the expert's opinions; (4) a list of other proceedings in which the expert has given expert testimony in the last four years; (5) a list of the expert's publications during the last ten years; (6) a statement establishing that the proposed expert's opinion will help the Hearing Panel understand the evidence or determine

a material fact in issue; and (7) if the witness is a former FINRA officer, a statement that the witness is not subject to the restrictions imposed by Rule 9141(c).

If expert testimony is permitted, the parties should expect that the expert's report will serve as part of the expert witness's direct examination and that the Hearing Officer may limit the amount of time for the witness's direct and cross-examinations.

### **C. Motions for Summary Disposition**

#### **1. Requirements in Support of Motion**

Motions for summary disposition filed under Rule 9264 must be accompanied by: (a) a supporting memorandum of law; (b) a statement of material facts as to which the moving party contends there is no genuine issue and that entitles the moving party to summary disposition as a matter of law; (c) affidavits or sworn declarations that set forth relevant facts that would be admissible at the hearing and show that the affiant is competent to testify about them; and (d) any other evidentiary materials upon which the movant relies.

The statement of material facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends no genuine issue exists. Each fact listed shall be supported by a specific reference to the record where the fact is established.

#### **2. Requirements in Opposition to Motion**

Oppositions to motions for summary disposition must be accompanied by: (a) a supporting memorandum of law; (b) opposing affidavits or sworn declarations that set forth relevant facts that would be admissible at the hearing and show that the affiant is competent to testify about them; and (c) a concise response, in matching numbered paragraphs, admitting or denying each statement of material fact and, in case of any disagreement, specific references to the affidavits, sworn declarations, parts of the record, or other materials relied upon to support the opposition.

#### **3. Form and Filing Requirements**

Unless the file size exceeds 80 pages or the parties lack the capability to send and receive emails, all papers in support of and opposition to a motion for summary disposition shall be filed by email in PDF format sent to [OHOCASEFILINGS@FINRA.ORG](mailto:OHOCASEFILINGS@FINRA.ORG). When a party is unable to file by email, the documents shall be filed in the paper format specified below.

Each memorandum of law must not exceed 35 double-spaced pages (exclusive of a table of contents, table of authorities, or addenda) in Times New Roman 12-point font. Long quotations may be single spaced, and footnotes may be single-spaced in Times New Roman 10

or 12-point font. Paper documents that cannot be stapled conveniently must be submitted in three-ring binders that are not wider than three inches.

The parties must file with the Office of Hearing Officers, simultaneously with their briefs, all evidentiary materials (e.g., affidavits, exhibits, transcripts or other documents) upon which the parties rely in support of or in opposition to the motion for summary disposition, except that the non-moving party may reference materials submitted by the moving party rather than re-submitting additional copies of the same materials. For paper filings, the parties must submit to the Office of Hearing Officers the original and three copies of their briefs and evidentiary materials. Exhibits and other attachments shall be separately tabbed and marked for identification in the manner specified below for proposed exhibits.

**V. Pre-Hearing Submissions**

Pre-hearing submissions shall consist of a pre-hearing brief, a list of proposed witnesses who will testify, a list of proposed exhibits to be offered at the hearing, copies of proposed exhibits, and stipulations, if any, as to uncontested facts and the authenticity, content, and admissibility of exhibits.

**A. Pre-Hearing Briefs**

Pre-hearing briefs may not exceed 35 double-spaced pages. Any brief that exceeds 10 pages must include a table of contents that accurately reflects the organization of the document. The table of contents and a table of citations are not included in the page limit. **Responsive briefs and reply briefs are not permitted.** Briefs should include a narrative summary of a party's case or defense, the legal theories on which the party shall rely, and a discussion of sanctions.

**B. Witness Lists**

Each party must provide a witness list that sets forth the name, address, telephone number, and current occupation of each prospective witness. The witness list should also include a brief summary of the substance and scope of the witness's anticipated testimony.

