This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-04 (CAF000045).

NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondents.	Disciplinary Proceeding No. CAF000045 Hearing Officer—Andrew H. Perkins

ORDER GRANTING MOTIONS TO QUASH

The Respondents filed motions to quash the requests by the Department of Enforcement ("Enforcement"), issued pursuant to NASD Procedural Rule 8210, that the Respondents provide information about certain of their affirmative defenses. Enforcement filed its opposition to the motions on January 12, 2001, and at the Initial Pre-Hearing Conference held on January 22, 2001, the Hearing Officer heard oral argument on the motions.

The Respondents' motions to quash raise the important, novel issue of the extent to which Enforcement may use NASD Procedural Rule 8210 as a discovery device to inquire into the facts

supporting a respondent's affirmative defenses and the protection to be accorded to attorneys' work product. For the reasons set forth below, the Hearing Officer will grant the Respondents' motions.

I. Background

The underlying allegations in this proceeding arise from NASD Regulation, Inc.'s investigation of the sale by _____ ("_____") of more than $2 billion of Term Trusts to more than 100,000 customer accounts between October 1992 and November 1993. In general, the Complaint filed on November 20, 2000, alleges that _____ instructed its sales force to sell the Term Trusts in a way that failed to disclose or obscured the risks of the investment and falsely portrayed the Term Trusts as safe, secure, low-risk investments and as the equivalent of a Certificate of Deposit. The Complaint further alleges that, as a result of _____'s internal marketing campaign, its sales force made material misrepresentations and failed to state material information in connection with the sale of the Term Trusts, and that the sales force recommended and sold the Term Trusts to customers for whom such securities were unsuitable. The Complaint also names _____, the Director of Sales responsible for marketing mutual fund products, and _____, _____'s Regional Director for the Northeast Region.

The day following the timely interposition of Answers, but before the completion of Enforcement's obligation under Rule 9251 to make the documents in its possession that gave rise to the filing of the Complaint available to the Respondents for inspection and copying, and before the Initial Pre-Hearing Conference could be scheduled, Enforcement issued, pursuant to NASD Procedural Rule 8210, nearly identical requests to each Respondent demanding the disclosure of certain information regarding the affirmative defenses contained in their Answers (collectively the "Rule 8210 Requests"). Enforcement sent the following four requests to _____:

1. In its answer to the complaint, _____ alleged ten affirmative defenses. Please identify and produce all documents that support each of those affirmative defenses. Be specific about which documents relate to which affirmative defenses.
2. Please describe each fact that supports the allegations contained in _____'s third, fourth, fifth, seventh, and ninth affirmative defenses alleged in its answer to the Department's complaint. Be specific about which facts relate to which affirmative defense.
3. In its third affirmative defense, _____ alleged that "the investigation of this matter by the Enforcement staff and the filing of this Complaint took an unreasonable amount of time, therefore causing prejudicial harm." Please specifically identify (not simply in general terms) how _____ has ostensibly been prejudiced.
4. In its fourth affirmative defense, _____ alleged that "[t]he Causes of Action set forth in the Complaint are barred by the five-year statute of limitations as set forth in 28 U.S.C. section 2462 or any other applicable statute of limitations." Please identify those "other applicable statute[s] of limitations" _____ contends may apply to these proceedings.

The instant dispute revolves around Enforcement's use of Rule 8210 to obtain this information. Each of the Respondents has moved to quash the Rule 8210 Requests for similar reasons. First, they complain that the Rule 8210 Requests improperly invade the zone of privacy traditionally accorded to attorneys' work product. Second, they assert that Enforcement's use of Rule 8210 as "contention interrogatories" is fundamentally unfair. Third, they assert that by demanding that the Respondents disclose the theories of their defenses and identify the evidence supporting each theory Enforcement has

impinged upon the Hearing Officer's role and responsibility to manage the proceeding. Thus, the issues raised by the pending motions and considered in this Order arise from the confluence of three substantial interests: the traditional protection given work product in litigation; Enforcement's need to discover the facts underlying Respondents' defenses; and the need for effective case management, particularly in complex proceedings.

II. Discussion

Because of the importance and novelty of the issues presented, this Order first explicates the work product doctrine. Then, the Order discusses the use of Rule 8210 requests for information as a discovery device and the intersection of that use with the Hearing Officer's case management power. Finally, the Order applies the relevant principles to the specific dispute at issue.

