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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT 1, RESPONDENT 2, and RESPONDENT 3 Respondents.	Disciplinary Proceeding No. 2015044960501 Hearing Officer– DRS

ORDER DENYING MOTION TO ADMIT NEWLY DISCOVERED EVIDENCE

A. Introduction

The hearing in this case was held on November 9–17, 2015. On December 22, 2015, Respondent 1 and Respondent 2 (collectively, "Respondents") moved to admit into evidence a November 20, 2015 letter ("Letter") regarding customer witness NL.[1] Respondents assert that the Letter undercuts NL's credibility, which the parties agree is at issue in this disciplinary proceeding.

The Letter was written by NL's lawyer in connection with a separate proceeding: NL's pending arbitration claim against Respondents. On November 20, 2015, NL's lawyer wrote to the Case Manager assigned to the arbitration matter, renewing NL's request to preserve his testimony through a pre-hearing *de bene esse* deposition. According to the Letter, NL's deposition had previously been scheduled but was cancelled due to his poor health. The Letter informed the arbitration Case Manager that NL "has recently bounced back to a certain extent from the grave condition he was in" when he cancelled the deposition.[2]

Respondents find the Letter troubling. NL's pre-hearing videotaped *de bene esse* deposition was taken by Enforcement in connection with this disciplinary proceeding on July 9, 2015. Enforcement took the deposition to preserve NL's testimony for possible use at hearing because it

[1] RX-43. Respondent 3 did not join in the motion or file a separate motion seeking the same relief.

[2] RX-43, at 2.

was concerned that NL's advanced age and poor health might render him unavailable for the hearing. At the final prehearing conference, I expressed my preference for live testimony at the hearing and directed Enforcement to contact NL's counsel and inquire whether NL would be willing to testify at the hearing.[3] After contacting NL's counsel, Enforcement notified the Respondents and my Case Administrator on November 4, 2015, that according to NL's counsel, NL had "suffered a grave decline in health" and "would not be able to testify either in person or by telephone."[4] Thereafter, at the hearing, I admitted into evidence NL's deposition and the deposition transcript.[5]

Respondents are skeptical of NL's claim that he was too sick to appear at the disciplinary hearing, given that three days after the hearing ended, he announced that he was healthy enough to testify at a deposition in his arbitration case. Respondents characterize NL's conduct as "cunning and opportunistic"[6] and ask that I admit the Letter because it is relevant and necessary for the Extended Hearing Panel's assessment of NL's credibility. Enforcement, on the other hand, opposes the motion on the grounds that the Letter is irrelevant to NL's credibility. For the reasons below, I deny the motion.

B. Discussion

Under FINRA Rule 9235(a), a Hearing Officer has the "authority to do all things necessary and appropriate to discharge his or her duties," including "reopening any hearing." Thus, I have the authority to reopen the record and admit new evidence. But I decline to do so here for two reasons. First, the Letter is not relevant. FINRA Rule 9263(a) states that "[t]he Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." In determining whether the Letter is relevant, I looked to the Federal Rules of Evidence, which, though not binding in this proceeding,[7] can be instructive.[8] Under those rules, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[9] As noted above, the parties agree that NL's credibility is at issue in this case. More specifically, the issue is whether, and to what extent, the Extended Hearing Panel should credit NL's deposition testimony concerning his dealings with Respondents. Respondents imply that NL was not forthright in November 2015 when he represented, through counsel, that he would be unable to testify by telephone or in person at the hearing. But even if NL was untruthful in November 2015 about his ability to appear at the hearing, I do not find that it would make it more

[3] Final Pre-Hearing Conference Tr. 64–65.

[4] Tr. 1042–43.

[5] CX-8(a) and (b), respectively.

[6] Mot. at 3.

[7] FINRA Rule 9145(a).

[8] *Dep't of Enforcement v. Ahmed*, No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *112 n. 98 (NAC Sept. 25, 2015), *appeal docketed*, No. 3-16900 (SEC Oct. 13, 2015); OHO Order 15-15 (2014040968501) (Dec. 22, 2015), https://www.finra.org/sites/default/files/OHO_Order15-15_2014040968501.pdf.

[9] Fed. R. of Evid. 401.

probable that he had been untruthful at his deposition four months earlier when he testified about his dealings with Respondents. Therefore, for this reason alone, I will not admit the Letter.

Additionally, the Letter constitutes extrinsic evidence offered to impeach NL's credibility on a collateral matter, namely, whether he was truthful when he claimed that poor health precluded him from appearing at the hearing. Under Federal Rule of Evidence 608(b), the Letter would be inadmissible. That Rule "generally prohibits the introduction of extrinsic evidence to attack the credibility of a witness."[10] It provides that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." The prohibition "is 'designed to prevent distracting mini-trials on collateral matters.'"[11] I find this evidentiary rule instructive here. Admitting the Letter would result in distracting arguments on collateral matters, made worse by not having had the benefit of NL's testimony on those matters, as they arose after his deposition. Accordingly, for this additional reason, I decline to admit the Letter.

Based on the foregoing, I **DENY** the motion.

SO ORDERED.

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David R. Sonnenberg
Hearing Officer

Dated: January 20, 2016

[10] *U.S. v. Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 8812 (2009).

[11] *U.S. v. Richardson*, 793 F.3d 612, 628 (6th Cir. 2015) (quoting *Boggs v. Collins*, 226 F.3d 728, 744 (6th Cir. 2000)).