

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	
	:	Disciplinary Proceeding
	:	No. C04970029
	:	
	:	Hearing Officer - DMF
	:	
	:	
Respondents.	:	

**ORDER ESTABLISHING PROCEDURE FOR ARRIVING AT STIPULATIONS
AND RE-SCHEDULING PRE-HEARING CONFERENCE**

The Complaint was filed on August 25, 1997. On October 10, 1997, prior to the Initial Pre-Hearing Conference, the parties filed a Proposed Scheduling Order asking that the hearing be scheduled for two weeks, from February 23 through March 6, 1998.

At the Conference, the Hearing Officer advised the parties that they would be required to undertake efforts to arrive at stipulations of uncontested facts in order to shorten and streamline the proceeding. The Hearing Officer also set another pre-hearing conference to be held in person in New York, NY, on December 16, 1997, at which the primary goal would be to simplify this case for presentation at the hearing.

On November 7, 1997, the Department of Enforcement filed a Motion to Conduct Pre-Hearing Conference by Telephone, in which Enforcement argued that counsel for Enforcement would incur substantial costs to travel to New York for the December 16

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-9 (C04970029).

conference, and that stipulations could be discussed and reached by telephone “because it is in the best interest of all of the parties to this case to stipulate to as much as possible to expedite the hearing of this matter.” Enforcement also represented that counsel for Respondents is agreeable to having the December 16 conference conducted by telephone, but that he is out of the country until November 21, 1997.

Upon further consideration, the Hearing Officer has decided to direct the parties to engage in a process by which they may arrive at stipulations of uncontested fact, and to postpone the next pre-hearing conference until after the parties have completed and reported on that process. The procedure set forth below is derived from the Manual for Complex Litigation (3d), §41.61. It provides for Enforcement first to tender to Respondents a list of those facts Enforcement expects to prove at the hearing that Enforcement believes Respondents will not contest. Next, Respondents will both reply to Enforcement’s list and set forth a list of facts Respondents expect to prove at the hearing that Respondents believe Enforcement will not contest. Then, Enforcement will respond to Respondents’ list. Based on these exchanges (which the parties are not to file), the parties will prepare and file a joint stipulation of uncontested facts.

Based on the Hearing Officer’s review of the Complaint and the Answer filed in this matter, it appears that many relevant facts may not be disputed at the hearing. This is consistent with the Hearing Officer’s general experience in litigation. Therefore, if the parties approach the process diligently and in good faith, in all likelihood they will reach stipulations that will substantially reduce the length of the hearing and the corresponding costs to the parties, and will allow the hearing panel to focus on resolving the disputed

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issues in this proceeding. If difficulties arise during this process, the parties should not hesitate to request a conference with the Hearing Officer.

In order to afford the parties a reasonable time to complete the stipulation process and report on the outcome, the Hearing Officer will re-schedule the pre-hearing conference presently set for December 16. Moreover, anticipating that the parties will arrive at stipulations through this process that will substantially shorten and streamline the hearing, the Hearing Officer will schedule the conference to be held by telephone. If it appears to the Hearing Officer that the parties are unwilling or unable to reach stipulations of uncontested facts, however, the Hearing Officer may hold the conference in-person. If so, the conference will not necessarily be held in New York.

Therefore, it is ORDERED:

1. Development of Joint Statement of Uncontested Facts.

(a) Complainant's Proposed Facts. By November 28, 1997, Enforcement shall serve on Respondents a numbered list of all facts that Enforcement expects to prove at the hearing, either in support of the Complaint or in opposition to Respondents' Affirmative Defenses, that Enforcement believes Respondents may not contest.

(b) Respondents' Response and Proposed Facts. By December 12, 1997, Respondents shall serve on Enforcement—

(1) a statement indicating separately as to each numbered statement of fact listed by Enforcement whether Respondents contest or do not contest it; and

(2) a numbered list of all additional facts that Respondents expect to prove at the hearing, either in opposition to or in Affirmative Defense against the Complaint, that Respondents believe Enforcement may not contest.

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(c) Reply. By December 19, 1997, Enforcement shall serve on Respondents a statement indicating separately as to each numbered statement of additional fact listed by Respondents whether Enforcement contests or does not contest it.

(d) Joint Statement of Uncontested Facts. By December 31, 1997, the parties shall file with the Office of Hearing Officers a joint list of the facts that are not contested. To the extent practicable, these uncontested facts should be organized according to the allegation, claim or defense to which they relate.

2. Directions.

(a) Narration of Proposed Facts. Each party's list of facts believed to be uncontested shall be set forth in brief, simple, declarative, self-contained, consecutively numbered sentences, avoiding all "color words," labels, argumentative language, and legal conclusions.

(b) Agreement and Disagreement. Counsel shall indicate that they do not contest a proposed undisputed fact if they will not controvert or dispute that fact at the hearing. If a proposed undisputed fact is contested as written, but would be uncontested if restated or qualified in some way, the responding party should, by deleting or adding words or phrases, propose such a restatement or qualification, rather than simply indicating that the fact is contested.

(c) Objections. Objections to the admissibility of a proposed fact (either as irrelevant or on other grounds) may not be used to avoid indicating whether or not the party contests the truth of that fact. Counsel may, however, indicate any objections to the admissibility of facts they do not contest.

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3. Effect. At the hearing, the uncontested facts shall be taken as established without the need for independent proof. Independent proof of uncontested facts will be allowed only if incidental to the presentation of evidence on contested facts or if such proof will better enable the panel to resolve contested facts.

4. Sanctions. A party may be subject to sanctions under Code of Procedure Rule 9280 if it appears to the panel at the hearing that the party unreasonably refused to stipulate to a fact that it does not contest, in disregard of this order.

5. Pre-Hearing Conference. The pre-hearing conference scheduled for December 16, 1997, in New York, NY, is re-scheduled for January 6, 1997, at 10:00 a.m. Absent further order of the Hearing Officer, the conference will be conducted by telephone conference call. Enforcement will initiate the call and add the Hearing Officer after all other parties are on the line by calling (202) 728-8008.

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
January 21, 1998