

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 02-05 (C02010041).

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02010041
v.	:	
	:	
	:	Hearing Officer - SW
	:	
	:	
	:	
Respondent.	:	

PRE-HEARING ORDER

At the final pre-hearing conference held on April 4, 2002, several motions were raised and orders were issued. The following is a summary of the final determinations:

1. Timing of Hearing:

The Parties have agreed that the Hearing will begin on Tuesday, April 9, 2002 at 8:00 a.m. and end at 12:30 p.m. Pacific Standard Time. A final decision regarding when the Hearing will begin on Wednesday, April 10, 2002 will be made on Tuesday, April 9, 2002.

2. Respondents Additional Exhibits.

Respondent proposed to seek the admission of three additional exhibits. The Hearing Officer, with the consent of Enforcement, accepted as Respondent's Exhibit 1 the full set of documents included with the UPS package slip dated August 21, 1998.

Respondent also proposed the admission of approximately six additional UPS package slips and the contents originally forwarded by Respondent to his former employer to be marked as Respondent's Exhibit 2. The additional UPS package slips are being

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proposed as an example of Respondent's usual method of providing information to his employer. The Hearing Officer determined to make a final ruling on the admissibility of proposed Respondent's Exhibit 2 at the Hearing. In the interim, Respondent will provide a copy of the proposed Respondent's Exhibit 2 to Enforcement.

Respondent also proposed the admission of an additional outside business activity form, discussing investment advisory services, which was completed by Respondent and submitted to his former employer. The proposed exhibit is to be marked Respondent's Exhibit 3. The Hearing Officer determined to make a final ruling on the admissibility of proposed Respondent's Exhibit 3 at the Hearing. In the interim, Respondent will provide a copy of the proposed Respondent's Exhibit 3 to Enforcement.

3. Motion for Witness Statements

On April 2, 2002, Respondent filed a motion requesting that Enforcement be compelled to provide witness statements pursuant to Rule 9252. Based on Enforcement counsel's representation that he was not aware of any such witness statements, Respondent withdrew his motion for witness statements.

4. Expert Witness

On April 2, 2002, Respondent filed a motion requesting that he be allowed to present the expert testimony of _____ to testify concerning (i) a broker's disclosure obligations when the broker believes that the outside business activity, in which the broker is involved, does not involve a security, (ii) tax line certificates, and (iii) the circumstances under which a belief that an instrument is not a security "is not unreasonable." Enforcement filed an objection to the motion on April 3, 2002, in which

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Enforcement argued that (i) the expert designation was untimely, and (ii) the expert testimony was related to subject matter within the expertise of the Hearing Panel.

An expert witness offers testimony by a person who's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ..." Fed. R. Evid. 702. In proceedings before a body such as the NASD, where the triers of fact generally have substantial relevant specialized knowledge themselves, expert testimony is often of little value, and may be excluded. See Pagel, Inc., Exchange Act Release No. 34-22280, 33 S.E.C. Docket 1003 (SEC Aug. 1, 1985), aff'd sub nom. Pagel, Inc. v. SEC, 803 F.2d 942, 947 (8th Cir. 1986) (affirming SEC Administrative Law Judge's exclusion of expert testimony).

Respondent's counsel stated that the expert would not offer testimony about Respondent's particular knowledge concerning whether or not the tax liens were securities. Respondent's expert would offer an opinion that under general circumstances Respondent's belief concerning the tax lien instruments was reasonable for a registered securities representative.

Such testimony would not be helpful to the Hearing Panelists, because they can apply their own expertise to determine what the general knowledge of registered representatives should be as to the character of tax lien certificates. In any event, the reasonableness of Respondent's belief will be judged by the particular circumstances surrounding his belief.

Accordingly, the Hearing Officer denied Respondent's motion to allow expert testimony.

5. Telephone Testimony

On March 20, 2002, the Parties filed joint Pre-Hearing Submissions. Included in the Pre-Hearing Submissions was a notice that the Parties had agreed that the testimony of four witnesses would be presented by telephone at the Hearing, which is scheduled to begin in California on April 9, 2002.¹

Subsequently, the Parties reached a stipulation as to the testimony of _____ who will not testify at the hearing.

Accordingly, the Hearing Officer grants the motion to permit telephone testimony of the other three witnesses listed in the March 20, 2002 filing, subject to the following conditions:

1. Enforcement shall have a notary public available at the witnesses' locations to swear the witnesses, or, alternatively, shall offer, at the time each witness is called, a sworn statement by the witness attesting that the testimony he will give at the hearing will be truthful.
2. Enforcement shall ensure that each witness has, at the time of testifying, copies of all exhibits that relate to that witness's direct testimony, as well as any exhibits that Respondent may designate to Enforcement, for possible use on cross-examination.
3. Enforcement shall ensure that each witness will be available by telephone during a block of time when it is reasonable to expect that the witness will be called to testify at the hearing, so that the hearing is not unduly disrupted if the

¹ The Hearing Officer agreed to treat the notice as a joint motion for telephone testimony, which would be ruled on at the final pre-hearing conference.

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testimony of prior witnesses is longer or shorter than expected. Enforcement shall be responsible for ensuring that an operable speakerphone is available for use at the hearing.

SO ORDERED

Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
April 5, 2002