

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 06-25 (E0220030425-01).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding  
No. E0220030425-01

Hearing Officer – DRP

**ORDER GRANTING THE PARTIES' MOTIONS  
FOR LEAVE TO INTRODUCE TESTIMONY OF HANDWRITING EXPERTS AND  
DENYING RESPONDENT'S MOTION TO INTRODUCE TESTIMONY OF A  
POLYGRAPH EXAMINER**

In a three-count Complaint, the Department of Enforcement charges that in August 2001, Respondent committed forgery and submitted falsified documents to member firm \_\_\_\_\_ [the Firm], in violation of NASD Conduct Rule 2110. The Complaint alleges that after the Firm rejected five separate account application forms that had been signed by customers DB and YB, Respondent "made or caused to be made handwritten markings" on the five application forms to reflect a fee increase and "placed or caused to be placed" DB's and YB's initials on each of the amended forms, without their knowledge, authorization or consent.

The Complaint also alleges that in connection with the staff's investigation, Respondent repeatedly asserted that DB and YB consented to the fee increase and initialed the amended forms. Enforcement charges that, in so doing, Respondent provided false and misleading information and testimony to NASD, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

The parties now seek leave to present expert testimony at the disciplinary hearing scheduled to commence on April 18, 2006 in Los Angeles.

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Enforcement seeks leave to present expert testimony by Expert 1 that the handwriting on the amended agreements was not the customers'. According to Enforcement's motion, Expert 1 has been a forensic document examiner, or handwriting expert, for approximately 34 years. Expert 1 began his career as a forensic document examiner in 1972, and after two years in the private sector, he worked for the Los Angeles County Auditor-Controller for five years and the Colorado Bureau of Investigation for four years. Since 1983, he has worked as an independent private examiner.

Expert 1 is certified by, and past president of, the American Board of Forensic Document Examiners, Inc. and has qualified and testified as an expert witness in more than 500 criminal and civil cases in federal and state courts in California, Arizona, Colorado, Nevada, Hawaii, Wyoming and New York. He currently serves as vice president of the Executive Board of the American Society of Questioned Document Examiners, Inc. and was a former membership/credentials chair of the Southwestern Association of Forensic Document Examiners. Respondent did not file a response to Enforcement's motion.

Respondent seeks leave to present expert testimony by Expert 2 that Respondent did not forge his customer's initials on the amended applications. According to Respondent's motion, Expert 2 retired from the Beverly Hills Police Department in 2000, after having worked as a detective and forensic document examiner for almost 20 years. He has taught graduate courses in document examination and is currently teaching at the Forensic Science Academy at the La Puente Valley Regional Occupation Program.

Expert 2 is a Board Certified Forensic Document Examiner and Fellow of the American College of Forensic Examiners. He has qualified and testified as an expert witness in state and federal courts and has published articles in the CALI Journal and The Forensic Examiner. Enforcement did not oppose expert testimony by Expert 2.

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In addition, Respondent requests leave to present expert testimony by Expert 3 that, during a voluntary polygraph examination, Respondent responded truthfully that he did not forge his clients' initials on the amended forms that are the subject of this disciplinary proceeding. According to Respondent's motion, Expert 3 is a licensed polygraphist in California and Arizona and a member of the American Polygraph Association and California Association of Polygraph Examiners. He is chief investigator and polygraphist at A.S.S.C.G. Corporation, where he has been employed for approximately 21 years.

Enforcement opposes Expert 3's proposed testimony on the grounds that polygraph tests are not reliable, do not constitute relevant and material evidence, and are unduly prejudicial. Enforcement also challenges Expert 3's qualifications as an expert, asserting that neither California nor Arizona licenses polygraph examiners and that his resume fails to provide information to allow for verification of his past or present employment. Without leave, Respondent filed a reply.<sup>1</sup>

NASD Rule 9263(a) gives the Hearing Officer authority to "exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." This includes the authority to allow or preclude expert testimony. Expert testimony is often excluded in NASD proceedings, because hearing panels include experienced securities professionals who have relevant, specialized knowledge. Nevertheless, a hearing panel may sometimes find expert testimony helpful on specific, narrowly defined technical issues, or on issues outside the securities industry.<sup>2</sup>

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<sup>1</sup> On October 19, 2005, the Hearing Officer issued a Scheduling Order, which states that "no reply briefs may be filed without leave and a showing of good cause." The Hearing Officer reviewed the filing in this instance, but Respondent is cautioned that any future filings that fail to comply with the Scheduling Order and/or NASD Rules will be rejected.

<sup>2</sup> See, e.g. *Dist. Bus. Conduct Comm. v. Bruno*, No. C10970007, 1998 NASD Discip. LEXIS 51, at \*15 (NAC July 8, 1998) (handwriting experts).

Though the formal rules of evidence do not apply to NASD disciplinary proceedings, the Federal Rules of Evidence and relevant case law provide that the party seeking to offer expert testimony must demonstrate that the testimony will assist the trier of fact in technical areas outside of the fact finder's area of expertise.<sup>3</sup> While it is certainly not necessary, the Hearing Officer believes that testimony regarding handwriting analysis is the type of technical evidence that would be relevant and helpful to the Hearing Panel.

The same cannot be said of the proposed testimony by Respondent's polygraph examiner. In virtually every case, hearing panelists – like judges and jurors – assess credibility in determining whether the complainant has proven that the respondent committed the alleged violations. Thus, even assuming that Respondent's polygraph evidence is reliable,<sup>4</sup> it will not assist the Hearing Panel in a technical area that is outside the Panel's area of expertise.<sup>5</sup>

In conclusion, the parties' unopposed motions for leave to offer expert testimony by Expert 1 and Expert 2 are granted. By April 4, 2006, the parties shall serve and file a written report prepared and signed by each expert that includes the information described in Procedural Rule 9242(a)(5), as well as a statement setting forth the expert's proposed testimony in sufficient detail, so that, at the discretion of the Hearing Panel, it may serve as the expert's direct

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<sup>3</sup> See *In re Diet Drugs Products Liability Litigation*, 2000 U.S. Dist. LEXIS 9037, at \*17 (E.D. Pa. 2000), citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993).

<sup>4</sup> The Supreme Court has noted that there is “no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.” *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998).

<sup>5</sup> Furthermore, contrary to Respondent's assertion that polygraph evidence is “commonly” or “routinely” admitted, federal courts continue to exclude polygraph evidence because it is not sufficiently reliable, or the prejudicial effect outweighs its probative value, particularly when the opposing party did not have notice of, or a reasonable opportunity to attend, the exam. See, e.g., *U.S. v. Thomas*, 167 F.3d 299, at \*308-309 (6th Cir. 1999) (unilaterally obtained polygraph evidence is almost never admissible); *U.S. v. Posada*, 57 F.3d 428, at \*435 (5th Cir. 1995) (prejudicial effect is reduced and reliability is increased when both parties participate and have a stake in the outcome of the exam). Here, Enforcement was apparently first informed of Respondent's test on December 22, 2003, the day after it was administered. See *Respondent's Reply*, Exhibit 1. Moreover, Expert 3's view of the purpose of the polygraph exam was “exculpation.” *Id.* These factors undermine the reliability and probative value of Respondent's polygraph exam.

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testimony. By the same date, the parties shall exchange copies of any documents the experts used as the basis for their opinions, such as handwriting exemplars.

Finally, Respondent's motion for leave to offer expert testimony by Expert 3 is denied.

**SO ORDERED.**

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Dana R. Pisanelli  
Hearing Officer

Dated: March 16, 2006  
Washington, DC