

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C05970035
v.	:	
	:	
	:	Hearing Officer - EAE
	:	
	:	
Respondents	:	

**ORDER GRANTING IN PART MOTION OF COMPLAINANT TO EXCLUDE
RESPONDENTS' EXPERT WITNESS AND CERTAIN OTHER WITNESSES**

On March 4, 1998, Complainant filed an "Opposition to Respondents's (sic) Expert Witness and To Certain Other Witnesses" (hereafter referred to as "Complainant's Motion").¹ Complainant's Motion seeks to exclude from testifying certain proposed witnesses of Respondents' _____. Specifically, Complainant seeks to exclude testimony to be offered by Respondents' designated expert, _____. Further, Complainant seeks to exclude testimony of five (5) fact witnesses.² On March 6, 1998, Respondents _____ filed a "Memorandum in Opposition to Motion of District No. 5 to Exclude Testimony of Certain Witnesses" (hereafter referred to as "Respondents' Opposition"). The witnesses objected to by Complainant are discussed below.

1. Respondents' Expert -- _____

Complainant argues that expert testimony typically only is permitted in proceedings where the witness has some specialized knowledge that will assist the trier of fact to understand

¹ Although not styled as such, Complainant's Opposition will be treated as a motion to exclude testimony.

² The fact witnesses Complainant seeks to exclude are _____.

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the evidence or determine the facts in issue.³ Further, Complainant notes that the Securities and Exchange Commission has recognized that expert testimony may be excluded where the tribunal has its own relevant expertise.⁴ Complainant argues that with respect to the issue in dispute, whether Respondents _____ reasonably supervised Respondent _____, the industry Panelists can make the necessary determination without the assistance of expert testimony.⁵

In their Opposition, Respondents argue that _____ has specialized knowledge about supervisory issues as evidenced by the retention of _____ by the Securities and Exchange Commission to testify in an administrative proceeding.⁶ Respondents contend that _____ would help the Hearing Panel arrive at a fair and reasonable decision and that without his testimony, Respondents would be unduly prejudiced.⁷

As Complainant correctly notes, Code of Procedure Rule 9263(a) gives the Hearing Officer discretionary authority to exclude all evidence that is irrelevant or immaterial. Further, Code of Procedure Rule 9235(a)(4) gives the Hearing Officer power to resolve evidentiary matters. In this forum, as in administrative proceedings before the Securities and Exchange Commission, the use of expert witnesses is not an absolute right, but depends on the facts of the

³ Complainant's Motion at 3.

⁴ Id.

⁵ Id. at 4. Complainant also seeks to exclude Respondents' expert on the ground that Respondents failed to address, in the form of a proffer, why the offered testimony should be allowed. (Motion at 2) The procedural defects attendant to Respondents' identification of an expert witnesses, however, were cured by later filings, including a proffer. Accordingly, this Order is not based on the errors initially made by Respondents with respect to identification of _____ as an expert witness.

⁶ Opposition at 3.

⁷ Id.

particular disciplinary proceeding and whether the proffered expert testimony would benefit the Hearing Panel in reaching a decision.

The Hearing Officer finds that the testimony to be offered by _____ would not be of assistance to the Hearing Panel with respect to the issues in dispute. The two industry Panelists who will hear the case with the Hearing Officer currently are associated with member firms, are members of the District No. 5 Business Conduct Committee, and have a degree of expertise about industry practices, including supervision of registered representatives. Accordingly, there is no reason to believe that the expert testimony of _____ would add anything to this administrative proceeding since it will be decided by persons already knowledgeable with respect to industry practices.⁸ For the same reason, the Hearing Officer concludes that Respondents will not be unduly prejudiced or, indeed, prejudiced at all, by excluding the testimony of _____.

2. _____

Complainant seeks to exclude _____ on the ground that she worked for Respondent _____ for only two weeks prior to the complaint which gave rise to this disciplinary proceeding ("the _____ complaint"), and only as a recruiting and training associate.⁹ The relevant exhibit appears to support the position of the Department of Enforcement.¹⁰

In their Opposition, Respondents make no proffer as to the specific subject matter of _____ testimony nor do they offer any reason why such testimony is relevant to the

⁸ See Complainant's Motion at 3 and cases cited therein.

⁹ Motion at 5.