**C. Exhibit Lists**

Each party must file an exhibit list. The exhibit list shall include all documents that a party expects to use at the hearing for any purpose, including documents that are relevant only for impeachment purposes. The exhibit list shall include a description of each exhibit and a brief statement of the purpose for which the exhibit will be offered in evidence.

If the parties agree to offer exhibits jointly, Enforcement will be responsible for pre-marking the joint exhibits and filing a joint exhibit list that separately identifies and briefly describes each joint exhibit.

#### **D. Proposed Exhibits**

**Pursuant to FINRA Rule 9261(a), proposed exhibits shall not become part of the record unless the Hearing Officer or the Hearing Panel so orders.**

The parties shall submit to the Office of Hearing Officers—in paper format—**four sets** of all exhibits they intend to introduce at the hearing. **The parties also must bring to the hearing a copy of their exhibits in paper format for the witnesses' use during their testimony.**

The parties shall also submit **three sets** of proposed exhibits on a portable media device, such as a CD-ROM or a flash drive. Each portable media device must be encrypted using an encryption method that meets industry standards for strong encryption. The password or other key needed to access the encrypted information shall be provided in a communication separate from the encrypted information itself. The portable media device shall contain the scanned versions of the proposed exhibits in PDF format and must be labeled with the case name, the case number, and the identity of the party submitting the disk.

##### **1. Exhibit Binders**

Paper exhibits shall be submitted in three-ring binders that do not exceed three inches in width, and shall be organized and numbered as provided below. Each exhibit binder shall be labeled on the cover and the spine, indicating the submitting party and the range of exhibits included in the binder.

The parties must ensure that each exhibit is legible. When it is necessary to offer a poor quality copy, the offering party must note on the exhibit that it is the “best available copy.”

##### **2. Exhibit Numbers**

Exhibits must be sequentially numbered and labeled in a manner that identifies the party offering the exhibit. For multiple page documents, each page shall be marked with the exhibit number followed by the page number and the total number of pages in the exhibit. For example, if Enforcement's first exhibit is a ten-page document, it should be marked as follows: CX-1, Page 1 of 10; CX-1, Page 2 of 10, etc. Similarly, if Respondent's first exhibit is a five-page document, it should be marked RX-1, Page 1 of 5; RX-1, Page 2 of 5, etc. Joint exhibits shall be labelled and numbered in a similar manner using the prefix “JX.” Enforcement shall mark and submit joint exhibits.

##### **3. Summary Exhibits**

The parties shall use summary exhibits in place of voluminous collections of data, writings, or recordings. A party intending to offer a summary exhibit must provide the underlying source documents to all other parties when exchanging pre-hearing submissions unless the source documents were provided at an earlier date during pre-hearing discovery. All

proposed summary exhibits shall be submitted with other pre-hearing submissions and must identify the underlying source documents.

#### **4. Objections to Exhibits**

Before objecting to proposed exhibits or witnesses, the parties shall confer to attempt to resolve the objections. The parties may not file objections unless the objecting party certifies in writing that he or she has attempted to resolve all objections with the opposing party. Objections not made by the deadline in the pre-hearing schedule may be deemed waived.

#### **5. Stipulations**

The parties are expected to stipulate to facts that cannot reasonably be contested and to the authenticity of documents that are expected to be offered in evidence, unless they have a good-faith basis to question the genuineness of the documents. Enforcement shall initiate the discussion of stipulations and the parties shall cooperate fully to reach stipulations consistent with the spirit of this Order.

### **VI. Restrictions on the Submission of Personal Confidential Information and Personal Sensitive Information**

A Protective Order Governing Personal Confidential Information ("PCI") has been entered in this proceeding. The Protective Order governs the production, handling, and use of PCI. The parties also shall comply with the following restrictions on the submission of PCI and Personal Sensitive Information ("PSI") to the Office of Hearing Officers.

#### **A. Hearing Exhibits**

Where practical, the parties shall redact the following PCI from exhibits submitted to the Office of Hearing Officers, unless the information is necessary for the determination of the issues in this disciplinary proceeding:

- Social Security numbers;
- taxpayer identification numbers (last four digits allowed);
- passport numbers (last four digits allowed);
- driver's license numbers (last four digits allowed);
- state-issued identification numbers (last four digits allowed); and
- financial account numbers (including checking and savings account numbers, credit card numbers, debit card numbers, or any other numbers or information

that can be used to access a person's financial resources) (last four digits allowed).

