

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-01 (CAF980002).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980002
	:	
v.	:	
	:	
Respondents.	:	Hearing Officer - DMF
	:	

**ORDER DENYING “NOTICE OF OBJECTION TO ORDER”
AND REJECTING “RESPONSE TO ORDER TO SHOW CAUSE”
OF RESPONDENTS**

Background

Pursuant to the Order Revising Pre-Hearing Schedule issued on November 10, 1998, the parties were required to file witness lists, exhibit lists and other pre-hearing submissions by November 30, 1998. Respondents _____ who are represented by counsel in this matter, did not file any pre-hearing submissions. The Order Revising Pre-Hearing Schedule warned: “If a Party fails to file pre-hearing submissions in a timely manner, the Party may be precluded from introducing evidence at the hearing.” On December 7, 1998, acting on this warning, the Department of Enforcement filed a motion to preclude _____ from offering evidence at the hearing, because of their failure to file pre-hearing submissions. Pursuant to the Order Revising Pre-Hearing Schedule, these respondents had until December 14, 1998, to file a response to Enforcement’s motion, but they did not do so.

As scheduled in the Order Revising Pre-Hearing Schedule, a Final Pre-Hearing Conference was conducted by telephone conference call on December 16, 1998. _____

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_____ did not appear for or participate in the Conference. During the Conference, the Hearing Officer orally granted Enforcement's motion to preclude _____ from offering any evidence at the hearing, and the Hearing Officer confirmed that ruling in an Order Following Pre-Hearing Conference issued on December 18, 1998. In addition, on December 17, 1998, the Hearing Officer issued an Order to Show Cause requiring _____ to show cause why they should not be held in default, pursuant to Rule 9241(f), for failing to attend and participate in the Conference. The Order to Show Cause provided that these respondents "shall file any response to this Order to Show Cause on or before December 24, 1998. To be timely, any such response must be **received** by the Office of Hearing Officers on or before that date." The Order to Show Cause was faxed to counsel for _____ on December 17, 1998, but these respondents did not file any response by December 24, 1998. Accordingly, on December 28, 1998, the Hearing Officer issued an Order holding _____ in default for failing to attend the Conference.

The "Objection" and "Response" of _____

On December 30, 1998, _____ filed a "Notice of Objection to Order," in which they asked the Hearing Officer to vacate the Order Following Pre-Hearing Conference insofar as it precludes them from offering any evidence at the hearing. The "Objection" did not explain why these respondents did not file a timely opposition to Enforcement's motion. It sought to justify their failure to file any pre-hearing submissions on the ground that they were "unable to determine how they will rebut the conspiracy allegations until such time as the Division of Enforcement puts on its evidence attempting to prove that allegation."

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On January 4, 1999, these respondents filed a “Response to Order to Show Cause.” As with the “Objection,” these respondents offered no excuse or explanation for filing the “Response” more than a week after the deadline established in the Order to Show Cause. Moreover, the only explanation offered by these respondents for failing to attend and participate in the Conference was that “they felt it was unnecessary to do so. No one has been prejudiced by their failure to participate. There are no unresolved issues between the Department of Enforcement and these respondents. These respondents ... have no motions pending either by them or adverse to them.”

Discussion

The “Objection” and the “Response” reflect a cavalier attitude about the obligation of these respondents to comply with the NASD’s Code of Procedure and the orders issued in this proceeding. These respondents were not entitled to ignore the requirements that they file pre-hearing submissions and that they attend and participate in the Conference, or the deadlines for responding to Enforcement’s motion and the Order to Show Cause.

The claim in the “Objection” that these respondents could ignore their obligation to file pre-hearing submissions because they could not determine what witnesses and exhibits they will offer until Enforcement puts on its case at the hearing is entirely without merit. These respondents, like the respondents who did file pre-hearing submissions, had notice of the charges against them based on the Complaint and other filings by Enforcement during this proceeding, and they have had access to Enforcement’s files, pursuant to Rule 9251, for months. If they nevertheless believed that they should be excused from filing pre-hearing submissions, they should have requested relief through a timely motion, rather than making a unilateral,

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undisclosed determination that they did not have to comply with the pre-hearing orders issued in this proceeding.

The “Response” is not only inadequate, but, frankly, bizarre. These respondents claim that their attendance at the Conference would have been meaningless because there were no issues pending between them and Enforcement, but, as discussed above: (1) at the time of the Conference, Enforcement’s motion to preclude these respondents from presenting evidence at the hearing was pending; (2) the motion was addressed during the Conference and in the Order Following Pre-Hearing Conference; and (3) these respondents have objected to the disposition of that motion. There were also other issues pending before the Conference that directly addressed these respondents, such as Enforcement’s Motion in Limine, in which Enforcement argued that _____ should be estopped from contesting to certain facts that Enforcement argued were determined in a prior disciplinary proceeding.

Furthermore, even if there had not been relevant motions pending, these respondents were needed. The Conference was called to help the Hearing Officer and all parties to prepare for a lengthy and complex hearing. To do that, it was essential to know who would be participating in the hearing, and the nature and extent of their participation. Finally, if these respondents believed that their participation was unnecessary, their remedy was to ask to be excused, not to decide for themselves, with no notice to the Hearing Officer or the other parties, that they simply would not attend.

The imposition of sanctions is a serious matter. Precluding a party from offering any evidence on its behalf is severe; holding a party in default even more severe. Just as sanctions should not be imposed lightly, a Hearing Officer should be liberal in granting relief from them when a party shows some justification for the conduct that gave rise to the sanctions. These

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respondents, however, have simply confirmed, without apology, that they deliberately and unilaterally decided not to file pre-hearing submissions or to attend the Conference, and they have done this, again without apology or explanation, in filings submitted long after the deadlines established by the Hearing Officer. Thus, these respondents have expressed frank contempt for the authority of the NASD and the Hearing Officer. To excuse them under these circumstances would seriously undermine the Code of Procedure and the authority of the Hearing Officer to manage these proceedings. If applied more generally, it would make this and other NASD proceedings ungovernable.

Accordingly, the “Notice of Objection to Order” filed by respondents _____ including their request that the portion of the December 18 Order precluding them from offering any evidence at the hearing be vacated, is denied. Similarly, their Response to Order to Show Cause is rejected, and the December 28 order holding them in default will stand.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
January 6, 1999