

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 00-32 (C10000122).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10000122
v.	:	
	:	Hearing Officer - GAC
	:	
	:	
Respondent.	:	

ORDER GRANTING MOTION TO ALLOW TELEPHONE TESTIMONY

The Complaint alleges that Respondent _____ (“Respondent”) engaged in ten unauthorized transactions in the accounts of eight customers in violation of NASD Conduct Rule 2110. On November 30, 2000, Complainant Department of Enforcement (“Enforcement”) filed a motion for leave to introduce, by telephone, the testimony of three customer witnesses, RR, GS and JB (“Motion”). The Motion states that the three customer witnesses have expressed a willingness to participate in the Hearing, but are unavailable to appear in New York City for the Hearing on February 21-23, 2000.

According to Enforcement, it would be “very inconvenient” for RR to travel to the Hearing since he is a 70 year old resident of Clearwater, Florida. Likewise, it would be “very inconvenient” for GS to travel to the Hearing since he is a 69 year old resident of San Diego, California. Finally, the Motion states that although JB is a resident of Bridgewater, Connecticut, he is unavailable to attend the Hearing in person since he will be traveling to both Florida and

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Washington, DC during the time of the Hearing. According to the Motion, none of the customer witnesses is subject to the NASD's jurisdiction.

Respondent did not file a response to the Motion within 14 days after service of the Motion. Respondent is therefore deemed to have waived any objection to the granting of the motion pursuant to NASD Code of Procedure Rule 9146(d). 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 . . .

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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[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 New York, New York on February 21-23, 2000. Customers RR, GS and JB are not subject to the Association's jurisdiction. Enforcement has represented that RR and GS indicated that considering the great distance they would need to travel to get to the Hearing, and their advanced ages, it would be “very inconvenient” for them to travel to New York, New York for the Hearing. Enforcement also represented that due to customer JB's commitments to be in Florida and Washington, DC during the dates of the proceeding, that he would not be available to testify in person at the Hearing.

In this case, the alternative to telephone testimony is no testimony from these witnesses but simply a reliance on written materials with no opportunity for cross-examination by the Respondent and without the opportunity for the Hearing Panel to ask questions of its own. Telephone testimony is preferable to the alternative. Cross-examination may be more difficult over the telephone, but experience shows that it may 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.

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).

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In addition, while the credibility of these witnesses may be highly material to the outcome of this proceeding, their physical absence is the risk that Enforcement bears by choosing not to have the witnesses testify in person at the Hearing. Since Enforcement bears the burden of proof, any uncertainty that the Hearing Panel may have about the credibility of the witnesses, because it cannot observe their demeanor, may be resolved against Enforcement and may affect the outcome of this proceeding.

As to authentication of documents, the Hearing Officer finds that the witnesses need not appear in person for this purpose. The procedures set forth here for telephone testimony are designed to ensure that the witnesses have all necessary documents.

Conclusion

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

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 location of each witness to swear that witness, or, alternatively, shall offer at the time each witness is called a sworn statement or a declaration of the witness attesting that the testimony he will give at the hearing will be truthful.

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3. Enforcement shall ensure that each witness appearing by telephone receives, and has at the time of testifying, copies of all exhibits relating to his testimony.
4. Enforcement shall ensure that there will be a means to contact each witness during the Hearing, in the event there is a change in schedule or a witness is recalled to give additional testimony.

SO ORDERED.

Gary Carleton
Hearing Officer

Dated: Washington, DC
December 26, 2000