

ORIGINAL



0000148455

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS

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

2013 SEP 24 A 11: 19

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

SEP 24 2013

DOCKETED BY

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.

**SEVENTEENTH**  
**PROCEDURAL ORDER**  
**(Grants Motion to Allow**  
**Telephonic Testimony)**

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.

1 On October 22, 2010, by Procedural Order, a status conference was scheduled on December  
2 16, 2010.

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

6 On December 16, 2010, by Procedural Order, a status conference was scheduled on February  
7 23, 2011.

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

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

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

16 On April 25, 2011, by Procedural Order, the status conference was continued from April 25,  
17 2011, to July 7, 2011.

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

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

26 On November 17, 2011, the Division and Respondents appeared through counsel. The  
27 Division indicated that it was preparing to file a Motion to Amend the Notice adding additional  
28 allegations against Respondents. The Division and Respondents were continuing to discuss a

1 possible resolution of the proceeding, but in the interim counsel agreed that an additional status  
2 conference be scheduled in March 2012.

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

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

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

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

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

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

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

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

26       On August 29, 2012, Respondents’ counsel filed a Motion to Withdraw and Motion for a  
27 Continuance. Although counsel indicated that Respondents wished to enter into a Consent Order  
28 with respect to the Division’s allegations contained in the Amended Notice, it was not made clear

1 why they required a continuance for additional time to conclude a settlement of the proceeding.  
2 Counsel additionally stated that his reasons for withdrawing from the proceeding “would violate  
3 attorney-client privilege,” but stated no other reason.

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

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

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

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

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

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

28

1 On February 7, 2013, by Procedural Order, a status conference was scheduled on March 6,  
2 2013.

3 On March 6, 2013, at the status conference, the Division appeared with counsel. Respondents  
4 failed to appear. The Division's counsel requested that a hearing be scheduled to allow for continuity  
5 of the proceeding because the Division estimates that it will call approximately seven witnesses.  
6 Additionally, counsel for the Division stated that he will be involved in a lengthy court proceeding  
7 from early July through the second week of August, and he also will be involved in another  
8 Commission proceeding in mid-September.

9 On March 18, 2013, by Procedural Order, a hearing was scheduled to commence on  
10 September 30, 2013.

11 On September 11, 2013, the Division filed a Motion to Allow Telephonic Testimony of a  
12 Witness who will be out of town during the scheduled hearing. There have been no objections filed  
13 by Respondents.

14 Accordingly, the Division's Motion to Allow Telephonic Testimony should be granted.

15 IT IS THEREFORE ORDERED that the Division's Motion to Allow Telephonic Testimony  
16 is hereby granted.

17 IT IS FURTHER ORDERED that a **hearing** shall be held on **September 30, 2013, at 10:00**  
18 **a.m.**, at the Commission's offices, 1200 West Washington Street, Hearing Room No. 2, Phoenix,  
19 Arizona, as previously ordered.

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

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

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

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

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

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

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

13 DATED this 24<sup>th</sup> day of September, 2013.

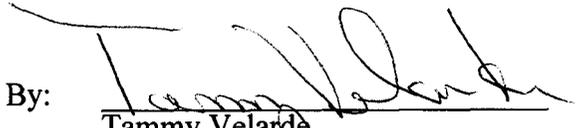
14  
15  
16   
17 MARC E. STERN  
ADMINISTRATIVE LAW JUDGE

18 Copies of the foregoing mailed/delivered  
19 this 24<sup>th</sup> day of September, 2013 to:

20 Richard Schmerman  
21 Amy Schmerman  
2613 East Mitchell Drive  
Phoenix, AZ 85016

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

22 Matt Neubert, Director  
23 Securities Division  
24 ARIZONA CORPORATION COMMISSION  
1300 West Washington Street  
Phoenix, AZ 85007

By:   
Tammy Velarde  
Assistant to Marc E. Stern

25  
26  
27  
28