

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2009019042402

Hearing Officer – LBB

**ORDER DENYING RESPONDENT'S MOTION TO DISQUALIFY
JOSEFINA MARTINEZ AND MOTION TO COMPEL TESTIMONY
AND PRODUCTION OF DOCUMENTS BY JOSEFINA MARTINEZ**

Respondent has moved to call Josefina Martinez, who is lead counsel for the Department of Enforcement in this proceeding, as a hearing witness, and to disqualify Martinez because she is allegedly a necessary witness. Respondent also asks for an order that would require Martinez to produce documents. Respondent alleges that Martinez is a necessary witness because in April 2008 she interviewed customer JN, who died in February 2009. The Complaint includes charges that Respondent recommended an unsuitable investment to customer JN, and Respondent seeks to require Martinez to testify about her interview of customer JN. Enforcement opposes both motions.

To prevail in a motion to require opposing counsel to testify, Respondent must show that there is a compelling need for her testimony. The unavailability of a witness alone is insufficient to constitute a compelling need, and would result in frequent disqualifications, an especially substantial risk in FINRA proceedings where customers, and often other potential witnesses, cannot typically be compelled to testify. Respondent has not established that there is a

compelling need for Martinez to testify. Respondent also has not shown any basis to compel Martinez to produce documents. Respondent's motions are denied.

I. Background

The causes of action of the Complaint that are relevant to these motions relate to Respondent's recommendation of an NFOA¹ installment plan contract to customer JN. The most relevant is a charge that Respondent's recommendation of the NFOA installment plan contract was unsuitable because Respondent lacked a reasonable basis for the recommendation. The Complaint was filed in December 2012.

Martinez interviewed Customer JN by telephone on April 21, 2008. Martinez and JN were the only participants in the telephone interview. Martinez's notes include the following statements:

- 1) Customer JN told her that Respondent was "totally honest."
- 2) "Respondent discovered that (NFOA's) tax-free status was not legit."
- 3) "Never made investment" and "He never transferred any \$."
- 4) "Respondent put in purchase order contingent on proof of tax-free status"

Customer JN died in February 2009. Enforcement has voluntarily produced Martinez's interview notes from her interview of customer JN to Respondent.

II. Respondent's Motion to Disqualify Martinez is Denied

Respondent argues that Martinez is a necessary witness because Respondent intends to call her to testify concerning statements in her notes, and represents that those statements are "only the starting point" for the proposed examination. Respondent identifies a non-exclusive list of seven additional topics on which Martinez may be questioned, including her assessment of

¹ The National Foundation of America, or NFOA, offered the installment contracts to investors who transferred assets to the NFOA in exchange for a fixed annual payment. NFOA was placed into receivership subsequent to the transactions that are the subject of the Complaint. See Motion to Dismiss Complaint by Respondent at 1.

JN's demeanor and mental acuity, whether JN intended to profit from the investment in the NFOA installment plan contracts, the proposed transfer of an annuity contract to NFOA, and JN's views of Respondent. Because an attorney may not participate in a judicial proceeding as both an advocate and a witness except in limited circumstances, Respondent argues that Martinez must be disqualified from participating in the hearing as counsel for Enforcement.

A. Respondent Must Establish a Compelling Need to Require Enforcement's Counsel to Testify

An attorney who is likely to be a witness at a trial is generally prohibited from acting as an advocate at the trial.² The ABA Comment on Rule 3.7 of the Model Rules of Professional Conduct states, "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." The Seventh Circuit has noted the wide application of the prohibition:

The advocate-witness rule generally bars a lawyer from acting as both an advocate and a witness in the same proceeding except under special circumstances....The rule "articulates the professional impropriety of assuming the dual role of advocate and witness in a single proceeding and has deep roots in American law."³

A party may call opposing counsel to the stand "only when doing so is justified by a compelling need."⁴

Permitting a party to call opposing counsel to testify because a witness becomes unavailable would have undesirable consequences, because every attorney who interviews a potential witness or participant in a relevant event could be a witness, risking disqualification.

² See Rule 3.6, ABA Model Rules of Professional Conduct.

³ *U.S. v. Jones*, 600 F.3d 847, 861-62 (7th Cir. 2010) (citations omitted).

