

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 09-02 (2007009461301).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. 2007009461301

Hearing Officer – MC

**ORDER DENYING RESPONDENT'S MOTION  
TO COMPEL PRODUCTION OF WITNESS STATEMENTS**

**I. BACKGROUND**

The Complaint filed in this disciplinary proceeding contains three causes of action. The First Cause of Action alleges that Respondent made unsuitable options transaction recommendations to certain customers, in violation of Conduct Rules 2110, 2310, and 2860(b)(19). The Second Cause of Action alleges that Respondent failed adequately to explain the risks of the investment strategy he recommended, in violation of Conduct Rule 2110. The Third Cause of Action alleges that Respondent sent false and misleading communications to one of his customers, in violation of Conduct Rules 2110, 2210(d)(1) and 2220(d)(1).

On August 3, 2009, Respondent filed a Motion to Compel Production of Witness Statements ("Motion to Compel") and a supporting Memorandum of Law. In his Motion to Compel, Respondent relies on Procedural Rule 9253(a)(1) and (2) for authority to compel the Department of Enforcement ("Enforcement") to produce "all notes or other

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documents containing or referring, in words or substance, to any statements made by any of the complaining customers referred to in the Complaint in this matter,” and lists nine customers identified in the Complaint (“Complaining Customers”). The Motion to Compel seeks the issuance of an order compelling production of the notes to him or, alternatively, for an *in camera* review of the notes by the Hearing Officer.

On September 14, 2009, Enforcement filed its Opposition to Respondent's Motion to Compel (“Opposition”). In it, Enforcement contends that the only notes relating to customer interviews in its possession are fragmentary, containing the “mental impressions, opinions and investigative process of an Enforcement attorney,” and do not contain any “substantially verbatim recital of an oral statement” by a customer whose production might be compellable under Procedural Rule 9253(a)(1). In addition, Enforcement asserts that it possesses no notes of conversations with customers taken by a FINRA staff member in the course of a “routine examination or inspection,” thus rendering Respondent's reliance on Procedural Rule 9253(a)(2) inapposite. Enforcement represents that the notes of interviews of customers in its possession are not otherwise discoverable because they do not contain exculpatory material. Enforcement points out that it will provide a summary of the testimony of its proposed witnesses as required by the Scheduling Order issued in this disciplinary proceeding, thereby obviating the need for the production of notes.

Enforcement also challenges Respondent's claimed need for the notes. Enforcement states that the Complaining Customers are all persons known to Respondent, and that he is familiar with arbitration complaints they filed against him. Enforcement notes that some of those customer complaints were settled and two resulted

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in formal arbitration proceedings. Enforcement represents that Respondent maintained notes of his contacts with the Complaining Customers while he was their broker.

Furthermore, Enforcement represents that it has provided Respondent with current contact information for the witnesses. According to Respondent, however, only one of the witnesses has thus far agreed to speak with his counsel.

On September 24, 2009, Respondent filed a Reply Memorandum of Law ("Reply Memorandum") responding to Enforcement's Opposition. In the Reply Memorandum, Respondent insists he is entitled to the statements of customers contained within Enforcement's notes, from which he argues redactions could eliminate mental impressions of the Enforcement attorney who created the notes. Because Respondent was able to contact one customer and obtain a statement from her, and obtained a transcript of an arbitration hearing involving another customer, he reduced to six the number of Complaining Customers whose interview notes he seeks.

In his Reply Memorandum, Respondent insists that he has a substantial need for Enforcement's notes of customer interviews because the Complaint is "based entirely on transactions relating to the Complaining Customers, and there exist no records of the Complaining Customers' version of the facts other than as reflected in the notes."

## **II. DISCUSSION**

Rule 9253(a)(1) requires production of a "substantially verbatim" recital of a witness's oral statement. Enforcement represents that the notes in its possession are not substantially verbatim and contain no exculpatory information that would require production. Enforcement represents the notes are fragmentary, general outlines of conversations between an Enforcement attorney and the witnesses. There is no basis for

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believing Enforcement's description of the notes should not be taken at face value, and therefore no reason to require Enforcement to produce the notes for *in camera* review at this time. Therefore the notes appear to be beyond the reach of Rule 9253(a)(1).

Rule 9253(a)(2), also cited by Respondent in support of his request, only applies to notes taken of statements of prospective witnesses during a routine examination or inspection. Here, the interviews at issue occurred in the course of investigating customer complaints and not during a routine examination or inspection. Thus, Rule 9253(a)(2) does not apply.

Respondent argues that fairness requires production of the notes to him or for *in camera* review because the Complaint is based upon statements of the Complaining Customers and he needs the notes to avoid "trial by ambush." First, the Complaint in this case has put Respondent on notice that he allegedly made unsuitable recommendations to certain customers, failed adequately to inform them of the risks inherent in his recommendations, and in one instance sent false and misleading communications to a customer. Second, the Revised Scheduling Order issued in this proceeding on September 9, 2009, requires the parties to exchange and to file accurate summaries of the breadth and scope of the testimony they expect from the witnesses they propose to call at the hearing. The Revised Scheduling Order requires submission of these summaries by December 7, 2009, well in advance of the commencement of the hearing, set for March 1, 2010.<sup>1</sup> The requirements imposed upon the parties by the Revised Scheduling Order are designed to ensure that the parties adhere to their discovery obligations as required by the

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<sup>1</sup> The initial Scheduling Order issued in this proceeding on August 14, 2009, set a deadline of December 14, 2009, for the parties to exchange [and file], among other things, their proposed witness lists. The Revised Scheduling Order sets a new deadline of December 7, 2009, for the parties to exchange and file their proposed witness lists.

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applicable Rules of Procedure and to afford the parties a fair opportunity to present their cases at the hearing.

For these reasons, Respondent's Motion to Compel is denied at this time.

**SO ORDERED.**

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Matthew Campbell  
Hearing Officer

October 14, 2009