

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-21 (CMS970026).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CMS970026
v.	:	
	:	Hearing Officer - JMF
	:	
Respondents.	:	
	:	

**FINAL PRE-HEARING CONFERENCE ORDER, ORDER GRANTING
RESPONDENTS' MOTION TO ADJOURN THE MARCH 17, 1998 HEARING,
ORDER REJECTING RESPONDENTS' CONTESTED OFFER OF
SETTLEMENT, AND ORDER DENYING THE DEPARTMENT OF
ENFORCEMENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION**

1. Pursuant to a March 5, 1998 Notice, a Final Pre-Hearing Conference ("Conference") in this proceeding was held on March 11, 1998. _____ represented the Department of Enforcement ("Enforcement") and _____, represented Respondents _____ and _____.
2. On March 3, 1998, _____ filed a Notice of Substitution of Counsel indicating that Respondents _____ had decided to replace _____ as their counsel in this disciplinary proceeding.
3. Counsel for Respondents on March 3, 1998 filed with the Office of Hearing Officers ("Office") a Motion for an Adjournment of the March 17, 1998 Hearing in order that he have ample opportunity to prepare for the Hearing. Enforcement opposed Respondents' motion in a submission filed with the Office on March 5, 1998.
4. The Hearing Officer indicated that _____ and his firm took on the representation of Respondents fully aware that a Hearing was scheduled for March

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17, 1998. In addition, the Hearing Officer noted that Respondents' Exhibits and Witnesses had been identified and submitted and that the core facts of this proceeding were not in dispute. The Hearing Officer expressed concern about a further delay in this proceeding, which originally was scheduled for Hearing on December 9, 1997, postponed until January 28, 1998 and then rescheduled until March 17, 1998.

5. _____ reiterated the points he made in his motion requesting an adjournment of the Hearing, and _____ further elaborated on Enforcement's opposition to _____ request.
6. Code of Procedure Rule 9222(b) provides that "a hearing shall begin at the time and place ordered, unless the Hearing Officer, for good cause shown, changes the place of the hearing, postpones the commencement of the hearing, or adjourns a convened hearing for a reasonable period of time..." Rule 9222(b) identifies five considerations that the Hearing Officer must consider in determining whether to grant a request to postpone the Hearing: (1) the length of the proceeding to date; (2) the number of postponements, adjournments, or extensions already granted; (3) the stage of the proceedings at the time of the request; (4) the potential harm to the investing public if an extension of time, adjournment or postponement is granted; and (5) such other matters as justice may require.
7. This proceeding was filed with the Office on September 18, 1998, approximately six months ago. Scheduled Hearing dates have been postponed or adjourned on two previous occasions – once because of an apparent settlement that would have resolved this disciplinary proceeding and once because of the withdrawal of a Hearing Panelist. In both instances, the postponement or adjournment of the Hearing was appropriate.

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Respondents' current request for an adjournment of the Hearing was filed on March 3, 1998, only two weeks before the Hearing in this proceeding was scheduled to commence. The age of this proceeding, the two previous adjournments of scheduled Hearings, and the late stage of the proceeding in which Respondents submitted their current Motion all militate against adjourning the Hearing again.

8. On the other hand, the Hearing Officer does not believe that a brief adjournment of the Hearing in this proceeding poses any harm to the investing public. In addition, although the Hearing Officer remains unconvinced that Respondent's new counsel would not be able to prepare adequately for the March 17, 1998 Hearing, justice and fairness caution against requiring Respondents to proceed to Hearing with counsel who believe they have not had adequate time to review files and fully prepare for Hearing. On balance, the Hearing Officer reluctantly concludes that a brief adjournment is not inappropriate. Accordingly, the March 17, 1998 Hearing in this proceeding is adjourned and re-scheduled for April 8, 1998, commencing at 8:30 a.m.¹

9. The Hearing Officer informed _____ that the deadline for submitting any Motions for Summary Disposition had since passed, and he would not be granted leave to file any such motion. In addition, the Hearing Officer indicated that because the time period for submitting witness lists and Hearing Exhibits had passed and Respondents already had identified witnesses and documents, _____ should prepare for Hearing in that context. Although the Hearing Officer indicated he was unwilling to categorically deny _____ the opportunity to identify additional witnesses or

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documents he might want to use at Hearing, _____ was informed that he would have to present a compelling reason to justify the use of any additional witnesses or documents. Enforcement vigorously objected to any attempt by Respondents' counsel to identify additional witnesses or documents at this late date.

10. The Hearing Officer noted that many allegations contained in the Complaint are not contested by Respondents. Accordingly, the Parties agreed to file a joint stipulation of uncontested facts by April 2, 1998.

11. The Hearing Officer instructed the Parties to be prepared to provide the court reporter with a marked copy of the Exhibits they introduce at the Hearing. The Hearing Officer also noted that certain Pre-Hearing Exhibits are duplicative and others are not admissible based on previous rulings in this proceeding. Respondents' Exhibit 3 appears identical to Complainant's Exhibit 11. The Hearing Officer noted that because the page markings of Respondents' Exhibit 3 did not copy well in what was submitted to the Office, the Parties should submit Complainant's Exhibit 11 as a Joint Exhibit at the Hearing. The Parties agreed. In addition, Respondents' Exhibit 4, which is the written statement of an expert witness Respondent _____ proffered, and Exhibit 6, which relates to records Respondents' attempted to request from another member firm, previously were ruled inadmissible.² Finally, the expert witness Respondent _____ identified will not be testifying as a witness at the Hearing, consistent with the Hearing Officer's previous ruling.³

¹ The Hearing will be held at the Doubletree Hotel in Southfield, Michigan, the same location where the March 17, 1998 Hearing was to be held.

² See Order dated January 22, 1998 at 9 and 11-13.

³ Id. at 9.

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12. In response to an inquiry by _____ concerning the submission of pre-hearing briefs, the Hearing Officer noted that no such briefs had been ordered in this proceeding. If either Respondents' counsel or counsel for Enforcement desires to submit pre-hearing briefs on the legal theories supporting their positions in this proceeding, those submission should be submitted to the Office by April 2, 1998.
13. The Hearing Officer indicated that the Hearing Panel, having considered Respondent _____ Contested Offer of Settlement and Enforcement's Opposition thereto, has rejected Respondent _____ Contested Offer of Settlement.
14. The Hearing Officer further noted that the Hearing Panel, having considered Enforcement's Motion for Partial Summary Disposition and Respondent _____ response thereto, has denied Enforcement's Motion.

SO ORDERED

Joseph M. Furey
Deputy Chief Hearing Officer

Dated: March 11, 1998
 Washington, D.C.