

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL VENTURINO
(CRD No. 5872439),

Respondent.

Disciplinary Proceeding
No. 2021070337501

Hearing Officer—MC

**ORDER GRANTING ENFORCEMENT'S MOTION FOR LEAVE TO OFFER
TELEPHONE OR VIDEOCONFERENCE TESTIMONY**

I. Background

The Department of Enforcement has filed a Motion to Permit Customer Witnesses to Testify by Videoconference or Telephone (“Motion”) requesting permission to allow five customer witnesses to testify by videoconference or telephone in the hearing of this matter. Respondent Michael Venturino has filed an Opposition to the Video and Telephone Testimony of Customer Witnesses (“Opposition”).

The hearing in this proceeding is set to take place in New York City. None of the customer witnesses lives in or near New York City: customer CB lives in Greenville, North Carolina; customer JF lives in Findlay, Ohio; customer DF lives in Minot, North Dakota; customer RL lives in Roanoke, Virginia; and customer JO lives in McAllen, Texas. Enforcement represents that when asked if he is willing to testify in person, JO replied that he will attend the hearing if his work and travel obligations permit, but if not, he will make himself available to testify by videoconference or telephone. Enforcement also represents that each of the other four customer witnesses stated that they could not testify in person because the demands of the businesses they own and operate will prevent them from traveling to New York City. However, they all agreed to make themselves available to testify by videoconference or telephone.¹

Enforcement represents that, if the Motion is granted, it will try to present the testimony of these witnesses by videoconference so that the parties and the hearing panel can see as well as hear the witnesses testify. However, if poor internet connections or other technical problems

¹ Motion 2–4.

impair the ability to proceed with a videoconference, Enforcement seeks permission to present their testimony by telephone.²

Respondent objects. While conceding that “the use of telephone and video testimony is a common occurrence in FINRA disciplinary proceedings,”³ Respondent nonetheless opposes allowing any of the customer witnesses to testify by videoconference or telephone. He argues that hearing officers “should take guidance” from Federal Rule of Civil Procedure 43(a)’s statement that witness testimony “must be taken in open court” unless for “good cause in compelling circumstances and with appropriate safeguards” the court permits testimony “by contemporaneous transmission from a different location.”⁴ Here, Respondent argues, Enforcement has failed to establish sufficient good cause for granting the Motion because Enforcement’s “singular basis for requesting the telephone and video testimony is that it would be inconvenient for the customers to spend time away from their businesses.”⁵

For authority supporting his argument, Respondent turns to federal court cases expressing the preference for “in-person proceedings.”⁶ He quotes a 2022 Pennsylvania federal trial court decision holding that permitting videoconference testimony “cannot be justified merely by showing that it is inconvenient for the witness to attend trial.”⁷ He also cites a federal appeals court decision that lists “shortcomings” of videoconference proceedings—such as decreased opportunity for fact-finders to observe witness demeanor—compared to testimony from physically-present witnesses.⁸ He cites other decisions approving administrative law judges’ denials of requests to use telephone testimony in Social Security disability hearings and argues that allowing telephone testimony would compromise his “right to a fair hearing” and his ability to use documents to impeach witnesses.⁹ Finally, Respondent quotes objections raised by federal administrative law judges opposed to a proposed rule permitting telephone testimony in proceedings before them that, in turn, have been cited by various courts.¹⁰

² Motion 6.

³ Opposition 1.

⁴ *Id.*, quoting Fed. R. Civ. P. 43(a).

⁵ *Id.* at 2.

⁶ *Id.* at 1.

⁷ *Id.*, quoting *J.D. v. Price*, 619 F. Supp. 3d 523, 527 (W.D. Pa. 2022).

⁸ Opposition 1, quoting from *Perotti v. Quinones*, 790 F.3d 712, 723–4 (7th Cir. 2015).

⁹ Opposition 4.

¹⁰ *Id.*, 3–4.

II. Discussion

As Respondent acknowledges, there is well-established precedent for permitting telephone or videoconference testimony in FINRA disciplinary proceedings.¹¹ In this forum, it has been determined that presenting witness testimony via telephone or videoconference does not deprive a party of the opportunity for a fair proceeding so long as the party has an adequate opportunity to cross examine the witness.¹² Against this backdrop, given the circumstances of this case, Respondent's reliance on cases applying federal procedural and evidentiary rules as authority to deny Enforcement's Motion is unavailing. When closely examined, Respondent's cited cases miss their mark.

For instance, Respondent states that the 2022 Pennsylvania federal trial court decision he cites "denied a motion in limine for the video testimony of multiple witnesses, based on inconvenience," arguing that since Enforcement's request is based on the inconvenience to customer witnesses it, too, should be denied.¹³ But the Pennsylvania case was not that simple.

