

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Gregory R. Masceri  
Rochester, NY,

Respondent.

DECISION

Complaint No. C8A040079

Dated: December 18, 2006

**Respondent forged signatures and provided NASD false information. Held, findings and sanctions affirmed.**

**Appearances**

For Complainant: UnBo Chung, Esq., and Leo F. Orenstein, Esq., Department of Enforcement.

For Respondent: M. David Sayid, Esq., Sayid and Associates, LLP.

**Decision**

**I. INTRODUCTION**

Respondent Gregory R. Masceri (“Masceri”) appeals a July 8, 2005 Hearing Panel decision, which found that Masceri had forged customer signatures in violation of NASD Conduct Rule 2110 and had provided false information to NASD staff in violation of Conduct Rule 2110 and Procedural Rule 8210. The Hearing Panel imposed on Masceri a bar for providing NASD staff false information and, absent the bar, would have imposed a two-year suspension and \$25,000 fine for the forgeries. We affirm the Hearing Panel’s decision.

**II. BACKGROUND**

Masceri entered the securities industry in April 1981 as an investment company products/variable contracts limited representative. During the relevant period, he was registered in that capacity with Allstate Financial Services, LLC (“Allstate”). He is not currently associated with a member firm.

### III. FACTUAL AND PROCEDURAL HISTORY

Customers Mr. and Mrs. SY had a home insurance policy through an Allstate “exclusive agent” named Rocco A. DiStaffen, Jr. (“DiStaffen”).<sup>1</sup> Masceri, an Allstate “financial specialist,” had an arrangement with DiStaffen to use DiStaffen’s home and automobile insurance book of business to generate leads for his life insurance and investment business. In the summer of 2002, DiStaffen mailed a card to his clients soliciting interest in Allstate products. One of DiStaffen’s clients, Mr. SY, a U.S. postal carrier, responded and expressed interest in a policy that included life insurance, disability insurance, and college and retirement savings features. Under Allstate’s system, the financial specialist, rather than the exclusive agent, generally handles all phases of insurance sales that do not relate to automobile and home coverage. For that reason, DiStaffen referred the lead to Masceri who contacted Mr. SY for an appointment.

On August 7, 2002, Masceri met with Mr. and Mrs. SY at their home to discuss their insurance needs. During that meeting, Masceri recommended that Mr. and Mrs. SY purchase a Jefferson Pilot Variable Universal Life (“Jefferson Pilot VUL”) insurance policy. He described the policy as a “poor man’s disability policy” because Jefferson Pilot would waive not only the cost of the insurance premium but also waive up to the maximum guideline premium if the customer became disabled.<sup>2</sup> Mr. and Mrs. SY decided to purchase the Jefferson Pilot VUL; although, they testified that they believed at the time that the policy included a disability provision, which it did not. Mr. SY testified that he signed only one document and his wife testified that she did not sign any documents on August 7, 2002.

Masceri submitted the application for the Jefferson Pilot VUL to Allstate on August 19, 2002 (hereinafter the “August 2002 VUL Application”).<sup>3</sup> The application required that Mr. and Mrs. SY provide urine and blood specimens. They did not, however, and the August 2002 VUL Application expired for lack of required medical information.

In November 2002, Mr. SY telephoned DiStaffen to find out why the policy had not been issued. DiStaffen passed the message on to Masceri who, in turn, contacted Mr. SY. Masceri then arranged for Mr. and Mrs. SY to provide urine and blood specimens. Masceri also completed a new application for the Jefferson Pilot VUL (hereinafter the “November 2002 VUL Application”), which included various forms that required customer signatures. The November

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<sup>1</sup> DiStaffen, as an Allstate “exclusive agent,” primarily sold and handled home and automobile insurance.

<sup>2</sup> The guideline premium for a VUL policy is the maximum premium that can be made without the policy being classified as something other than a life insurance product.

<sup>3</sup> The August 2002 VUL Application included the following: a four-page, nine-part application; a two-page application supplement for variable life insurance listing separate sub-account investments, with confirmation of receipt of a current prospectus; an insurance illustration; and a notice and consent for HIV-related testing.

2002 VUL Application contained the same type of information that was supplied in the August 2002 VUL Application.<sup>4</sup>

On December 4, 2002, Mr. and Mrs. SY provided urine and blood specimens. Masceri submitted the November 2002 VUL Application to Allstate on December 9, 2002, with the purported signatures of Mr. and Mrs. SY in multiple places.

In early January 2003, having not heard from Masceri since November 2002, Mr. SY again contacted Allstate to ask about the status of his policy. In response, Masceri requested a check from Mr. SY for \$125, which Mr. SY provided.<sup>5</sup> Shortly thereafter, Masceri completed a third application for the Jefferson Pilot VUL, dated January 7, 2003 (hereinafter the “January 2003 VUL Application”), which similarly included a number of forms that required customer signatures. The January 2003 VUL Application contained information similar to the November 2002 VUL Application. The only substantive difference between the November 2002 Application and the January 2003 Application was that the November 2002 Application indicated a disability waiver of \$2,000 *per month* whereas the January 2003 Application indicated a disability waiver of \$2,000 *per year*. The spouse rider for the January 2003 VUL Application also was on a new form entitled “Other Insured Supplement.”

