

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOHNNY E. BURRIS
(CRD No. 2850953),

Respondent.

Disciplinary Proceeding
No. 2015044921601

Hearing Officer—MJD

ORDER DENYING RESPONDENT'S DISCOVERY MOTION

The Department of Enforcement filed a three-cause Complaint against Respondent Johnny E. Burris. Enforcement alleges that in April 2012, while registered with a predecessor of J.P. Morgan Securities LLC, Respondent failed to timely execute his customers' (a married couple) order to sell a security so they had enough money in their account to make an income tax payment to the Internal Revenue Service. The alleged failure to execute the sell order caused the IRS to reject the customers' attempted payment because of insufficient funds. Enforcement further alleges that Respondent settled the customers' complaint away from J.P. Morgan and failed to get his firm's approval before sending correspondence to the customers and the Internal Revenue Service.

Each cause of action alleges that Respondent failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. In his Answer, Respondent admits he "inadvertently" failed to place the requested trade and the customers' tax payment was rejected by the IRS for insufficient funds. Respondent also admits he sent correspondence to the customers and the IRS but denies that it was not approved by his supervisor. He also denies that that he attempted to settle the customers' complaint away from J.P. Morgan.¹

Respondent has filed a motion to compel discovery under FINRA Rule 9251 and to order Enforcement to request a copy of a former employee's personnel file from J.P. Morgan under FINRA Rule 9252. Enforcement opposes Respondent's motion. Respondent's motion was

¹ Complaint ¶¶ 1, 4, 12-14, 34-36, 41-43, 52; Answer ¶¶ 1, 4, 12-14, 34-36, 41-43, 52.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 17-04 (2015044921601).

discussed during a pre-hearing conference held on January 31, 2017. For the reasons discussed below, I deny the motion.

Discussion

Respondent’s motion is untimely, and on this ground alone is objectionable. The Case Management and Scheduling Order entered in this matter on November 4, 2016, set deadlines of December 2, and December 16, 2016, respectively, for Respondent to file motions under FINRA Rules 9252 and 9251. Respondent filed his motion on January 6, 2017.²

Respondent’s motion also is objectionable because it does not meet the minimum requirements set forth in FINRA Rules 9251 and 9252.

FINRA Rule 9251

FINRA Rule 9251(a)(1) obligates Enforcement to make available to a respondent for inspection and copying the “[d]ocuments prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.” This provision identifies examples of such documents, including requests for information to FINRA member firms and associated persons pursuant to FINRA Rule 8210, requests for information to other persons not employed by FINRA, and documents that FINRA staff obtained by means of such requests. Other documents include transcripts and transcript exhibits and all other documents obtained by FINRA staff from persons not employed by FINRA.

In his motion, Respondent states that J.P. Morgan retaliated against him because he complained to management about the firm’s practices in selling proprietary products. J.P. Morgan terminated him in November 2012. Respondent says that in 2015 the firm was fined \$367 million for misconduct because of its proprietary product sales practices. He further alleges that firm representatives made false statements under oath and they provided FINRA with “false information” during the prior investigation.³

Respondent seeks production under Rule 9251 of copies of transcripts of on-the-record interviews of ten current or former J.P. Morgan employees. Respondent acknowledges that the interviews, to the extent they took place, were conducted as part of an earlier FINRA investigation of J.P. Morgan relating to sales of proprietary products. He states the transcripts “may ... assist in showing JP Morgan’s motive to remove, alter, destroy, and fabricate evidence against” him. He also seeks—without limiting or specifying his request—copies of “all

² Respondent was represented by counsel until January 6, 2017, when his former attorneys filed a motion to withdraw their representation. I granted the motion on January 11, 2017. New counsel entered their appearance for Respondent on February 10, 2017.

³ Respondent’s Motion (“Mot.”) at 1.

communications” from the prior FINRA investigation.⁴ Respondent offers no support that the documents he seeks relate to the limited allegations in this case surrounding his handling of the customers’ sell order. Furthermore, Respondent admitted certain factual allegations in his Answer.