In it, the plaintiffs claimed good cause to have eleven witnesses testify remotely because of COVID-19 and the inconvenience of making them travel to Pennsylvania for the trial. The court noted, however, that the pandemic-based state of emergency had ended, and the employer of eight of the eleven gave assurances that they would all be present to testify. The court further noted that the plaintiffs selected Pennsylvania as their forum even though the three other witnesses, as well as the plaintiffs, resided in Georgia, where the case investigation had occurred. Under these facts, the court concluded the plaintiffs did not establish sufficient reason to overcome the preference for in-person testimony.¹⁴

Respondent relies on two other cases that involved suits filed by prisoners. Neither supports denying Enforcement's Motion. True, in one the court denied a request by the plaintiff to present an eyewitness's testimony by videoconference. But the denial was not based on concerns about remote testimony. The principal reason was the court's concern over the witness's safety. This eyewitness was a prisoner who had been threatened by other inmates who said they would kill him if he testified. The court concluded the eyewitness was at serious risk whether he testified remotely or in person. However, there was another prisoner eyewitness available who could provide essentially the same testimony, and who was housed in a safer location. The court allowed this eyewitness to testify by video. In doing so, the court noted the

¹¹ See, e.g., OHO Order 15-14 (2012030564701) (Oct. 25, 2015), https://www.finra.org/sites/default/files/OHO_Order15-14_201203564701_0.pdf (motion granted for telephone testimony of customer witnesses).

¹² *Dep't of Enforcement v. Brigandi*, No. C10040025, 2007 NASD Discip. LEXIS 3, at *24 n.20 (NAC Jan. 17, 2007) (citing *Daniel Joseph Alderman*, Exchange Act Release No. 35997, 1995 SEC LEXIS 1823, at *4 n.6 (Jul. 20, 1995); *Ronald W. Gibbs*, Exchange Act Release No. 35998, 1995 SEC LEXIS 1824, at *16 n.19 (Jul. 20, 1995); *Keith DeSanto*, Exchange Act Release No. 35860, 1995 SEC LEXIS 1500, at *6 n.5 (June 19, 1995), *petition denied*, No. 95-4127, 1996 U.S. App. LEXIS 5304 (2d Cir. Mar. 22, 1996).

¹³ Opposition 1.

¹⁴ *Price*, 619 F. Supp. 3d 523, 525–27, 529–30.

generally accepted admissibility of videoconference testimony.¹⁵ In its ruling the court cited *Alderman v. SEC*—a precedent relevant here—approving credibility findings based on telephone testimony.¹⁶

In the second prisoner's lawsuit, the court recognized that it is preferable for parties to testify in person, and that video testimony has its limitations regarding the ability to make credibility determinations. Nonetheless the court required the plaintiff to testify by videoconference. Under the circumstances of the case, the court found video testimony "an acceptable alternative to his appearance in person" as it allowed him to participate fully.¹⁷

A third case Respondent relies on is clearly inapposite. In it, a South Carolina federal trial judge sentenced a defendant for bank robbery. The defendant was incarcerated in Colorado. Over the defendant's objection, the judge conducted the sentencing hearing by closed-circuit television. On appeal, the Fourth Circuit Court of Appeals held that this violated Federal Rule of Criminal Procedure 43, requiring a defendant to be physically present when sentenced.¹⁸

As for Respondent's emphasis on Federal Rule of Civil Procedure Rule 43's statement requiring testimony to be taken in open court, FINRA hearing officers are permitted to consult federal rules for guidance when resolving procedural and evidentiary issues, but those rules do not govern FINRA disciplinary proceedings.¹⁹ This is consistent with FINRA Rule 9145(a)'s admonition that "formal rules of evidence shall not apply" in FINRA disciplinary proceedings. And it recognizes that the alternative, if a non-compellable witness refuses to attend, would be to lose access to the testimony, and thus impair the ability of the panel to become fully informed of the facts of a case.²⁰ And as the discussion above shows, under certain circumstances federal courts and administrative agencies judges accept testimony transmitted from remotely located witnesses.

Respondent's reliance on federal court decisions reviewing administrative judges' decisions in Social Security Administration disability proceedings are also unpersuasive. His

¹⁵ *Draper v. Rosario*, 836 F.3d 1072, 1080–82 (9th Cir. 2016)

¹⁶ *Id.* at 1082, citing *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997) (denying challenge to fact finder's credibility determination where witness testified by telephone).

¹⁷ *Perotti*, 790 F.3d 712, 723–25 (7th Cir. 2015).

