

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JORGE A. REYES
(CRD No. 4256834),

Respondent.

Disciplinary Proceeding
No. 2016051493704

Hearing Officer–DW

ORDER ON RESPONDENT'S MOTION PURSUANT TO RULE 9253

I. Background

The Department of Enforcement's Complaint alleges that Respondent Jorge Reyes engaged in fraud as part of three private placement offerings, misappropriated customer funds, and engaged in other misconduct. Reyes denies participating in any of the alleged misconduct.

Reyes moves for an order requiring Enforcement to produce witness statements under FINRA Rule 9253. Reyes seeks "any statement of any person called or to be called as a witness by [Enforcement] that pertains, or is expected to pertain, to his or her direct testimony," as well as contemporaneous written statements by FINRA staff made "during a routine examination or inspection about the substance of oral statements made by a non-FINRA person."¹

Enforcement opposes the motion. Enforcement states that it has already produced all transcripts of on-the-record testimony taken during its investigation. It maintains that it has no other witness statements that are a "substantially verbatim" recordation.² It adds that after Reyes filed his motion, it produced to him a responsive interview memorandum. This memorandum relates to an interview of several employees of Reyes' former employer during a cycle examination. Enforcement expects to call several of these witnesses at the hearing. Enforcement admits that it has other interview memoranda, but says that these interviews were all conducted during its investigation and the memoranda are not substantially verbatim recitations of the interviews.

¹ Respondent's Motion at 1.

² Enforcement's Response at 4.

Enforcement supports its assertions with an attorney declaration representing that (i) its investigative notes contain no materially exculpatory evidence; (ii) the notes reveal the mental impressions and investigative techniques of Enforcement staff; (iii) the notes are attorney work-product created in anticipation of litigation; and (iv) Enforcement does not expect to offer the notes into evidence at the hearing. Enforcement represents that it has produced all that it is due to produce pursuant to FINRA Rule 9253.

II. Discussion

Rule 9253(a)(1) requires Enforcement to produce any contemporaneous and substantially verbatim transcription of a potential witness's statements that pertains to the witness's expected testimony. Rule 9253(a)(2) requires Enforcement to produce any interested FINRA staff member's statements contemporaneously written during an exam or inspection about oral statements made by non-FINRA persons if either is to be called as a witness and the statement directly relates to their testimony.

Neither provision is applicable here. Given Enforcement's representation that it has produced its only interview memorandum written during an exam or inspection, there is nothing to order pursuant to Rule 9253(a)(2). As for Rule 9253(a)(1), although Reyes' motion seeks any witness statement of Enforcement's witnesses related to their testimony, the language of the Rule limits its reach to those statements that are contemporaneously recorded and a "substantially verbatim" recitation of what the witness said. Because Enforcement's attorney declaration attests that it has already produced all verbatim transcripts and that its investigative interview notes are not substantially verbatim recitations, there appears to be nothing left to order under Rule 9253(a)(1) either.

That said, the attorney declaration does not identify for Reyes the individual witnesses for whom Enforcement has investigative interview notes. The declaration instead asserts in blanket fashion that all of its investigative interview notes are subject to attorney work-product privilege. But if Enforcement chooses to offer statements made by a witness to investigators as evidence at the hearing,³ it would waive any privilege over notes related to those statements.⁴ And fairness may well require the production of such notes notwithstanding the provisions of Rule 9253.⁵ Thus, given Enforcement's continuing obligation to ensure that its averments of privilege are

³ The declaration asserts that Enforcement does not intend to offer the memoranda as evidence, but makes no representation that it does not intend to offer the substance of the conversations reflected in its notes.

⁴ *Clarke T. Blizzard*, 55 S.E.C. 754, 763 (2001), quoting *U.S. v. Nobles*, 422 U.S. 225, 239 (1975) ("a person who chose to present testimony by an investigator waived any privilege derived from the work product doctrine 'with respect to matters covered in the investigator's testimony.'").

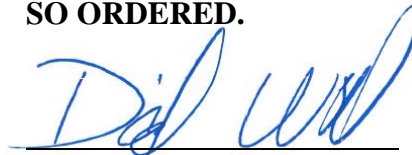
⁵ *Blizzard*, 55 S.E.C. at 762-63 ("[opposing] counsel, in the interest of fairness, should have equal access to those notes."); see OHO Order 06-16 (C02040032) (Feb. 1, 2006), at 6, http://www.finra.org/sites/default/files/OHODecision/p017574_0_0_0_0_0.pdf (Hearing Officer ordered investigator's notes disclosed where investigator referred to notes during his testimony).

grounded in fact,⁶ I remind Enforcement of its affirmative obligation to disclose to Reyes and the hearing panel the existence of any interview notes or memoranda related to a third party before eliciting evidence of that person's statements through an Enforcement staff witness at the hearing.

III. Conclusion

For the reasons explained above, Respondents' Motion to Pursuant to Rule 9253 is **DENIED**.

SO ORDERED.



David Williams
Hearing Officer

Dated: May 7, 2019

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⁶ See FINRA Rule 9137(b).