

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. E0220030425-01

Hearing Officer – DMF

**ORDER DENYING RESPONDENT'S MOTION TO
DISQUALIFY EXPERT WITNESS**

Respondent filed a motion seeking to disqualify the Department of Enforcement's proposed expert witness, [the Expert]. Enforcement opposed the motion. For the following reasons, the motion is denied.

The Complaint alleges that Respondent forged the initials of two customers, DB and YB, husband and wife, on certain account applications, submitted the false applications to his employer firm, and lied about his actions to NASD staff during NASD's investigation. Respondent denies the allegations.

On January 30, 2006, Enforcement filed a motion for leave to offer the expert testimony of the Expert, a forensic document examiner. Respondent filed no opposition to the motion, and on March 16, 2006 the Hearing Officer then assigned to this case issued an order permitting the Expert's testimony. At the same time, the Hearing Officer granted Respondent's motion for leave to offer the testimony of his own forensic document examiner. The Expert was also listed on Enforcement's pre-hearing witness list, filed on March 13, 2006; Respondent filed no objections to Enforcement's witnesses

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by the March 27, 2006 deadline for filing such objections. In accordance with the amended pre-hearing schedule, Enforcement filed and served the Expert's expert report on April 10, 2006.

That same day, Respondent for the first time raised an objection to the Expert serving as an expert for Enforcement, first in a conversation with Enforcement counsel and later during the final pre-hearing conference. He did not file a motion to disqualify the Expert until April 12, 2006. In substance, he argues that the Expert should be disqualified from serving as Enforcement's expert because in December 2003 a private investigator acting on his behalf, who is also his father, contacted the Expert about serving as an expert for Respondent. In a declaration accompanying Respondent's motion, the investigator represents that during three separate telephone conversations, he spoke to the Expert or his partner, and in doing so conveyed confidential information, including "our evaluation of the weaknesses of the case and our strategy for defending [Respondent], including our need to retain experts." He states that he "fully expected that my communications with [the experts] would remain absolutely confidential and that [the experts] would not disclose the information I shared with them or agree to testify against [Respondent]."

As Enforcement points out, the motion is untimely because Respondent failed to oppose Enforcement's motion for leave to call the Expert and failed to file any objections to Enforcement's proposed witnesses within the time allowed under the pre-hearing schedule. In his motion, Respondent offers no excuse for his tardy filing, but during the conference, Respondent's counsel represented that Respondent was unaware that there were grounds to move to disqualify the Expert until the investigator reviewed

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Enforcement's witness list and noticed the Expert's name. While this is an explanation, it is not an excuse. Enforcement disclosed its prospective expert in a timely manner, and Respondent should have undertaken whatever clearance was necessary within his own camp to determine whether he had any objection to Enforcement's expert. By failing to object in a timely manner, he waived his right to seek the Expert's disqualification.

In any event, Respondent has failed to establish adequate grounds to disqualify the Expert. "Federal courts have the inherent power to disqualify expert witnesses to protect the integrity of the adversary process, protect privileges that otherwise may be breached, and promote public confidence in the legal system." Hewlett-Packard Co. v. EMC Corp., 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004). Although NASD's rules do not specifically address disqualification of experts, Rule 9235 grants the Hearing Officer broad authority to oversee disciplinary proceedings, and it may be assumed for purposes of this order that the Hearing Officer has the same authority to disqualify expert witnesses as a federal judge would have. See OHO Order 6-26 (CLG050021)(Mar.17, 2006) (granting, in part, a motion to disqualify an expert witness).

In the federal courts, it is well established that disqualification of an expert witness "is a drastic measure that courts should impose only hesitantly, reluctantly, and rarely." Hewlett-Packard at 1092. Disqualification may be warranted based on a prior relationship with the opposing party if (1) the opponent had a confidential relationship with the expert and (2) the opponent disclosed confidential information to the expert that is relevant to the case at hand. Both elements – a confidential relationship and disclosure of confidential information – are required to support disqualification. In addition, federal courts consider whether disqualification would be fair to the party proposing to utilize the

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expert – and in that regard the timing of the motion to disqualify is critically important – and whether disqualification would promote the integrity of the legal process. As to all considerations, the party moving for disqualification bears the burden of proof. Id. at 1093-96; OHO Order 6-26 at 2-3.