A. The Work-Product Doctrine

The modern genesis of the work-product doctrine can be traced back to the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), in which the Court recognized that the "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." The product of this effort, which has become known as attorney's "work product," is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and [in] countless other tangible and intangible ways." *Id.* at 511. Acknowledging the well-recognized policy against invading the privacy of an attorney's course of preparation, the Court held that a party may obtain access to an attorney's work product only upon a showing of adequate justification. *Id.* at 512. In its essence, the work-product doctrine shields the

mental processes of the attorney, "providing a privileged area within which he can analyze and prepare his client's case." *Alexander v. F.B.I.*, 192 F.R.D. 12, 21, (D.D.C. 2000).

The work-product doctrine has evolved to recognize two types of work product—each with its own standard of protection. The first is "ordinary" work product. It consists of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. Fed. R. Civ. P. 26(b)(3). Ordinary work product includes raw factual information. *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). Generally, a party seeking discovery of ordinary work product must show a "substantial need" and "undue hardship" in obtaining the subject materials or their substantial equivalent by other means. *Id.*

The second type is "opinion" work product. In contrast, opinion work product encompasses more than raw facts—it applies to materials that contain the mental impressions, conclusions, opinions or legal theories of an attorney. *Id.* The federal courts afford opinion work product almost absolute immunity and permit its discovery "only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud." *Id.* Such material is accorded this heightened protection because any slight factual content they have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases. *Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir.), *cert. denied*, 474 U.S. 903 (1985).

Typically, documents deserving of protection from discovery as work product have been produced by or on behalf of a party's attorney because of litigation. But, "the facts themselves are plainly not privileged merely because they were learned and conveyed to the client by an attorney." *Primetime 24 Joint Venture v. Echostar Com. Corp.*, 2000 U.S. Dist. LEXIS 779, *4 (S.D.N.Y.

Jan. 28, 2000). Otherwise, a party could resist discovery of information in its possession by retaining an attorney to do the investigation and fact gathering relevant to a case. *Id.*

Documents that are "factual in basis but opinionative in structure" do not fall neatly into the fact/opinion classification. *Washington Bancorporation v. Said*, 145 F.R.D. 274, 276 (D.D.C. 1992). The leading case dealing with such hybrid documents is *Sporck v. Peil, supra*.

In *Sporck* the Third Circuit Court of Appeals recognized that a compilation of a small number of very select documents culled to prepare a witness for his deposition should be protected as opinion work product. The court reasoned: "In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case." *Sporck* at 316 (quoting *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D.Del. 1982)). In the Third Circuit's view, the selectivity of the compilation was the significant factor that placed it within the category of opinion work product.

Since *Sporck*, a split has developed among the courts on the treatment of hybrid documents. For example, the Eighth Circuit[1] and Second Circuit[2] have similarly recognized that this category of documents may be protected, opinion work product, whereas the First Circuit has declined to do so where either there is not a real, nonspeculative danger of revealing the attorney's thought process or where the documents would otherwise be subject to disclosure at some point in the litigation. *See In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st Cir. 1988). For the First Circuit the analysis does not end with the determination that the documents may reveal an attorney's mental impressions, conclusions, opinions, or legal theories if the attorney "has had no justifiable

[1] *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).

[2] *See Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676 (2d Cir. 1987).

expectation that the mental impressions revealed by the materials will remain private." *San Juan* at 1016. In *San Juan* the First Circuit concluded that whether material should be accorded protection as opinion work product depended upon the specific circumstances. Without an expectation of confidentiality, none accrues. *Id.* "The key factor distinguishing [unprotected] material from protected opinion work product is that, even absent compelled disclosure, the information will probably come to light during the course of the trial, if not before. *Id.*

B. Discovery Utilizing Rule 8210

The second issue presented by Respondents' motions is Enforcement's ability to use Rule 8210 to discover the facts the Respondents claim support their defenses. The Respondents object to this use of Rule 8210 on the grounds that such use is inherently unfair because they do not have the right to similar discovery and that in this case the early deployment of information requests upsets the orderly management of the proceeding.

