

**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, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION
FOR VIDEOCONFERENCE AND/OR TELEPHONE TESTIMONY OF CERTAIN
WITNESSES**

I. Introduction

The hearing in this disciplinary proceeding is scheduled to be held at FINRA's New York City office on June 3–7, 2024, and June 10–14, 2024. On May 8, 2024, Respondent Eugene H. Kim filed a motion seeking permission to present videoconference and/or telephone testimony of two witnesses, Roger Monteforte and David Levine. Monteforte is listed as a witness on both parties' witness lists, while Levine appears only on Kim's list.

The motion states that Monteforte's testimony is crucial to Kim's defense, but he will not be available to appear in person from June 6–10, 2024, as he will be traveling outside of the United States. Further, the motion states both Kim and Enforcement want Monteforte to testify in person, and Enforcement hopes to have Monteforte testify before he leaves the country. But Enforcement could not confirm that it could do so. That said, according to the motion, Monteforte has informed Kim's counsel that he can appear by videoconference or telephone during that period. As a result, to the extent Kim needs Monteforte to testify during his period of unavailability, Kim requests permission for Monteforte to appear by videoconference or telephonic conference.

As for Levine, the motion states that he is located in Florida and is employed on a full-time basis. According to the motion, Levine informed Kim's counsel that it would be difficult for him to travel to New York to provide testimony due to his employment demands. The motion further states that Levine is willing to testify by videoconference or telephone, and Enforcement does not object.

With respect to both witnesses, according to the motion, Kim

will work with Enforcement to present the testimony of Levine, and Monteforte if necessary, 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 present which prevent the testimony by videoconference, Respondent seeks permission to present their testimony by telephone. Further, if this motion is granted, Respondent will provide signed declarations from the witnesses who testify by telephone or videoconference stating that their testimony will be truthful. Respondent will provide copies of the exhibits he intends to reference during the videoconference or telephonic testimony.¹

On May 15, 2024, Enforcement responded to the motion. Enforcement states it does not object to Levine testifying by videoconference or telephone but objects to Monteforte testifying that way because he is available to testify in person during most of the scheduled hearing. Enforcement also states that it has not determined when it may call Monteforte but “will endeavor to call him before he leaves the country.”² Further, Enforcement represents that

[i]f Monteforte does not testify before June 6, Enforcement is willing to question Monteforte after June 10, 2024, when he is available to appear in-person. Attempting to schedule video or telephonic testimony for Monteforte while he is out of the country presents logistical and technical complications that are easily avoided by Monteforte simply appearing in-person to testify when he is available.³

II. Legal Standard

“In all cases, hearing panels and parties would prefer to have witnesses testify in person; however, telephone testimony is often a practical necessity, because NASD has no power to compel the attendance of witnesses who are not subject to the NASD’s jurisdiction.”⁴ As a result, telephone testimony is regularly used in FINRA proceedings,⁵ and the Securities and Exchange Commission has repeatedly upheld FINRA’s reliance on telephone testimony in reaching its decisions.⁶ “There is also well established precedent for permitting telephone or

¹ Mot. 3.

² Opp’n 1–2.

³ Opp’n 2.

⁴ OHO Order 06-21 (CAF040079) (Mar. 8, 2006), at 2, https://www.finra.org/sites/default/files/OHODecision/p017562_0.pdf.

⁵ See, e.g., OHO Order 24-04 (2018057297102) (Jan. 17, 2024), at 2, https://www.finra.org/sites/default/files/2024-05/OHO_Order_24-04_Kolta_2018057297102.pdf; OHO Order 23-07 (2017055886402) (Feb. 21, 2023), at 1, https://www.finra.org/sites/default/files/2023-05/oho_order_23-07_2017055886402_cantone.pdf; OHO Order 15-14 (2012030564701) (Oct. 22, 2015), at 1-2, https://www.finra.org/sites/default/files/OHO_Order15-14_2012030564701_0.pdf.

