

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. C9B040033

Hearing Officer – SW

**PRE-HEARING ORDER**

**I. Enforcement's Objection to Respondent's Witnesses**

On September 16, 2004, Respondent filed his list of proposed witnesses. At the September 24, 2004 pre-hearing conference, the Department of Enforcement ("Enforcement") raised oral objections to the following witnesses:

1. Dr. LG, Respondent's physician;
2. RD, DW, and RQ, associated persons<sup>1</sup> at The Investment Center; and
3. AD and RN, former counsel for Respondent.

After reviewing the reasons raised by Respondent for the appearance of his witnesses, and the objections raised by Enforcement, with the exception of Dr. LG, the Hearing Officer overrules Enforcement's objections to the witnesses.

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<sup>1</sup> RQ is no longer associated with The Investment Center.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 04-24 (C9B040033).**

**A. Dr. LG**

At the October 4, 2004 final pre-hearing conference ("Conference"), Respondent confirmed that he was not arguing and had not argued that he did not attend the scheduled on-the-record interviews because of a medical condition. Accordingly, based on a finding that Dr. LG's testimony would not be relevant, the Hearing Officer grants Enforcement's objection, and precludes Dr. LG from testifying at the Hearing.

**B. AD, Esq. and RN, Esq.**

The Hearing Officer finds that AD and RN have relevant information concerning the third count of the Complaint, and accordingly will be permitted to testify at the Hearing regarding their knowledge of the events surrounding count three of the Complaint.

**C. RD, DW, and RQ**

The Hearing Officer finds that RD, DW, and RQ have knowledge concerning the splitting of commissions as alleged in count one of the Complaint. Accordingly, RD, DW, and RQ will be permitted to testify at the Hearing.

At the Conference, the Hearing Officer advised the Parties that RD, DW, and RQ had orally responded to her Order granting Respondent's Rule 9252 motion as to them. RD, DW, and RQ indicated that they would be requesting in writing that the Hearing Officer reconsider her Order, in part, because of their previously scheduled commitments. The Hearing Officer further advised the Parties that, depending on the content of the objections raised by the witnesses, she might permit the proposed witnesses to testify by telephone.

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On October 4, 2004, RD, DW, and RQ filed oppositions to the Hearing Officer's Rule 9252 Order. The Hearing Officer has decided to permit DW and RQ to testify via telephone subject to certain conditions. A separate order regarding these witnesses has been issued. Enforcement must designate to Respondent by 3:00 p.m., Eastern Time, on October 7, 2004, its exhibits that it would like Respondent to provide to the witnesses for possible use on cross-examination.

## **II. Respondent's Motion to Offer Testimony of AD, Esq. via Telephone Granted**

Previously, on September 14, 2004, Respondent filed a copy of a letter from AD that stated that he would be in a hearing, and therefore would not be available to provide in-person testimony on either October 13 or 14, 2004. AD, who is not subject to NASD jurisdiction, indicated that he would be available by means of telephone on October 13, 2004. Respondent expressed a desire that AD's schedule be accommodated.

Enforcement has agreed that AD may testify on October 13, 2004 via telephone, whether or not it has completed his case. Accordingly, at 5:00 p.m. on October 13, 2004, Respondent may present the testimony of AD, subject to the following conditions:

a. Respondent shall have a notary public available at each witness location to swear the witness, or, alternatively, shall offer, at the time the witness is called, a sworn statement in the form attached hereto signed by the witness attesting that the testimony he will give at the Hearing will be truthful.

b. Respondent shall ensure that AD has, at the time of testifying, copies of all exhibits that relate to his direct testimony, as well as any exhibits that Enforcement designates to Respondent by 3:00 p.m., Eastern Time, on October 7, 2004, for possible use on cross-examination.

c. Respondent shall confirm with AD that he will be available by telephone beginning at 5:00 p.m., Eastern Time, on October 13, 2004.

