

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

EUGENE H. KIM
(CRD No. 2264940),

Respondent.

Disciplinary Proceeding
No. 2019064508802

Hearing Officer—DRS

**ORDER GRANTING AND DENYING, IN PART, RESPONDENT'S MOTION TO
MODIFY THE CASE MANAGEMENT AND SCHEDULING ORDER AND FOR
RECONSIDERATION OF THE HEARING PROCEDURES FOR WITNESS
EXAMINATIONS**

I. Introduction

The Case Management and Scheduling Order (CMSO) required the parties to identify on their exhibit lists all documents they expect “to use at the hearing for any purpose, including documents that are relevant only for impeachment purposes.” The parties were also required to include on their exhibit lists “a description of each exhibit (e.g., email, letter, chart, hand-written note, etc.), the date (if the document is dated), the author (if identifiable from the face of the document), and a statement of the purpose for which the exhibit will be offered in evidence.”¹ The CMSO also directed the parties to ensure that any of their witnesses who are permitted to testify by videoconference or telephone “have, at the time of testifying, electronic or paper copies of all exhibits that relate to their direct testimony, as well as any exhibits that may be designated for possible use on cross-examination.”²

On May 8, 2024, Respondent Eugene H. Kim filed a motion asking that I modify the CMSO. He argues that the two provisions described above unfairly required the parties to identify and provide copies of all cross-examination, rebuttal and impeachment exhibits prior to the hearing. He claims that this requirement infringes on his due process right “because it places an insurmountable burden on Respondent to project all potential variations of evidence and testimony that Enforcement will submit. Moreover,” he adds, “it provides Enforcement with an unfair advantage to prepare its witnesses for Respondent’s cross-examination and impeachment

¹ CMSO 12, § VII. C.

² *Id.* at 13 § VII. D.

prior to the hearing. Such a procedure defies standards of required proof in an administrative proceeding.”³ Nevertheless, Kim represents that, over objection (which I denied), he complied with that requirement directing the parties to identify and provide copies of all cross-examination, rebuttal, and impeachment exhibits.

But he requests that I modify the CMSO provision about providing exhibits to remote witnesses by requiring them to keep those exhibits sent to them for cross-examination, rebuttal, and impeachment “in the sealed packaging . . . to be opened during the start of the videoconference/telephone testimony.”⁴ Kim explains that this approach will enable the Hearing Panel “to assess the credibility of the witnesses and obtain testimony from the witnesses without undue influence,” as it will prevent any party from gaining an unfair advantage by reviewing the cross-examination, rebuttal and impeachment exhibits with a witness before the hearing. He maintains that his proposal “will preserve the integrity of the hearing process.”⁵

The motion also requests that I reconsider the approach I communicated to the parties at pre-hearing conferences requiring that witnesses who appear on both parties’ witness lists, other than Kim, be called once.⁶ Specifically, Kim requests permission to call witnesses on his witness list at a time determined by his counsel, regardless of when Enforcement calls the same witness.

The Department of Enforcement filed its opposition to the motion on May 15, 2024. Enforcement argues that that the “motion is untimely and lacks both factual and legal support,” and that Kim’s “proposed changes to the CMSO would unnecessarily complicate and lengthen the hearing and unduly burden witnesses.”⁷ Enforcement states that Kim failed to show he has a right to call witnesses separately from Enforcement’s case or that “requiring him to question witnesses appearing on each party’s witness list during Enforcement’s case and to reveal to remote witnesses potential exhibits to be used during his cross examination of those witnesses violates his due process rights and gives Enforcement an ‘unfair advantage.’”⁸ Indeed, according to Enforcement “[c]alling non-party witnesses to appear and testify twice at a disciplinary, as Respondent suggests, would unnecessarily complicate and lengthen the hearing and unduly burden witnesses by forcing them to miss work and travel to the hearing multiple times for no good reason.”⁹

³ Mot. 1–2.

⁴ *Id.* at 3.

⁵ *Id.* at 3–4.

⁶ The motion failed to include a meet-and-confer certification, as required by the CMSO. Kim is reminded of this obligation and that I may strike any filings that do not include the certification.

⁷ Opp’n. 1.

⁸ *Id.*

⁹ *Id.* at 5.

Finally, Enforcement argues that Kim did not explain “how the integrity of the hearing process is compromised by sending remote witnesses potential cross examination exhibits in unsealed packaging in advance,”¹⁰ or how he would be “disadvantaged or prejudiced by having to comply with this basic and routinely-followed procedure,”¹¹ especially given that the exhibits he produced included the exhibits he intends to use on cross examination. Enforcement maintains that it is not unfair “to provide, for the remote witnesses’ convenience, in advance, the exhibits on which they will be questioned.”¹²

II. Discussion

The parties interpret the CMSO as requiring that they provide to remote witnesses, in advance, all exhibits they will use on direct and cross examination. The CMSO, however, does not include this requirement. It only requires that the exhibits be provided electronically or in hard copy “at the time of testifying.”¹³ Even so, it is appropriate for me to address this issue since orders granting permission for witnesses to testify by videoconference or telephonically typically require that cross-examining parties designate, in advance, the exhibits they intend to use on cross examination with the witness. Kim has failed to demonstrate that requiring advance production of all exhibits to witnesses testifying remotely is unfair. There is nothing unfair about Kim not having the opportunity to try and surprise remote witnesses on cross-examination by showing them exhibits they may not have seen beforehand.

