

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2013036217601

Hearing Officer—CC

**ORDER GRANTING IN PART AND DENYING IN PART
ENFORCEMENT'S MOTION TO COMPEL
RESPONDENT'S COMPLIANCE WITH A POST-COMPLAINT
RULE 8210 REQUEST FOR TESTIMONY**

On January 29, 2015, the Department of Enforcement ("Enforcement") filed a motion to compel Respondent's compliance with a post-Complaint Rule 8210 request for Respondent to appear for testimony on February 13, 2015. On February 13, 2015, the Office of Hearing Officers received an opposition from Respondent.

I. Background

On October 30, 2014, Enforcement filed the Complaint, which alleged that Respondent recommended and sold unsuitable investments to four customers, engaged in private securities transactions without providing his firm with prior written notice, provided false information to his firm, provided false information to FINRA in response to Rule 8210 requests for information, and failed to appear twice for on-the-record testimony requested pursuant to FINRA Rule 8210. Respondent denies that he violated FINRA Rules, but states that he is unable to admit or deny many of the factual allegations of the Complaint.

II. Motion to Compel

Enforcement avers that Respondent claims in his Answer a widespread lack of knowledge regarding his own conduct. Enforcement notes, for instance, that Respondent claims not to know if he received funds from the issuer of the securities that he allegedly sold away from his firm or if he used a fax machine to send and receive documents pertaining to the investments. Enforcement argues that it is entitled to use Rule 8210 to probe the factual bases for Respondent's defenses. Enforcement argues that its ability to use Rule 8210 to obtain

information pertaining to Respondent's defenses is particularly important in a case such as this where Respondent refused to appear to testify during FINRA's investigation.

Enforcement further argues that requiring Respondent to appear and to testify on the record will support the Hearing Officer's efforts to manage the proceedings effectively. Enforcement represents that it intends to request that Respondent authenticate his handwriting on certain documents, affirm his participation in a tape-recorded interview by his firm, and acknowledge his receipt of payments from the issuer and its affiliate. Enforcement asserts that this will streamline the issues to be litigated at the hearing, minimize the potential for surprise, lessen or eliminate the need for expert testimony to authenticate Respondent's handwriting, and lessen or eliminate the need for witness testimony to authenticate his voice.

In addition, Enforcement argues that FINRA is soon to lose jurisdiction over Respondent and therefore may not be able to compel his testimony at the hearing. Enforcement argues that requiring Respondent to testify in advance of the hearing will preserve his testimony.

Respondent opposes Enforcement's motion. Respondent notes, by way of background, that he appeared at FINRA's offices in Atlanta, Georgia to provide on-the-record testimony on January 15, 2014. He contends that Enforcement had notified him on January 14, 2014, after business hours, just 16 hours prior to the scheduled testimony, that FINRA intended to reschedule Respondent's testimony because an investigator was ill and an Enforcement attorney was not prepared to proceed. Respondent appeared nonetheless on January 15, and then refused to appear for subsequent on-the-record testimony, maintaining the position that he met his obligations under Rule 8210 to attend on-the-record testimony by appearing on January 15, 2014, and that he should not be faulted because Enforcement chose not to appear. Respondent argues that he already provided Enforcement with the opportunity to take his testimony on January 15, 2014, and Enforcement chose not to proceed.

Respondent argues that, given that the hearing in this matter is scheduled to commence in two months, on April 14, 2015, he will be prejudiced by his appearance at on-the-record testimony because such questioning will interfere with his attorney's preparation for hearing. Respondent argues that Enforcement filed its Complaint on October 30, 2014, and that it could have issued a post-Complaint Rule 8210 request any time after that.¹

Respondent argues that the Hearing Officer can effectively manage the case without requiring him to appear for on-the-record testimony. He also argues that to require him to testify just months before the hearing will deprive him of the opportunity to be heard at a meaningful time and in a meaningful manner.

¹ Respondent filed an Answer to the Complaint on December 22, 2014.

Finally, Respondent argues that Enforcement has abused its discretion by attempting to force Respondent to travel to Rockville, Maryland to appear to provide testimony. Respondent's attorney represents in the filing that she is under a doctor's care until March 28, 2015, and is unable to accompany Respondent for on-the-record testimony until after that date.

III. Discussion

At the outset, the Hearing Officer notes that Enforcement filed its motion to compel Respondent's appearance at on-the-record testimony before Respondent actually failed to appear for the testimony. Respondent, however, filed a response in which he stated that he would not appear for the testimony. The motion, therefore, is ripe for ruling.

