

ORIGINAL



RECEIVED

2010 JUN 10 A 9:13

ALL DOCUMENTS
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

- KRISTIN K. MAYES, Chairman
- GARY PIERCE
- PAUL NEWMAN
- SANDRA D. KENNEDY
- BOB STUMP

In the matter of:)
)
 THEODORE J. HOGAN & ASSOCIATES, LLC)
 a.k.a. TED HOGAN AND ASSOCIATES, an)
 Arizona limited liability company,)
)
 THEODORE J. HOGAN a.k.a. TED KILLS IN)
 THE FOG, a married man)
)
 and)
)
 CHRISTINA L. DAMITIO a.k.a. CHRISTINA)
 HOGAN, a married woman,)
)
 Respondent.)

DOCKET NO. S-20714A-09-0553

REPLY TO SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

Arizona Corporation Commission
DOCKETED

JUN 10 2010

DOCKETED BY

I. Introduction

On December 8, 2009, the Securities Division of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing against respondents Theodore J. Hogan & Associates, LLC, a.k.a. Ted Hogan and Associates ("Hogan & Associates"), Theodore J. Hogan a.k.a. Ted Kills In The Fog ("Hogan"), and Christina L. Damitio a.k.a. Christina Hogan ("Damitio"). On December 22, 2009, Hogan and Damitio filed a Request-Order for Discovery-Answer and requested a hearing. On January 7, 2010, the Securities Division filed a Response to the Request-Order for Discovery-Answer. On February 1, 2010, Administrative Law Judge ("ALJ") Stern issued a Procedural Order scheduling an evidentiary hearing for June 15, 2010. Pursuant to the Procedural Order, the Securities Division was to provide its witness list and exhibits to the Respondents by April 23, 2010. The Securities Division filed a Notice of Compliance with Procedural Order on April 27, 2010. The Respondents were to provide its

1 witness list and exhibits to the Securities Division by May 21, 2010. On May 21, Respondents
2 filed a Motion to Dismiss. On May 25, 2010, the Securities Division filed its Response to the
3 Respondents' Motion to Dismiss. The ALJ issued a Procedural Order on May 27, 2010 denying
4 the Respondents' Motion to Dismiss. On May 24, 2010, the Securities Division filed a Motion for
5 Telephonic Testimony. On June 7, 2010, Damitio filed her response to the Securities Division's
6 Motion to Allow Telephonic Testimony. On June 8, 2010, Hogan filed his response and Motion to
7 Dismiss.

8 **II. Telephonic Testimony is Permissible in Administrative Proceedings.**

9 The Respondents will obtain a fair, speedy and cost effective hearing even if telephonic
10 testimony is permitted. ALJ Stern has the authority to grant telephonic testimony if 1) personal
11 attendance by a witness will present an undue hardship; 2) telephonic testimony will not cause
12 undue prejudice to any party; and 3) the proponent of the telephonic testimony pays for the cost of
13 obtaining the testimony telephonically. See A.A.C. R2-19-114.

14 Consistent with these administrative rules, courts have routinely acknowledged that
15 telephonic testimony in administrative proceedings is permissible and consistent with the
16 requirements of procedural due process. See A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*
17 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000). The Court initially noted that telephonic
18 testimony was superior to a mere transcription of testimony because the telephonic medium
19 "preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in
20 making determinations of credibility." See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court
21 then went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and
22 are charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,
23 *citing* A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic
24 testimony offered in this case was fully consistent with the requirement of "substantial justice."

25 In *C & C Partners, LTD. v. Dept. of Industrial Relations*, 82 Cal.Rptr.2d 783, 70
26 Cal.App.4th 603 (1999), the appellate court found that 1) cross-examination was available to C &

1 C; and 2) that administrative hearing of this nature need not be conducted according to the
2 technical rules relating to evidence and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In
3 making this determination, the court in *C & C Partners* found particularly instructive a passage
4 from *Slattery v. Unemployment Ins. Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976),
5 another matter involving the utilization of telephonic testimony. In *Slattery*, the court described
6 administrative hearings involving telephonic testimony as:

7 “a pragmatic solution, made possible by modern technology, which
8 attempts to reconcile the problem of geographically separated adversaries
9 with the core elements of a fair adversary hearing: the opportunity to
cross-examine adverse witnesses and to rebut or explain unfavorable
evidence.” *Id.* at 251, 131 Cal.Rptr. at 422.

