

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. CAF040056 Hearing Officer – DRP
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**ORDER GRANTING IN PART, AND DENYING IN PART,
ENFORCEMENT'S MOTION FOR LEAVE TO OFFER TELEPHONE TESTIMONY**

On July 28, 2004, the Department of Enforcement filed a motion seeking leave to offer the testimony of eleven customer witnesses by telephone during the temporary cease and desist hearing, scheduled to take place in Deerfield Beach, Florida, on August 9-11, 2004.

Enforcement further seeks permission to offer testimony by telephone if other witnesses, currently scheduled to testify in person, are unable to appear. On July 30, 2004, Respondent filed its opposition to Enforcement's motion.

Enforcement states that most of the eleven proposed witnesses do not live in Florida.¹ Enforcement represents that many of the out-of-state customers are adverse to testifying before the hearing panel, because of the inconvenience of traveling to Florida, but Enforcement presents no information about those customers who apparently reside in-state.

In opposition, Respondent asserts a right to observe these witnesses and argues that they must testify in person, because it will be "difficult or impossible to follow the witness[es]' telephone testimony and to effectively cross-examine" them. Respondent also argues there is no

¹ According to Enforcement, the out-of-state witnesses reside in the following states: Pennsylvania, Connecticut, Georgia, Montana, New York, California, Arizona and Ohio.

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evidence the witnesses are not subject to NASD jurisdiction or that they are unavailable to testify at the hearing. Respondent urges that his need to confront the witnesses in person outweighs their objections based on cost or personal convenience and contends that this proceeding is "substantially different" from other NASD proceedings.

Telephone testimony is a familiar and well-accepted part of NASD disciplinary proceedings and has been approved on numerous occasions by the SEC. Though the hearing panel in the instant proceeding must determine whether a temporary cease and desist order (TCDO) should be issued pursuant to NASD Rule 9840, there is nothing inherently distinctive about this hearing that renders telephone testimony inappropriate. To the contrary, the expedited nature of a TCDO hearing, which must be held within 15 days after service of the notice initiating the proceeding, provides an additional reason to allow telephone testimony in this instance.

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. Such is the case here. Thus, the alternatives to telephone testimony are no testimony from these customer witnesses at all, or presentation of their evidence by written declaration, with no opportunity for Respondent to cross-examine, or for the hearing panel to ask questions of its own.² Telephone testimony is preferable to either of these alternatives. Cross-examination may be more difficult over the telephone, but it can be done effectively, and hearing panels are able to evaluate the credibility of witnesses who testify by telephone, even though they cannot observe the witnesses' demeanor.

² The Hearing Officer would have discretion to admit such declarations, even if they would not be admissible in a judicial proceeding, because Rule 9145 provides that "[t]he formal rules of evidence shall not apply in a proceeding under the Rule 9000 Series."

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The Hearing Officer concludes that Respondent will not be unfairly prejudiced and rules that the out-of-state witnesses may testify by telephone. The motion is denied, however, regarding those witnesses who apparently reside in Florida, because Enforcement provides no reason why they should be permitted to testify by telephone. Finally, the Hearing Officer declines to rule on Enforcement's request regarding other witnesses who may ultimately be unable to testify in person, for the motion is premature.

Thus, Enforcement's motion is granted with respect to the witnesses who reside in Pennsylvania, Connecticut, Georgia, Montana, New York, California, Arizona and Ohio, subject to the following conditions:

1. On or before August 4, Enforcement shall file a declaration from each witness testifying by telephone that the testimony he will give at the hearing will be truthful.
2. Enforcement shall ensure that each witness has, at the time of testifying, copies of all exhibits that relate to that witness's direct testimony, as well as any exhibits that Respondent may designate for possible use on cross-examination. Respondent must provide any such exhibits on or before August 5.
3. Enforcement shall ensure that each witness will be available by telephone during a period of time when it is reasonable to expect that the witness will be called to testify, so that the hearing is not unduly disrupted if the testimony of prior witnesses is longer or shorter than expected.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: August 2, 2004
Washington, DC