

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,		
	Complainant,	Disciplinary Proceeding
v.		No. E0220030845-01
		Hearing Officer – DRP
	Respondent.	

**ORDER REQUIRING COUNSEL TO FILE NOTICE PURSUANT TO RULE 9142**

**I. Background**

On March 9, 2006, the Department of Enforcement filed a three-count Complaint against Respondent.<sup>1</sup> Though Respondent's Answer was untimely filed, the Hearing Officer held an initial pre-hearing conference on June 22, 2006, with counsel for Enforcement and Respondent, who appeared pro se. With the parties' consent, a hearing in this matter was scheduled for August 30-31, 2006, in Los Angeles. The Hearing Officer subsequently issued a Scheduling Order and a formal Notice of Hearing, each confirming the hearing date of August 30-31, 2006.

During an August 4 pre-hearing conference that the Hearing Officer convened to discuss discovery issues, Enforcement raised a question about Respondent's intent to retain counsel and seek postponement of the hearing. Respondent was equivocal about whether he would retain

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<sup>1</sup> The Complaint alleges that Respondent defrauded customer CC of approximately \$500,000, in violation of NASD Conduct Rules 2120 and 2110 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10-5 thereunder; engaged in private securities transactions without providing prior written notice to his member firm, in violation of NASD Conduct Rules 3040 and 2110; and failed to respond to requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent failed to file an Answer or otherwise respond to the Complaint, Amended Notice of Complaint, and Second Notice of Complaint. On June 9 – the same day Enforcement filed a motion for entry of default decision – Respondent filed an Answer.

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counsel, but confirmed that he was seeking a postponement, because he planned to travel overseas at the end of August to pursue "a business opportunity." The Hearing Officer denied Respondent's request to postpone the hearing, reminding Respondent that he had agreed to the hearing date prior to scheduling his business trip, but offered to entertain an application to postpone the hearing in writing. She told the parties that if Respondent retained counsel, she would convene a pre-hearing conference to discuss postponing the hearing.

On August 11, 2006, newly retained counsel for Respondent submitted a letter seeking an extension of the August 11 deadline for pre-hearing submissions and a continuance of the August 30-31 hearing until November 30, to allow for discovery and hearing preparation.<sup>2</sup> Counsel also noted Respondent's trip to Dubai from August 16-30. In his letter, counsel wrote:

Our firm has been consulted and has been retained to represent [Respondent] in the current disciplinary proceeding in which he is the respondent. We are hereby requesting a continuance of the current hearing set for August 30 to allow our firm to review this file, become familiar with it, potentially associate other counsel with us on this matter and to take other steps necessary to defend [Respondent] against the allegations brought by the NASD.

On August 14, Enforcement filed its opposition to Respondent's request for a continuance.

On August 17, the Hearing Officer convened a pre-hearing conference to discuss counsel's request for a continuance.<sup>3</sup> At the outset of the conference, the Hearing Officer expressed her concern that counsel was representing Respondent solely to request a continuance and would withdraw thereafter. Counsel replied that if a continuance were granted, his firm

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<sup>2</sup> The letter, written on the letterhead of the \_\_\_\_\_ Law Corporation of Orange, California, was signed by \_\_\_\_\_.

<sup>3</sup> On August 15, the Case Administrator phoned the parties to arrange an immediate telephonic pre-hearing conference with the Hearing Officer, but counsel for Respondent was not available until August 17.

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would be representing Respondent in this proceeding, but if the request for continuance were denied, he would be unable to represent Respondent.<sup>4</sup> In addition to arguing for a continuance, counsel also participated in an off-the-record discussion regarding the possibility of settlement, asking Enforcement to send him documents for this purpose by e-mail that he could then forward to Respondent.

In an Order dated August 18, 2006, the Hearing Officer denied Respondent's request to postpone the hearing until November 30, finding that Respondent's conduct did not constitute good cause for a continuance, as required by Procedural Rule 9222.<sup>5</sup> The Hearing Officer found, however, that Respondent's unavailability placed counsel in an untenable position. Noting that a short postponement would "still ensure the prompt resolution of this proceeding and enable Enforcement to fulfill its responsibility to protect the investing public,<sup>6</sup> while also affording Respondent's counsel ample opportunity to provide meaningful representation of his client," the

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<sup>4</sup> HEARING OFFICER: My first question to you, Mr. \_\_\_\_\_, is you just indicated when you were stating your appearance for the record that you are appearing for the special purpose of applying for this postponement. So I'm a little concerned that you may be in the case primarily to assist [Respondent] to postpone the hearing and then you are not going to be involved in the case beyond that.

