

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-13 (C3A970067).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A970067
v.	:	
	:	Hearing Officer—AHP
Respondent.	:	
	:	
	:	
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**ORDER GRANTING DEPARTMENT OF ENFORCEMENT'S MOTION FOR
TELEPHONE TESTIMONY**

The Department of Enforcement has filed a motion for leave to introduce testimony by telephone. For the reasons set forth below, the motion is granted.

Discussion

The touchstone for the conduct of a disciplinary hearing is Section 15A(b)(8) of the Securities Exchange Act of 1934 (Exchange Act) that requires that the rules of a self-regulatory association “provide a fair procedure for the disciplining of members and persons associated with members.” Fairness in this context does not mandate the full range of procedural rights guaranteed to a defendant in a criminal proceeding.¹ On the contrary, in providing for self-regulation of securities dealers, Congress did not intend to create tribunals similar to the courts or the Securities and Exchange Commission (SEC).² Rather, Congress recognized the need for informality to enable effective self-regulation.³

¹ Howard Alweil, 51 S.E.C. 14, 17 (1992).

² Sumner B. Cotzin, 45 S.E.C. 575, 579-580 (1974).

³ Id.

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One area of recognized, permissible informality to facilitate the National Association of Securities Dealers, Inc. (NASD) in carrying out its self-regulatory duties is the use of telephone testimony in lieu of a witness's personal appearance. In fact, without the ability to use telephone testimony, the NASD disciplinary process could be stymied in some cases due to its lack of subpoena power to compel the attendance of witnesses at disciplinary hearings. Thus, there is a clear and substantial interest in permitting telephone testimony in appropriate circumstances.

Telephone testimony meets the Exchange Act's fairness requirement where there is an adequate opportunity to cross-examine the witness. A respondent does not have a per se right to a face-to-face confrontation of witnesses in an NASD disciplinary proceeding.⁴ But the fact that telephone testimony meets the fairness requirement of Section 15A(b)(8) of the Exchange Act does not answer the question of whether telephone testimony of a particular witness should be permitted in a particular proceeding. Instead, the determination of whether to allow telephone testimony under the new NASD Code of Procedure will be based on the circumstances of each case.⁵

In this proceeding, the Department of Enforcement has requested that all three of its customer witnesses be allowed to testify by telephone. None of these potential witnesses is subject to the jurisdiction of the NASD, and therefore they cannot be compelled to appear in person at the hearing. Accordingly, allowing these witnesses to

⁴ See, e.g., Robert E. Gibbs, 51 S.E.C. 482, 484 n.3 (1993), aff'd., 25 F.3d 1056 (10th Cir. 1994); Curtis I. Wilson, 49 S.E.C. 1020, 1024-25 (1989), aff'd., 902 F.2d 1580 (9th Cir. 1990); David A. Gingras, 50 S.E.C. 1286, 1293 n. 20 (1992).

⁵ Letter dated July 11, 1997, from NASD Regulation, Inc. to the Securities and Exchange Commission in response to comments from the American Bar Association Ad Hoc Committee regarding the NASD's rule filing, SR-NASD-97-28, at 16.

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testify by telephone is appropriate absent a demonstrated need for their personal appearance.

Respondent _____ opposes allowing the customer witnesses to testify by telephone on two grounds: telephone testimony will deprive the hearing panel of the ability to observe the witnesses' demeanor and will deprive _____ of the ability to effectively cross-examine the witnesses.⁶ Neither of these arguments establishes that these witnesses' personal appearances are necessary to a fair hearing in this proceeding.

As previously discussed, telephone testimony is permissible in disciplinary hearings despite the fact that the hearing panel cannot observe the witness. The hearing panel can assess credibility "by listening solely to a person's voice."⁷ In addition, the hearing panel can assess a witness's credibility by examining the consistency of the witness's answers, evaluating how directly or indirectly the witness responds to cross-examination, and comparing the witness's testimony to other evidence in the proceeding.

Similarly, the mere fact that a witness testifies by telephone does not mean that effective cross-examination is made impossible.⁸ Indeed, there are many situations in civil litigation where cross-examination by telephone is adequate. For example, Rule 30(b)(7) of the Federal Rules of Civil Procedure permits depositions to be taken by "telephone or other remote electronic means." In the event that the witness is not then available to testify at trial, the telephone deposition may be used as if the witness were

⁶ Respondent's Brief in Opposition to Complainant's Motion for Leave to Offer Telephone Testimony, at 3.

⁷ Joseph Alderman, 59 S.E.C. Docket 2075, 2076 n. 6 (1995). See also Official Airline Guides, Inc. v. Churchfield Publications, Inc., 756 F.Supp. 1393, 1398 n. 2 (D. Or. 1990), aff'd., 6 F.3d 1385 (9th Cir. 1993).

⁸ See, e.g., Gingras, supra, at 1293 n. 20.

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present.⁹ Therefore, to bar the customer witnesses from testifying by telephone when they will be subject to cross-examination during the hearing, _____ needed to show that he would be unfairly prejudiced under the facts and circumstances of this case. _____ has failed to meet this burden.

On the other hand, although telephone testimony may be appropriately used in a particular proceeding, the relative weight to be given it will depend upon the facts and circumstances of each case.¹⁰ Because the reliability of the witness's testimony can often be evaluated better by observing the witness's demeanor, nervousness, expressions, gestures, and other body language, it may be appropriate in some cases to give greater weight to in-person testimony. Moreover, in a proceeding involving complex testimony or a large number of documents, it may be so difficult to follow the witness's testimony that either the testimony should be given little or no weight, or the witness should be required to testify in person.

This proceeding however does not involve a large number of documents or such complex testimony that the hearing panel or the parties will be unable to follow the witnesses' testimony. Therefore, Department of Enforcement's customer witnesses are permitted to testify by telephone.

Conclusion

For the foregoing reasons, the Department of Enforcement's Motion for Leave to Offer Telephone Testimony is granted, and it is further ordered that:

1. The Department of Enforcement shall have a notary public available at each witness's location to swear the witness.

⁹ Federal Rules of Civil Procedure Rule 32.

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2. Counsel shall confer at least seven days before the hearing regarding the documents about which each witness will be questioned. The Department of Enforcement shall ensure that each witness receives, and has at the time of testifying, copies of all exhibits relating to that witness's direct testimony.
3. _____ shall notify the Department of Enforcement of all documents that he will use during the cross-examination of each witness. If the Department of Enforcement does not have a copy of any of the designated documents, _____ shall provide a copy to the Department of Enforcement. The Department of Enforcement shall then ensure that each witness receives before the hearing a copy of each document _____ has designated for use during cross-examination of that witness.
4. The Department of Enforcement shall ensure that there will be a means to contact each witness during the hearing in case there is a change in schedule or the witness is re-called to give additional testimony.

SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: Washington, DC
January 27, 1998

¹⁰ Letter dated July 11, 1997, from NASD Regulation, Inc. to the Securities and Exchange Commission, at 16.