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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. CLI050016 Hearing Officer – DMF

ORDER GRANTING, IN PART, COMPLAINANT'S MOTION TO PRECLUDE AND DENYING RESPONDENT'S MOTION TO LIMIT COMPLAINANT'S EVIDENCE

The Department of Enforcement filed a motion objecting to many of Respondent's proposed witnesses and exhibits and moving to preclude them. Respondent filed an opposition to Enforcement's motion, together with a motion to limit Enforcement's evidence, and Enforcement filed its opposition to Respondent's motion. For the reasons set forth below, Enforcement's motion is granted, in part, and Respondent's motion is denied.

Earlier in this proceeding, Enforcement filed a motion for summary disposition as to both liability and sanctions. On January 11, 2006, the Hearing Panel issued an order granting the motion as to liability, but deferring its determination on sanctions pending a hearing on that issue. The Panel advised the parties that at the hearing they would be limited to offering testimony, exhibits and arguments on the issue of sanctions; that they need not re-introduce at the hearing the same evidence they had already submitted in support of or in opposition to Enforcement's motion; and that they should limit their proposed witnesses and exhibits in their pre-hearing submissions accordingly.

In its pre-hearing submission, Enforcement indicated that at the hearing it would rely on the exhibits it submitted in support of its motion, and would offer testimony only from Respondent himself. In contrast, Respondent's pre-hearing submission included a "Revised and Supplemental Exhibit List" identifying eight additional proposed exhibits and a "Revised Witness List" identifying 14 proposed witnesses, including himself. Respondent subsequently filed a "Supplemental Witness List" identifying two additional proposed witnesses.

Rule 9263(a) provides: "The Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." Enforcement contends that, as described in Respondent's pre-hearing submission, the testimony and exhibits he proposes to offer are irrelevant to the issue of sanctions, and, in addition, his proposed evidence would be unduly repetitious.

According to Respondent's descriptions, nine of his witnesses would "testify as a character witness for" Respondent, and three of his other witnesses would also testify about his character, in addition "to the mitigating factor of whether [the Firm] [Respondent's then-employer] encouraged the alleged 2110 conduct." Enforcement objects that evidence regarding Respondent's character is not relevant or material to the issue of sanctions, and should be precluded. As Enforcement points out, NASD's Sanction Guidelines set out a list of considerations to guide Hearing Panels in arriving at sanctions, and the list does not include a respondent's character, as such, among those considerations. On the other hand, Respondent points out that the Guidelines state that the listed considerations are intended to be illustrative, not exhaustive. He cites a number of NASD decisions from the 1990s indicating that certain types of character evidence were offered and received in NASD disciplinary proceedings during

that time period. Although these decisions are somewhat dated, Enforcement has cited no subsequent NASD decision ruling that character evidence is no longer admissible.

The Hearing Officer agrees with Enforcement, however, that Respondent's proposed character evidence would be unduly repetitious. Accordingly, Respondent may offer testimony regarding his character from no more than two witnesses. Further, at the hearing the witnesses' testimony will be limited to such aspects of Respondent's character as may bear upon his fitness for employment in the securities industry.

Enforcement also objects to the three witnesses who Respondent indicates would testify to "the mitigating factor of whether [the Firm] encouraged the alleged Rule 2110 conduct." Enforcement argues that in a recent case the National Adjudicatory Council (NAC) held that such encouragement, even if proved, would not be mitigating:

> First, if [the respondent] felt pressured to forge documents, it was not an appropriate reaction to succumb to such pressure. See Dist. Bus. Conduct Comm. v. Bozzi, Complaint No. C10970003, 1999 NASD Discip. LEXIS 5, at *16 (NAC Jan. 13, 1999) (finding the alleged fact that a registered representative succumbed to institutional pressure to submit falsified life insurance applications is not a factor that warrants mitigation of sanctions). Second, we do not accept the proposition, given the facts of this case, that if conduct is pervasive, or even approved by a firm, it should mitigate the sanction imposed. See Charles E. Kautz, 52 S.E.C. 730, 733, 736 (1996) (holding that assertions that the falsification of documents was accepted or approved by the firm did not call for mitigation of sanctions).

DOE v. Grafenauer, No. C8A030068 (NAC May 17, 2005).

The Hearing Officer notes, however, the NAC's reference to "the facts of this case" in its decision, and concludes that Respondent should be permitted to offer evidence regarding the nature of [the Firm]'s alleged encouragement of his conduct in this case. Given that Enforcement intends to call no witnesses other than Respondent, himself, however, the Hearing

Officer will limit Respondent's evidence on this topic to his own testimony and that of no more than one other witness. Additional testimony on this topic would be unduly repetitious.[1]

Finally, Enforcement objects to two of Respondent's three remaining proposed witnesses, apart from himself. One witness is his former supervisor, [Witness 1], who he states he intends to call "as an adverse witness" in order to "attack the veracity and credibility of Witness 1's on the record testimony that [Enforcement] uses to support apparent aggravating factors in this case." Respondent indicates that Witness 1 "will testify as to whether he has himself been implicated in the same or similar alleged Rule 2110 conduct to demonstrate various issues that support mitigating factors, including whether the alleged Rule 2110 conduct was common industry practice. Witness 1 also will testify to the sanctions he received for similar alleged Rule 2110 conduct."

