This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-01 (C10000172).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	
Complainant,	Disciplinary Proceeding No. C10000172
v.	Hearing Officer - DMF
Respondents	

ORDER DENYING MOTION TO QUASH

On January 11, 2001, respondents filed a motion to quash a request by the Department of Enforcement, pursuant to Rule 8210, that respondent _______ appear and testify in an on-the-record interview that "will concern the Answer of Respondents … in the above-referenced disciplinary proceeding." In the alternative, respondents requested a protective order that would limit the scope of Enforcement's inquiry. Enforcement filed its opposition to the motion on January 17, and respondents filed a reply memorandum on January 22.

In its opposition, Enforcement points out that respondents' Answer denied certain allegations in the Complaint and raised affirmative defenses, including reliance upon counsel. Enforcement represents that it has requested that ______ appear and testify in "an effort to clarify and narrow the factual issues in dispute, and to obtain additional information relevant to any remaining issues in dispute." Enforcement

also states that, following the initial pre-hearing conference in this case, Enforcement prepared and sent to respondents' counsel "a proposed stipulation of facts to address various new issues raised by the Answer (which [Enforcement] believed could be resolved through stipulation) to avoid or reduce the need for" ______ to appear and testify. Respondents, however, declined to enter into the proposed stipulation.

Respondents say, without further elaboration, that they "could not stipulate to the facts as set forth in the stipulation." Respondents nevertheless contend that Enforcement should not be permitted to take ______'s testimony. They argue that "any information sought in connection with Respondents' answers should have and could have been ascertained during the investigation stage, or could be adduced at the hearing of this matter." They urge that respondents may be prejudiced if Enforcement takes ______'s testimony. They hypothesize this could occur if Enforcement asks ______ questions that would be objectionable at the hearing, on the ground that if ______ refuses to answer such questions, he may be subject to disciplinary action. Respondents urge: "At least at a … hearing the hearing panel would be available to make a ruling on any objection and there would be some due process available to ______." Respondents also ask that, if Enforcement is permitted to take ______'s testimony, the Hearing Officer issue a protective order under which "questions must be limited to factual matters as they are specifically set forth in the complaint and the answers and are not to touch upon or be related in any way to any legal issue, theory or allegation."

Discussion

Rule 8210 gives Association staff broad authority to request information from members or persons associated with members, but that authority is not unlimited. In the disciplinary proceeding

context, Enforcement's ability to employ Rule 8210 is subject to the Hearing Officer's authority under Rule 9235 "to do all things necessary and appropriate to discharge his or her duties" including "resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions …." The Hearing Officer's paramount duty is to ensure that the disciplinary proceeding is conducted fairly.[1] Therefore, the Hearing Officer has an obligation to ensure that Enforcement does not abuse its post-Complaint Rule 8210 authority.

In this case, Enforcement indicates it wants to explore the factual bases for certain issues raised in the Answer, including respondents' "Affirmative Defenses." There is nothing inherently improper about such an inquiry. As Enforcement points out, clarification of respondents' contentions may expedite the hearing. And although Enforcement might have asked more questions during the investigation, it is not surprising that respondents' Answer and Affirmative Defenses may have suggested some unforeseen areas for inquiry.

It is, of course, theoretically possible that Enforcement could conduct a legitimate post-Complaint inquiry in an abusive manner, but there is no basis for assuming that will be the case here. The Hearing Officer notes with approval, for example, that Enforcement attempted to avoid or limit the need for ______'s testimony by proposing a stipulation. Respondents were not required to enter into such a stipulation, but Enforcement's efforts certainly suggest the absence of any bad faith on its part.

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[1] Section 15A(b)(8) of the Exchange Act requires that "[t]he rules of the association … provide a fair procedure for the disciplining of members and persons associated with members …."

In their reply memorandum, respondents argue that if Enforcement is permitted to take ______'s testimony, "the hearing becomes a rubber stamp of [Enforcement's] conclusions." That is simply not correct. The Hearing Panel will draw its own conclusions based on all the evidence adduced at the hearing.

Therefore, the Hearing Officer will deny respondents' motion to quash. The Hearing Officer will also deny respondents' alternative request for a protective order. Respondents' primary concern appears to be that Enforcement's questioning may exceed the limits that would be imposed at the hearing. Even assuming those limits would apply, however, they are very broad. Under Rule 9263(a), the Hearing Officer should receive relevant evidence, but may exclude evidence if it is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. There is no suggestion in the present record that Enforcement's examination of ______ would range beyond relevant topics into those categories, and, once again, the Hearing Officer will not assume that will be the case.

In contrast to the broad scope of inquiry allowed under Rule 9263(a), respondents' proposal that the Hearing Officer prohibit Enforcement from asking any questions that "touch upon or [are] related in any way to any legal issue, theory or allegation" is both vague and too restrictive. It might, for example, be interpreted to preclude Enforcement from asking any questions about the nature and circumstances of respondents' purported "[r]eliance upon _________ attorney's letter of July 7, 2000," which respondents allege as an affirmative defense, and which, therefore, is a relevant area for possible inquiry.

Respondents' motion is denied.[2]

SO ORDERED

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David M. FitzGerald
Hearing Officer

Dated: Washington, DC
January 23, 2001

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[2] For the reasons stated, on the current record respondents' motion is speculative and unwarranted. This order will not preclude respondents from seeking appropriate relief if they are able to demonstrate in some specific, concrete manner that Enforcement is pursuing its examination of ______ in some abusive or unfairly prejudicial manner, but, as explained above, there is no reason to believe that will occur.