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out that many facts are common to both charges, and, if the charges are severed, _____ may actually be required to testify in the case against _____.

Legal Analysis and Discussion

Two factors must be considered when deciding a motion to sever. The first factor involves a determination of whether the claims against the respondent requesting severance involve questions of law or fact common to all respondents.¹ In other words, an analysis must be made whether the moving respondent's degree of involvement in the alleged transactions is closely connected to the same transactions involving other respondents. If common issues of law or fact are present, there is sufficient basis for denying a motion for severance.

The Securities and Exchange Commission has recognized that the "NASD frequently holds disciplinary hearings involving multiple respondents" and it has "approved this procedure where a case involves common issues of law or fact."² The Securities and Exchange Commission has recognized that not "every respondent in a multi-respondent case has a right to a wholly independent trial in a proceeding that revolves entirely around him."³

The second factor to be considered in deciding a motion for severance is whether the moving respondent will suffer prejudice if not granted a separate proceeding.⁴ To this end, a respondent requesting severance must detail the attendant prejudice from a consolidated proceeding.⁵ In evaluating this factor, a countervailing consideration is whether severance would

¹ See, e.g., In re Carlton Wade Fleming, Exchange Act Release No. 36215, 60 S.E.C. Docket 523, 1995 SEC LEXIS 2326, at *10 (Sept. 11, 1995).

² Id.

³ In re Richard C. Spangler, Inc., Exchange Act Release No. 12104, 1976 SEC LEXIS 2418, at *35 (Feb. 12, 1976).

⁴ Cf. In re Kirk A. Knapp, Exchange Act Release No. 30391, 1992 SEC LEXIS 430, at *12-13 (Feb. 21, 1992) (finding no unfairness in consolidation of deficient supervision charge with fraud charge against co-respondent).

⁵ Cf. Klein v. Spear, Leeds & Kellogg, 306 F. Supp. 743, 752 (S.D.N.Y. 1969).

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lead to piecemeal litigation. That is whether the adjudication of claims against a severed respondent would include the adjudication of issues which also form the basis for charges against other, non-severed respondents.⁶ If the evidence regarding the moving respondent and non-moving respondent is so closely related that much of the same evidence would have to be introduced in two proceedings, severance is inappropriate.⁷ This is particularly true because sufficient procedural safeguards typically exist in the disciplinary process.

Applying the foregoing factors to the instant case, the Chief Hearing Officer finds that severance of the disciplinary hearing as to Respondent _____ would lead to unnecessary piecemeal litigation. While the allegations against the Respondents are separate and distinct from each other, much of the same witness and documentary evidence necessary to prove the allegations against _____ also must be presented with respect to the allegations against _____. In order to prove that _____ failed to supervise _____ adequately, Enforcement will need to submit evidence of the facts and circumstances surrounding _____ alleged violative conduct. Thus, severance of the disciplinary hearing against _____ is inappropriate.

Moreover, _____ has not demonstrated undue prejudice. _____ complains that he is charged with respect to _____ conduct in only one of three accounts while they were at _____, thereby subjecting him to a hearing involving evidence that has no connection to him. Thus, he argues, joinder in the “extended proceedings with Mr. _____ will not only require [him] to spend significant time away from his family and office, it will also unnecessarily burden

⁶ In re First Jersey Securities, Inc., Administrative Proceedings Release No. 221, 1979 SEC LEXIS 2434, at *7 (Sept. 12, 1979).

⁷ See, e.g., District Business Conduct Committee for District No. 8 v. Frank J. Custable, Complaint No. C8A910006, 1992 NASD Discip. LEXIS 94, at *58 (April 21, 1992).

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his [current employer].”⁸ But _____ overlooks the fact that he may be a witness in the case against _____ and that the hearing is scheduled for just three days. Under these circumstances, the potential convenience to _____ if he is afforded a separate hearing is outweighed by the added cost and inconvenience to Enforcement and those witnesses who would be required to testify in both proceedings.

Applying the foregoing factors to the instant case, the Chief Hearing Officer finds that severance of the disciplinary hearing against _____ would lead to unnecessary piecemeal litigation, and that _____ has not shown sufficient prejudice to require severance. Accordingly, the Motion is denied.

SO ORDERED.

Linda D. Fienberg
Chief Hearing Officer

Dated: Washington, DC
May 7, 1999

⁸ _____ Motion for Separate Proceedings and Stay of Action, p. 6.