## **III. Hearing Procedures**

At the Hearing, the procedures set forth below shall be followed:

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**a.** First, the Hearing Officer will read her opening statement. At the end of the opening statement, the Parties will have an opportunity to ask any questions regarding procedures to be followed at the Hearing, i.e., housekeeping matters.

**b.** Second, counsel for Enforcement will make an opening statement. The opening statement should set forth the theory of the prosecution's case and briefly summarize the evidence that Enforcement intends to introduce in its direct case as it relates to counts one through three of the Complaint. The opening statement shall be limited to 15 minutes.

**c.** Third, Respondent will have an opportunity to make an opening statement. The opening statement shall be limited to 15 minutes. The opening statement should consist of a broad outline of what Respondent intends the Hearing Panel to understand at the conclusion of his evidence.

**d.** Opening statements are not considered evidence. Objections to opening statements are not permitted. Concerns about any inaccuracies in another Party's opening statement may be addressed in the closing statements or through questioning of witnesses.

**e.** Fourth, Enforcement will present evidence in support of the allegations of the Complaint. At the conclusion of Enforcement's presentation of each witness, Respondent will have an opportunity to cross-examine that witness.

**f.** Questions on cross-examination are limited to those issues relevant and material to the allegations in the Complaint.

**g.** Fifth, once Enforcement has completed its case, except for the testimony of Respondent, Respondent will have an opportunity to present evidence relating to his case, including any affirmative defenses. At the conclusion of the presentation of Respondent's witnesses, Enforcement will have an opportunity to question Respondent's witnesses, including Respondent.

**h.** Hearing Panel members may question any witness at any time while the witness is on the witness stand, or recall any witness for additional questions.

**i.** Questions may only be addressed to the witnesses on the stand or to the Hearing Officer.

**j.** Parties objecting to particular questions must address the objection to the Hearing Officer and should state the reason for the objection. The Party asking the question will then have an opportunity to describe to the Hearing Officer why the objection should be overruled, the Hearing Officer will then either sustain or overrule the original objection. Parties are not permitted to object to answers to questions. If they

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believe incorrect information has been provided they may ask additional questions of the witness or address the inaccuracy in their closing statement or their testimony.

**k.** The Hearing Officer may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

**l.** For each exhibit officially offered by Enforcement, Respondent will have an opportunity to object to the particular exhibit, stating the reasons for the objection. The Hearing Officer will then rule on which of Enforcement's exhibits will be accepted. Respondent will then offer his exhibits, which Enforcement will have an opportunity to object to, stating the reasons for the objection. The Hearing Officer will then rule on which of Respondent's exhibits will be accepted.

**m.** Once all Parties have completed the presentation of their evidence, Enforcement will have the opportunity to make a closing argument, followed by the closing argument of Respondent.<sup>2</sup> The closing arguments should summarize the evidence that has been presented supporting a finding of liability or supporting a finding of not liable. The closing arguments should also present the Parties' suggestions for sanctions. Enforcement should list any aggravating and mitigating factors that it considered in reaching their proposed sanctions.<sup>3</sup> Respondent should be prepared to argue any evidence of mitigating factors.

**n.** At the conclusion of the Hearing, the Hearing Officer will read a closing statement indicating: (i) that the Parties may request that they be permitted to file post-hearing briefs, and (ii) with the exception of any permitted post-hearing briefs, that the Hearing is completed.

Any questions regarding this order may be initially addressed to Nick Laliberté at (202) 728-8460.

**SO ORDERED.**

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Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
April 23, 2004

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<sup>2</sup> The Hearing Officer does not anticipate permitting the time for closing statements to exceed a maximum of 30 minutes. The Hearing Officer will determine and announce the length of the closing arguments at the Hearing.

<sup>3</sup> Aggravating and mitigating factors are listed in the NASD Sanction Guidelines at [http://www.nasdr.com/sanction\\_guide.asp](http://www.nasdr.com/sanction_guide.asp)