

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9B000013
v.	:	
	:	Hearing Officer - EBC
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	:	
	:	
	:	
	:	
	:	
Respondents.	:	

**ORDER DENYING RESPONDENTS' MOTION FOR LEAVE
TO OFFER EXPERT WITNESS TESTIMONY**

Respondents _____ (“_____” or the “Firm”) and _____ (“_____”) have moved for leave to introduce expert witness testimony at the hearing in this proceeding. The Department of Enforcement has opposed the motion. For the reasons set forth below, Respondents’ motion is denied.

I. Factual Background and the Proposed Expert Witness Testimony

The Complaint alleges that on 11 business days between May 12 and June 1, 1999, _____, an NASD member firm, acting through _____, the Firm’s Financial and Operations Principal (FINOP), conducted a securities business while its net capital was below its minimum requirement of \$100,000. Based on the foregoing _____ and _____ are

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charged with violating SEC Rule 15c3-1 and NASD Conduct Rule 2110.¹ According to the schedule attached to the Complaint, _____'s net capital deficiencies resulted from the substantial "haircuts" and "undue concentration" charges that it was required to take on several stock positions, and the Firm's net capital deficiencies ranged from approximately \$256,700 to approximately \$890,300. Respondents filed an Answer in which they assert, among other things, that: (1) the net capital deficiencies were technical and inadvertent; and (2) during the relevant period, the Firm's CEO was preoccupied with his mother's medical crisis and, consequently, was unaware of the size of the Firm's proprietary positions and did not take corrective action. Respondents also assert that _____, who worked only part-time as a FINOP for the Firm and performed some of his FINOP duties off-site, reasonably and appropriately performed the responsibilities delegated to him.

Respondents seek to offer expert testimony regarding the customary practices of an off-site FINOP, operating within the securities industry's small-firm sector, in monitoring a firm's proprietary trading inventories² and, in particular, the propriety of the manner in which _____ allocated responsibilities between its CEO and _____ for net capital compliance.³

II. Ruling

In support of their motion, Respondents argue that this case presents unique issues concerning the role and duties of a FINOP. In this connection, Respondents point out that:

¹ In its papers in support of its motion for summary disposition, Enforcement acknowledged that only a member firm can commit a direct violation of SEC Rule 15c3-1. See Memorandum of Points and Authorities in Support of Complainant's Motion for Summary Disposition, p. 9 n.4.

² See Respondents' Motion Seeking Leave to Introduce Expert Testimony, pp. 1, 3, 6.

³ Id., pp. 4, 6.

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(1) _____ is a one-office broker dealer; (2) the Firm’s CEO has sole responsibility for trading and trading inventories; (3) the Firm’s net capital has traditionally been far greater than its minimum net capital requirements; and (4) _____ serves as a FINOP for approximately 28 member firms, including _____, and does so with the assistance of a firm known as _____.⁴ Enforcement argues in opposition that Respondents have failed to demonstrate that the issues presented are so complex or unique as to require the assistance of an expert and that Respondents’ proposed expert testimony encompasses issues of law that are solely within the province of the Hearing Panel.

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 deny a party’s request to offer expert testimony. Under the Federal Rules of Evidence, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify . . . in the form of an opinion or otherwise” about such matters. Fed. R. Evid. 702.⁵

In proceedings before a body such as an NASD Hearing Panel, where two of the three panelists will have substantial relevant specialized knowledge, expert testimony is often of little value, and may be excluded. See Pagel, Inc., 48 S.E.C. 223 (1985), aff’d, sub nom. Pagel, Inc. v. SEC, 803 F.2d 942, 947 (8th Cir. 1986) (affirming SEC Administrative Law Judge’s exclusion of expert testimony). Typically, therefore, expert witness testimony is not offered in NASD disciplinary matters, unless novel issues or new, complex, or unusual securities products are involved. The fundamental

⁴ See Respondents’ Motion Seeking Leave to Introduce Expert Testimony, pp. 9-10.

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question is whether the proposed testimony would assist the Hearing Panel in understanding the evidence or a fact at issue in the proceeding.

The Hearing Officer concludes that there is nothing so unique or complex about the matters at issue to require the assistance of expert testimony. As Respondents themselves acknowledge, many small to mid-sized broker-dealers employ part-time FINOPs who perform their services off-site.⁶ The members of the Hearing Panel are quite capable of considering these factors, to the extent they may be relevant either to liability or sanctions, in determining whether _____ properly discharged his responsibilities and functions. In addition, to the extent Respondents' proposed expert testimony would address legal issues (e.g., whether an off-site FINOP should be held to the same standard as a full-time FINOP and whether _____ legitimately relied on information he received from the Firm's CEO in discharging his responsibilities), such issues are more properly the subject of briefing and argument than expert testimony. The Hearing Panel will have sufficient expertise to interpret the evidence and evaluate the arguments without resorting to an expert opinion for guidance.

SO ORDERED.

Ellen B. Cohn
Hearing Officer

Dated: New York, New York
October 6, 2000

⁵ Because the NASD Code of Procedure does not set forth a standard to assess the admissibility of expert testimony, the Hearing Officer has looked to the Federal Rules of Evidence for guidance.

⁶ See Respondents' Motion Seeking Leave to Introduce Expert Testimony, pp. 9-10.