¹⁸ Opposition 1, citing *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

¹⁹ *Dep't of Enforcement v. North*, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *8 (NAC Aug. 3, 2017).

²⁰ See, e.g., OHO Order 00-02 (C02990052) (Jan. 18, 2000), at 3, https://www.finra.org/sites/default/files/OHODecision/p007852_0_0_0_0.pdf ("In this case, the alternative to telephone testimony is no testimony from these witnesses at all, or reliance on their written declarations (which Enforcement intends to introduce as exhibits), with no opportunity for _____ to cross-examine or for the Hearing Panel to ask questions of its own. Telephone testimony is preferable to either of these alternatives. Cross-examination may be more difficult over the telephone, but experience shows that it can be done effectively, and that Hearing Panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses.").

cited cases do not reject telephone and videoconference testimony per se. In one, the reviewing court remanded a hearing decision because the administrative law judge allowed telephone testimony in violation of regulations requiring the testimony to be in-person or by videoconference. In addition, the judge did not provide the parties with required advance notice of how the testimony would be presented.²¹ In another, the reviewing court concluded that Social Security Administration regulations were unclear on the permissibility of using telephone testimony. Without deciding that issue, the court remanded an administrative law judge's decision because the transcript of the telephone testimony contained so many gaps that it did not provide a sufficient record to allow proper appellate review.²²

III. Conclusion

In FINRA disciplinary proceedings, persons who are not subject to FINRA jurisdiction cannot be compelled to testify at disciplinary proceedings. Hence it has become customary to permit them to testify by telephone or video when they are unwilling to undergo the disruption and inconvenience of traveling to appear in person at a hearing. This has been deemed acceptable and not inherently unfair so long as they are subject to cross examination and the hearing panel is able to assess their credibility.²³ Permitting remote testimony is preferable to proceeding without their testimony. This works to the advantage of both parties and promotes the ability of hearing panels to consider all available reliable evidence to arrive at a just result. And it is consistent with the broad mandate of FINRA Rule 9263(a) that hearing officers “shall receive relevant evidence.”

Although in-person testimony is always preferable, allowing videoconference and telephonic testimony does not, as Respondent argues, deny him the ability to offer impeachment materials with which to cross examine. Permission to present witness testimony by video or telephone is conditioned upon Enforcement making available to the witness documents Respondent wishes the witness to refer to during cross examination.

Under these circumstances, I find that Enforcement's request is reasonable, and Respondent's opposition is unpersuasive. Enforcement's Motion is **GRANTED** for good cause.

Enforcement will be permitted to present the testimony of customer witnesses CB, JF, DF, and RL by videoconference if possible, and if not, by telephone. If customer JO is unable to

²¹ Opposition 4, citing *Porter v. Barnhart*, No. C05-5166FDB, 2006 U.S. Dist. LEXIS 101838, at *5–6 (W.D. Washington Apr. 11, 2006).


²² Opposition 4, citing *Ainsworth v. Astrue*, No. 09-cv-286-SM, 2010 U.S. Dist. LEXIS 60686, at *10–12 (D.N.H. June 17, 2010).

²³ See, e.g., *Dep't of Enforcement v. Tucker*, No. 2009016764901, 2013 FINRA Discip. LEXIS 45, at *18 (NAC Dec. 31, 2013) (“[T]elephone testimony is not uncommon in FINRA proceedings, and the Commission has repeatedly upheld FINRA's reliance on telephone testimony in reaching its decisions.”), *appeal dismissed*, 2014 SEC LEXIS 1370 (Apr. 18, 2014). See also *Gerald E. Donnelly*, Exchange Act Release No. 36690, 1996 SEC LEXIS 89, at *9 n.16 (Jan. 5, 1996) (upholding Hearing Panel determination to hear and credit telephone testimony in FINRA disciplinary proceeding).

attend the hearing in person, Enforcement will also be permitted to present his testimony by videoconference if possible, or alternatively, by telephone. These customer witnesses will be allowed to testify by videoconference or telephone so long as Enforcement:

- Provides each witness in advance with, copies of all exhibits relating to the witness's direct testimony as well as any exhibits Respondent requests to be given to the witness for possible use on cross-examination. Respondent shall designate and provide Enforcement with copies of any documents it wishes to be forwarded to the witness no later than May 31, 2023.
- Files an affidavit or sworn declaration signed by each witness attesting that the testimony given at the hearing will be truthful and subject to the penalties of perjury.
- Ensures in advance that each witness will be available for a block of time when it is reasonable to expect that the witness will be called to testify, so the hearing is not disrupted if the testimony of a prior witness is longer or shorter than expected.

SO ORDERED.



Matthew Campbell
Hearing Officer

Dated: May 26, 2023

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