

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS970028
v.	:	
	:	Hearing Officer - EAE
	:	
Respondent.	:	
	:	

**ORDER GRANTING IN PART COMPLAINANT'S MOTION
TO EXCLUDE WITNESSES AND AMEND EXHIBIT LIST**

Pursuant to the December 9, 1997, Final Pre-Hearing Order, Complainant timely filed a Motion to Exclude Witnesses and Amend Exhibit List¹ and Respondent timely filed its Response and Opposition² thereto. Having considered the respective arguments of the parties, Complainant's Motion is granted in part.

I. Motion to Exclude Witnesses

A. Positions of the Parties

Complainant requests that Respondent's witnesses be sequestered during the hearing and, thus, excluded from hearing the testimony of other witnesses.³ Although Complainant does not question the integrity of these individuals, it argues that the majority of witnesses will be testifying on the same general

¹ Hereafter referred to as "Complainant's Motion."

² Hereafter referred to as "Respondent's Opposition."

³ Complainant's Motion at 1.

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topic -- _____ Supervisory Procedures -- and "[t]here will be, in all likelihood, a substantial duplication in the questions asked of these individuals, both on direct and cross-examination."⁴

As Complainant properly recognizes, section 9(b) of the October 6, 1997 Standing Pre-Hearing Order states that the "[t]he Hearing Officer, in the exercise of discretion, or at the request of one of the Parties, may exclude witnesses from attending the hearing, before and after they have testified, so that they cannot hear the testimony of other witnesses." Complainant also recognizes that the Standing Pre-Hearing Order states that witnesses essential to the preparation of a Party's case will not be excluded.

Respondent opposes sequestration of its witnesses. Citing Code of Procedure Rule 9145(a), it first argues that because the formal rules of evidence do not apply, the evidentiary rule allowing the exclusion of witnesses is not applicable.⁵

Second, Respondent argues that because the Federal Rules of Evidence do not apply, there is no authority in the Code of Procedure for the Hearing Officer to disregard Rule 9145(a) and to exclude a Party's witnesses from a hearing.⁶ Respondent recognizes the broad authority of the Hearing Officer to resolve evidentiary matters set forth in Code of Procedure Rule 9235, but argues that the language therein -- "subject to any limitations set forth elsewhere in the Code"⁷ -- read in conjunction with Code of Procedure Rule 9145(a), effectively prohibits the Hearing Officer from excluding witnesses absent an express grant of authority.

⁴ Id.

⁵ Respondent's Opposition at 2. Fed. R. Evid. 615 provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

⁶ Id.

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Third, Respondent argues that since the Initial Pre-Hearing Order required all motions to be filed on or before November 17, 1997, Complainant's motion is untimely and should be denied.⁸ Respondent also claims that "participation of [its witnesses] throughout the hearing would further the goals of self-regulation by permitting all participants to achieve a better understanding of the new hearing procedures and rules."⁹

Finally, Respondent claims that "significant prejudice would result to the Respondent if witnesses * * * were excluded from the hearing."¹⁰ Respondent represents that _____, "the head of the trading department during the relevant time period, will have traveled from Atlanta, Georgia to be present at the hearing and to assist in responding to the allegations made by the Complainant against his former employer."¹¹ Respondent claims that _____ has been invaluable in the preparation of Respondent's defense and continues to be essential to the preparation of Respondent's case throughout the hearing.

B. Decision

The Federal Rules of Evidence do not govern NASD disciplinary proceedings. Respondent's argument, however, that the Hearing Officer lacks discretionary authority to order the exclusion of witnesses is misplaced. Simply because the Hearing Officer is not required to apply the Federal Rules

⁷ Code of Procedure Rule 9235 (a)(4).

