

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-05 (CMS000157).

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

DEPARTMENT OF MARKET REGULATION,	:	
	:	
Complainant,	:	
	:	
v.	:	Disciplinary Proceeding
	:	No. CMS000157
	:	
	:	Hearing Officer—AHP
	:	
Respondent.	:	

ORDER GRANTING RESPONDENT’S MOTION TO EXCLUDE DOCUMENTS

The Final Pre-Hearing Conference (“Final Conference”) was held in this disciplinary proceeding on February 14, 2001. The Market Regulation Department (“Department”) was represented by David H. Katz, Esq. and James J. Nixon, Esq. and the Respondent was represented by

_____.

At the Final Conference the Parties presented argument on the Respondent’s Motion to Exclude Documents, which was filed on January 29, 2001. In the motion, the Respondent objects to the Department introducing the following documents at the hearing relating to *United States v.*

_____, Criminal No. _____, U. S. District Court for the _____: (i)

the Judgment; (ii) the Plea Agreement; (iii) the Factual Resume; and (iv) the Indictment. The Respondent also seeks to exclude introduction of the Respondent’s Form U-4 and Disclosure Reporting Pages,

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which are part of his record in the Central Registration Depository, and portions of the trial transcript reflecting the Respondent's testimony in the case *SEC v. _____, et al.*, U.S. District Court for the _____. (Mot. to Exclude at 1.) As grounds for his motion, the Respondent asserts that the documents were produced after the cut-off date for the completion of discovery, which was set by the Hearing Officer in the Initial Pre-Hearing Order, and on the grounds that the documents are irrelevant and unduly prejudicial. The Respondent further objects to the Department's introduction of the affidavit of _____, an Assistant U.S. Attorney who was involved in the criminal prosecution of the Respondent, on the grounds that it was not timely produced and that it is hearsay.

Generally, the Department opposes the Respondent's motion on the grounds that the evidence it seeks to offer is admissible to show the Respondent had a motive to lie at his on-the-record interview—that is, to cover up the existence of any actual or potential criminal charges. In support, the Department relies on Fed. R. of Evid. 404(b), which allows the introduction of evidence of prior crimes and bad acts to show such things as motive. In counter to this argument, the Respondent offered to stipulate that the transcript of _____ on-the-record interview (Ex. C4) and the Cooperation Agreement dated May 17, 1995 (Ex. C5) establish a prima facie case. The Department declined to accept the stipulation and withdraw the contested exhibits.

Following extensive argument, the Hearing Officer indicated that, although he was inclined to deny the Respondent's motion, he would review the matter further following the Final Conference. Having now had the opportunity to carefully consider the motion and the Parties' arguments, the Hearing Officer grants the motion.

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Discussion

1. The Documents Relating to the Texas Criminal Proceedings

The Hearing Officer grants the Respondent's motion to exclude the following documents relating to the _____ criminal proceedings: (i) Sentencing Hearing Transcript dated May 15, 2000, Ex. C6; (ii) Letter from _____ to _____ dated January 27, 1997, Ex. C7; (iii) Factual Resume, Ex. C9; and (iv) Plea Agreement, Ex. C10. These documents relate to unrelated criminal proceedings that commenced after the date of the Respondent's on-the-record interview. They contain various levels of hearsay statements and material that is customarily excluded by courts because of its potentially prejudicial character. Here, the Department has not shown that their value outweighs the risk of their prejudicial impact. Accordingly, the Hearing Officer excludes these documents from being introduced by the Department in its case-in-chief. In making this ruling, the Hearing Officer notes that Respondent's counsel indicated at the Final Conference that the Respondent would not deny the existence of the _____ criminal proceeding, which is referenced in the Cooperation Agreement, Ex. C5. This order does not, however, exclude their appropriate use to impeach the Respondent or to rebut the Respondent's case.

2. The Documents Relating to the California Criminal Proceedings

The Hearing Officer also grants the Respondent's motion to exclude the Government's Sentencing Memorandum (and attachments) dated November 19, 1997 and filed on December 2, 1997, in *United States v. _____*,¹ Ex. C8. This is a narrative summary of the government's case

¹ This apparently is the case the Respondent refers to as *SEC v. _____, et al.*

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against two other individuals prepared by one or more attorneys for the United States. As such, the Respondent would not have had a role in its preparation or presentation. The existence of the memorandum is irrelevant to the issues in this proceeding and the facts recited in the memorandum by the government's attorneys are, at best, only marginally relevant. Under these circumstances, the potential for prejudice outweighs the documents evidentiary value. Moreover, the Hearing Officer finds that the details of the crimes charged in the California criminal case do not directly bear on the Respondent's motive to lie to the NASD. Indeed, in his on-the-record interview he admitted that he considered himself to have been a target of that investigation. Accordingly, the sentencing memorandum is excluded from being introduced by the Department in its case-in-chief. This order does not, however, exclude its appropriate use to impeach the Respondent or to rebut the Respondent's case.

In summary, the Hearing Officer considers these documents to be more appropriately offered once the Respondent has testified.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

February 15, 2001