

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10970143
	:	
v.	:	
	:	
	:	Hearing Officer - SW
	:	
	:	
Respondents.	:	

**ORDER DENYING RESPONDENTS' MOTION TO COMPEL PRODUCTION OF
INFORMATION AND DOCUMENTS FROM CUSTOMER WITNESSES**

I. Motions to Compel Production of Financial Information and Documents

Counsel for Respondents _____ and _____ filed a motion on April 13, 2000 requesting that those customers who the Department of Enforcement (“Enforcement”) intends to call as witnesses to testify against Respondents _____ and _____ in the disciplinary proceeding be required to produce certain financial information and documents. A similar motion with respect to those customers who Enforcement intends to call as witnesses to testify against Respondent _____ was filed on April 14, 2000 by counsel for Respondent _____. Enforcement filed a response on April 27, 2000 opposing Respondents’ Motions.

The financial information and documents requested by the Motions included, among other things: (i) the name, address, and account number of any brokerage account over which the witness had a direct or indirect interest or over which they exercised investment control at any time during the period from two years prior to the date they opened their account at the Respondents’ prior firm to the

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present; (ii) a copy of any and all account documents relating to those investment accounts; (iii) a copy of the individuals' tax returns, along with the returns for any business over which they are 5% or more shareholder, and which businesses also maintained investment accounts; and (4) copy of any transcript of testimony of any other occasion in which the customer testified under oath in any matter relating to their finances, investment history, or any securities regulatory or arbitration matter. The Motions further requested that Respondents _____, _____, and _____ be authorized to issue subpoena to any brokerage firm for financial information and documents in its possession relating to any of the accounts that were disclosed by the customer witnesses. In the alternative, counsel for Respondent _____ requested that customer witnesses who do not provide the financial information be precluded from testifying at the hearing.

In support of their Motions, counsels for Respondents _____, _____, and _____ argued principally that the financial information and documents were necessary to effectively cross-examine and impeach the credibility of the customer witnesses. Counsels also argued that, in the context of a customer arbitration proceeding, they routinely would receive such financial information and documents. In support of its opposition to the Motions, Enforcement argued that (1) the Motions were requests for production of financial documents at the hearing, subject to the requirements of Rule 9252,¹ (2) the Motions failed to meet the requirements of Rule 9252, and (3) the Motions were untimely.

¹ Rule 9252(c) provides if the Hearing Officer grants the request for production of documents, he shall order that the requested documents be produced to all parties not less than ten days before the hearing.

II. Discussion and Ruling

A. Rule 9252

The only provision of the Code that might conceivably authorize the relief sought by Respondents is Rule 9252. Accordingly, the Hearing Officer reviewed Rule 9252 to determine if Respondents _____, _____, and _____ met the requirements for the Association to invoke Rule 8210 to compel the production of documents on behalf of respondents.

Rule 9252(a) affords respondents the right to request that the Association invoke its Rule 8210 powers to compel the production of documents for hearing; it does not authorize discovery.² Pursuant to Rule 9252(b), a request shall be granted only upon a showing that: (1) the information sought is relevant, material, and non-cumulative; (2) the requesting Party has previously attempted in good faith to obtain the desired documents through other means but has been unsuccessful in such efforts; and (3) each of the persons from whom the documents are sought is subject to the Association's jurisdiction. In addition, the Rule requires the Hearing Officer to consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

B. Production from Customer Witnesses

The Hearing Officer has no authority, under Rule 9252 or any other provision of the Code, to invoke Rule 8210 to obtain documents or elicit testimony from persons who are not subject to the

² A request under Rule 9252(a) must be in writing and “describe with specificity the Documents, [or] the category or type of Documents . . . sought; state why the Documents, [or] the category or type of Documents . . . are material; describe the requesting Party’s previous efforts to obtain the Documents, [or] the category or type of Documents . . . through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents . . . is subject to the Association’s jurisdiction.” Rule 9252(a) also affords respondents the right to request that the Association invoke Rule 8210 to compel testimony at the hearing.

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Association's jurisdiction, such as the "customer-witnesses." Respondents' argument that they routinely would receive such financial documents in the context of an arbitration proceeding is without merit. The procedures in a customer arbitration proceeding are irrelevant in determining whether Respondents have made an adequate showing under Rule 9252 in a disciplinary proceeding.³ Accordingly, having considered the Parties' written submissions⁴ and finding no representation that the customer witnesses are subject to the Association's jurisdiction, the Hearing Officer concludes that Respondents failed to meet the third requirement of Rule 9252(b), and the Hearing Officer, therefore, denies the first part of the Motions, without any further review.

C. Production from Member Firms

Although member firms obviously are subject to the Association's jurisdiction, which meets the third requirement of Rule 9252, Respondents' submissions failed to satisfy the first requirement of Rule 9252, i.e., the information sought be relevant, material, and non-cumulative.

Respondents have only proffered the theory that the financial documents requested are potentially relevant in that they might bear negatively on the customer witness's credibility. Respondents have not demonstrated that they have any basis to believe that the documents sought contain any

³ In the arbitration forum, an aggrieved customer voluntarily submits to the jurisdiction of the Association and, as a party to the proceeding, may be required to produce documents. In contrast, in a disciplinary proceeding such as this, customers appear voluntarily and do not subject themselves to the Association's jurisdiction.

⁴ Counsel for Respondents _____ and _____ filed a request on May 4, 2000 for leave to reply to Enforcement's opposition. On May 9, 2000, Enforcement filed an objection to the request for leave to reply. The Hearing Officer grants the request of Respondents _____ and _____ to file the reply, deeming the reply filed as of May 4, 2000. The reply was considered a part of the written submissions.

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evidence relevant to allegations of the Complaint or that they might bear negatively on the customer witnesses' credibility.⁵

D. Unreasonable, Oppressive and Unduly Burdensome

In addition, it would be unreasonable, oppressive, and unduly burdensome to require customer witnesses who agree to testify voluntarily to provide, directly or through their brokers, highly confidential financial documentation. The practical effect of doing so would be that customers would refuse to testify.

In contrast, the documents Respondents seek are not crucial to the defense. Respondents do not represent that the documents relate to the allegations in the Complaint, and in so far as the customers' other financial dealings may be relevant on cross-examination, the financial dealings may be covered without the documents. The Hearing Officer notes, however, that any inquiry into the customers' other financial dealings is subject to the provisions of Rule 9263, which authorizes the Hearing Officer to exclude evidence that is irrelevant, immaterial, unduly repetitious or unduly burdensome. Accordingly, the Hearing Officer denies the second part of Respondents' Motions.⁶

⁵ The Hearing Officer also notes that under the Federal Rules of Evidence, which she may look to for guidance, specific instances of conduct introduced for the purpose of attacking a witness's credibility may not be proved through extrinsic evidence. FRE 608(b).

⁶ Because Respondents failed to meet the requirements of Rule 9252, the Hearing Officer did not consider whether the request was untimely.

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In view of Respondents' failure to meet the requirements of Rule 9252, the Hearing Officer also denies the alternate request that the customer witnesses who do not provide the financial documentation be precluded from testifying at the hearing.

SO ORDERED

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
May 17, 2000