

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1

RESPONDENT 2

RESPONDENT 3

RESPONDENT 4

RESPONDENT 5

and

RESPONDENT 6

Respondents.

Disciplinary Proceeding
No. 2012030564701

Hearing Officer—DMF

**ORDER GRANTING, IN PART, ENFORCEMENT'S MOTION FOR LEAVE TO
OFFER TELEPHONE TESTIMONY**

On September 29, 2015, the Department of Enforcement filed a motion seeking leave to offer the testimony of up to 23 witnesses by telephone at the hearing in this matter. Respondent 1 filed its opposition to the motion on October 15, 2015. No other respondent has responded to the motion.

In person testimony is favored in FINRA disciplinary proceedings because it facilitates the parties' examinations of the witnesses, particularly where the examinations entail the use of exhibits, as well as the Hearing Panel's ability to understand and evaluate the witnesses' testimony. Nevertheless, telephone testimony is a familiar aspect of FINRA disciplinary hearings. Because FINRA has no subpoena power, it relies on the voluntary cooperation of customers and others who are not subject to FINRA jurisdiction. The use of telephone testimony as an accommodation to obtain this cooperation is well accepted, and has been upheld by the Securities and Exchange Commission.¹ In addition, Hearing Officers may allow a person subject

¹ See, e.g., *Robert Gibbs*, 51 S.E.C. 482, 484 n.3 (1993).

to FINRA jurisdiction to testify by telephone if it would be inconvenient for the individual to attend the hearing and the subject matter of the witness's testimony is limited.

In its motion, Enforcement identifies 10 witnesses who, it asserts, "have indicated that they are unable to travel to New York to testify live at the hearing, but that they are willing and able to testify telephonically at the hearing." Nine of the witnesses are not subject to FINRA jurisdiction. Enforcement lists for each such witness a reasonable health or business ground for their inability or unwillingness to travel to New York for the hearing. The tenth witness is associated with a FINRA member and thus could be compelled to attend the hearing and testify, pursuant to Rule 8210. Enforcement asserts, however, that the witness resides in California; that the witness's testimony will concern "information on [a] Monthly Active Account Report, which was an exception report available to Respondent 1, through its clearing firm, Wedbush Securities, Inc. during the relevant time period as alleged in the Complaint"; and that "[g]iven the brief scope of her proposed testimony and the considerable distance that she would need to travel to testify in person, as well as time away from her duties to Wedbush Securities, [the witness] has indicated that she cannot travel to New York to testify in person."

Although Respondent 1 acknowledges the general rule permitting telephone testimony, it argues that each request for leave to offer telephone testimony must be evaluated on its own merits and asserts that a number of circumstances make Enforcement's request unreasonable in this case. First, Respondent 1 asserts that the sheer number of witnesses is unreasonable and far exceeds the number of witnesses authorized to testify by telephone in prior cases. Respondent 1's premise is incorrect. In fact, similar numbers of witnesses have been allowed to testify by telephone in prior cases, although that circumstance may not be reflected in any published order or decision. In any event, the number of witnesses is not, by itself, a sound basis for precluding them from testifying by telephone, assuming that their testimony would be otherwise admissible. In that regard, Respondent 1 has not argued that any of the proposed witnesses' testimony would be inadmissible under Rule 9252.² If, indeed, the witnesses have admissible testimony to offer, there is a strong interest in finding a reasonable means for them to offer that testimony.

Next, Respondent 1 argues that there are practical difficulties in offering the testimony of customer witnesses by telephone considering the number of proposed exhibits identified by the parties. Enforcement, however, will be required to identify to respondents the specific exhibits that it proposes to use with each witness, and will be allowed to provide only those exhibits to the witness. Respondents will be permitted to provide to the witness any additional proposed exhibits that they want to use in cross-examination. To the extent that the telephone testimony process is made more cumbersome by the volume of exhibits, Enforcement, which carries the burden of proof in this proceeding, is likely to be the most affected party.

² Nothing in this Order is intended to preclude Respondent 1 or any other respondent from objecting to specific testimony that any witness may seek to offer at the hearing on the ground that such testimony is inadmissible under Rule 9263. For present purposes, it is sufficient that Respondent 1 has not made any blanket objection to the testimony of any of Enforcement's witnesses.

Respondent 1 argues that allowing the witnesses to testify by telephone will preclude the Hearing Panel from effectively assessing their credibility, and that such an assessment is particularly critical given the sanctions that Enforcement is seeking, which include expulsion of the firm from FINRA membership. While the ability to observe a witness's demeanor is helpful in assessing credibility, experience shows that the credibility of witnesses who testify by telephone can be evaluated effectively based on other factors, such as the manner in which the witness responds to questions, and whether the testimony is internally consistent and consistent with the testimony of other witnesses and contemporaneous documentary evidence. Those factors apply regardless of the sanctions Enforcement may seek.