⁶ OHO Order 24-04, at 2 (citing *Ronald W. Gibbs*, Exchange Act Release No. 35998, 1995 SEC LEXIS 1824, at *16 (July 20, 1995)).

videoconference testimony in FINRA disciplinary proceedings.”⁷ In these proceedings, “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.”⁸

III. Discussion

A. Monteforte

According to the parties’ witness lists, Monteforte is currently associated with a FINRA member firm,⁹ and thus is subject to FINRA’s jurisdiction. Neither the motion nor the opposition indicates that it would be a hardship for him to appear in person at the hearing, or that he would be otherwise unable to do so, except for June 6–10.

I recognize that videoconference and telephone testimony can be used in a FINRA disciplinary proceeding. And I appreciate Kim’s interest in calling Monteforte at a time that facilitates the efficiency of the hearing and the presentation of his defense. But it is important that Monteforte testify in person given: (1) the general preference for in-person testimony; (2) that based on the filings to date in this case, including the motion, Monteforte will be an important witness; and (3) the likelihood that his testimony will be lengthy and document-intensive. In light of Enforcement’s representation that it will call Monteforte either before or, if necessary, after his period of unavailability, I find it unnecessary to grant permission for him to testify by videoconference or telephone. Accordingly, the motion is **DENIED** as to Monteforte.

B. Levine

Like Monteforte, Levine is also currently associated with a member firm and under FINRA’s jurisdiction.¹⁰ But because it is undisputed that it would be a hardship for Levine to appear in person at the hearing and Enforcement has no objection to him testifying by videoconference or telephone, I find it appropriate to permit Levine to do so. Accordingly, I **GRANT** the motion, as to him.

That said, the Hearing Panel prefers that Levine testify by videoconference, rather than by telephone. But if poor internet connections or other technical problems make videoconference

⁷ OHO Order 23-16 (2021070337501) (May 26, 2023), at 3, https://www.finra.org/sites/default/files/2023-09/oho_order_23-16_2021070337501_venturino.pdf.

⁸ *Id.*

⁹ Department of Enforcement’s Witness List 3; Respondent’s Updated Proposed Witness List 2. The record, however, does not reflect that Enforcement has issued a FINRA Rule 8210 request compelling his attendance at the hearing.

¹⁰ Respondent’s Updated Proposed Witness List 3. Enforcement has issued a FINRA Rule 8210 request for Levine to appear at the hearing and give testimony. Notice of Issuance of Post-Complaint Rule 8210 Requests for Testimony.

testimony impossible, we will accept telephone testimony instead. Enforcement should ensure that the necessary technology is in place in the hearing room to enable Levine to testify remotely.

Kim's right to present Levine's testimony by videoconference or telephone is subject to the following conditions:

1. By **May 29, 2024**, Kim shall file an affidavit signed by the Levine stating that his testimony at the hearing will be truthful.¹¹
2. Kim shall ensure that Levine has, at the time he is called to testify, copies of all exhibits that relate to his direct testimony and any exhibits that Enforcement requests be made available for possible use on cross-examination, rebuttal, and impeachment.
3. Kim shall instruct Levine **not** to open the package transmitting the cross-examination, rebuttal, and impeachment exhibits until he has entered the virtual hearing room and is ready to testify. At that time, he will be directed to open the package.
4. Kim must ensure that Levine is available during a block of time when it is reasonable to expect that he will be called to testify, so the hearing is not disrupted if the testimony of a prior witness is longer or shorter than anticipated.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Dated: May 21, 2024

Copies to:

Martin H. Kaplan, Esq. (via email)
Robyn Paster, Esq. (via email)
Robert Kennedy, Esq. (via email)
Roger Kiley, Esq. (via email)
John R. Baraniak, Jr., Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

¹¹ See FINRA Rule 9262 (“A person who is subject to the jurisdiction of FINRA shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.”).