10 In light of the relaxed evidentiary and procedural rules governing administrative hearings
11 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
12 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
13 telephonic testimony in their administrative hearings to introduce probative evidence. This
14 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*
15 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
16 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
17 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

18 Consistent with past determinations in this forum, leave to introduce the telephonic
19 testimony of this prospective witness is warranted.

20 **III. The Respondents Are Not Entitled To Complete Access To The Securities Division’s**
21 **Files.**

22 On May 21, 2010, Respondents Hogan and Damitio filed Motions to Dismiss claiming that
23 the Securities Division was entitled to full discovery. On May 27, 2010, ALJ Stern denied their
24 Motion to Dismiss. Damitio and Hogan are renewing their Motion to Dismiss asserting that the
25 Securities Division failed to provide “the entire discovery” as ordered by ALJ Stern. *See Damitio’s*
26

1 *June 7, 2010 Response to the Securities Division Motion for Telephonic Testimony and Hogan's*
2 *June 8, 2010 Motion-to-Dismiss Docket No. S-20714A-09-0553.*

3 Damitio and Hogan misquote ALJ Stern. The transcript from the prehearing on January 28,
4 2010 clearly states that the Securities Division was ordered to provide exhibits intended to be used
5 at hearing and the witnesses it intends to call, and not the full discovery as represented in Damitio
6 or Hogan's Motions to Dismiss. *See Transcript dated January 28, 2010 page 9, lines 1-10; page*
7 *15, lines 1-4.*

8 The Securities Division provided its exhibits and witness list as ordered by ALJ Stern. The
9 Respondents are not entitled to additional discovery. R14-3-104 reiterates a respondent's rights set
10 forth in § 41-1061, by stating: "At a hearing a party shall be entitled to enter an appearance, to
11 introduce evidence, examine and cross-examine witnesses, make arguments, and generally
12 participate in the conduct of the proceeding."

13 The legislature has mandated that contested cases before the Arizona Corporation
14 Commission ("Commission") are governed by Arizona Revised Statutes. *See A.R.S. §§ 41-1067*
15 *and 41-1092.02(A)(4).* Specifically, A.R.S. § 41-1061(A)(1) states: "Every person who is a party
16 to such proceedings shall have the right to be represented by counsel, to submit evidence in open
17 hearing and shall have the right of cross-examination."

18 Respondents have the right to cross-examine the witnesses against them. Further,
19 Respondents have the ability, pursuant to A.A.C. Rule R14-3-109(O), to call witnesses that they
20 believe have testimony relevant to the allegations in the Notice.

21 Other than the exchange of a witness list and the exhibits, "[t]here is no basic constitutional
22 right to pretrial discovery in administrative proceedings." *Silverman v. Commodity Futures*
23 *Trading Commission*, 549 F.2d 28 (7th Cir. 1977). Respondents received the Securities Division's
24 witness and exhibit list prior to the scheduled hearing as ordered by ALJ Stern. The Respondents
25 are entitled to receive the evidence the Securities Division plans to introduce at the evidentiary
26

1 hearing. The Respondents are not entitled to every piece of information contained within the
2 Securities Division's files. The Motions to Dismiss should be denied.

3 **IV. Conclusion**

4 Telephonic testimony should be allowed in this administrative proceeding. The
5 respondents will be able to cross-examine the witnesses. The Respondents received copies of the
6 exhibits the Securities Division intends to utilize at hearing. The Securities Division's Motion for
7 telephonic Testimony should be granted. Hogan and Damitio's Motion to Dismiss should be
8 denied, again.

9 RESPECTFULLY SUBMITTED this 10th day of June, 2010.

10
11 By Wendy Coy (pc)
12 Wendy Coy
13 Attorney for the Securities Division of the
14 Arizona Corporation Commission

13 ORIGINAL AND EIGHT (8) COPIES of the foregoing
14 filed this 10th day of June, 2010, with

15 Docket Control
16 Arizona Corporation Commission
17 1200 West Washington
18 Phoenix, AZ 85007

19 COPY of the foregoing hand-delivered this
20 10th day of June, 2010, to:

21 ALJ Marc Stern
22 Arizona Corporation Commission/Hearing Division
23 1200 West Washington
24 Phoenix, AZ 85007

25 3 COPIES of the foregoing mailed
26 this 10th day of June, 2010, to:

THEODORE J. HOGAN & ASSOCIATES
THEODORE J. HOGAN, and
CHRISTINA L. DAMITIO
460 Andante
Sedona, Arizona 86336

By: Veronica Sanborn