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

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of Evidence does not compel the opposite conclusion that, under appropriate circumstances, the Federal Rules of Evidence cannot provide a guide to rulings on evidentiary matters.¹²

Pursuant to the Code of Procedure, the Hearing Officer has specific authority to resolve all procedural and evidentiary matters and other non-dispositive motions¹³ and to regulate the course of the hearing.¹⁴ The Hearing Officer also has broad "authority to do all things necessary and appropriate to discharge his or her duties."¹⁵ The language of Code of Procedure Rule 9235(a) expressly indicates that the list of powers is illustrative, not exhaustive.¹⁶ There is no question that this Rule, read in conjunction with the other procedural Rules addressing the specific duties of a Hearing Officer, grants the Hearing Officer broad discretionary authority for all aspects of case management, from the institution of the proceeding to its conclusion.¹⁷

¹² There is no express limitation in the Code of Procedure that the Hearing Officer may not, under appropriate circumstances, look to the Federal Rules of Procedures (as well as other precedents) as a guide in ruling on evidentiary matters and for effective case management. For example, Code of Procedure Rule 9263 (a) states that "[t]he Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." It would defy logic to suggest that the Hearing Officer could not look to the Federal Rules of Evidence, and the cases decided thereunder, for assistance in making such evidentiary rulings.

¹³ Code of Procedure Rule 9235(a)(4).

¹⁴ Id. at a(2).

¹⁵ Id. at 9235(a).

¹⁶ This Rule is patterned on SEC Rule of Practice 111 (17 C.F.R. § 201.111) entitled "Hearing Officer: Authority" which, in turn, is based on Section 556(c) of the Administrative Procedure Act, 5 U.S.C. §556(c). The powers enumerated in Code of Procedure Rule 9235 are consistent with many of the powers enumerated in the SEC Rule and also with certain of the powers enumerated in ACUS Model Adjudication Rule 111 (MAR 111).

¹⁷ 62 Fed. Reg. 25226, 25250 (May 8, 1997).

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Of necessity, effective case management encompasses not only ruling on evidentiary matters, but protecting the integrity of the hearing process to improve the quality of the hearing.¹⁸ In fulfilling such responsibilities, the Hearing Officer can look to other precedents and procedures, including the Federal Rules of Evidence, for guidance. The exclusion of witnesses from the hearing so that they cannot hear the testimony of other witnesses, in order to discourage fabrication, collusion, and inaccuracy of testimony¹⁹ is a procedure the Hearing Officer may choose to use to improve the quality and integrity of the hearing. There is nothing inconsistent with this exercise of discretion and the language of Code of Procedure Rule 9145 on which Respondent relies.

Here, Respondent has identified six witnesses all of whom are expected to testify as to various aspects of Respondent's Supervisory Procedures and Trading Department Compliance. Complainant correctly notes that there is a likelihood of substantial duplication in questions asked both on direct and cross-examination²⁰ of such witnesses. Thus, to avoid any tailoring of testimony, as inadvertent as it may be, the integrity of the hearing will be better protected by excluding the majority of these witnesses from hearing the testimony of other witnesses.²¹

Even though witnesses may be excluded from the hearing for the reasons stated above, an exception is recognized for "a person whose presence is shown by a party to be essential to the presentation of the party's case."²² This exception appears to be applicable with respect to _____,

¹⁸ See Id.

¹⁹ Fed. R. Evid. 615, Advisory Committee Notes (1972).

²⁰ Complainant's Motion at 1.

²¹ With the exception discussed below, Respondent does not claim that the presence of these witnesses is essential to the effective presentation of its case. Cf. Fed. R. Evid. 615(3).

²² Fed. R. Evid. 615(3).

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the former head of Respondent's trading department and, thus, he will be permitted to be present during the hearing to assist Respondent with the presentation of its case.

Respondent's other argument that Complainant's motion to exclude witnesses was not timely filed is well taken.²³ The Initial Pre-Hearing Order made clear that all motions were to be filed by November 17, 1997. This includes a motion to exclude or sequester witnesses, especially since the date for filing and serving pre-hearing submissions (including the identification of witnesses) was set sufficiently in advance so that all outstanding issues could be addressed by appropriate motions prior to the hearing.

Parties are expected to comply with the procedural deadlines set forth in pre-hearing orders and Complainant has offered no bona fide explanation why it did not do so. A party's motion may be denied because it was not timely filed. Nevertheless, since this is one of the first hearings under the new Code of Procedure, some flexibility is necessary. Accordingly, Complainant's motion will be granted in part even though it was not timely filed.

II. Motion to Amend Exhibit List

A. Position of the Parties

Complainant moves to amend its exhibit list to include print-outs of the disciplinary history of Respondent as reflected in the Central Registration Depository ("CRD"). Complainant argues that this information is relevant because the NASD's Sanction Guidelines direct the Hearing Panel to consider

²³ Respondent also argues that the presence of its witnesses at the hearing will enable them to achieve a better understanding of the new hearing procedures and rules. (Respondent's Opposition at 3). This is an admirable goal; however, there are other ways to achieve the same result -- through training and observation of hearings in which such persons do not appear as witnesses -- without the possible complications attendant to their presence here.

