

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 02-06 (CAF000027).

issue and that the Hearing Panel could better assess the credibility of those witnesses if they testified in person.¹

Section 15A(b)(8) of the Securities Exchange Act of 1934 ("Exchange Act") requires the rules of a national securities association to "provide a fair procedure for the disciplining of members and persons associated with members." 15 U.S.C. 78o-3(b)(8). Fairness in this context, however, does not mandate the procedural rights guaranteed to a defendant in a criminal proceeding. *See, e.g. Howard Alweil*, Exch. Act Rel. No. 31278, 1992 SEC LEXIS 2576, at *8. In providing for self-regulation of securities dealers, Congress recognized the need for informality to enable effective self-regulation, and did not intend to create tribunals similar to the courts. *Sumner B. Cotzin*, Exch. Act Rel. No. 10850, 1974 SEC LEXIS 1130, at *11.

The use of telephone testimony in lieu of a witness' personal appearance is a recognized manner of presenting testimony that facilitates the Association's ability to carry out its self-regulatory duties. Where a party is given an adequate opportunity to cross-examine the witness, the fact that the witness testifies by telephone does not violate the fairness requirement of the Exchange Act. *Id. See also Ronald W. Gibbs*, Exch. Act Rel. No. 35998, 1995 SEC LEXIS 1824, at *16; *Howard Alweil*, 1992 SEC LEXIS, at **8-9.

Telephone testimony by public customers, as well as by registered persons, has been permitted in numerous NASD disciplinary matters. *Id. See also Daniel Joseph Alderman*, Exch. Act Rel. No. 35997, 1995 SEC LEXIS 1823, at *4. The relative weight to be given to telephone testimony will depend on the facts and circumstances of each case.

¹ Counsel did not file a written opposition to the motions, but argued orally against them during the pre-

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Four of the five customer witnesses reside outside of the State of California, as do the three non-customer witnesses. In all cases, those witnesses would be subjected to hardship if asked, or required, to appear in person. The cost to Respondent ____ of bringing to California witnesses from New York and Florida would be prohibitive and beyond his means. Counsel for Respondent _____ has failed to identify any compelling reason why he would not be able to cross-examine the witnesses telephonically, or why the Hearing Panel could not assess the credibility of those witnesses by listening to their voices, evaluating the candor of their responses to questions, evaluating the consistency of their testimony, and comparing their testimony to other evidence in the proceeding. Accordingly, both motions for leave to offer testimony by telephone will be *granted*.

Motion in Limine

The Department of Enforcement filed a motion in limine for an order excluding evidence and prohibiting argument on Respondent _____' defense of reliance on advice of counsel. Although no written opposition to the motion was filed, Counsel for _____ opposed the motion orally during the pre-hearing conference.

Enforcement argues that because, on July 3, 2001, Respondent _____ withdrew all affirmative defenses identified in both answers in this matter, including the defense of advice of counsel, Enforcement cancelled a scheduled interview with _____ and withdrew its request for certain documents. Enforcement argues that, if at this late date, _____ were allowed to raise previously withdrawn defenses, "it would encourage

hearing conference.

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'sandbagging.'" Counsel for _____ conceded during the pre-hearing conference that he withdrew his affirmative defenses.

With only two weeks remaining before the commencement of the hearing in this matter, Enforcement would be unfairly prejudiced if it were required now to investigate any affirmative defense, arrange to interview witnesses on that defense, and receive, inspect, and copy documents relating to that defense. Counsel for Respondent _____ failed to explain why, if he wished to assert the affirmative defense of reliance upon the advice of counsel, he withdrew that defense in the first place, or why he could not have attempted to reassert it in a timely manner. Good cause having been shown by Enforcement, its motion in limine is *granted*, and the Hearing Panel will accept no evidence or argument on the defense of reliance upon the advice of counsel.

