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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. CAF030008 Hearing Officer—Andrew H. Perkins

ORDER REGARDING THE DEPARTMENT'S MOTIONS IN LIMINE

The Department of Enforcement (the "Department") filed two motions in limine, which seek to restrict the Respondent from presenting most of the documents and witnesses listed in his pre-hearing submissions. Respondent has opposed the motions. Except as discussed below, the Hearing Officer has determined to defer ruling on many of the issues the Department raised until the Final Pre-Hearing Conference on November 5. At the Conference, the Parties should be prepared to address the remaining issues in light of the Hearing Panel's recent ruling that the hearing will be limited to a determination of what sanctions, if any, are appropriate under the facts and circumstances of this case.

I. Motion to Exclude Testimony from Respondent's Defense Counsel

Respondent has included two of his current attorneys, HH, Esq. and JK, Esq. on his witness list. Among other subjects, Respondent indicates that he will call them to testify regarding their advice that he not appear and testify in response to NASD staff's Rule 8210 request dated February 3, 2003. Essentially, the Department objects to their testimony on two grounds. First, the Department objects to them continuing to represent

Respondent if they are permitted to testify as fact witnesses. Thus, the Department moves to disqualify both of them from continuing to represent Respondent in this proceeding. Second, the Department objects to their proposed testimony on the ground that it is irrelevant. The Department argues that there is no Fifth Amendment right against self-incrimination in NASD disciplinary proceedings, so their proposed testimony is irrelevant.

The Hearing Officer denies both the motion in limine and the motion to disqualify counsel. The National Adjudicatory Council has ruled repeatedly that reasonable reliance on counsel may mitigate a respondent's misconduct.[1] Thus, their proposed testimony regarding the facts and circumstances surrounding the advice they gave Respondent is relevant to the issue of sanctions.

Moreover, motions to disqualify counsel generally are disfavored in civil cases.[2] Disqualification is a drastic measure that courts should hesitate to impose except when necessary because disqualification serves to destroy an attorney-client relationship by depriving a party of the right to employ counsel of his choice.[3] Moreover, courts have long recognized that such motions are often made for tactical reasons."[4] Accordingly, federal courts impose a relatively high burden of proof on those who move to disqualify

[1] *See Department of Enforcement v. Steinhart*, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *9 n.1 (N.A.C. Aug. 11, 2003) ("While reliance on counsel may mitigate his conduct, it is not a defense to a failure to respond to NASD requests for information.") (citing *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd* , 34 F.3d 99 (2d Cir. 1994).

[2] *See, e.g. Skidmore v. Warburg Dillon Read LLC*, No. 99 Civ. 10525, 2001 U.S. Dist. LEXIS 6101, at *4–5 (S.D.N.Y., May 11, 2001).

[3] *Advanced Manufacturing Technologies, Inc. v. Motorola, Inc.*, No. CIV 99–01219, 2002 U.S. Dist. LEXIS 12055, at *7 (D. AZ, July 3, 2002).

[4] *Skidmore.* 2001 U.S. Dist. LEXIS 6101, at *5.

counsel.[5] Here, however, the Department presents no justification for such an extreme measure, and the Hearing Officer finds no basis to conclude that the Department will be unduly prejudiced if HH and JK are permitted to testify. Accordingly, the motion is denied. Respondent will be permitted to present evidence in support of his claim that he reasonably relied on advice of counsel when he refused to respond to the Rule 8210 request for information.

II. Motion to Exclude Evidence of "Disparate Treatment"

Respondent proposes to present evidence that four former registered representatives at _____ ("**the Firm**") also refused to provide information in connection with NASD's investigation into IPO profit sharing at **the Firm**, but NASD did not bring an enforcement action against them. In addition, Respondent points out that they were allowed to consent to relatively lenient sanctions after they ultimately cooperated. Respondent argues that this evidence is relevant for two reasons. First, Respondent contends that the lenient treatment they received is a measure of the Department's animus towards him. Second, Respondent contends that the sanctions they received is direct evidence of the appropriate sanction in this case because their misconduct is nearly identical to his.

The Hearing Officer grants the Department's motion in limine. To establish selective enforcement, a respondent must show "that she was singled out for enforcement while others who were similarly situated were not and that her prosecution was motivated by arbitrary or unjust considerations, such as race, religion, or the desire to prevent a

[5] *Id.*

constitutionally-protected right."[6] Here, the Hearing Panel has rejected Respondent's contention that NASD violated his Fifth Amendment right against self-incrimination, and Respondent has alleged no other form of invidious discrimination.

In addition, Respndent's contention that his case is "nearly identical" to that of his former associates at _____ is factually inaccurate. His former associates ultimately complied with the requests for information; Respondent has not. Accordingly, Respondent cannot point to the sanctions they received to demonstrate the alleged animus he attributes to the Department.

III. Motion to Exclude Evidence of Respondent's Compliance with Disciplinary Rules

The Department next objects to eight potential witnesses on the grounds that they would be "character witnesses." Respondent argues that they are not offered to show character or habit evidence; instead, he intends to offer their testimony to establish that he had a character and practice of scrupulously complying with applicable disciplinary rules. Respondent points out that such testimony should be permitted because under the NASD Sanction Guidelines adjudicators are directed to impose sanctions that are tailored to address the particular misconduct. One such consideration is the likelihood of future violations.

In general, the Hearing Officer agrees with Respondent's argument. The Hearing Officer finds no grounds warranting the exclusion of all evidence predictive of Respondent's future behavior—particularly at this stage of the proceeding. On the other

[6] *District Bus. Conduct Comm. v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, at *19 n.13 (N.B.C.C. Jan. 20, 1998) (rejecting a claim of selective enforcement where NASD knew of more serious violations by respondent's firm and other employees, but chose only to file a complaint against respondent) (citing *George H. Rather*, Exchange Act Release No. 36,688, 1996 SEC LEXIS 85, at *6 (Jan. 5, 1996). *See also U.S. v. Huff*, 959 F.2d 731 (8th Cir. 1992); *C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1437 (10th Cir. 1988).

hand, at the Final Pre-Hearing Conference the Hearing Officer will address the possibility of limiting the number of witnesses that will be permitted to testify on this subject.

IV. Motion to Exclude Post-Complaint Correspondence

The Department moves to exclude the introduction of a letter written by Respondent's counsel offering to explore alternative forms of cooperation that would not adversely impact Respondent's Fifth Amendment concerns. The Department contends the correspondence is irrelevant. The Hearing Officer overrules the Department's objection. The relevance of the proposed exhibit cannot be determined at this stage of the proceeding. The Department may renew its objection at the hearing if Respondent offers the document in evidence.

IT IS SO ORDERED

_____
Andrew H. Perkins
Hearing Officer

October 30, 2003