

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-9 (C07970055).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C07970055
v.	:	
	:	Hearing Officer - SW
	:	
	:	
Respondent.	:	

**FINAL PRE-HEARING CONFERENCE
ORDER**

Pursuant to Code of Procedure Rule 9241, a Final Pre-Hearing Conference (“Conference”) was held on November 24, 1997, before Hearing Officer Sharon Witherspoon. At the Conference, _____ appeared on behalf of the Department of Enforcement (“Enforcement”) and _____ appeared on behalf of the Respondent. Based on the representations of counsel and pursuant to the agreements reached during the Conference, the following procedural determinations have been made by the Hearing Officer.

1. Hearing Time

The Hearing was initially scheduled for 9:15 a.m. on December 2, 1997. In order to accommodate a conflict, the Hearing has been rescheduled to begin at 10:15 a.m.

2. Telephone Testimony

On November 17, 1997, Enforcement filed a motion for leave to have _____ testify by telephone. At the November 24, 1997 Final Pre-Hearing Conference, Respondent

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-9 (C07970055).

indicated he did not object to the motion. Therefore, Enforcement's motion to have

_____ testify by telephone is granted, under the following conditions:

(i) Enforcement will be responsible for ensuring that functioning speakerphones are available so that the members of the Hearing Panel, the Parties, and the court reporter may clearly hear the testimony;

(ii) Enforcement will make arrangements to secure a competent notary to swear the witness, or explain why such an arrangement is not feasible and use an alternative method for securing sworn testimony, such as requiring the witness to execute an affidavit or declaration attesting that the testimony is truthful;

(iii) Enforcement will ensure that the witness receives, and has available at the time of testifying, all exhibits relating to that witness's testimony, as agreed upon by the Parties at the November 24, 1997 Final Pre-Hearing Conference;

(iv) Enforcement will ensure that the witness will be available the morning of December 2, 1997; and

(v) Enforcement will have the means necessary to contact the witness during the hearing, in the event that there is a change in schedule or the witness needs to be recalled to give additional testimony.

3. Expert Testimony

In Respondent's Pre-Hearing Submissions filed on November 11, 1997, Respondent listed as a proposed expert witness _____. _____ would testify as to the duties and activities of brokerage firm branch office managers and as to the industry standards of reasonable supervision. By a motion filed on November 18, 1997, Enforcement objected to

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-9 (C07970055).

Respondent calling _____ on the grounds that expert testimony is not needed and that such testimony could confuse the disposition of the case because the hearing panel might erroneously give the expert's opinion undue weight.

The Respondent filed a response to the objection on November 20, 1997. The Respondent argued that as a matter of due process and fairness to the Respondent, Respondent should be permitted to present testimony and evidence that he believes will help the hearing panel understand and resolve the issues in the case.

Enforcement's argument that such testimony could confuse the disposition of the case because the hearing panel may erroneously give the expert's opinion undue weight is without merit.

Respondent's argument that he should be permitted to present testimony and evidence that he believes will help the hearing panel understand and resolve the issues in the case is not compelling.

The fundamental question is whether the hearing panel believes that the testimony would help the hearing panel understand the evidence or a fact in issue. In this particular case, when each of the industry panelists has more than 25 years of experience in the supervisory area of the brokerage business, the Hearing Officer does not believe that the testimony of _____ is necessary or helpful in the hearing panel's understanding of the industry standards of reasonable supervision. Therefore, Enforcement's motion to preclude _____ is granted.

4. Exclusion of Non-Party Fact Witnesses

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 97-9 (C07970055).

On November 19, 1997, Respondent filed a motion requesting that all non-party fact witnesses called by Enforcement be excluded from attending or otherwise participating in the hearing before and after their testimony. At the November 24, 1997 Final Pre-Hearing Conference, the Parties agreed that fact witnesses would be excluded with the exception of _____ and _____. The presence of _____ and _____ was argued to be essential to the presentation of Enforcement's and the Respondent's case, respectively.

Therefore, it is ordered that all non-party fact witnesses be excluded from the hearing before and after their testimony, with the exception of _____ and _____.

5. Hearsay Objections to Exhibits

In the November 19, 1997 motion, Respondent also objected to three exhibits submitted by Enforcement as part of Enforcement's Pre-Hearing Submissions. The admission of the three documents, Exhibits C-19, C-20 and C-22, was objected to on the theory that the documents are hearsay. At the November 24, 1997 Final Pre-Hearing Conference, Enforcement argued that a hearsay argument is not a valid objection in this forum. Enforcement's argument is persuasive, particularly since there is no argument that the Respondent would be unduly harmed by the admission of the memoranda as evidence. Respondent's motion to preclude Exhibits C-19, C-20 and C-22 is denied.

SO ORDERED.

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 25, 1997