This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 98-35 (CAF980014).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. CAF980014
v.	:	
	:	Hearing Officer - JN
Respondent.	:	

ORDER DENYING MOTION TO DISQUALIFY AS PREMATURE

Respondent moved to disqualify Mr. James M. McNamara, one of the Department of Enforcement's lawyers in this case. The Department filed an Opposition and the Respondent (with the Hearing Officer's permission) filed a Reply. The Hearing Officer has considered these submissions and concluded that with the record in its present posture, the motion should be denied as premature. This denial is without prejudice to renewal of the motion in light of subsequent developments which may render it ripe for decision.

The Complaint alleges that Respondent refused to give investigative testimony, in violation of Rules 2110 and 8210. As stated in Respondent's Reply to the motion to disqualify, "[r]espondent refused to testify, stating that there was a stay in place which prohibited his testimony completely, or at least, with respect to certain matters being investigated in a court proceeding in Tennessee" (Reply, 2).[1]

[1] In Department of Enforcement v. _____, _____, the Hearing Officer, at the request of Enforcement and the United States Attorney for the _____ District of _____, entered orders staying "this

Respondent argues that Mr. McNamara will become a witness in the hearing and is, therefore, disqualified to function as an advocate. The motion rests on DR 5-102 of the New York Code of Professional Responsibility, which states:[2]

(A) If, after undertaking employment in a contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, the lawyer shall withdraw as an advocate before the tribunal, except that the lawyer may continue as an advocate and may testify in the circumstances enumerated in DR 5-101(b)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer…must withdraw from acting as advocate before the tribunal.

The Hearing Officer rejects the Department's contention that he lacks the authority to grant the relief sought (Complainant's Opposition, p.5). Rules 9146(j) and 9147 state that "a motion on a procedural matter may be decided by a Hearing Officer," who has "full authority…to rule on a procedural motion and any other procedural or administrative matter arising during the course of a proceeding conducted pursuant to the Code…." Rule 9235(a)(4) empowers the Hearing Officer to resolve "any and all procedural and evidentiary matters…and other non-dispositive motions,…." The present motion seeks only the disqualification of a lawyer. It does not ask for or require a ruling on the merits of the Complaint. It is procedural and non-dispositive and falls well within the Hearing Officer's broad authority under the above Rules.

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proceeding" (Orders of February 2 and April 6, 1998). Respondent in the instant case (who is also a Respondent in _____) has made no request of that Hearing Officer concerning the scope of the stay.

[2] For purposes of this Order, the Hearing Officer assumes, without deciding, that the New York Rules apply. Because the motion is premature, there is no present need to decide whether (or which) particular state standards govern lawyer conduct in NASD's nationwide adjudicatory forum.

Turning to the Motion itself, the Hearing Officer finds it premature and denies it without prejudice.

1.) Enforcement argues that it plans to file a motion for summary disposition, which, if granted, would result in no hearing and thus no "witness" role for Mr. McNamara (Complainant's Opposition, pp. 2, 6). Disciplinary Rule 5-102, is, by its terms, limited to situations where the lawyer will be involved "as a witness." Without a hearing, there is no problem of the advocate also functioning as a witness. The Department correctly argues that granting a motion for summary disposition would moot Respondent's disqualification motion. For present purposes, therefore, the motion is denied as premature.

2.) In addition, the "lawyer-as-witness" issue is not well developed on this record. Respondent says only that Mr. McNamara's testimony is relevant because of that lawyer's involvement in negotiations concerning the requested investigative testimony (Motion, p. 2; Reply. pp. 4-5). The New York Court of Appeals explained that

> [d]isqualification [under DR 5-102] may be required only when it is likely that the testimony to be given by the witness is necessary (citation omitted). Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence. S & S Hotel Ventures Limited Partnership v. 777 S. H. Corp., 69 N.Y. 2d 437, 515 N.Y.S.2d 735 (1987).

The "necessity" test is "not based simply upon whether the lawyer's adversary intends to call [the lawyer] as a witness." Bullard v. Coulter, ___ A.D. 2d ___, 667 N.Y.S.2d 495, 496 (1998). On the present record, the Hearing Officer cannot determine that Mr. McNamara's testimony is necessary.

The requirements are equally strict under DR 5-102(B), where the lawyer "may be called as other than on behalf of the client" and must withdraw if the testimony will be "prejudicial to

the client…." Insofar as Respondent rests on this provision, he must "explain precisely" what testimony he requires, why he requires it, and in what respect Mr. McNamara's testimony would be prejudicial to Enforcement. Jolicoeur v. American Transit Ins. Co., 159 A.D.2d 236, 552 N.Y.S.2d 215, 216 (1990). See also Plotkin v. Interco Development Corp., 137 A.D.2d 671, 524 N.Y.S.2s 763, 765 (1988) ("The movants' conclusory allegations with respect to Schulman's involvement in the negotiations are insufficient to establish a plausible basis for his disqualification….they fail to explain precisely what testimony they require, why they require it, and in what respect Schulman's testimony will be prejudicial to the plaintiffs").

The Motion to Disqualify is denied without prejudice. By separate Order, the Hearing Officer will convene an Initial Pre-Hearing Conference.

SO ORDERED.

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
August 12, 1998