Finally, with regard to the one witness who is subject to FINRA jurisdiction, Respondent 1 has failed to offer any rationale for requiring that individual to travel to New York merely to provide testimony about an activity report.

In addition to the 10 witnesses who are unwilling or unable to testify in person, Enforcement seeks back-up authority to call 13 witnesses by telephone. Enforcement states that these 13 witnesses, who are not subject to FINRA jurisdiction, "have indicated that they intend to testify in person at the hearing" but, as a precautionary measure, Enforcement requests leave to offer their testimony by telephone if they are not able to appear in person at the hearing.

While the 13 witnesses have expressed their intention to testify in person, a variety of circumstances could arise that would preclude them from appearing in person, and as noted above, Enforcement would have no means to compel their attendance and testimony. For that reason, it was reasonable for Enforcement to seek leave for them to testify by telephone, if necessary, at this time. Indeed, if Enforcement had not done so, it might have been precluded from raising the issue at a later date if one or more of the 13 advised that they were no longer willing or able to attend.

Nevertheless, because the 13 witnesses have expressed their intent to appear and testify, it is premature to determine whether they would be allowed to testify by telephone. Accordingly, Enforcement's motion will be denied as to those witnesses without prejudice to Enforcement seeking leave to call any of the 13 by telephone if circumstances change. In any such case, Enforcement shall show good cause for allowing the witness to testify by telephone rather than in person.

Finally, Respondent 1 requests that, "as a precondition for each customer to testify," the customer be required to produce a "their account forms, account form updates, margin agreements, account statements, and communications to and from [Respondent 1] and any of its registered representatives, supervisors, compliance officers, or staff, as well as to and from every *other* securities firm where they held securities in the year before, during, and after also holding an account at [Respondent 1]." Respondent 1 asserts that this material would be relevant to "whether [Respondent 1] had *de facto* control over each of the twenty (21) [*sic*] customer accounts at issue in the Complaint."

Respondent 1's request bears no relation to the motion for telephone testimony. It is, rather, an attempt to obtain material that could be used in cross-examination of *any* customer witness, regardless whether the customer testifies by telephone or in person. Nothing in FINRA's rules or any authority cited by Respondent 1 indicates that customer witnesses should be required to provide materials to facilitate their cross-examinations as a condition to being allowed to testify. Respondent 1 claims it has been denied the ability to obtain the customers' account records by other means in this proceeding, but in fact it never sought such materials. As Respondent 1 itself points out, FINRA has authority to obtain account records directly from member firms, but Respondent 1 never requested that such authority be exercised to obtain information about the customer witnesses' accounts at other firms. Respondent 1 cites *Dep't of Enforcement v. Medeck*³ as support for its right to obtain customer witness account records, but in that case the National Adjudicatory Council indicated that the customer witness account records could have been obtained by the respondent through Rule 9252. Respondent 1 made no request for customer witness account records pursuant to Rule 9252.⁴

Accordingly, Enforcement's motion for leave to offer telephone testimony is GRANTED as to the following witnesses, only: CA; LC; JE; CF; MG; RG; PH; BS; JS; and LW. As to the remaining witnesses listed in Enforcement's motion, the motion is DENIED without prejudice.

Enforcement's right to present testimony by telephone will be subject to the following conditions:

1. Before a witness testifies by telephone, Enforcement shall file a sworn affidavit or declaration signed by the testifying witness stating that his or her telephone testimony at the hearing will be truthful, under penalty of perjury.
2. Enforcement shall ensure that each witness has, at the time he or she is called to testify, copies of all exhibits that relate to his or her direct testimony and any exhibits that respondents request be made available for possible use on cross-examination. Enforcement must notify respondents of the exhibits it will provide to each witness no later than seven business days before the witness is expected to testify, and respondents may designate exhibits that they want available for cross-examination no later than three business days before the witness is expected to testify.

³ *Dep't of Enforcement v. Medeck*, No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *55-56 (NAC July 30, 2009).

⁴ Because Respondent 1 did not seek the customer witnesses' account materials under Rule 9252, it is unnecessary to determine whether they would have been entitled to them under the facts of this case.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-14 (2012030564701).

3. Enforcement must ensure that each witness who will testify by telephone is available during a block of time when it is reasonable to expect that he or she will be called to testify, and that there is a working speakerphone where the witness is located.

SO ORDERED.

Andrew H. Perkins⁵
Chief Hearing Officer

Dated: October 22, 2015

⁵ Pursuant to Rule 9235(b) the Chief Hearing Officer signs this Order in Hearing Officer FitzGerald's absence.