Enforcement objects to the motion on the grounds that Respondent is seeking materials that fall outside the scope of the investigation that led to the filing of the Complaint, in contravention of Rule 9251(a)(1), and because his true motive is to use the transcripts in his pending arbitration against J.P. Morgan. Enforcement contends that it has complied with its discovery obligations under Rule 9251 by providing Respondent with the complete non-privileged investigative file that led to the filing of the Complaint.⁵ Enforcement represents that the prior investigation of J.P. Morgan addressed misconduct by the firm and its predecessor and is unrelated to the alleged misconduct by Respondent that is at issue here. The transcripts and communications that Respondent seeks are not related to the institution of this disciplinary proceeding or any issues raised in the Complaint, according to Enforcement.⁶

Accordingly, Respondent’s motion under FINRA Rule 9251 for copies of transcripts of on-the-record interviews and “all communications” from the prior FINRA investigation is DENIED.⁷

FINRA Rule 9252

Under Rule 9252, a respondent may request that the Hearing Officer order Enforcement to invoke Rule 8210 to compel the production of documents or testimony from entities or individuals that are subject to FINRA’s jurisdiction. Rule 9252(a) states that the request must describe with specificity the documents or category of documents sought, state why they are material, describe the requesting party’s previous good faith efforts to obtain the documents or testimony through other means, and state whether the custodian of the documents or the person requested to testify is subject to FINRA’s jurisdiction.

Pursuant to FINRA Rule 9252(b), “[t]he Hearing Officer may grant such a request only upon a showing that the information sought is relevant, material, and non-cumulative; that the requesting party has previously attempted to obtain the documents or testimony through other means, but has been unsuccessful; and that the person from whom the documents or testimony is

⁴ Respondent’s Mot. at 1-2.

⁵ Enforcement’s Opposition (“Opp’n.”), at 2.

⁶ Enforcement’s Opp’n. at 3.

⁷ Although FINRA Rule 9251(a)(3) gives the Hearing Officer the authority to order the production of any other document notwithstanding the limitations contained in Rule 9251(a)(1), I decline to do so because the documents Respondent seeks are not relevant to this disciplinary proceeding.

sought is subject to FINRA jurisdiction.”⁸ Rule 9252(b) also requires the Hearing Officer to consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.⁹ Rule 9252(c) gives the Hearing Officer the authority, after consideration of all the circumstances and after determining that a request is “unreasonable, oppressive, excessive in scope or unduly burdensome,” to grant the request “only upon such conditions as fairness requires.”

In FINRA disciplinary proceedings, “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.¹⁰ Rule 401 of the Federal Rules of Evidence provides that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence to determining the action.”

Respondent requests a copy of the employment file of a former J.P. Morgan employee. He says this person “will be called as a witness and her truthfulness and candor are highly important in this case.” He states that he believes that “many of her statements to FINRA in the [on-the-record interview] are false.” In its opposition to the motion, Enforcement states that it does not have copy of the employee’s file. Accordingly, the I treat Respondent’s request for a copy of the employee file as a request that I issue an order directing Enforcement to ask J.P. Morgan to produce the file pursuant to FINRA Rule 9252.¹¹

Respondent has failed to comply with FINRA Rule 9252. He has not described his previous efforts to obtain the employment file through other means—by asking JP Morgan directly, for example. On this ground alone his request is objectionable. But he also has failed to explain how any information in the employment file is material and relevant. Respondent suggests that he intends to call the employee to testify but does not establish how the records contained in her employment file relate to her expected testimony. His request is also unreasonably broad in that it asks for her entire file, without specifying what materials therein could be relevant to the issues in this case.¹²

⁸ OHO Order 08-12 (2005003188901) (Aug. 27, 2008), at 2, http://www.finra.org/sites/default/files/OHODecision/p118011_0.pdf.

⁹ OHO Order 15-05 (2012034936005) (Jan. 27, 2015), at 7, http://www.finra.org/sites/default/files/OHO-Order-15-05-ProceedingNo.2012034936005_0.pdf.

¹⁰ See OHO Order 15-05 (2012034936005), at 2; OHO Order 12-04 (2010023367001) (Aug. 30, 2012), at 2-3, <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p229424.pdf>.

¹¹ Respondent did not specifically refer to FINRA Rule 9252 in his motion.

¹² Although under Rule 9252(b) I have the authority to limit or modify Respondent’s request, I decline to do so in this case because the materials he seeks are not relevant to this action.

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Respondent is engaged in the proverbial "fishing expedition." A respondent may not invoke Rule 8210's authority for that purpose.¹³ Therefore, Respondent's motion under Rule 9252 that I order Enforcement to request a copy of the employee's personnel file from J.P. Morgan is DENIED.

Conclusion

For the reasons set forth above, Respondent's motion under FINRA Rules 9251 and 9252 is **DENIED**.

SO ORDERED.

Michael J. Dixon
Hearing Officer

Dated: March 6, 2017

¹³ See OHO Order 06-05 (CLI050016) (Jan. 10, 2006), at 3, <http://www.finra.org/sites/default/files/OHODecision/p016220.pdf>; OHO Order 06-08 (C07050029) (Jan. 12, 2006), at 3, <http://www.finra.org/sites/default/files/OHODecision/p016223.pdf>.