Enforcement, on the other hand, disregards the Respondents' concerns. Instead, Enforcement stakes out the position that it has the absolute right to use Rule 8210 requests for information and that during litigation Rule 8210 operates separate and apart from the rules governing the conduct of the proceeding. (Dep't of Enforcement's Opp'n to the Respondents' Mot. to Quash at 3-4.)

While Enforcement is correct in its observation that the Code of Procedure does not prohibit Enforcement from issuing post-complaint requests for information pursuant to Rule 8210, the Code does not address the timing and manner of their use. The only reference in the Code of Procedure to the use of Rule 8210 requests for information by Enforcement once the proceeding has commenced is found in Rule 9251(a)(2), which requires that Enforcement promptly inform the Hearing Officer when the requests are issued and to make material and relevant documents obtained thereby available to the

respondents. The absence of more specific guidance, however, does not inexorably lead to the conclusion that Enforcement's use of Rule 8210 is without limits. Indeed, the commentary surrounding the approval of the current rule clearly supports the opposite conclusion.

In 1997, when the National Association of Securities Dealers, Inc. ("NASD" or "Association") proposed the current Code of Procedure,[3] the American Bar Association Ad Hoc Task Force on the NASD's Proposed Rules Relating to Investigations and Disciplinary Proceedings ("ABA Task Force ") filed a comment letter with the Securities and Exchange Commission ("SEC").[4] The ABA Task Force advocated that the NASD amend Rule 8210 to change the existing practice of allowing the NASD to obtain information and documents from a member or person associated with a member at any time. The letter pointed out that Rule 8210 "does not differentiate between the NASD's right to obtain information and documents prior to a complaint being filed" and questioned "the propriety of making such demands once a proceeding is initiated."[5] The ABA Task Force contended that "such a broad and unfettered right to obtain information and documents and compel testimony once a proceeding is commenced without review by the Hearing Panel (or, at a minimum, a Hearing Officer) deprives respondents of their right to fundamental fairness and creates an advantage in favor of the staff of the Department of Enforcement."[6]

---

[3] Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. to Proposed Changes in the By-laws of the NASD, NASD Regulation, Inc., The Nasdaq Stock Market, Inc., the Plan of Allocation and Delegation of Functions by the NASD to Subsidiaries, Membership Application Procedures, Disciplinary Proceedings, Other Proceedings, and Other Conforming Changes (Release No. 34-38545; File No. SR-NASD-97-28), 62 Fed. Reg. 25226 (May 8, 1997).

[4] Letter from George S. Frazza, Chair, Section of Business Law and Barry F. McNeil, Chair, Section of Litigation, American Bar Association, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated June 17, 1997 ("ABA Letter").

[5] *Id*. 8.

[6] *Id*.

In its response to the comments filed by the ABA Task Force,[7] the NASD stated that it is neither necessary nor appropriate to limit the investigatory and enforcement functions of the NASD during the pendency of a disciplinary proceeding because of the obligations imposed on the Department of Enforcement under Code of Procedure Rule 9251(b) to turn over additional documents obtained pursuant to a Rule 8210 request to respondents, and because of Rule 9235,[8] which gives Hearing Officers broad authority regarding the conduct of disciplinary proceedings, and Rule 9146(k), which gives Hearing Officers authority to issue protective orders in the course of a disciplinary hearing. The SEC approved Rule 8210 as proposed by the Association, without the proposed amendments suggested by the ABA Task Force.[9]

The foregoing makes clear that in drafting the revised Code of Procedure, the NASD did not intend to limit the use of Rule 8210 to pre-complaint investigations, but it did recognize that the use of Rule 8210—although an essential tool to NASD Regulation's enforcement functions—would be monitored by the Hearing Officer when needed to maintain a fundamentally fair proceeding. Principles of fairness and efficiency in the conduct of the proceeding dictate that Enforcement's ability to use Rule 8210 during the pendency of a proceeding is not unfettered. Enforcement must exercise its right to issue

[7] Letter of July 11, 1997, from Alden S. Adkins to Katherine A. England, Assistant Director, Division of Market Regulation, Securities and Exchange Commission ("Response Letter") at 6.

[8] Rule 9235(a) states in part: "The Hearing Officer shall . . . have authority to do all things necessary and appropriate to discharge his or her duties."