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the Respondent's disciplinary history in determining sanctions.²⁴ Complainant states that the Panel may take Official Notice of these documents pursuant to NASD Procedural Rule 9145(b), but submits that it would be more appropriate to offer the documents as an exhibit and allow the parties to argue the issue of relevance at the hearing.²⁵

Respondent objects to Complainant's motion on the basis it has not been timely filed.²⁶ Respondent also claims that the proposed exhibit is prejudicial and has no probative value with respect to the allegations of liability.²⁷ Respondent is concerned that the presence of this exhibit before the Panel for the entire hearing creates the implication that liability should be presumed and that sanctions will be required because of past acts.²⁸

B. Decision

There is no question that the information Complainant now seeks to include as an exhibit should have been submitted with its pre-hearing submissions which were required to be file on or before November 6, 1997.²⁹ On that date, all evidence that a party wishes to present as to liability and sanctions was to be filed.³⁰ Respondent is correct is noting that "Complainant was fully aware of its responsibilities regarding proof necessary for both liability and sanctions" and "failed to

²⁴ Complainant's Motion at 2.

²⁵ *Id.*

²⁶ Respondent's Opposition at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Initial Pre-Hearing Order (October 23, 1997).

³⁰ *See* Standing Pre-Hearing Order (October 6, 1997).

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timely proffer this exhibit."³¹ Indeed, Complainant offers no excuse whatsoever for the proposed, very belated, addition to its exhibit list.³²

In future disciplinary proceedings, Complainant may find that failure to comply with procedural deadlines results in the exclusion of evidence which, correspondingly, seriously hampers its ability to present its case effectively. Nevertheless, for the reasons stated above and in the Final Pre-Hearing Order, some flexibility is necessary in the context of this particular disciplinary proceeding to ensure that both parties have the opportunity to present fully all procedural and substantive issues which may impact the outcome. Thus, Complainant's motion will not be denied even though it was not timely filed.

Respondent's other point that the exhibit is prejudicial and has no probative value with respect to liability also has been considered. As Respondent is well aware from its arguments in opposition to Complainant's motion, all evidence as to liability and sanctions must be presented at the hearing during a party's case. Respondent also does not dispute that the proposed exhibit may be relevant with respect to the imposition of sanctions.

NASD disciplinary hearings are unified, not bifurcated, proceedings. There is no opportunity during an disciplinary hearing for a party to present two cases -- one with respect to liability and one with respect to sanctions. Similarly, there is no opportunity for a Hearing Panel to deliberate twice -- once as to liability and, then, if liability were found, as to sanctions. Accordingly, all evidence as to both

³¹ Respondent's Opposition. at 4.

³² Complainant does state that it sent Respondent's counsel a proposed stipulation with these documents on November 6, 1997, the same day its pre-hearing submissions were due. (Complainant's Motion at 2). This stipulation was rejected a few days later by Respondent's counsel (*Id.*). This does not excuse Complainant from timely filing its exhibits or, at a minimum, once the stipulation was rejected, from promptly seeking leave to amend its exhibit list or filing a motion by November 17, 1997, requesting that judicial notice be taken of these documents pursuant to Code of Procedure Rule 9145(b). There is no excuse for waiting until the final Pre-Hearing Conference, within days of the hearing, to raise this issue for the first time.

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issues must be received at the same time. Hearing Panel members understand the purpose of the introduction of evidence of a Respondent's disciplinary history and also understand that it is to be considered only with respect to the imposition of sanctions if liability first were found. Thus, the introduction of Complainant's proposed exhibit is not unduly prejudicial to Respondent.

III. Conclusion

For the reasons stated above, Complainant's motion to exclude Respondent's witnesses from hearing the testimony of other witnesses is granted in part. With the exception of _____, Respondent's witnesses will be sequestered from the hearing.

Complainant's motion to amend its exhibit list to include proposed Exhibit C in the form attached to its motion of December 9, 1997, also is granted.

SO ORDERED

Ellen A. Efros
Hearing Officer

Dated: Washington, D.C.
December 15, 1997