⁴ Restatement (Third) of the Law Governing Lawyers, § 108(4); see, e.g., *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 267 (5th Cir. 2001) (refusing to disqualify counsel because his testimony would be cumulative); *U.S. v. Watson*, 952 F.2d 982, 986 (8th Cir. 1991); *U.S. v. Ross*, 2007 U.S. Dist. LEXIS 65096, at *58 (E.D. Pa. Aug. 31, 2007)

Prosecutors would be particularly at risk for being disqualified because they often participate in fact-finding both before and after an action is filed.⁵ Disqualification of attorneys who interview witnesses could be commonplace if the attorney who interviewed the witness becomes a necessary witness when a witness becomes unavailable. Disqualification would be especially likely in FINRA's proceedings due to FINRA's limited jurisdiction. For example, customer witnesses often refuse to testify even after cooperating with FINRA or Respondents' counsel, and cannot be compelled to testify at hearings. Even witnesses who agree to testify may become unavailable because of intervening events or changing their minds.⁶

For these reasons, it will rarely, if ever, be appropriate to require an attorney to become a witness merely because a witness becomes unavailable after the attorney interviews the witness.⁷ At a minimum, however, the party who seeks to call the attorney for the opposing party must establish that there is a compelling need to call her.

B. Respondent Has Not Shown a Compelling Need to Require Martinez to Testify at the Hearing

Respondent has not shown that there is a compelling need to require Martinez to testify at the hearing. There is substantial additional evidence available to the parties relating to Respondent's transaction with customer JN. Moreover, Martinez's testimony would consist of

⁵ Cf. *U.S. v. Keller*, 2009 U.S. Dist. LEXIS 114638, at *9-10 (E.D. Mich. Dec. 9, 2009).

⁶ While having an investigator or paralegal present at an interview may provide some insurance that the attorney will not become a witness because the non-attorney would have the same information, it would impose an undue burden on the parties to have a non-attorney present for interviews or risk becoming a witness. In addition, it is not at all uncommon for investigators or examiners who conduct an examination or investigation to leave FINRA before a hearing occurs. It is also not uncommon for paralegals to leave law firms for other pursuits. The former FINRA or law firm employees may be unavailable and not subject to FINRA's jurisdiction by the time of a hearing. Thus, an attorney could become a witness even if a non-attorney participates in an interview.

⁷ In addition, Martinez's testimony might force disclosure of Enforcement's work product. *Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947). Enforcement is not required to produce written work product under FINRA Rule 9251(b)(1)(A). However, the Rule does not authorize Enforcement to withhold exculpatory material. FINRA Rule 9251(b)(3).

hearsay testimony of uncertain reliability, which would substantially diminish its significance if she were required to testify.

Respondent seeks to obtain Martinez's testimony concerning JN's recollection of the facts concerning the NFOA installment plan contract transaction. Respondent can testify about what JN told him with respect to such matters as JN's motivation in considering the investment in the NFOA contracts, what Respondent told JN about the investment, and Respondent's actions in connection with the alleged investment. In addition, documentary evidence is available with respect to a number of the matters that Martinez may have discussed with JN, such as cancellation of the annuity contract and whether an investment was made. Respondent's proposed examination of Martinez concerning JN's opinions would be of little or no evidentiary value, and perhaps inadmissible, even if JN were available to testify. The availability of Respondent's testimony and documentary evidence concerning the transactions establishes that there is not a compelling need for Martinez's testimony.

The value of Martinez's testimony is further lessened because JN's statements to Martinez are hearsay of unknown reliability. "In determining whether to rely on hearsay evidence, 'it is necessary to evaluate its probative value and reliability, and the fairness of its use.' The factors to consider include 'the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated.'"⁸ JN's statements were oral and not under oath. They are either uncorroborated, or if corroborated, they are cumulative and Martinez's testimony is unnecessary.

⁸ *Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *46-47 (Jan. 30, 2009) (citations omitted).

Neither party has cited to cases presenting comparable facts, where a party seeks to call an opposing attorney to testify concerning hearsay from an unavailable witness.⁹ In fact, the more common, although still unusual, situation is where an attorney seeks to impeach a witness by testifying concerning statements a witness made in an interview.¹⁰ Respondent relies on cases in which attorneys were disqualified because they participated or witnessed events that were the subject of the complaint; in one case had agreed not to participate as counsel and were potential impeachment witnesses; and one in which the attorneys were not disqualified because their testimony was irrelevant and there were other witnesses who could testify about the same topics.¹¹ None of these cases supports calling an attorney for an opposing party to testify concerning the content of an interview with an unavailable witness.

Respondent has not shown that there is a compelling need to require Martinez to testify at the hearing, and, as discussed below, the motion to require her to testify is denied. Accordingly,

⁹ The absence of case law might be due, in part, to the fact that Martinez's testimony would likely be inadmissible hearsay in court proceedings. Respondent argues that the testimony would be admissible in court pursuant to hearsay exceptions for "statements against interest and relating to unavailable witnesses." Motion to Disqualify at 2. The exception does not apply. Under Rule 804 of the Federal Rules of Evidence, a statement against interest is admissible if "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability." There is no reason to suspect that JN's statements to Martinez were contrary to JN's proprietary or pecuniary interest or exposed him to criminal liability. The other Rule 804 exceptions to the inadmissibility of hearsay evidence are also inapplicable.