[9] Order Approving Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change, Order Granting Accelerated Approval of Amendment No. 2 to the Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3, 4, and 5 to Proposed Rule Change Regarding Membership Application Procedures, Disciplinary Proceedings, Investigations and Sanctions Procedures, and Other Conforming Changes (Release No. 34-38908; File No. SR-NASD-97-28), 62 Fed. Reg. 43385 (Aug. 13, 1997).

post-complaint Rule 8210 requests in a manner consistent with the Hearing Officer's orders regarding scheduling and procedural matters.[10]

C. Enforcement's Rule 8210 Requests

Turning now to the specific requests Enforcement issued in this proceeding, the application of the foregoing rules and principles starts with the observation that Enforcement sent the Rule 8210 Requests to the Respondents to have them identify and produce all documents they contend support each of their affirmative defenses. Enforcement's stated purpose is to have the Respondents identify the facts and documents relating to each of their defenses so that Enforcement can move to strike those defenses it considers meritless. (Dep't of Enforcement's Opp'n to the Resp'ts' Mot. to Quash at 2-3, 8-9.) Enforcement seeks this information solely to aid it in the prosecution of this proceeding.[11] As a result, the Rule 8210 Requests closely resemble "contention interrogatories," which are permitted with limitations under Fed. R. Civ. P. 33(c).[12] This is quite different and raises distinct issues from Enforcement's post-complaint use of Rule 8210 to continue an ongoing investigation.[13] In this situation, the Hearing Officer must balance Enforcement's use of Rule 8210, protection of defense counsel's work product, and the goals of effective case management to ensure the fairness of the adjudicatory process.

---

[10] OHO Order 98-23 (May 6, 1998), <http://www.nasdr.com/pdf-text/98_23oho.txt>.

[11] In this regard, the Hearing Officer notes that over the course of the Enforcement staff's investigation, the staff served some 24 sets of document requests and information demands on _____ and received the material requested.

[12] Fed. R. Civ. P. 33(c) provides in relevant part:

> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

[13] This Order does not address Enforcement's post-complaint use of Rule 8210 as part of an ongoing investigation.

1. Protection of Work Product

The first element of the balancing equation is whether the information sought by Enforcement is protected work product. Respondents assert that Enforcement's questions and requests for documents are protected by the work-product doctrine. Indeed, Respondents argue that Enforcement intentionally drafted the Rule 8210 Requests to force Respondents' counsel to disclose their trial strategy and trial preparation information, which constitute privileged opinion work product. (_____ Mot. to Quash 4-5.) Respondents further assert that Enforcement's improper motive is evidenced by the fact that it already has in its possession all of the subject documents. (*Id.* at 5.)

On the other hand, Enforcement contends that the documents it seeks are fact documents, not internal memoranda containing defense counsels' mental impressions, conclusions, opinions, or legal theories. (Dep't of Enforcement's Opp'n to the Resp'ts' Mot. to Quash at 11.) Relying on the First Circuit's rational in *San Juan*, Enforcement argues that defense counsels' identification of these documents also does not fall within the category of opinion work product because counsel has no reasonable expectation that the information will not be revealed at the hearing. (*Id.*) In essence, Enforcement argues that the defense put its theories in issue by filing the affirmative defenses, so they cannot later complain when they are requested to disclose the facts and documents they contend support their theories.

Under the rules and principles discussed above, Enforcement's Rule 8210 Requests ask for opinion work product.[14] Contrary to Enforcement's argument, some of the requests do more than merely ask for the facts supporting Respondents' affirmative defenses. Rather, Respondents' counsel are asked to produce and specify the documents on which they rely as to each affirmative defense. *See*

United States v. Pepper's Steel & Alloys, Inc., 132 F.R.D. 695, 699 (S.D.Fl. 1990). Thus, there is a real, nonspeculative danger of revealing defense counsels' mental processes and opinions. *See San Juan,* 859 F.2d at 1015. In effect, Enforcement has requested defense counsel to particularize its defenses at the inception of the proceeding.

Nevertheless, not all work product is deserving of absolute protection. Litigants are routinely required to reveal their theories and the facts on which they rely in answer to contention interrogatories, propounded pursuant to Fed. R. Civ. P. 33(c), and in pre-trial briefs required to be filed pursuant to the court's case management authority under Fed. R. Civ. P. 16. These materials are not forever shielded from disclosure because the information will ultimately be disclosed at the trial. Thus, the decision about disclosure of this type of work product in the pre-trial phase of litigation often can be viewed as a matter of when the information is disclosed rather than whether it is disclosed. *See San Juan,* 859 F.2d at 1017.