¹⁰ Respondents' Exhibit 26. All references are to the Parties' pre-hearing exhibits.

issues in dispute. Rather, Respondents generally represent, as they do for several witnesses, that _____ testimony will corroborate the testimony of _____.¹¹

Given her very short tenure at Respondent _____ prior to the _____ complaint, as well as her position as a recruiting and training associate, the Hearing Officer finds that the anticipated testimony of _____ neither is material nor relevant to the issues in dispute. Since _____ appears only to have been employed by Respondent _____ for two weeks prior to the _____ complaint, and was not in a supervisory position, she would have no direct factual knowledge of any issues with respect to Respondent _____ conduct or any alleged customer complaints implicating his sales practices.¹²

3. _____

Complainant asserts that _____ was employed as a cashier in Respondent _____ New York office and, accordingly, he could not have first-hand knowledge of the supervision of Respondent _____ since Respondent _____ worked in _____ office.¹³

The relevant exhibit¹⁴ indicates that _____ was the head cashier in Respondent _____ New York office and that in September 1996 he was advised directly by _____

¹¹ Opposition at 4.

¹² It appears that the purpose of _____ testimony would be to offer her "opinion" that _____ was not a problem broker. See Respondents' Exhibit 26. Given her very short tenure at _____, however, this opinion would not be entitled to any weight in deciding the issues in dispute. Moreover, fact witnesses typically are not entitled to offer "opinions." Rather they must testify as to facts. Respondents _____ make no proffer as to any facts relevant to the issues in this disciplinary proceeding as to which _____ could provide credible and relevant testimony.

¹³ Motion at 6. Complainant's statement as to where Respondent _____ was employed in September 1996 clearly is erroneous. The documents demonstrate that Respondent _____ was employed in _____ New York office in September 1996 when witness _____ represents to have received instructions from _____ regarding execution of Respondent _____ order tickets. See, e.g., Respondents' Exhibits 1 (at ¶¶5-6), 5, 27, and 28. In addition, based on its pre-Complaint investigation, Complainant must have been aware of this fact.

¹⁴ Respondents' Exhibit 27.

_____, the branch manager of the New York office where _____ then was employed, that all of _____ order tickets would need to be approved by _____ before they were submitted for execution. Since one of the issues in this proceeding appears to be whether Respondents subjected Respondent _____ to reasonable supervision after the _____ complaint, the testimony of _____ clearly is relevant.¹⁵

4. _____

_____ was Respondent _____ sales assistant in the New York office in late August and September 1996.¹⁶ The relevant exhibit¹⁷ indicates that, after the _____ complaint, she was instructed directly by _____ to contact him if, among other things, any of _____ customers expressed any concerns or complaints about the handling of their accounts. For the reasons noted above with respect to _____, it appears that _____ anticipated testimony is directly relevant to an issue in dispute.

5. _____

Complainant asserts that (1) _____ was a FINOP during the relevant time period; (2) she had no supervisory duties over _____; and (3) she did not have responsibility for the implementation of _____ supervisory procedures.¹⁸ By comparison, Respondents contend that _____ (1) was the Chief Operating Officer of _____ during the period in dispute;

¹⁵ The Complaint is somewhat ambiguous as to whether Respondents are being charged with a failure to subject Respondent _____ to appropriate and reasonable supervision after the _____ complaint. To the extent this is an issue, _____ testimony clearly is relevant.

¹⁶ Motion at 6; Respondents' Exhibit 28.

¹⁷ Respondents' Exhibit 28.

¹⁸ Motion at 6.

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(2) is intimately familiar with the supervisory issues at the firm; and (3) worked closely with the Independent Consultant during his review of _____ procedures.¹⁹

Respondents _____ do not assert that _____ has any knowledge of:

- a. Respondent _____ sales practices;
- b. the alleged customer complaints against him prior to the _____ complaint;
- c. the alleged customer complaints against him after the _____ complaint;
- d. any investigations done by Respondents _____ with respect to those complaints;
- e. the factors considered by these Respondents in determining whether to subject Respondent _____ to heightened supervision; or
- f. the factors considered generally by Respondents in determining whether to subject a registered representative to "heightened supervision."²⁰

The central issue in this case as it relates to the claim against Respondents _____ is whether Respondent _____ sales practices prior to the _____ complaint raised sufficient "red flags" to require that Respondent _____ be subjected to "heightened supervision."²¹ In the Memorandum in Support of the Joint Motion for Summary Disposition submitted by Respondents _____, these Respondents take the position that prior to the _____ complaint, Respondent _____ was not a "problem broker" and there was no basis

¹⁹ Opposition at 5.

²⁰ If _____ has direct knowledge with respect to these issue, the Hearing Officer may reconsider and allow her to testify with respect to these matters. Respondents _____, however, made no proffer that _____ has such knowledge. None of the pre-hearing exhibits gives any indication of _____ expected testimony.

