

ORIGINAL



0000143553

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Arizona Corporation Commission

DOCKETED

2013 MAR 18 A 9:35

MAR 18 2013

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

DOCKETED BY
JM

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

IN THE MATTER OF:

RICHARD M. SCHMERMAN, individually and
d/b/a Diversified Financial and/or Diversified
Financial Planners, and Amy Schmerman, husband
and wife.

DOCKET NO. S-20757A-10-0373

RESPONDENTS.

SIXTEENTH
PROCEDURAL ORDER
(Schedules Hearing)

BY THE COMMISSION:

On September 9, 2010, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Richard M. Schmerman d/b/a Diversified Financial and/or Diversified Financial Planners ("Diversified") and Amy Schmerman, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") and the Investment Management Act ("IM Act") in connection with Respondent Richard A. Schmerman's practices in business and securities matters which allegedly involved mishandling of client funds and misrepresentation.

The Respondents were duly served with copies of the Notice.

On September 20, 2010, a request for hearing was filed by the Respondents.

On September 22, 2010, by Procedural Order, a pre-hearing conference was scheduled on October 21, 2010.

On October 21, 2010, at the pre-hearing conference, the Division and Respondents appeared through counsel. The parties were discussing a possible resolution of the issues raised by the Notice, but agreed that a status conference should be scheduled approximately 60 days later.

On October 22, 2010, by Procedural Order, a status conference was scheduled on December 16, 2010.

1 On December 16, 2010, the Division and Respondents appeared through counsel at the status
2 conference. The parties were continuing to discuss a resolution of the proceeding and in the interim,
3 the Division requested that another status conference be scheduled in approximately 60 days.

4 On December 16, 2010, by Procedural Order, a status conference was scheduled on February
5 23, 2011.

6 On February 22, 2011, the Division and Respondents filed a Joint Stipulation to Continue the
7 status conference for at least 60 days in order that the parties could continue to review matters and
8 attempt to resolve the issues raised by the Notice.

9 On February 23, 2011, by Procedural Order, the status conference was continued from
10 February 23, 2011, to April 25, 2011.

11 On April 22, 2011, the Division and Respondents filed another Joint Stipulation to Continue
12 the status conference for at least 60 days to allow the parties to continue to work towards a settlement
13 of the issues raised by the Notice.

14 On April 25, 2011, by Procedural Order, the status conference was continued from April 25,
15 2011, to July 7, 2011.

16 On July 5, 2011, the Division and Respondents filed another Joint Stipulation to Continue the
17 status conference for at least 60 days to allow the parties to continue to work towards a settlement of
18 the issues raised by the Notice. Subsequently, by Procedural Order, the status conference was
19 continued from July 7, 2011, to September 8, 2011.

20 On September 7, 2011, the Division and Respondents filed another Joint Stipulation to
21 Continue the status conference for sixty days or more to allow the parties to review additional
22 documentation and to discuss a possible resolution of the proceeding. Subsequently, by Procedural
23 Order, the status conference was continued to November 17, 2011.

24 On November 17, 2011, the Division and Respondents appeared through counsel. The
25 Division indicated that it was preparing to file a Motion to Amend the Notice adding additional
26 allegations against Respondents. The Division and Respondents were continuing to discuss a
27 possible resolution of the proceeding, but in the interim counsel agreed that an additional status
28 conference be scheduled in March 2012.

1 On November 21, 2011, by Procedural Order, a status conference was scheduled as agreed on
2 March 12, 2012.

3 On December 6, 2011, the Division filed a Motion to File Amended Notice (“Motion”).

4 On December 12, 2011, the Division and Respondents filed a Joint Stipulation regarding the
5 Division’s Motion. Respondents had no objections to the filing of the Amended Notice and the
6 parties stipulated that Respondents’ initial request for hearing filed September 20, 2010, would be
7 applicable as to the Amended Notice. Additionally, the parties stipulated that Respondents would
8 have at least 30 days to file an Answer from the date of an Order which authorizes the filing of the
9 Amended Notice.

10 On December 14, 2011, the Division was authorized to file the Amended Notice as stipulated
11 by the parties.

12 On March 12, 2012, at the status conference, the Division and Respondents appeared through
13 counsel. The Division’s counsel indicated that the parties were continuing to negotiate a settlement
14 of the proceeding, but more time would be required for a resolution of the issues raised by the Notice.
15 The Division and Respondents agreed that a hearing should commence on June 25, 2012 if a
16 settlement could not be reached.

17 On March 13, 2012, by Procedural Order, a hearing was scheduled on June 25, 2012, with the
18 exchange of documentation scheduled on May 15, 2012.

19 On May 11, 2012, the Division and Respondents filed a Joint Stipulation to continue the
20 hearing for at least 60 days and to delay the exchange of documentation until 20 days before the date
21 of the continued hearing.

22 On May 14, 2012, by Procedural Order, the proceeding was continued as agreed between the
23 parties to September 10, 2012.