Enforcement may issue post-Complaint Rule 8210 requests for information and testimony, including requests for information relating to a Respondent's defenses, and other issues related to the proceeding, subject to the Hearing Officer's authority under Rule 9235(a) to "do all things necessary and appropriate to discharge his or her duties."² "Principles of fairness and efficiency in the conduct of the proceeding dictate that Enforcement's ability to use Rule 8210 during the pendency of a proceeding is not unfettered."³ Thus, the Hearing Officer must "balance Enforcement's need for the requested information and its value to resolving the issues in dispute in the proceeding on the one hand against the prejudice, if any that will result" to Respondent by allowing Enforcement to obtain testimony.⁴

The Hearing Officer finds irrelevant to this motion Respondent's alleged failures previously to appear for on-the-record testimony, as detailed in Respondent's response to Enforcement's motion. The Complaint contains allegations related to Respondent's alleged pre-Complaint failures to appear. The facts related to Respondent's alleged pre-Complaint failures to appear and Enforcement's postponement of testimony will be decided by the Hearing Panel. They are unrelated to Enforcement's motion and this ruling on the motion.

The Hearing Officer rejects Respondent's suggestion that Enforcement's motion is not timely and that he therefore is prejudiced by the timing. The parties participated in a pre-hearing conference on January 22, 2015, during which they requested and agreed to an April hearing date.⁵ Subsequently, the parties jointly filed a proposed pre-hearing schedule in which they agreed to February 27, 2015, as the deadline for Enforcement to issue post-Complaint Rule 8210 requests in connection with this proceeding. Enforcement filed its Rule 8210 request for

² See OHO Order 01-01 (C10000172) (Jan. 23, 2001), at 3, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p007922.pdf>; OHO Order 00-21 (C3A990071) (Aug. 2, 2000), at 3-5, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p007924.pdf>.

³ OHO Order 01-04 (CAF000045) (Feb. 14, 2001), at 9, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p007896.pdf>.

⁴ OHO Order 00-21 (CAF000045), at 7.

⁵ Transcript of January 22, 2015 pre-hearing conference at 33-34.

Respondent's on-the-record testimony well in advance of this deadline. The Hearing Officer therefore rejects any suggestion that Respondent is prejudiced by the timing of Enforcement's request.

Enforcement's motion to compel Respondent's appearance is granted in part. Enforcement states that it seeks to gather information from Respondent regarding the factual bases for his contention in his answer of a widespread lack of knowledge or memory as to his own conduct. As the Hearing Officer noted during the initial pre-hearing conference on January 22, 2015, there are numerous paragraphs in Respondent's Answer in which he states that he does not recall, does not have, or has not been able to obtain sufficient information to admit or deny the allegations. For instance, Respondent answered that he does not recall, does not have, or has not been able to obtain sufficient information to admit or deny allegations that he recommended that his customers invest in City Capital Corporation ("CCC"), that he completed forms related to customers' investments in CCC, that he transferred funds to CCC, that he held power of attorney for certain customers, and that he received compensation from CCC. At the January 22, 2015, pre-hearing conference, Respondent's counsel confirmed that it was not Respondent's intention to deny these allegations, but rather to indicate that he did not know whether the allegations were correct and could not recall the facts.⁶

Enforcement also states that, through on-the-record questioning of Respondent, it may be able to streamline the issues to be litigated at the hearing if Respondent is able to authenticate his handwriting on certain documents, confirm his participation in a tape-recorded interview by his firm, and address questions regarding his receipt of payments from the issuer and its affiliate.

The purpose of post-Complaint Rule 8210 requests for information is "(1) to obtain evidence for use at hearing; (2) to narrow the issues; and (3) to secure information as to the existence of evidence that may be used at the hearing."⁷ Enforcement is entitled to probe Respondent's claim of an inability to recall and lack of knowledge as to his own actions. Furthermore, now that Enforcement has made its investigative file available to Respondent pursuant to FINRA Rule 9251, Enforcement can question Respondent about particular documents to determine if they enable him to recall his prior actions or to authenticate his handwriting on documents or his voice on a recording.⁸ The Hearing Officer does not find that Enforcement's Rule 8210 request unfairly prejudices Respondent, interferes with his attorney's ability to prepare for the hearing, or violates his attorney-client privilege or the attorney work-product doctrine.

Enforcement's motion to compel is not granted, however, with respect to its request that Respondent be required to appear in Rockville, Maryland to provide testimony. Given that

⁶ Transcript of January 22, 2015 pre-hearing conference at 7-16.

⁷ OHO Order 13-02 (2011026874301) (Mar. 13, 2013), at 4, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p229436.pdf>.

⁸ Pursuant to the pre-hearing scheduling order to which the parties agreed, Enforcement was required to complete its production of discovery to Respondent by January 30, 2015.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-03 (2013036217601).

Respondent resides in Georgia, Enforcement should issue a request for Respondent to appear to provide testimony at FINRA's offices in Atlanta, Georgia.

As to Respondent's counsel's representation that she is unable to accompany him prior to March 28, 2015, Respondent may need to seek other counsel to accompany him for on-the-record testimony, or the parties may jointly request that the April 2015 hearing date to which they both agreed be changed to accommodate Respondent's counsel.

IV. Conclusion

For the reasons stated herein, Enforcement's motion to compel Respondent to appear and provide on-the-record testimony regarding Respondent's defenses and other issues related to the proceeding is granted, except that Enforcement is ordered to schedule Respondent's testimony to occur in Atlanta, Georgia.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: February 13, 2015