¹⁰ See, e.g., *U.S. v. Torres*, 503 F.2d 1120, 1126 (2d Cir. 1974) ("A Government prosecutor should not take the stand to impeach the testimony of Government witnesses unless it is unavoidably necessary.").

¹¹ *EEOC v. Bardon, Inc.* 2010 U.S. Dist. LEXIS 3980 (Jan. 19, 2010) (in a retaliatory discharge case, attorney was "a primary actor" in the decision to discharge); *Hamrick v. Union Twp.*, 81 F.Supp.2d 876 (S. D. Ohio 2000) (employment case, attorney witnessed a key event, interviewed witnesses who would testify at trial and who had allegedly participated in destruction of evidence; attorney had submitted a complaint to a judge two years prior to filing the lawsuit, pledging not to participate in any ensuing litigation); *Finkel v. Frattarelli Bros.*, 740 F.Supp.2d 368 (E.D.N.Y. 2010) (motion to disqualify denied because others could testify about same matters, which were largely irrelevant); *Acme Analgesics, Ltd. v. Lemmon Co.*, 602 F.Supp. 306 (S.D.N.Y. 1985 (attorney participated in contract negotiations and drafting); *Zweig v. Safeco Ins. Co. of America*, 125 A.D. 2d 205 (First Dep't, N.Y. 1986) (insurance coverage matter on bad faith refusal to settle, where attorney was necessary witness because had represented plaintiff in underlying litigation).

there will not be a violation of the witness-advocate rule, and the motion to disqualify her as counsel is denied.

III. The Motion to Require Martinez to Testify and Produce Documents Is Denied

Respondent moves to compel Martinez to appear and testify at the hearing, and to produce documents. Respondent's motion is denied because Respondent filed his motion pursuant to FINRA Rule 9252, requesting the issuance of a Rule 8210 request to Martinez, a procedure that does not apply to requests directed to Enforcement. In addition, the motions are denied because Respondent has not shown a compelling need for Martinez's testimony, and because Enforcement has produced the only document covered by the request that Enforcement is required to produce pursuant to FINRA Rule 9251.

A. Respondent's Motion is Denied Because Discovery from Enforcement Counsel is Not Authorized by Rule 9252

FINRA Rule 9252 provides for discovery from persons who are subject to FINRA's jurisdiction. FINRA's By-Laws provide for jurisdiction over its members and persons associated with members, and a period of continuing jurisdiction over former members and persons associated with members. Nothing in FINRA's By-Laws suggests that FINRA has jurisdiction over its employees for purposes of Rules 9252 or 8210, or that Rule 8210 may be used to compel an employee to testify or produce documents.

Martinez is not a person associated with a FINRA member, and is therefore not subject to a request pursuant to FINRA Rule 8210. Accordingly, Respondent's motion is denied.

B. Respondent's Motion to Call Martinez as a Witness Is Denied Because There Is No Compelling Need for Her Testimony

Respondent has not shown a compelling need for Martinez's testimony. As discussed above, Martinez is not a necessary witness. Accordingly, the motion to require her to testify is denied.

C. Respondent's Motion to Require Martinez to Produce Documents Is Also Denied Because Enforcement Has No Documents Subject to Production Under FINRA's Rules

Respondent seeks an order requiring Martinez to produce all documents relating to communications with customer JN. Although Respondent's motion to require Martinez to produce documents is improper because Respondent seeks to invoke a procedure that is inapplicable, the Hearing Officer also considered whether Enforcement should be required to produce documents if the request were treated as made pursuant to FINRA Rule 9251.

Enforcement represents that it has produced all documents it is required to produce under FINRA Rule 9251. Enforcement also represents that its sole conversation with customer JN was the telephone interview that Martinez conducted, and that it has no other notes of any conversations between Enforcement staff and customer JN. Respondent's motion is moot to the extent it seeks notes of what customer JN said to Martinez. To the extent Respondent may seek documents containing Enforcement's views about the interview, if any exist, the documents may generally be withheld under Rule 9251(b).

IV. Conclusion

For the foregoing reasons, Respondent's motions to disqualify Josefina Martinez as counsel for Enforcement in this proceeding, and to require her to produce documents and testify at the hearing, are denied.

SO ORDERED.

Lawrence B. Bernard
Hearing Officer

Dated: June 3, 2013