In this case, there is some dispute regarding the contacts between the experts and Respondent's investigator/father. In his declaration, the Expert says that his records reflect a single conversation with the investigator in December 2003, and that his notes of that conversation, which are attached to his declaration, indicate that during the conversation the investigator disclosed that his son was employed by UBS PaineWebber, they "discussed son's problem," and the Expert "recommended he contact an attorney." Neither the Expert nor his partner, who also submitted a declaration, recalls any other contacts, and both state that their normal practice would be to include notes of any subsequent contacts on the same "Case Log Inquiry/Data Sheet" record that contained the Expert's notes of his conversation with the investigator.

The investigator, on the other hand, states that he had "at least three conversations with [the Expert] and/or [his partner] and obtained information from them regarding their rates and fees for providing expert witness services." During these conversations, he states, he discussed with them "our evaluation of the weaknesses of the case and our strategy for defending [Respondent], including our need to retain experts." He also says that he requested that the experts "examine the allegedly forged documents and render an opinion as to whether the initials contained on the documents were made by [Respondent]," and that the Expert urged him to try to obtain the original account applications because he "could not perform a forensic examination on a copy of the

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allegedly forged documents.”¹ The investigator did not include any records substantiating his alleged contacts with the experts.

The investigator's declaration is not sufficient to satisfy Respondent's burden. It does not demonstrate that Respondent's investigator had any reasonable basis to believe that a confidential relationship existed or that the investigator conveyed any confidential information to the experts. The investigator simply claims to have made three preliminary calls. He did not provide any written materials to the Expert or his partner, did not retain the Expert or his partner, and apparently failed to make and retain any records of his contacts – suggesting that he viewed the contacts as informal and preliminary. While he states that he expected that they would not agree to testify against Respondent, he does not claim that the Expert or his partner gave him any such assurances, or offer any other objective basis for that expectation. And although he claims to have discussed “our evaluation of the weaknesses of the case and our strategy,” he is not an attorney and does not claim to have been acting on the instructions of an attorney when he contacted the Expert and his partner. Indeed, it appears that at that time, Respondent had discharged his former attorney and had not yet retained his current counsel. Thus, to the extent the investigator discussed perceived “weaknesses of the case” or “strategy” with the experts, he could not have been disclosing confidential attorney work-product.

Further, there is no indication that the Expert has disclosed or utilized any information – confidential or otherwise – that the investigator conveyed. The Expert's principal opinion, which is based on a comparison of the questioned initials on the

¹ The Expert states that as a matter of course he advises potential clients who call him about questioned documents to try to obtain the originals for examination.

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applications with certain exemplars of the customers' initials on documents pre-dating the applications that the customers provided to Enforcement, is that the persons who initialed the applications were not the same persons who initialed the exemplars.

Respondent has not offered any basis for believing that this opinion was influenced or affected by any information provided by the investigator. In addition, the Expert's report indicates that Enforcement asked him whether he could offer an opinion as to whether Respondent wrote the customers' initials on the applications, based on a comparison of the applications with several exemplars provided by Respondent, but the Expert states that he could not determine whether Respondent wrote the questioned initials on the applications. Again, Respondent has not attempted to show how this opinion could have been affected or influenced by any information disclosed to the Expert by the investigator.

In addition, as noted above, Respondent's motion comes on the eve of the hearing, after he failed to object to Enforcement's motion for leave to call the Expert as an expert witness, and failed to file any timely objections to Enforcement's witness list. It would be highly prejudicial to Enforcement to disqualify its expert at this point, requiring Enforcement either to proceed without an expert or to seek a postponement of the hearing. The Hearing Officer concludes that, considering all these circumstances, granting Respondent's motion to disqualify would not promote the integrity of NASD's disciplinary proceedings – indeed, it would have precisely the opposite effect.

Respondent's motion to disqualify Enforcement's expert, therefore, is denied.

SO ORDERED.

David M. FitzGerald

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Hearing Officer

Dated: April 17, 2006