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NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. C10970161 Hearing Officer—AHP

ORDER

The Final Pre-Hearing Conference (Conference) in this disciplinary proceeding was held by conference call on January 13, 1998. ___________ appeared on behalf of the Department of Enforcement, and _____________ appeared on behalf of the Respondent.

1. __________ Failure to File a Pre-Hearing Submission. In response to the Order to Show Cause dated January 9, 1998, ___________ stated that he did not file a pre-hearing submission because he did not intend to offer any evidence at the hearing in this proceeding. Therefore, it is ordered that ____________ may not introduce documentary evidence or call any witnesses other than himself to testify in defense of the charges in the Amended Complaint.

2. ____________ Failure to File Objections to the Department of Enforcement's Pre-Hearing Submission. The Department of Enforcement filed its Pre-Hearing Submission on January 5, 1998, that included a "List of Exhibits to be Offered

by Complainant" (Exhibit List) and a list of witnesses the Department of Enforcement may call to testify at the hearing (Witness List). __________ did not file any objections to the listed exhibits and witnesses as required by the Initial Pre-Hearing Order dated October 29, 1997. Therefore, in accordance with the terms of the Initial Pre-Hearing Order, it is ordered that ____________ has waived all objections he may have had to the admissibility of the documents on the Exhibit List and to the ability of the Department of Enforcement to call the witnesses identified on its Witness List to testify at the hearing.

3. The Department of Enforcement's Exhibit List. The Initial Pre-Hearing Order required the Parties to exchange and file their pre-hearing submissions by January 2, 1998, pursuant to Code of Procedure Rules 9242 and 9261. With respect to proposed exhibits, these rules require that the parties to a disciplinary proceeding submit only those documents that they intend to introduce at the hearing. There is no requirement to list or submit documents that will not be introduced, such as those that may be used for cross-examination of a witness. And submission of documents that the parties are not planning to introduce adds unnecessary cost, burden, and confusion. For these reasons, parties should not list and file documents with their pre-hearing submissions that they do not, in good faith, intend to offer in evidence at the hearing.

In this proceeding, the Department of Enforcement has included improperly the documents discussed below as proposed exhibits in its Pre-Hearing Submission. These documents are inadmissible, and they may not be used for the purposes for which they were offered by the Department of Enforcement.

a) Amended Complaint and Answer, Proposed Exhibits C-1 and C-2. The Department of Enforcement advanced two theories supporting inclusion of the

Amended Complaint and the Answer in its Pre-Hearing Submission. First, the Department of Enforcement states in its Exhibit List that the Amended Complaint and the Answer are included among its proposed exhibits because they set forth the "charges to be decided" and _________ "response" and "purported defenses." But because the Amended Complaint and the Answer are already part of the record under Rule 9267(a), there is no need to admit them into evidence for this purpose. Second, the Department of Enforcement supplemented its position at the Conference by stating that the Amended Complaint and the Answer might be used in cross-examining __________. But this does not support introduction of the documents into evidence; they may be used for cross-examination without admitting them into evidence. Accordingly, the Amended Complaint and the Answer may not be introduced into evidence at the hearing.

b) Letters to Listed Witnesses Advising them of the Hearing Date, Proposed Exhibits C-11, C-21, C-34, C-46, C-56, C-68, C-83, and C-94. The Department of Enforcement included in its Pre-Hearing Submission copies of the letters that were sent to its customer witnesses advising them of the hearing date. The Department of Enforcement states in its Exhibit List that the letters would be used to show the staff's efforts to ensure that the witnesses will be ready to testify at the hearing and to "establish a foundation for introducing other documents" if the witnesses are not available to testify. But these letters are not admissible in the Department of Enforcement's case-in-chief on these grounds. Not only do the letters fail to address the efforts, if any, that the Department of Enforcement made to arrange for the witnesses to be available to testify, but the letters cannot operate as a foundation for introducing documents that are not listed in the Department of Enforcement's Pre-Hearing

Submission. Further, even if the Department of Enforcement wanted to offer one of the letters if a witness failed to appear, that would not warrant including the letters in the Pre-Hearing Submission. The Parties should include in their proposed exhibits only such documents and other materials as the Parties intend to offer in evidence during their case-in-direct. The Parties should not include in their proposed exhibits any materials that the Parties expect to use only for impeachment, rebuttal, or other reference. Accordingly, these letters may not be offered into evidence.

c) Transcript of Prior Testimony of __________, Proposed Exhibit C-97. Counsel for the Department of Enforcement stated that he included the entire transcript of ____________ prior testimony in the Department of Enforcement's Pre-Hearing Submission so that the transcript could be used during ____________ cross-examination. But as already discussed, it is not necessary to place a document in evidence to be able to refer to it during cross-examination of a witness. Therefore, the Department of Enforcement should not have filed the transcript to preserve its use in cross-examining ____________. Also, the Department of Enforcement stated that it did not intend to introduce any of the transcript into evidence. For that reason the Department of Enforcement explained that it had not filed a designation of transcript pages that would otherwise have been required if some or all of the transcript was going to be introduced. Accordingly, none of the transcript of __________ prior testimony may be introduced into evidence at the hearing, but the Department of Enforcement may use the transcript during ______________ cross-examination.