The foregoing considerations weigh in favor of delaying the use of Rule 8210 as contention interrogatories in a complex case until later in the proceedings. Once the respondents have had the opportunity to investigate the charges in the Complaint and to review the documents Enforcement produced to them pursuant to Rule 9251, discovery of the respondents' contentions may be less likely to invade the zone of privacy protected by the work-product doctrine. By delaying the requests, it is more likely that only those defense theories and plans that will actually be relied on at the hearing need be disclosed. The alternate plans and theories the respondents' attorneys considered and rejected during the preparation of the case would remain protected.

---

[14] There is no need to examine the documents because the documents themselves are not protected as work product. *See Shelton* 805 F.2d at 1330.

2. Case Management

The timing of disclosure also implicates the second element of the balancing equation—effective case management. When Enforcement elects to employ Rule 8210 in a manner that closely approximates traditional discovery it is appropriate to subject its use to controls customarily employed to enhance the efficiency and to assure the fairness of the adjudicatory process. Under the Federal Rules of Civil Procedure, the parties' competing interests are balanced by permitting the court to defer the answers to contention interrogatories "until after designated discovery has been completed or until a pre-trial conference or other later time." *See* Fed. R. Civ. P. 33(c). Thereby, the court can phase discovery and employ the other case management devises authorized by Fed. R. Civ. P. 16. One of those devises is the use of pre-trial conferences at which the court can consider "the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial." *See* Fed. R. Civ. P. 16(c)(7).

Although less elaborate than Fed. R. Civ. P. 16, the NASD Code of Procedure likewise recognizes the need for effective case management and authorizes Hearing Officers to use pre-hearing conferences to establish "procedures to manage the proceeding efficiently." *See* Rule 9241(a)(2). Among the specific matters Hearing Officers may consider are the identification of witnesses and exhibits, and the schedule for exchanging pre-hearing briefs. *See* Rules 9241(c)(2) and (5). Moreover, Rule 9242(a) provides that Hearing Officers may require the parties to furnish:

(1) an outline or narrative summary of a Party's case or defense;

(2) the legal theories upon which a Party shall rely;

(3) a list and copies of documents that a Party intends to introduce at the hearing. . . .

In order to effectively and efficiently utilize these case management tools, the Hearing Officer should in some cases order that a Respondent need not respond to a Rule 8210 request for information that seeks discovery of the Respondent's contentions, such as the Rule 8210 Requests in this proceeding. This is particularly true where the early use of Rule 8210 could result in unfairness.

Here again, the federal courts' experiences with discovery under the Federal Rules of Civil Procedure are instructive. For example, under Fed. R. Civ. P. 30(b)(6) a corporation may be required to designate a representative to "testify [at a discovery deposition] as to matters known or reasonably available to the organization." Use of this rule to discover a party's contentions and proof—particularly in the early stages of complex litigation—has been severely criticized. As two commentators observed: "Rule 30(b)(6) was never intended to be a culminating stage at which a party's entire proof would be synthesized for the benefit of the other side, organized, then restated orally by one omniscient witness's integration." Kent Sinclair & Roger P. Fendich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 Ala. L.J. 651, 699 (1999). Carried to an extreme, and unless checked by the court, Rule 30(b)(6) could be used by a discovering party to demand its opponent to produce "every document, and recall every fact, contention, intuition, understanding, belief, and sense impression" relevant to all of the issues in the case. *See General Foods Corp. v. Computer Election Sys.*, 1980 U.S. Dist. LEXIS 10479, at *1 (S.D.N.Y. Mar. 13, 1991). Thus, many courts have refused to enforce deposition requests that would require the defending party's attorneys to collect and synthesize all of the information in their possession and then impart that knowledge to the witness so that the witness could feed it back at the Rule 30(b)(6) deposition. *See, e.g., United States v. District Council of Carpenters*, 1992 U.S. Dist. LEXIS 12037, at *46 (S.D.N.Y. Aug. 14, 1992).