24 On August 29, 2012, Respondents’ counsel filed a Motion to Withdraw and Motion for a
25 Continuance. Although counsel indicated that Respondents wished to enter into a Consent Order
26 with respect to the Division’s allegations contained in the Amended Notice, it was not made clear
27 why they required a continuance for additional time to conclude a settlement of the proceeding.
28 Counsel additionally stated that his reasons for withdrawing from the proceeding “would violate

1 attorney-client privilege,” but stated no other reason.

2 On August 31, 2012, the Division responded to the aforementioned motions filed on August
3 29, 2012, by Respondents’ counsel, and urged their denial. The Division stated that the proceeding
4 was set for hearing in a short time and cited Commission Rule A.A.C. R14-3-104(E) which requires
5 good cause to be shown for withdrawal from a proceeding and that by itself violation of attorney-
6 client privilege is insufficient cause. Further, the Division described ways for counsel to show good
7 cause citing Ariz. Rules of Civ. Proc. 5.1(a)(2)(C) which describes the steps to be taken to withdraw
8 from a proceeding once it has been set for trial, and these steps had not been followed.

9 On September 5, 2012, a Procedural Order was issued denying the Respondents’ Motion to
10 Withdraw and Motion for a Continuance “unless good cause can be shown.” The Procedural Order
11 further found that the Respondents had not stated a reason to terminate representation consistent with
12 Rule 1.16 of the Rules of Professional Conduct.

13 On September 6, 2012, the Respondents’ counsel submitted to the Commission’s Hearing
14 Division, under seal, a Motion for Reconsideration of Motion to Withdraw and Motion to Continue.
15 The Assistant Chief Administrative Law Judge undertook an in-camera review of the Motion filed by
16 Respondents’ counsel and concluded that good cause had been stated to grant a 60-day continuance
17 of the hearing. The request for reconsideration regarding the withdrawal of counsel was taken under
18 further advisement.

19 On September 7, 2012, by Procedural Order, the Respondents’ request for a continuance of
20 the hearing was granted, and the request for withdrawal of counsel was taken under further
21 advisement.

22 On December 12, 2012, the Division filed a Motion to Set a Status Conference and other
23 Affirmative Action. There were no responses filed by Respondents or their counsel.

24 On February 6, 2013, by Procedural Order, Respondents’ counsel was granted leave to
25 withdraw.

26 On February 7, 2013, by Procedural Order, a status conference was scheduled on March 6,
27 2013.

28 On March 6, 2013, at the status conference, the Division appeared with counsel. Respondents

1 failed to appear. The Division's counsel requested that a hearing be scheduled to allow for continuity
2 of the proceeding because the Division estimates that it will call approximately seven witnesses.
3 Additionally, counsel for the Division stated that he will be involved in a lengthy court proceeding
4 from early July through the second week of August, and he also will be involved in another
5 Commission proceeding in mid-September.

6 Accordingly a hearing should be scheduled.

7 IT IS THEREFORE ORDERED that a **hearing** shall be held on **September 30, 2013, at**
8 **10:00 a.m.**, at the Commission's offices, 1200 West Washington Street, Hearing Room No. 1,
9 Phoenix, Arizona.

10 IT IS FURTHER ORDERED that **the parties shall reserve October 1, 2, 3 and 4, 2013, for**
11 **additional days of hearing**, if necessary.

12 IT IS FURTHER ORDERED that **the Division and Respondents shall exchange copies of**
13 **their Witness Lists and copies of their Exhibits by August 16, 2013**, with courtesy copies
14 provided to the presiding Administrative Law Judge.

15 IT IS FURTHER ORDERED that **the Division shall file a Motion to Vacate the hearing in**
16 **the event that the parties conclude a settlement prior to the scheduled date of the hearing.**

17 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 – Unauthorized
18 Communications) continues to apply to this proceeding.

19 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance
20 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
21 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
22 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
23 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
24 Administrative Law Judge or the Commission.

25 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
26 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to practice of law and admission *pro*
27 *hac vice*.

28 ..

1 IT IS FURTHER ORDERED that the Administrative Law Judge may rescind, alter, amend,
2 or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at
3 hearing.

4 DATED this 18th day of March, 2013.

5
6
7 
8 MARC E. STERN
ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered
10 this 18th day of March, 2013 to:

11 Richard Schmerman
12 Amy Schmerman
13 2613 East Mitchell Drive
14 Phoenix, AZ 85016

15 Matt Neubert, Director
16 Securities Division
17 ARIZONA CORPORATION COMMISSION
18 1300 West Washington Street
19 Phoenix, AZ 85007

20 ARIZONA REPORTING SERVICE, INC.
21 2200 N. Central Ave., Suite 502
22 Phoenix, AZ 85004-1481

23
24
25
26
27
28
By: 
Debbi Person
Assistant to Marc E. Stern