

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02990052
v.	:	
	:	
	:	Hearing Officer - EBC
	:	
	:	
Respondent.	:	

**ORDER GRANTING ENFORCEMENT’S MOTION FOR
LEAVE TO OFFER TELEPHONE TESTIMONY**

The Department of Enforcement’s Complaint in this proceeding charges that the Respondent, _____ (“_____” or the “Respondent”), violated NASD Conduct Rules 2110 and 2330(a) by misusing \$40,000 that he received from customers JJB and DB (husband and wife) for investment purposes. In his Answer and Pre-Hearing Submission, _____ claims that the funds he received from JJB and DB were intended as a personal loan for use in connection with the restructuring of his office. Enforcement has moved for leave to introduce, by telephone, the testimony of JJB and DB. Respondent has opposed the motion asserting that he will be severely prejudiced if they are permitted to testify by telephone: he claims that JJB and DB should be “compelled” to testify in person so that the Hearing Panel may properly assess their credibility and he may be afforded a “proper opportunity” to cross-examine. For the reasons set forth below, Enforcement’s motion is granted.

Discussion

A. General Principles

Section 15A(b)(8) of the Securities Exchange Act of 1934 (Exchange Act) requires that the rules of a self-regulatory association “provide a fair procedure for the disciplining of members and persons associated with members.”¹ Fairness in this context does not require that a respondent be afforded the full range of procedural rights guaranteed to a defendant in a criminal proceeding.² Telephone testimony satisfies the Exchange Act’s fairness requirement where there is an adequate opportunity to cross-examine the witness; a respondent simply does not have an inherent right to a face-to-face confrontation of witnesses in an NASD disciplinary proceeding.³ Demeanor or “forthrightness of manner may be gauged solely by listening to . . . [the witness’s] voice.”⁴ Further, as a practical matter, an inability to use telephone testimony would impede the NASD’s disciplinary process in some cases because the NASD lacks subpoena power to compel the attendance of witnesses who are not subject to its jurisdiction.

B. Ruling

The hearing in this proceeding is scheduled to be held in Los Angeles, CA _____ . JJB and DB reside in New York City and are not subject to the Association’s jurisdiction. Enforcement counsel has represented that she has spoken with JJB and DB and that

¹ 15 U.S.C. § 78o-3(b)(8).

² See e.g., In re Howard Alweil, 51 S.E.C. 14, 17 (1992).

³ See, e.g., In re Robert E. Gibbs, 51 S.E.C. 482, 484 n.3 (1993), aff’d., 25 F.3d 1056 (10th Cir. 1994) (Table); In re David A. Gingras, 50 S.E.C. 1286, 1293 n. 20 (1992); In re Curtis I. Wilson, 49 S.E.C. 1020, 1024-25 (1989), aff’d., 902 F.2d 1580 (9th Cir. 1990) (Table). The Hearing Officer also notes that the Sixth Amendment right to a face-to-face confrontation applies only in criminal proceedings. See e.g., SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 742 (1984).

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they are unwilling and unable to appear in person at the hearing due to financial, professional, and personal reasons. Apparently, JJB and DB have two children, a three-month old infant and a 10 year-old child; DB works in the morning and JJB works from noon through the evening, which enables them to share child care responsibilities.⁵ 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.

In addition, while JJB's and DB's credibility ultimately may be highly material to the outcome of this proceeding, the substance of their testimony will be limited to one substantive area: whether the funds they gave _____ were intended for investment purposes or as a personal loan. JJB's and DB's declarations, which were executed under penalty of perjury, also may provide a basis for the Hearing Panel to assess their credibility.

Conclusion

Based on the foregoing, the Hearing Officer concludes that it is appropriate to allow JJB and DB to testify by telephone, and that _____ will not be unfairly prejudiced. Accordingly, Enforcement's motion for leave to introduce JJB's and DB's testimony by telephone is GRANTED, and it is further ORDERED that:

⁴ In re Alderman, Exchange Act Release No. 35997, 1995 SEC LEXIS 1823 n.6 at *4 (July 20, 1995). See also Official Airlines Guide v. Churchfield Publications, Inc., 756 F. Supp. 1393, 1398 n.2 (D. Or. 1990), aff'd, 6 F.3d 1385 (9th Cir. 1993).

⁵ See Complainant's Motion for Leave to Offer Telephone Testimony, pp. 1, 4.

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1. Enforcement will be responsible for ensuring that functioning speakerphones are available at the hearing so that the members of the Hearing Panel, the Parties, and the court reporter may clearly hear the testimony.
2. Enforcement shall arrange to have a competent notary public available at the witnesses' locations to swear the witnesses, or, alternatively, shall offer at the time each witness is called a sworn statement of the witness attesting that the testimony he or she will give at the hearing will be truthful.
3. At least eight days before the commencement of the hearing, Enforcement shall provide Respondent a list of all exhibits (if any) about which the witnesses will be questioned on direct examination.
4. At least five days before the hearing, Respondent shall notify Enforcement of all documents that he will use during the cross-examination of the witnesses. If Enforcement does not have a copy of any of the designated documents, Respondent shall provide a copy to Enforcement with the notice.
5. Enforcement shall ensure that the witnesses receive, and have at the time of testifying, copies of all exhibits relating to their testimony.
6. Enforcement shall ensure that there will be a means to contact the witnesses during the hearing, in the event there is a change in schedule or the witnesses are recalled to give additional testimony.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
January 18, 2000