

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-14 (CAF970011).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF970011
v.	:	
	:	Hearing Officer—AHP
	:	
Respondents.	:	
	:	

**ORDER DENYING MOTION TO DISQUALIFY COUNSEL FOR COMPLAINANT
AND HEARING PANELISTS**

On January 20, 1998, all of the Respondents except _____ filed a Motion for Disqualification of _____, Esq. and Disqualification of the Hearing Panel. The identical motion was filed again on January 21 by all of the Respondents. Accordingly, the motion will be treated as having been filed by all of the Respondents, and they will be referred to collectively in this Order as the Respondents.

The Respondents' motion to disqualify the panelists is denied because no panelists other than the hearing officer have yet been appointed; therefore, there is no one who can be the subject of the Respondents' charge of bias.¹ Also, the Respondents' motion to disqualify _____, counsel for the Department of Enforcement, is denied for the reasons set forth below.

¹ The Respondents' also moved to have the hearing officer recuse himself. That portion of the motion was denied in a separate order issued on January 29, 1998.

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Respondents' Allegations

The Respondents rest their motion to disqualify _____, the Department of Enforcement's lead counsel, on the ground that his alleged unethical conduct has tainted this proceeding.² In support, the Respondents complain that _____ acted improperly by: (1) filing the Complaint on December 23; (2) filing the Department of Enforcement's opposition to the Respondents' motion for an extension of time to answer on January 8, without reference to the Department of Enforcement's intention to amend the Complaint; and (3) referring to settlement discussions and the Respondents' decision not to make a Wells submission before the Complaint was filed.³ The Respondents argue that _____ took each of these actions to gain unfair advantage and unfairly prejudice the members of the hearing panel.⁴ Although the Respondents do not allege how they were prejudiced, they request that _____ be disqualified from continuing to represent the Department of Enforcement in this proceeding.

Legal Standard

The general standard for disqualification of an attorney in NASD Regulation disciplinary proceedings is found in NASD Code of Procedure Rule 9150. Rule 9150(a) provides that a hearing officer may exclude an attorney "for contemptuous conduct under Rule 9280 or unethical or improper professional conduct." In this regard, Rule 9141(b) also makes clear that the right to representation in a disciplinary proceeding is subject to the power to exclude a party's attorney

² Motion for Disqualification of _____, Esq. and Disqualification of the Hearing Panel at 1.

³ Id. at 4.

⁴ Id.

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under Rules 9150 and 9280.⁵ NASD enacted Rule 9280 to discipline parties or counsel on either side who engage in frivolous practice or contumacious conduct.⁶ And NASD drew heavily on administrative and judicial rules in devising Rules 9150 and 9280.⁷ Therefore, NASD Regulation relies, in part, on judicial decisions concerning the disqualification of attorneys in applying Rules 9150 and 9280.

Courts generally have been very reluctant to disqualify an attorney from a case for unethical behavior because disqualification motions are often used for tactical reasons.⁸ Moreover, courts recognize that even in those cases where such motions are filed in the best of faith, they inevitably cause delay and interfere with a party's right to be represented by counsel of their own choosing. Thus, disqualification has been ordered only when necessary to preserve the integrity of the adversary process.⁹ In other words, courts have limited disqualification of an attorney to essentially two kinds of cases: (1) where there is a possibility that the attorney may improperly use privileged information that was learned through prior representation of the other side in the case, or (2) where the attorney's conflict of interest undermines the court's confidence that the attorney will vigorously represent his or her client.¹⁰ In these cases, the courts have been willing to

⁵ See Exchange Act Release No. 38545, 64 S.E.C. Docket 862, 911 (April 24, 1997). The NASD's proposed rule change, as amended, was approved by the Securities Exchange Commission on August 7, 1997. See Exchange Act Release No. 38908, 65 S.E.C. Docket 237 (August 7, 1997).

⁶ Id. at 910.

⁷ Id. at 911.

⁸ See, e.g., Evans v. Artek Systems Corp., 715 F.2d 788, 791-92 (2d Cir. 1983).

⁹ See, e.g., Board of Education of the City of New York v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1978).

¹⁰ Id.

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disqualify an attorney to prevent his conduct from tainting the underlying trial by “disturbing the balance of the presentations” at the trial.¹¹ But neither situation is presented in this proceeding.

Discussion

The Respondents complain that _____ has engaged in sharp and unethical practices in an effort to gain an unfair advantage.¹² But they fail to point to any conduct that violates either the rules governing NASD disciplinary proceedings or the general rules prohibiting conflicts of interest. There is no claim that _____ has a conflict of interest or has privileged information that was obtained from an attorney-client relationship with any of the Respondents. Nor is there evidence that _____ is anything less than vigorous in his representation. Thus, _____ representation of the Department of Enforcement cannot be said to taint the proceeding by disturbing the balance of the presentations.

The Respondents make much ado about the Department of Enforcement’s decision to file the Complaint in this proceeding on December 23.¹³ This is much ado about nothing. Not only is it perfectly proper under the Code of Procedure (and any other set of court rules of which I am familiar) to file a Complaint on any day that is not a legal holiday, but the Respondents admit that they promptly received the Complaint on December 27. Since they had an extra three days to answer because the Complaint was served by mail, the Respondents’ time to answer did not begin to run until December 27.¹⁴ The Respondents then had the full 25 days allowed under Rule 9215 before their answers were due. Thus, there is no evidence that filing the Complaint on

¹¹ Id.

¹² Motion for Disqualification, supra, at 3-4.

¹³ Id. at 4.

¹⁴ See Rule 9138(c).

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December 23 was improper or that the Respondents were in any way prejudiced by the timing of the filing. In addition, the Respondents were granted an additional 14 days to answer by Order dated January 12, 1998.

The Respondents also overstate their complaints about the Department of Enforcement's motion to amend. Again, _____ did not violate any procedural rules or canons of ethics when he filed the opposition to the Respondents' motion for an extension of time to answer. While disclosing his intent to amend the Complaint might have forestalled the present argument, there is absolutely no evidence to support the Respondents' contention that _____ was attempting to gain undue advantage by not mentioning his intent to amend the Complaint in the opposition filed by the Department of Enforcement. _____ was not obligated to mention the forthcoming motion, and the opposition was not misleading. Accordingly, the Respondents' complaint about the timing of these motions does not require _____ disqualification.

Finally, the Respondents completely misstate the rules governing the limitations on the introduction of evidence of settlement talks and offers of settlement. This aspect of the Respondents' argument is discussed fully in the Order Denying Motion For Recusal Of Hearing Officer dated January 29, 1998. For the purposes of this Order, it is sufficient to note that the Respondents' argument was found to be completely baseless and lacking good faith.

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For the foregoing reasons, I find that the Respondents' motion to disqualify _____ fails to meet the requirements of Rule 9150. The Respondents cite no evidence of improper conduct by _____. Accordingly, the Respondents' motion to disqualify _____ is denied.

Andrew H. Perkins
Hearing Officer

Dated: Washington, DC, January 29, 1998