²¹ Complaint, Second Cause of Action at 3. As noted above in n.14, there also may be an issue as to whether Respondents _____ took appropriate action with respect to Respondent _____ after the _____ Complaint. Even assuming, however, that this is a contested issue, it does not affect the Hearing Officer's conclusion with respect to whether _____ should be permitted to testify.

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for concluding that he should be subjected to "heightened supervision." Given the alleged violation at issue and Respondents' position with respect thereto, whatever general knowledge _____ may have as to the supervisory procedures of _____ or the report of the Independent Consultant appears to be neither relevant or material.²²

6. _____

Complainant asserts that _____ was a sales assistant in Respondent _____ New York office (she was not Respondent _____ sales assistant) and that she provided Complainant with a statement that she overheard one end of a conversation in late September 1996 regarding additional supervision over Respondent _____.²³ Complainant objects to her testimony as inadmissible hearsay.²⁴ Respondents _____ make no proffer as to _____ anticipated testimony other than to state generally, as they do for witnesses _____, that she will corroborate the testimony of _____.²⁵

The relevant exhibit ²⁶ appears to support Complainant's statement as to the extent of _____ knowledge with respect to the issues in dispute. That exhibit, a letter dated September 15, 1997 from _____, counsel for Complainant, states that in September 1996, _____ overheard _____ ask _____ to call him if, among _____

²² If, however, Complainant seeks to present any evidence at the disciplinary hearing as to the general sufficiency of _____ supervisory compliance procedures at the time of the _____ complaint or the alleged prior complaints against Respondent _____, _____ may be permitted to testify as to specific issues raised by Complainant in that regard.

²³ Motion at 6.

²⁴ Id.

²⁵ Opposition at 4.

²⁶ Respondents' Exhibit 29.

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other things, any of _____ customers expressed any concerns or complaints about the handling of their accounts. In addition, _____ states that she heard _____ advise several people in the New York office that he would need to approve all of Respondent _____ order tickets before the tickets were submitted for execution.²⁷

Under the Federal Rules of Evidence, hearsay generally is not admissible in court and, accordingly, may not be considered in determining the facts at issue. In NASD disciplinary proceedings, however, the Federal Rules of Evidence serve only as a guide. Probative hearsay evidence may be admitted and considered in reaching a decision. In determining whether to allow hearsay evidence, an evaluation must be made of its probative value, reliability, and fairness of use.

The fact that the testimony to be offered by _____ is hearsay is not necessarily grounds for its exclusion. _____ anticipated testimony, however, as evidenced by Respondent's Exhibit 29, is cumulative of the anticipated testimony of witnesses _____, and _____ who purport to have direct knowledge of what instructions, if any, were given regarding the supervision of Respondent _____ in September 1996. Thus, the testimony of _____ appears to be unnecessary.²⁸

²⁷ Id.

²⁸ Code of Procedure Rule 9263(a) clearly gives the Hearing Officer authority to exclude cumulative testimony. If Complainant seeks to present evidence at the hearing which contradicts the testimony of witnesses _____, _____, and _____ as to the actions taken with respect to Respondent _____ after the _____ complaint, _____ then may be permitted to offer testimony consistent with her statement in order to corroborate the testimony of these witnesses. Nothing filed by Complainant to date, however, including its Opposition to Respondents' Joint Motion for Summary Disposition suggests that the testimony of these witnesses with respect to this issue is in dispute.

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For the foregoing reasons, it is ordered as follows²⁹:

1. Complainant's Motion is granted with respect to witnesses _____,³⁰ and _____.

3. Complainant's Motion is denied with respect to witnesses _____ and _____.

SO ORDERED

Ellen A. Efros
Hearing Officer

Dated: Washington, DC
March 11, 1998

²⁹ Although the Hearing Officer clearly has authority to exclude witnesses, including expert witnesses, from testifying (see, e.g., Code of Procedure Rules 9235 and 9263), the decisions reflected in this Order were reached after consultation with and with the concurrence of the full Hearing Panel.

³⁰ The Motion is granted with respect to these witnesses subject to the conditions expressed in this Order. In addition, the Hearing Officer notes that Complainant's Exhibit 43 includes written statements of some of the very witnesses whose testimony Complainant seeks to exclude and who are excluded from testifying by this Order. To the extent Complainant uses those statements, or seeks to make such statements part of the record, such witnesses will be permitted to testify notwithstanding this Order.