

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A040030
v.	:	
	:	Hearing Officer – Andrew H. Perkins
	:	
	:	
	:	
Respondent.	:	

**ORDER DENYING RESPONDENT'S MOTION TO RE-OPEN HEARING
AND DENYING COMPLAINANT'S MOTION TO STRIKE
RESPONDENT'S TESTIMONY**

On June 9, 2005, Respondent filed a motion to re-open the hearing based on newly discovered information regarding _____'s availability to participate as a witness. The Department of Enforcement ("Enforcement") filed an opposition to the motion on June 14, 2005.

For the reasons discussed below, the motion is denied.

Discussion

1. Background

Enforcement filed a two-count Complaint on June 1, 2004, charging that Respondent recommended qualitatively unsuitable transactions in two customer accounts at PaineWebber Incorporated, currently UBS Financial Services, Inc. ("UBS").¹ The first cause of the Complaint alleges that, in July 2000, the Respondent recommended that _____ and _____ liquidate their bond mutual funds and purchase

¹ PaineWebber Incorporated later changed its name to UBS PaineWebber Inc. and then to UBS Financial Services, Inc. The Complaint incorrectly alleges that he was associated with Solomon Smith Barney between September 1999 and October 2002.

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Class B shares of four equity growth mutual funds offered by IDEX. The second cause of the Complaint alleges that, in November 2000, the Respondent recommended that another customer liquidate her bond mutual funds and purchase Class B shares of various IDEX growth mutual funds. The Complaint alleges that the Respondent's recommendations were unsuitable in light of the customers' financial needs and circumstances and violated NASD Conduct Rules 2310 and 2110.

The Respondent filed an Answer on July 16, 2004.² In general, the Respondent claimed that his customers demanded that he purchase growth-oriented investments and that he fully explained the risks and costs associated with the IDEX funds. The Respondent further asserted that the new investments were suitable.

In addition to denying the charges in the Complaint, the Respondent waived his right to a hearing. He wrote, "With the recommendation of my physician I am not requesting a hearing. But I am more than willing to provide sworn testimony as well as provide additional documentation if requested by the NASD or the hearing officer."³

On August 2, 2004, the Hearing Officer previously assigned to this proceeding held an Initial Pre-Hearing Conference, at which the Respondent expressly waived his right to a hearing.⁴ Thereafter, the Hearing Officer entered an order directing the Respondent to file any written submission no later than October 25, 2004.⁵ The Hearing Officer also ordered the Respondent to file an Amended Answer on or before September 7, 2004, addressing the allegation that his recommendations resulted in undue

² Contrary to Enforcement's assertion, Respondent filed his Answer within the time provided in the Second Notice of Complaint.

³ Ans. at 17.

⁴ Aug. 2 Tr. at 6.

⁵ Respondent agreed to this deadline at the Initial Pre-Hearing Conference. (Aug 2 Tr. at 21.)

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concentration in the customers' accounts.⁶ The Respondent filed neither the Amended Answer nor a written submission addressing the allegations in the Complaint.

After reviewing Enforcement's submission, the Hearing Panel wanted Enforcement to submit additional information regarding the circumstances surrounding the recommendations the Respondent made to Mr. and Mrs. _____. Accordingly, the Hearing Officer convened a pre-hearing conference on April 15, 2005, to determine what other evidence was available. Ultimately, it was agreed that Enforcement would inquire if Mr. _____ would testify. However, Enforcement later reported that Mr. _____ had been severely injured in an automobile accident, and he therefore could not testify. His wife, however, agreed to testify if the hearing could be conducted by telephone. The Hearing Officer then set this case for an evidentiary hearing on June 8, 2005.⁷

At the hearing, _____ testified regarding the Respondent's recommendations. The Respondent participated by telephone and cross-examined Mrs. _____. He also provided a statement regarding his version of the events in question.

During the Respondent's questioning of Mrs. _____, the Respondent requested that he be given the opportunity to question her husband. The Hearing Officer denied the Respondent's request. The Hearing Officer explained that Enforcement had called _____ because her husband was not able to testify due to his injuries.

2. The Respondent's Motion

Following the June 8 hearing, the Respondent moved to re-open the record because he had found a newspaper article dated May 29, 2005, which reported that

⁶ The Order also directed Enforcement to provide the Respondent with an index of all documents in its investigative file and established a procedure for the Respondent to review and copy any of the documents in the investigative file.

⁷ Order Setting Hearing dated May 19, 2005.

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Mr. _____ was expected to participate in an upcoming foot race in Boulder, CO, on Memorial Day. The Respondent attached a copy of the article to his motion. The article provided the following information about Mr. _____.

_____, the 80-year-old Arizona man, was the winner of his age group in 2004. He's participating in the race again this year despite almost dying after a serious car accident in December.

He was released from the hospital March 30 after recovering from 17 broken ribs, broken pelvic and collar bones, a fractured skull, and a lacerated liver, kidneys and spleen.

He started walking without assistance just over a week ago, and his daughter ... said they're hoping to walk the last half mile of the race.

Relying on the foregoing, the Respondent concludes that Mrs. _____ made a "blatant misrepresentation" regarding her husband's ability to testify, which creates a "significant credibility issue." Therefore, the Respondent requests that the proceeding be re-opened so that he and his attorney⁸ may have the opportunity to question both Mr. and Mrs. _____.

The Respondent's motion is denied for two reasons. First, the Respondent failed to show that _____ mischaracterized her husband's condition. As Enforcement points out in its opposition, the issue is not his physical ability to walk to the telephone. Rather, the question is whether he can recall the events and conversations relevant to this proceeding. Mrs. _____ has represented to Enforcement's counsel that his memory was impaired by the serious head injury he sustained in the accident. The Respondent has no basis to contest that representation.

Second, NASD lacks jurisdiction to compel Mr. _____'s testimony. At the Hearing Panel's request, Enforcement asked Mr. _____ to testify, and he declined.

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Enforcement then proposed to have Mrs. _____ testify, who has direct, relevant knowledge of the facts and circumstances surrounding the recommendations at issue in this proceeding. She actually attended the meeting at the Respondent's office when he recommended the IDEX growth funds to the _____. Moreover, despite the fact that the Respondent represented that he waived his right to a hearing on the advice of his doctor, the Respondent participated in the June 8 evidentiary hearing and cross-examined Mrs. _____.

In conclusion, the Respondent has not shown a valid reason for re-opening the record at this stage of the proceeding. Accordingly, the Respondent's motion is denied.

3. Motion to Strike Respondent's Testimony

Enforcement moves to strike the Respondent's testimony because it is not under oath. The motion is denied. On or before June 29, 2005, the Respondent shall file an affidavit or sworn declaration with the Office of Hearing Officers stating that the testimony he gave at the June 8 hearing is truthful. The Respondent may use the same format as the affidavit Enforcement filed on behalf of _____ dated June 6, 2005. Enforcement may renew its motion if the Respondent fails to comply with this Order.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

June 15, 2005

⁸ While the Respondent mentions an attorney, none has entered an appearance in this proceeding or otherwise contacted the Office of Hearing Officers.