By producing a non-redacted exhibit(s), the submitting party represents that it is impractical to remove the foregoing PCI and acknowledges that the exhibit(s), including PCI, may be further disseminated to the other parties in the proceeding.

**B. Pleadings and Other Submissions Prepared by the Parties**

The parties shall not include the foregoing PCI or any of the following PSI in motions, briefs, memoranda, pleadings, and other written submissions prepared by the parties, and shall not refer to this information in testimony, arguments, or statements on the record:

- home address (other than city and state);
- personal telephone numbers;
- date of birth (other than year);
- names and initials of minor children; or
- sensitive health information identifiable by individual (such as an individual's medical records).

**VII. The Hearing**

**A. Examination of Witnesses and Order of Proof**

Enforcement presents its evidence first because it bears the burden of proof. The parties may request permission to proceed in another manner either to accommodate a witness's schedule or to avoid the need to have a witness testify multiple times. Such joint requests must be made at or before the final pre-hearing conference. To aid in the orderly and expeditious disposition of the proceeding, the Hearing Officer may require the parties to call non-party witnesses only once.

Generally, Respondent's counsel will be prohibited from asking leading questions on cross-examination of his or her own client.

**B. Prior Sworn Investigative Testimony and Statements**

**1. Non-Party Witnesses**

Live testimony is favored in FINRA disciplinary proceedings. The Hearing Officer will entertain—but not automatically grant—a motion to admit a non-party's prior sworn

investigative testimony or other sworn statement if the evidence is admissible under Rule 9263(a) and either:

- a. The witness is unavailable to testify in person or by telephone at the hearing, unless it appears that the absence of the witness was procured by the party offering the testimony or statement;
- b. The Hearing Officer determines in the interests of justice that it would be appropriate to allow the use of the prior sworn testimony or sworn statement;
- c. The witness's prior testimony or sworn statement is shown to be inconsistent with the witness's hearing testimony; or
- d. The parties have stipulated to accept the prior sworn testimony or statement in lieu of live testimony.

## **2. Respondents**

A party may use a Respondent's prior sworn investigative testimony or sworn statement for any purpose if it is otherwise admissible under Rule 9263(a). The Hearing Officer may nonetheless require a Respondent to testify at the hearing.

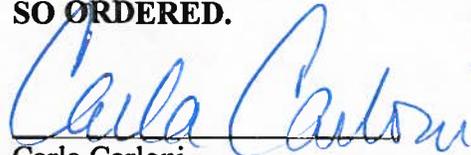
## **3. Introducing Transcripts of Prior Sworn Testimony**

If a party intends to offer a witness's prior sworn testimony for any purpose, the transcript shall be included as a proposed exhibit on the party's exhibit list. The exhibit should include only the portions of the transcript that the party intends to offer as evidence, together with the pages identifying the caption of the proceeding, the date on which the testimony was given, the identity of the witness, and the court reporter's certification. The Hearing Officer may require that all relevant portions of the testimony be introduced and irrelevant portions be excluded.

**VIII. Presentation of Evidence Relevant to Liability and Sanctions**

The Hearing Panel will not hold a separate hearing to determine the appropriate remedial sanction if a violation is found. Thus, the parties must offer at the hearing all evidence bearing on both liability and sanctions including, if applicable, detailed financial information in support of an individual respondent's claim of financial hardship that would prevent the payment of a monetary sanction.

**SO ORDERED.**

  
Carla Carloni  
Hearing Officer

Dated: December 1, 2017

Copies to: James R. Clay (via email and first-class mail)  
Kevin E. Pogue, Esq. (via email and first-class mail)  
David Monachino, Esq. (via email)  
Richard Chin, Esq. (via email)  
Tiffany A. Buxton, Esq. (via email)  
Jeffrey D. Pariser, Esq. (via email)