d) Transcript of Initial Pre-Hearing Conference, Proposed Exhibit C-98. Finally, the Department of Enforcement included in its Pre-Hearing

Submission a copy of the transcript of the Initial Pre-Hearing Conference that was held in this proceeding. According to counsel for the Department of Enforcement, he has offered the transcript so that he can use it to impeach ____________ at the hearing. Counsel for the Department of Enforcement has asserted that the statements of _____________ counsel at the Initial Pre-Hearing Conference are inconsistent with _________ prior recorded testimony. Thus, if _____________ testifies consistently with his prior testimony, counsel for the Department of Enforcement has stated that he intends to impeach _______________ by introducing the transcript of his counsel's remarks made at the Initial Pre-Hearing Conference. The Department of Enforcement has cited no authority for its position; it is an issue of first impression in NASD disciplinary hearings.

Because there are no NASD disciplinary decisions addressing the question of whether a party may be impeached by a prior inconsistent statement of his attorney, it is appropriate to look to the Federal Rules of Evidence (Fed. R. Evid.) and federal court decisions for guidance. Fed. R. Evid. 613(b) controls when a witness may be impeached by a prior statement that is inconsistent with his in-court testimony. Significantly, Fed. R. Evid. 613(b) does not provide for the attribution of statements made by others to a witness.[1] A witness may be impeached only by the witness's <u>own</u> prior inconsistent

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[1] Rule 613 provides:
Rule 613. Prior Statements of Witnesses
(a) Examining witness concerning prior statement.
In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.
Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

statements.[2] Accordingly, Fed. R. Evid. 613(b) does not permit an attorney's statements to be introduced as prior inconsistent statements of that attorney's client.[3] The same general rule should apply in NASD disciplinary proceedings. To avoid undue prejudice, a party may not be impeached by a prior inconsistent statement of the party's attorney.

This result is supported also by sound policy considerations. Permitting an attorney's statements to be used as a prior inconsistent statement of a party would impede the ability of Hearing Officers to effectively manage disciplinary proceedings. One of the chief purposes of pre-hearing conferences is to simplify the issues and eliminate waste of time and money by avoiding unnecessary proof at the hearing. To accomplish this, it is beneficial for Hearing Officers to be able to engage in an open, running discussion with counsel concerning the nature of the proceeding and the expected conduct of the hearing. This discussion will stagnate if counsel fear that "the client may be faced with the prospect that his defender has suddenly become the admission-witness against him."[4] Moreover, the free use of the prior statements of counsel in this manner may deter counsel from vigorous and legitimate advocacy.

This is not to say that there is no consequence to an attorney's representation at a pre-hearing conference. On the contrary, if the pre-hearing conference is to be a useful tool for the management of disciplinary proceedings, attorneys usually should be bound by their stipulations, agreements, and statements made at a pre-hearing conference. By doing so, the issues at the hearing may be limited to those actually in dispute without

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[2] See, e.g., United States v. Tarantino, 846 F.2d 1384, 1416 (DC Cir. 1988).
[3] See, e.g., United States v. Pimentel, 815 F. Supp. 81, 83 (Conn. 1993).
[4] See, e.g., Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948, 954 (5th Cir. 1959) (discussing effect of attorney statements at pre-trial conference under F. R. Civ. P. 16).

impairing the right of the parties to a fair hearing. And once a stipulation, agreement, or admission concerning a factual issue is incorporated in a pre-hearing order, that issue is fully determined unless the Hearing Officer or Hearing Panel relieves counsel from the stipulation, agreement, or admission to avoid manifest injustice. But these statements and agreements may not be used to impeach the party on whose behalf they were made. Instead, they are treated as admissions.

All statements made by counsel at a pre-hearing conference however do not constitute admissions. For example, general statements by counsel concerning his strategy, conception of the legal theory of the case, and view or characterization of the evidence are not admissions at all.[5] Thus, such statements do not irrefutably bind a party to a position, nor may they be introduced to establish a contested fact.

In this proceeding, counsel for both parties were requested at the Initial Pre-Hearing Conference to give the Hearing Officer their "sense" of the scope of the issues in the proceeding. In response, ___________ counsel clearly indicated that he was not sure what the evidence would be. He punctuated his comments by saying that he was representing what he thought the evidence would show, and he explained that he had not yet had the opportunity to review the discovery material.[6] ___________ counsel was not requested to stipulate to the facts or otherwise restrict ____________ defense. His statements were not intended as admissions, and they may not therefore be introduced at the hearing for any purpose.

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[5] See, e.g., New Amsterdam Cas. Co. v. Waller, 323. F.2d 20 (4th Cir. 1963), cert. denied, 376 U.S. 963 (1964).

[6] Initial Pre-Hearing Conference Tr. At 6-7.

In light of these rulings, the Department of Enforcement is ordered to serve and file an amended exhibit list without the foregoing exhibits that have been held inadmissible. The Department of Enforcement however need not re-mark the remaining exhibits. The amended exhibit list may be served and filed at the start of the hearing.

SO ORDERED.

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Andrew H. Perkins
Hearing Officer

Dated: Washington, DC
January 20, 1998