The Hearing Officer agrees with Enforcement that whether Witness 1 engaged in the same or similar misconduct, and what sanctions he may have received for that misconduct are irrelevant to the issue of the appropriate sanctions for Respondent's misconduct in this case, because it is well established "that appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with the actions taken in other proceedings." Mark F. Mizenko, Exch. Act Rel. No. 52,600, 2005 SEC LEXIS 2655 at *20 n. 17 (Oct. 13, 2005). Enforcement has, however, cited Witness 1's testimony that he was unaware of Respondent's activities; therefore, if he wishes to do so, Respondent may call Witness 1 to challenge him on that point. But because, under the

[1] In support of his argument that reliance on one's employer may be a mitigating factor, Respondent relies upon DBCC v. Lucadamo, No. C10930053, 1997 NASD Discip. LEXIS 35 (N.B.C.C. May 20, 1997), but that case is clearly distinguishable. There, NASD found that the respondent's employer misled its sales force, including the respondent, about certain securities products, and that the respondent, relying reasonably and in good faith on his employer, conveyed those misrepresentations to customers. In this case, however, Respondent admits that he knowingly falsified customers' addresses on variable annuity applications.

scheduling order in this case, the time for Respondent to file a motion to compel Witness 1 to testify has long since passed, Respondent may only call Witness 1 if he is willing to appear voluntarily. Respondent may not seek an order pursuant to Rule 9252, or attempt to employ any other type of compulsory process to obtain his appearance or testimony at the hearing.

Respondent also indicates that he intends to call as a witness a former colleague, [Witness 2], who he states "will testify to impeach testimony submitted by Witness 1 to undermine [Enforcement's] case against respondent Grasso on sanctions, including testimony that will explain an alternate reason why Witness 1 was unaware of the alleged Rule 2110 conduct …." The Hearing Officer agrees with Enforcement's argument that any "alternate reason" why Witness 1 was unaware of Respondent's misconduct, even if shown, would not be material on the issue of sanctions. Therefore, Respondent will be precluded from calling Witness 2 as a witness.

Respondent's remaining proposed witness is [Witness 3], who is identified as a [Firm] employee who "will testify about the extent, if any, of [the Firm]'s purported injury due to the alleged Rule 2110 conduct …." Enforcement has not objected to this witness, and Respondent will be permitted to call him, if he is willing to testify voluntarily. As noted above, however, the deadline has passed for Respondent to seek to compel Witness 3 to testify.

Enforcement also objects to Respondent's proposed exhibits insofar as they relate to his character, or to Witness 1's conduct, or to alternate explanations for Witness 1's lack of awareness of Respondent's misconduct. The Hearing Officer will defer ruling on the admissibility of Respondent's exhibits until they are offered at the hearing. At that time, Respondent should be prepared, in particular, to identify the specific portions of proposed exhibit

RX-8, a transcript of Witness 2's on-the-record testimony, on which he relies, and to demonstrate why that testimony is relevant and material to the sanctions issue.

In addition to opposing Enforcement's motion, Respondent objects to Enforcement's proposed exhibits, arguing that Enforcement's pre-hearing submission does not comply with the Hearing Panel's order. As the Hearing Officer reads Enforcement's submission, Enforcement merely indicates that at the hearing it will rely on the exhibits it previously submitted in support of its motion for summary disposition, and will not offer any additional exhibits. This is consistent with the Hearing Panel's order, which allowed the parties to rely on the materials in their prior submissions, and required them to identify only such additional materials as they wished to offer at the hearing. The Panel's order, however, provided that at the hearing the parties will be permitted to argue only the issue of sanctions. Therefore, the parties may rely on their previously submitted exhibits when arguing their positions on sanctions at the hearing, but the Panel will not allow either party to utilize those materials to re-argue the issue of liability.

Finally, the Hearing Officer notes Respondent's suggestion that if the parties could stipulate to certain facts, it might obviate the need for Respondent to offer at least some of his proposed exhibits and witness testimony at the hearing. Consistent with general practice, the Hearing Officer encourages the parties to consider stipulating to facts not at issue, even if they disagree about the weight, if any, that the Panel should give such facts in determining sanctions.

SO ORDERED.

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David M. FitzGerald
Hearing Officer

Dated: January 13, 2006