Objections to Exhibits and Witnesses

1. Enforcement objects to Respondent _____' unnumbered exhibit, the Declaration of _____, and to the appearance of Mr. _____ as a witness in this matter. Mr. _____ is proffered as an expert witness whose testimony would relate to Causes Nine and Ten of the Complaint. Cause Nine alleges that Respondent _____ violated Conduct Rules 2110 and 3010 by failing to establish and maintain an adequate supervisory system, failing to establish, implement, and enforce written supervisory procedures, and failing to exercise adequately or reasonably his supervisory responsibilities. Cause Ten alleges that Respondent _____ improperly cancelled customer orders. Enforcement argues that expert testimony is unnecessary and inappropriate in this matter. Counsel for Respondent _____ provided no compelling

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rationale as to how the proffered testimony would help the Hearing Panel understand the evidence or a fact in issue in the proceeding.

Respondent _____ proposes to offer Mr. _____'s views as to whether the supervisory procedures and implementation were consistent with industry practices to a hearing panel consisting of two persons with substantial supervisory and trading experience. No new, complex, or unusual securities products are involved in this proceeding, and the supervision and improper cancellation of customer order charges against Respondent _____ are straightforward. Whether the supervisory system, procedures, and oversight were consistent with industry practice is precisely the type of question Hearing Panelists are expected to make in the context of a self-regulatory organization disciplinary proceeding. The Hearing Officer concludes that Mr. _____'s proposed expert testimony would not significantly assist the Hearing Panel in its understanding of industry standards regarding reasonable supervisory practices. Accordingly, the Department of Enforcement's objections to Mr. _____'s declaration and testimony are *sustained*.

2. The Department of Enforcement objects to the following exhibits and witnesses on the basis of inadmissible hearsay and relevance:

Exhibit RH-25 – Declaration of _____

Exhibit RH-26 – Declaration of _____

Exhibit RH-27 – Declaration of _____; and Mr. _____ as a witness.

Exhibit RH-28 – Declaration of _____; and Mr. _____ as a witness.

_____, as a witness.

_____, as a witness.

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Exhibits RH-25, 26, 27, and 28 are written declarations of persons who are scheduled, or who are available, to testify in this proceeding. Accordingly, there is no reason to admit those declarations into evidence in lieu of testimony, unless they are offered to impeach the testimony of the person making the declaration. To the extent that that above witnesses are called to testify on the affirmative defense of reliance upon the advice of counsel, that testimony is irrelevant because all affirmative defenses have been withdrawn. The testimony of Attorney _____ relates to correspondence that she had with Mr. _____, and is, therefore, irrelevant since Mr. _____ will not be a witness in this proceeding.

3. The Department of Enforcement objects to Exhibits RH 33 and 36 which have not been filed with the Office of Hearing Officers, nor served on the parties. The Hearing Officer will reserve a ruling on the objection until and unless those documents are properly filed and served on the parties.

4. The Department of Enforcement objects generally to witnesses on Respondent _____' list of witnesses whose addresses were not provided, as required by Rule 9242(a)(4). The Hearing Officer will reserve a ruling on that objection in light of the offer of Counsel for Respondent _____ to provide those addresses.

5. Respondent ____ objects to submissions by the Department of Enforcement that relate to matters involving Respondent _____, which has been dismissed from the proceeding, and Respondent _____, who is currently involved in settlement negotiations with Enforcement. While the Hearing Officer is sympathetic to Respondent ____'s desire to minimize his involvement and expense in defending the allegations against him, the Hearing Officer is constrained to overrule the objection on

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grounds that Enforcement must be allowed to attempt to prove the underlying violations of Section 10(b) of the Exchange Act, Rule 10b-6, thereunder, and NASD Conduct Rule 2110. That evidence is crucial to certain remaining causes in the Complaint.

The parties have been encouraged to attempt to reach stipulations of facts, including agreement on the authenticity of documents underlying summary exhibits.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

Dated: Washington, DC
April 23, 2002