

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13559

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
October 27, 2009

In the Matter of :
:
WILLIAM KEITH PHILLIPS : ORDER

The hearing in this matter is scheduled to commence November 16, 2009, in Nashville, Tennessee. The parties exchanged witness lists and exhibit lists on August 28 and September 25, 2009, respectively. Under consideration are the October 9, 2009, Motion in Limine of the Division of Enforcement (Division) and Motions of Respondent William Keith Phillips to Exclude Certain Exhibits and to Exclude Evidence of Fact and Amounts of Prior Compromises and Settlements and the parties' October 16, 2009, Responses. The parties' Responses indicate that some issues raised in their Motions have been resolved. However, some issues remain.

The Division's Motion in Limine urges that certain of Respondent's proposed exhibits are irrelevant as involving time periods outside the time of the events at issue or entities not involved in the events at issue and that a proposed witness, John Flippen, is also irrelevant as being associated with an entity not at issue. Respondent argues that the questioned exhibits provide context and bear directly on the nature and extent of sanctions if liability is found. In light of these considerations the questioned exhibits and testimony of Mr. Flippen will not be excluded in limine.

In reversing administrative law judges' exclusion of evidence as irrelevant, the Securities and Exchange Commission (Commission) has stressed its requirement that its law judges be inclusive in making evidentiary determinations. See Herbert Moskowitz, 55 S.E.C. 658, 685 n.68 (2002) (admitting indictment of Respondent's brother on charges unrelated to Respondent "while noting the limited relevance and utility of the indictment" to the proceeding against Respondent). See also City of Anaheim, 54 S.E.C. 452 (1999) (reversing in limine exclusion of evidence outside the time period or entities involved in the events at issue and indicating that the admissibility of the evidence should be weighed at the hearing), in which the Commission stated that 17 C.F.R. § 201.320

provides that law judges shall exclude evidence that is "irrelevant, immaterial or unduly repetitious." The notion of 'relevance' embodied in this rule, however, is much broader than that concept under the Federal Rules of Evidence. The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries. (footnotes omitted).

Id. at 454.¹

Respondent's Motion to Exclude Certain Exhibits urges the exclusion as hearsay of transcripts of testimony of Respondent (and various other persons²) (Division Exhibits 344-358, 399-402), an "Explanatory Statement Regarding Phillips Accounts" from an unidentified source (Division Exhibit 6), and a report by Commission staff of an examination of Respondent's former place of employment (OCIE Report) (Division Exhibit 244). These questioned exhibits also will not be excluded in limine.

As the Division notes, the hearsay rule is inapplicable in Commission administrative proceedings. Del Mar Fin. Servs., Inc., 56 S.E.C. 1332, 1349-50 (2003); Alessandrini & Co., 45 S.E.C. 399, 408 (1973). It goes without saying, however, that documents such as Division Exhibit 6 and the OCIE Report are not self-authenticating. Further, lacking testimony of a witness who participated in the examination, such evidence would be accorded little weight. Concerning investigative testimony of Phillips, entire transcripts will not be admitted. Rather, the Division must specify the specific statements on which it intends to rely.³ See Del Mar, 56 S.E.C. at 1350-51 (2003). Additionally, live testimony is preferable to written testimony, especially where credibility is at issue. Cf. 17 C.F.R. § 201.235(a)(5).

Respondent's Motion to Exclude Evidence of Fact and Amounts of Prior Compromises and Settlements urges the exclusion of Division exhibits that concern prior situations that are not at issue in this proceeding. Specifically, Respondent argues, Exhibits 91 (a 2004 NASD Letter of Caution), 191 and 192 (Forms U-4 and U-5), and 400 (transcript of Respondent's 2004 NASD testimony) should be excluded under the Federal Rules of Evidence and are prejudicial, as well, as referring to raw complaints and settlements entered by his employers to which he did not agree. Again, the questioned exhibits will not be excluded in limine. As the Division states, the Federal Rules of Evidence are not applicable to Commission administrative proceedings. Del Mar Fin. Servs., Inc., 56 S.E.C. at 1349-50. Further, the Letter of Caution, with which Respondent does not agree, refers to failure to disclose a conflict of interest analogous to issues in this proceeding and could bear on sanctions, if liability is found. Inasmuch as the undersigned, not a jury, is the fact-finder in this proceeding, appropriate weight will be given to evidence consisting of raw complaints and settlements to which Respondent did not agree. Finally, the Division indicates that it intends to use Respondent's 2004 NASD testimony only to refresh recollection or impeach.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

¹ The Commission also noted that "an agency cannot commit error by admitting particular evidence, no matter how incompetent or irrelevant that evidence may be" (internal citation omitted). Id. at 454 n.7.

² The Division states that it plans to use the testimony of persons other than Respondent only to refresh recollection or to impeach.

³ Respondent may counter-designate portions of the transcripts and/or introduce additional responsive evidence.