As an alternative, many courts have required parties seeking information concerning their opponents contentions to use contention interrogatories. Although often held to be the preferred method of discovery of a party's contentions (*See, e.g., United States v. Taylor*, 166 F.R.D. 356, 362 n.7 (M.D.N.C.), *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996)), the courts have nevertheless struggled with their potential for imposing an unfair burden on the respondent. *See McCormack-Morgan, Inc. v. Teledyne Indus.*, 134 F.R.D. 275, 286 (N.D.Cal.), *rev'd on other grounds*, 765 F.Supp. 611 (N.D. Cal. 1991). Thus, generally speaking, the use of contention interrogatories has been restricted to the later stages of the preparations. *See, e.g., B. Braun Med. Inc. v. Abbott Laboratories*, 155 F.R.D. 525, 527 (E.D.Pa. 1994).

The same concerns that have caused the federal courts to moderate the use of Fed. R. Civ. P. 30(b)(6) and Fed. R. Civ. P. 33(c) apply to the use of Rule 8210 in NASD disciplinary proceedings. Ultimately, the Hearing Officer must balance Enforcement's need for the requested information and its value to resolving the issues in dispute in the proceeding on the one hand against the prejudice, if any, that will result to the Respondents by allowing Enforcement to obtain testimony and documents from them early in the proceeding. By issuing the Rule 8210 Requests the day after the Respondents filed their Answers, Enforcement sought to freeze their defenses to those they could fully develop before they had had the opportunity to conduct any of their own discovery. Respondents are thereby put in the unfair position of being required to marshal and order all of their proof on each potential defensive theory before they have had the chance to review the 77,000 pages of discovery material produced to them by Enforcement. Such a use of Rule 8210 transcends the notions of fundamental fairness required in NASD disciplinary proceedings.

3. Fairness Considerations in NASD Disciplinary Proceedings

In assessing the burden and impact Enforcement's Rule 8210 Requests have in this proceeding, the Hearing Officer cannot overlook the unique characteristics of disciplinary proceedings under the NASD Code of Procedure, with which the courts are not confronted. First, unlike civil discovery under the Federal Rules of Civil Procedure, the NASD Code of Procedure does not accorded Respondents the same rights of discovery as those accorded to Enforcement. Other than filing a motion for a more definite statement, the Respondents have no right to ask Enforcement to disclose its proof on each charge. And, in cases where Enforcement has been asked to do so by way of a motion for a more definite statement, it has strenuously objected on the grounds that such a request is premature—it need not disclose its theories and proofs before the hearing unless and until ordered to do so by the Hearing Officer in a pre-hearing brief. *See* OHO Order 00-06 (Mar. 10, 2000) <http://www.nasdr.com/pdf-text/00_06oho.txt>. Second, the Hearing Officer cannot ignore the consequences of a failure to comply fully and timely to a request under Rule 8210. In this regard, a Rule 8210 request is not just a discovery device as in federal court: non-compliance can and often does bring serious charges of misconduct. Under the NASD Sanction Guidelines, an associated person may be barred for failing to comply. *See* NASD Sanction Guidelines 31. As a result, a respondent subject to a request under Rule 8210 to disclose all of the contentions supporting his answer and affirmative defenses is placed in jeopardy of serious sanctions if he does not make a complete disclosure, including all possible theories he may have discussed with his attorney. This is a tremendous burden at such an early stage of a proceeding such as this where the investigation that led to the filing of the complaint has taken years.

D. Conclusion

Under the circumstances of this proceeding, fairness and efficient case management dictate that the Respondents' motions to quash the Rule 8210 Requests should be granted. While Enforcement is ultimately entitled to discover the facts underlying the Respondents' defenses, in this case that discovery should be delayed until Enforcement has completed its document disclosure under Rule 9251 and the Respondents have had the opportunity to review that material. Moreover, the Hearing Officer believes that all Parties should have the opportunity to propose a case management plan at a pre-hearing conference before the Respondents' attorneys are required to commence the burdensome and often fruitless exercise of answering contention interrogatories. *See generally McCormack-Morgan*, 134 F.R.D. at 287 (recognizing that answers to contention interrogatories are usually written by lawyers, not parties, and often the trouble of writing answers cannot be justified).

Accordingly, the Respondents' motions to quash are granted.

IT IS SO ORDERED.

_____

Andrew H. Perkins
Hearing Officer

February 14, 2001