MR. \_\_\_\_\_: Well, let me clarify what I meant by that. If obviously the continuance is granted then unless something strange happens, which I don't expect will happen, my firm will be representing him in this matter. Now, we will likely associate in other counsel in this matter with us, but I don't believe that [Respondent] is going to be firing me and hiring somebody else. If the continuance is not granted, it will be virtually impossible for me to represent him. I have nothing on this case as of this time. I don't have a copy of the complaint, the amendment that was filed. I don't have a copy of any of the answers. I have not seen or received any discovery. And, obviously, with [Respondent] being away it would be impossible for me to represent him. That is the special nature of my appearance today. (Transcript of Aug. 17, 2006 Pre-Hearing Conference at 6:1-7:1.)

<sup>5</sup> Specifically, the Hearing Officer found that scheduling a trip that conflicts with the hearing date; failing to bring the scheduling conflict to the Hearing Officer's attention; and leaving the country while the motion to postpone the hearing was pending, did not constitute good cause for a continuance.

<sup>6</sup> See *Dep't of Enforcement v. Respondent*, No. CLI050004, OHO Order 06-01 (Jan. 6, 2006) (prompt resolution of disciplinary proceedings to protect investing public is primary purpose of Rule 9222).

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Hearing Officer postponed the hearing to September 28-29, 2006, dates when counsel was available.<sup>7</sup> She also granted an extension until August 25 for pre-hearing submissions.

On August 25, counsel did not file pre-hearing submissions on Respondent's behalf. Instead, the Hearing Officer received a copy of a letter counsel had addressed to Enforcement.

In the letter, counsel wrote:

As you know, our firm made a special appearance for the purposes of obtaining a continuance on behalf of [Respondent] and to determine whether or not we would represent him. Unfortunately, we have not yet been formally retained at this time to take over this matter. Therefore, please direct all further communications to [Respondent]. If this changes in the future and our firm is retained to fully represent [Respondent] in this matter, we will let you know.

## **II. Discussion**

Counsel entered an appearance in this case on behalf of Respondent. Based on his August 25 letter to Enforcement, it appears that he is attempting to withdraw from representation. NASD Procedural Rule 9142 provides that “[a]n attorney for a Party . . . may withdraw [from representation] by giving notice to the Adjudicator. The notice shall be in writing, set forth the good cause for withdrawal, and, unless circumstances do not permit, be given at least 30 days prior to withdrawal.”

Counsel for Respondent has not complied with Rule 9142. Correspondence with opposing counsel does not constitute notice to the Adjudicator.<sup>8</sup> Furthermore, counsel's August 25 letter to Enforcement does not provide 30 days' notice of his attempted withdrawal. Finally,

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<sup>7</sup> HEARING OFFICER: If I do grant the application it will not be for the November 30th date that was requested. We are looking at the last week of September. [During an off-the-record discussion,] Mr. \_\_\_\_\_ indicates that he is available the 28th and 29th of September. (Transcript of Aug. 17, 2006 Pre-Hearing Conference at 43:8-13.)

<sup>8</sup> Copies of correspondence between the parties do not become part of the official record in NASD disciplinary proceedings. For that reason, counsel's August 25 letter to Enforcement is attached to this Order as Exhibit A.

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counsel's letter, which contradicts his prior statements about his representation of Respondent, does not set forth good cause for withdrawal.

In his letter dated August 11, counsel specifically stated that his firm "has been retained to represent [the Respondent] in th[is] disciplinary proceeding." In addition to seeking a continuance of the hearing, counsel also requested time for hearing preparation. Moreover, counsel stated at the August 17 pre-hearing conference that if the hearing were postponed, his firm would represent Respondent, barring "something strange" occurring. Counsel further said that he did not believe Respondent "is going to be firing [him] and hiring someone else." The Hearing Officer continued the hearing for one month, in part, to afford counsel the opportunity to provide meaningful representation of his client.

Counsel's August 25 letter, which states that "his firm made a special appearance for the purposes of obtaining a continuance on behalf of [the Respondent] and to determine whether or not we would represent him," contradicts his prior statements that he had been retained by Respondent, and would, in fact, represent him if the hearing were postponed. Before concluding that counsel's prior statements were misrepresentations designed to obtain a continuance for Respondent that may not otherwise have been granted, the Hearing Officer is directing counsel to file a notice of withdrawal that complies with NASD Rule 9142 by September 8, 2006.<sup>9</sup>

**SO ORDERED.**

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Dana R. Pisanelli  
Hearing Officer

Dated: September 1, 2006  
Washington, DC

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<sup>9</sup> The Hearing Officer notes that pursuant to Section 6068 of California's Business and Professions Code, an attorney shall "never ... seek to mislead ... any judicial officer by any artifice or false statement of fact."