

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 12-04 (2010023367001).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1,

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2010023367001

Hearing Officer – MAD

**ORDER DENYING RESPONDENT 1'S MOTION TO COMPEL PRODUCTION OF
WITHHELD DOCUMENTS**

On August 8, 2012, Respondent 1 moved for entry of an order compelling the Department of Enforcement ("Enforcement") to produce certain documents that it withheld from discovery pursuant to Procedural Rule 9251(b)(1). Respondent 1 contends that the withheld documents "may contain 'material exculpatory evidence,'" as that term is defined by Procedural Rule 9251(b)(3) and the principles enunciated by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), commonly referred to as the Brady Doctrine. Specifically, Respondent 1 states that Enforcement has withheld notes regarding witness interviews that may contain exculpatory material.

FINRA Procedural Rule 9251(a) sets the outside limit of discovery in FINRA disciplinary proceedings, which is substantially less than the scope of discovery permitted in federal court under the Federal Rules of Civil Procedure. Pursuant to Rule 9251(a), Enforcement

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 12-04 (2010023367001).

is obligated to allow respondents to inspect and copy non-privileged “documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings.”¹ Notwithstanding its obligation under Procedural Rule 9251(a), Enforcement may withhold any document protected by Procedural Rule 9251(b)(1), which includes documents subject to attorney-client privilege, internal reports, memoranda, notes, other writings related to an investigation or examination, and documents that would reveal an enforcement technique or guideline.² Enforcement is permitted to withhold such documents to ensure that FINRA’s enforcement efforts are not impaired.³

Enforcement’s ability to withhold otherwise discoverable documents is limited, however, by Procedural Rule 9251(b)(3), which requires Enforcement to produce any document it withheld pursuant to Rule 9251(b)(1) if it contains “material exculpatory evidence.”⁴ FINRA applies Procedural Rule 9251(b)(3) consonant with the principles enunciated by the Supreme Court in *Brady*. In *Brady*, the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁵ The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence.

In a FINRA disciplinary proceeding, “material evidence” is evidence relating to liability or sanctions that might be considered favorable to the respondent’s case, which, if suppressed,

¹ The term “Interested FINRA Staff” is defined in Procedural Rule 9120(t)(1).

² See Procedural Rule 9251(b)(1).

³ See Order Approving Proposed Rule Change, Exchange Act Release No. 38,908, 1997 SEC LEXIS 1617, at *134 n.194 (Aug. 7, 1997).

⁴ See Procedural Rule 9251(b)(3).

⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Supreme Court later held that the duty encompasses impeachment evidence as well as exculpatory evidence. See *United States v. Bagley*, 473 U.S. 667, 676 (1985).

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 12-04 (2010023367001).

would deprive the respondent of a fair hearing.⁶ However, mere speculation that FINRA documents might contain material exculpatory information is not sufficient to warrant their production.⁷ Instead, a respondent must make a “plausible showing” that the requested documents contain information that is both favorable and material to its defense.⁸ In addition, the Brady Doctrine is not violated by failing to disclose information already known to the defense.⁹

Another constraint on Enforcement’s right to withhold documents is Rule 9253, which requires Enforcement to produce certain types of “witness statements.” In the context of this case, Rule 9253(a)(1) requires Enforcement to produce any document containing a substantially verbatim transcription of a statement made by a potential witness, where the transcription was made contemporaneously with the making of the statement. In support of his contention that Enforcement has improperly withheld documents, Respondent 1 asserts that “it is substantially likely that the alleged victims communicated some exculpatory information to Enforcement in the course of its investigation, and that such statements are in Enforcement’s investigative file.”¹⁰

On August 22, 2012, Enforcement filed an opposition to Respondent 1’s motion, and attached to its opposition the sworn Declaration of Laura Leigh Blackston, an Enforcement Senior Regional Counsel and counsel of record in this proceeding. Ms. Blackston stated, under penalty of perjury, that she reviewed all documents prepared or obtained by FINRA staff in connection with the investigation that led to the institution of this proceeding for the purpose of identifying material exculpatory evidence. She also stated that her review included customer

⁶ OHO Order 01-13, CAF000045, at 11 (May 17, 2001), *available at* <http://www.FINRA.org/IndustryProfessionals/Enforcement/Adjudication/OfficeofHearingOfficers/DisciplinaryOrders/2001Orders/01-13> (citing *United States v. Bagley*, 473 U.S. 667, 675 (1985)).

⁷ *See In re Jett*, 52 S.E.C. 830, 1996 SEC LEXIS 1683, at *1-2 (1996) (vacating an SEC order for the Division of Enforcement to produce memoranda for in camera review, finding that defendant’s proposal amounted to a “fishing expedition” through confidential documents, in the hope of finding something useful to his case).

⁸ *Id.* at 2.

⁹ *United States v. Morris and Gardner*, 80 F.3d 1151, 1170 (7th Cir. 1996).

¹⁰ Respondent 1’s Mot. at 3.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 12-04 (2010023367001).

interview notes. Ms. Blackston stated that the interview notes are not substantially verbatim statements of witnesses; rather, they are fragmentary, general outlines of conversations with customers that reveal her mental impressions, as well as opinions and the investigative process of FINRA staff. In addition, her co-counsel reviewed the customer interview notes for the purpose of identifying any documents (or portions thereof) that contain material exculpatory evidence. Ms. Blackston stated that, based on her review and her consultation with her co-counsel regarding his review, she did not find any documents that were required to be produced under Rules 9251(b)(3) or 9253.¹¹ Ms. Blackston further stated that she is aware of Enforcement's continuing obligation to produce any material exculpatory evidence it may discover in the course of this proceeding.

Here, Respondent 1 has failed to make a plausible showing that Enforcement is withholding material exculpatory evidence. He merely states that it is "substantially likely" that Enforcement has material exculpatory information. Although Enforcement admits that it has documents relating to its interviews of certain witnesses, it declares, under penalty of perjury, that the documents do not contain verbatim witness statements or *Brady* material. Respondent 1 has not provided any evidence sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations under Procedural Rules 9253 and 9251(b)(3) and the Brady Doctrine.

¹¹ Enforcement's Opposition and Declaration refer to former Rule 9251(b)(2) instead of Rule 9251(b)(3). The Securities and Exchange Commission approved an amendment of FINRA Rule 9251, which added a new subpart and became effective on December 2, 2011. Former Rule 9251(b)(2) was renumbered as Rule 9251(b)(3), with virtually identical language. *See* Regulatory Notice, 11-50.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 12-04 (2010023367001).

For the reasons discussed above, Respondent 1's motion for production of documents withheld pursuant to Procedural Rule 9251(b)(1) is DENIED.

SO ORDERED.

Maureen A. Delaney
Hearing Officer

Dated: August 30, 2012