That said, there is an advantage to adopting Kim’s proposed modification. Although the CMSO required the parties—among other things—to include the purpose for which each listed exhibit will be offered in evidence, with one exception, neither party described any exhibit’s purpose as impeachment, rebuttal, or cross-examination.¹⁴ As a result, witnesses who appear in person will not necessarily know, in advance of their testimony, which exhibits will be used during their cross-examination. Granting Kim’s request will place remote witnesses on the same footing as witnesses appearing in person, as far as not knowing with certainty, until they testify, which exhibits will be used in their cross examination.

Accordingly, Kim’s request is **GRANTED**. I will include appropriate language in this regard in any orders I issue permitting a witness to testify by videoconference or telephone.

I turn next to Kim’s request that I reconsider the protocol in this case requiring that witnesses testify only once, with the exception of Kim. I informed the parties of this approach at

¹⁰ *Id.*

¹¹ *Id.* at 6.

¹² *Id.* at 5–6.

¹³ CMSO 13, § VII. D.

¹⁴ Enforcement described the purpose of CX-6 as including possible impeachment. Department of Enforcement’s Exhibit List 2.

both the initial pre-hearing conference on October 25, 2023,¹⁵ and at a later prehearing conference on April 5, 2024.¹⁶ At the initial pre-hearing conference, Kim's counsel did not object to the process. To the contrary, he specifically said that he agreed with it.¹⁷ Likewise, he failed to object or raise due process concerns about this process at the April pre-hearing conference, after acknowledging that he understood my "rules."¹⁸ Arguably, Kim's current challenge is untimely, as Enforcement asserts, or, more aptly put, he waived his objection.

Regardless, I consider his arguments on the merits and reject them for several reasons. First, constitutional due process does not apply to FINRA disciplinary proceedings.¹⁹ Second, Kim cites no legal authority supporting his claim that this process is unfair. Third, limiting the parties to calling witnesses (other than Kim) once is an appropriate approach to case management. I am authorized under FINRA Rule 9235 "to do all things necessary and appropriate to discharge" my duties,²⁰ including "regulating the course of the hearing"²¹ and "resolving any and all procedural and evidentiary matters."²² The procedure I have adopted is fair to both parties and falls well within my discretionary authority. It helps streamline the hearing, reduces inconvenience to witnesses by not requiring them to appear multiple times, and facilitates the Hearing Panel's ability to understand a witness's testimony by having it occur all at one time, rather than separated by as much as several days. Finally, this approach is not novel; it is standard practice in this forum and, in various permutations, is frequently used by federal courts.²³

¹⁵ Initial pre-hearing conference transcript (IPHC Tr.) 51–52.

¹⁶ Pre-hearing conference transcript (PHC Tr.) 37–38.

¹⁷ IPHC Tr. 52–53.

¹⁸ PHC Tr. 40.

¹⁹ See, e.g., *Edward Beyn*, Exchange Act Release No. 97325, 2023 SEC LEXIS 980, at *40 & n.86 (Apr. 19, 2023). ("Constitutional due process does not apply to FINRA proceedings."); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *38 n. 40 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

²⁰ FINRA Rule 9235(a).


²¹ FINRA Rule 9235(a)(2).

²² FINRA Rule 9235(a)(4).

²³ See, e.g., *Kim v. Hanlon*, Civil Action No. 24-1098 (ZNQ) (TJB), 2024 U.S. Dist. LEXIS 57533, at *36 (D.N.J. March 29, 2024) (noting that the court "instructed the parties to call each witness only once; it allowed for and permitted witnesses to be called out of order at Defendants' request"); *Sanchez v. E.I.G. Auto Salvage, Inc.*, Case No. 21 Civ. 8266 (PAE) (SN), 2023 U.S. Dist. LEXIS 159543, at *2 n.1 (S.D.N.Y. Sept. 8, 2023) ("For witnesses' convenience, each witness testified only once. Each party had the opportunity to conduct cross-examination beyond the scope of the direct examination of any witness called by the opposing party."); *Mizrachi v. Ordower*, Case No. 17 C 8036, 2021 U.S. Dist. LEXIS 88563, at *2–3 (N.D. Ill. May 10, 2021) (requiring that each witness—including the parties—be called once with the exception of when rebutting evidence is offered later and the party wishing to recall the witness could not have reasonably anticipated the need to do so); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, Case No. 3:19md2885; 7:20cv39, 2021 U.S. Dist. LEXIS 121446, at *14 (N.D. Fla. May 28, 2021) (same).

For these reasons, Kim's request that I reconsider and change the witness examination procedure I outlined at the pre-hearing conferences and allow him to call witnesses on his witness list at a time determined by his counsel regardless of when Enforcement calls the same witness is **DENIED**.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: May 21, 2024

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