

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-14 (C02980024).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02980024
v.	:	
	:	
	:	Hearing Officer - EAE
	:	
	:	
	:	
Respondents.	:	

ORDER GRANTING COMPLAINANT’S MOTION TO STRIKE

On August 9, 1999, the Department of Enforcement (“Complainant”) filed a Motion To Strike Portions of Respondent _____ Post-Hearing Brief On The Issue Of Sanctions (“Motion”). Specifically, Complainant moves to strike those portions of Respondent _____ Brief referring to settlement negotiations and the affidavit of _____ (“_____ Aff.”)¹ and all references thereto.

As to that portion of Respondent _____ Brief relating to settlement negotiations, Complainant’s Motion is predicated on two grounds: (1) discussions relating to settlement negotiations were not placed in evidence at the Hearing and (2) settlement negotiations are inadmissible as evidence.² With respect to the latter point, Complainant relies upon Rule 408 of the Federal Rules of Evidence for the proposition that settlement negotiations are inadmissible on

¹ The _____ Aff. was attached to Respondent _____ Post-Hearing Brief.

² Motion at 2.

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-14 (C02980024).
the issues of liability and sanctions.³

As to the _____ Aff., Complainant argues that it clearly is evidence which is inadmissible at this point in this proceeding.⁴ Since it never was introduced at the Hearing, Complainant submits that the _____ Aff. should not be admitted as part of the record or considered in determining sanctions.⁵

On August 23, 1999, Respondent _____ filed a Response To Complainant's Motion To Strike ("Response"). Respondent _____ argues that the Panel should consider all relevant evidence as to the issue of sanctions which includes evidence of settlement discussions.⁶ Relying on Code of Procedure Rule 9145(a), Respondent _____ argues that Rule 408 does not apply to this proceeding since adjudicators in NASD disciplinary proceedings are not bound by formal rules of evidence.⁷ Further, Respondent _____ argues that evidence of settlement negotiations can be introduced for purposes other than to prove liability and damages. Respondent _____ submits that such evidence is relevant here to demonstrate why he could not settle prior to the Hearing.⁸

³ Id. at 2.

⁴ Id. at 3.

⁵ Id.

⁶ Response at 1. (The page numbering in the Response is somewhat confusing since the second page of the response is denominated page 1. References to page numbers herein are those used in the Response).

⁷ Id. at 2.

⁸ Id.

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-14 (C02980024).

As for the _____ Aff., Respondent _____ does not dispute that it was not introduced at the Hearing.⁹ Respondent _____, however, submits that the Hearing Panel can accept any item into the record it deems appropriate pursuant to Code of Procedure Rule 9267(a)(8).¹⁰

In deciding the Motion, the Hearing Officer need not reach the issue of under what circumstances prior settlement negotiations may be admissible with respect to the issue of sanctions. Rather, the Hearing Officer agrees with Complainant that those portions of the Response relating to settlement discussions and the _____ Aff. should not be considered since such evidence was not introduced at the Hearing.

After Complainant concluded its direct case, and prior to hearing argument on Respondents' Motions for Judgment, the Hearing Officer conferred with counsel for each Respondent, including Respondent _____, that regardless of the Hearing Panel's decision on such Motions, none of the Respondents intended to put on any further evidence.¹¹ Accordingly, at this time the record was closed as to any additional evidence.

Further, after the Hearing Officer informed the Parties of the Panel's decision on the Motions for Judgment, she again made clear that the record was closed and there was no objection from any Party.¹² She then instructed Complainant and Respondent _____ with respect to their post-hearing briefs on the issue of sanctions. As relevant here, she stated "[a]gain, we are

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

¹¹ Transcript of Proceeding ("Tr"), June 8, 1999 at 1689-1690. In fact, none of the Respondents, including Respondent _____, ever put on a direct case. Rather, they relied solely on the examination of witnesses called during Complainant's direct case, including the three Respondents.

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-14 (C02980024).

not going to take any new evidence, obviously on the issue of sanctions. The evidence is what the evidence is at this point * * *.”¹³ There was no objection from any Party.

Neither discussions as to settlement negotiations nor the _____ Aff. were introduced at the Hearing or made part of the record of this proceeding. Clearly, this is new evidence which cannot now be considered by the Panel in determining sanctions.¹⁴ Accordingly, those portions of the Response relating to these issues will be stricken. Further, the _____ Aff. will not be made part of the record.

Further, Respondent _____ argument in the Response that “The Supervisory Bar DOE Seeks Is Inappropriate” also will be stricken since it does not address the issues raised by Complainant’s Motion. Rather it is an impermissible reply to the substantive arguments raised in Complainant’s Post-Hearing Brief On The Issue Of Sanctions.

SO ORDERED

Ellen A. Efros
Hearing Officer

Dated: Washington, DC
August 27, 1999

¹² Tr., June 9, 1999 at 1796.

¹³ Id. at 1797.

¹⁴ Further Respondent _____ reliance on Code of Procedure Rule 9267(a)(8) is misplaced. That Rule merely states that the record shall consist of any other document or item accepted into the record by the Panel. It does not provide authority for the proposition that once the record is closed the Panel may consider new evidence that could have been introduced at the Hearing when it could be subject to examination by the opposing Party.