On January 10, 2003, Masceri submitted to Allstate the January 2003 VUL Application, which contained the purported signatures of Mr. and Mrs. SY in several places. In February 2003, Masceri contacted Mr. SY to advise him that the Jefferson Pilot VUL was ready and that he needed to submit an additional \$26.87.<sup>6</sup> Because Masceri was about to leave on vacation, he dropped the insurance policy off with DiStaffen so that Mr. SY could pick it up at that location and provide the additional \$26.87 that was owed.<sup>7</sup>

On February 7, 2003, Mr. SY picked up his insurance policy from DiStaffen. Upon reviewing the policy, Mr. SY realized that it did not have the disability feature that he thought he

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<sup>4</sup> The November 2002 VUL Application included, among other things, the application, a supplement for variable life with information about sub-account investments, a risk disclosure statement, a notice and consent for HIV-related testing, a W-9 tax certification form, and a “spouse rider” application. These documents had places for the signatures of both the customers and the licensed agent. The documents were purportedly signed by Mr. SY as the insured and by Masceri as the licensed agent. In addition, Mrs. SY purportedly signed the “spouse rider” application and a separate notice and consent for HIV-related testing.

<sup>5</sup> Mr. SY and Masceri testified that the \$125 was a premium payment.

<sup>6</sup> Mr. SY testified that Masceri told him that the \$26.87 was for an application fee. Masceri, however, testified that the \$26.87 was a premium supplement.

<sup>7</sup> DiStaffen was located in Allstate’s West Ridge office in New York, whereas Masceri was located in Allstate’s Brighton office in New York.

was purchasing. According to Mr. SY, Masceri had advised him that the VUL policy had a disability feature that would provide \$2,000 in monthly income, after taxes, if Mr. SY became disabled. The actual policy did not have such a feature.<sup>8</sup> Nonetheless, Mr. SY left a check for \$26.87 and took the policy home to review it with greater care.

On February 19, 2003, Mr. SY returned to Allstate's West Ridge office and reviewed the insurance policy and the attached insurance applications with DiStaffen. Mr. SY pointed out the pages that showed his and his wife's forged signatures. Mr. SY told DiStaffen to cancel the insurance policy, which he did.<sup>9</sup> At Mr. SY's request, DiStaffen documented Mr. SY's complaint on an Allstate customer complaint form.

On or about March 27, 2003, Allstate terminated Masceri's employment after conducting an internal investigation, which included a tape-recorded interview of Masceri wherein he admitted signing Mr. and Mrs. SY's names to the insurance documents without their permission. Allstate then filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") that provided the following explanations for the termination: "Non genuine signature on Jefferson Pilot VUL Application for customers [Mr. and Mrs. SY]" and "discharged due to violation of company policy relative to forgery."

On September 9, 2003, NASD's Department of Enforcement ("Enforcement") sent Masceri a request, pursuant to Procedural Rule 8210, seeking information regarding the signatures. Specifically, the 8210 request asked whether Masceri had signed Mr. and Mrs. SY's names and whether they had given him permission to do so. By letter dated October 3, 2003, Masceri denied signing either customer's name. He also denied seeking or receiving permission to do so.

On March 16, 2004, Enforcement sent a second Rule 8210 request to Masceri seeking explanations for the apparent inconsistencies between his October 2003 response to Enforcement's September 2003 request for information, which stated that he had not signed Mr. and Mrs. SY's names on the insurance documents, and his earlier statements to Allstate supervisors and investigators that he had signed his customers' names without their permission.

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<sup>8</sup> Instead of a disability feature that would provide an income replacement in the case of disability, the policy had a waiver-of-premium feature in the case of disability. Masceri acknowledged that Mr. SY wanted disability insurance, but he explained that insurers are reluctant to provide affordable disability insurance to U.S. postal carriers such as Mr. SY. Masceri claimed that Mr. SY's budget simply would not have enabled him to purchase disability insurance in light of his occupation. Masceri stated that, as a result, he recommended the variable life policy at issue, which Masceri described as a "poor man's disability" policy. Masceri stated that he conveyed this information to Mr. and Mrs. SY, but that they apparently did not understand it.

<sup>9</sup> In a letter dated February 20, 2003, Jefferson Pilot confirmed to Mr. and Mrs. SY that the VUL insurance policy was canceled.

By letter dated March 24, 2004, Masceri responded that Allstate investigators had pressured him into saying that he had forged the signatures, the interview violated the National Labor Relations Act (“NLRA”), and he was being medicated for an anxiety disorder at the time, which affected his concentration and memory.

In a complaint dated September 7, 2004, Enforcement initiated the current action based on allegations of forgery and failure to respond truthfully to a request for information. Masceri denied the substantive allegations and requested a hearing.

As part of the four-day hearing below, Mr. SY testified that when he reviewed the policy he discovered that his signature had been forged and he complained to DiStaffen. Afterwards, Masceri called Mr. SY. According to Mr. SY, Masceri confessed during the telephone conversation that he had forged the signatures. Mr. SY testified that he and his wife did not authorize Masceri to sign their names to the forms. Mr. SY also testified that Masceri appeared to offer him a bribe to withdraw his complaint. Mr. SY stated, moreover, that Masceri sued him for defamation and said he would drop the lawsuit if Mr. SY would sign an affidavit that contained “a lot of untruths in it.” Mr. SY stated that he signed only one document early in the process (at the initial meeting on August 7, 2002).

Mrs. SY testified that she did not sign her name to any of the documents. She also testified that she was familiar with her husband’s signature and that the signatures on the documents in question were not his. In addition, she testified that she did not give Masceri or anyone else authority to sign her name. Furthermore, she stated that she was present when Masceri called her husband and that she heard her husband’s side of the conversation. She stated, “And when I heard my husband ask if he was bribing him, I told him to hang up. And I told him that a lot. I told him just hang up. You don’t need to be talking to him anymore.”

Enforcement also presented the testimony of Mathew Eby (“Eby”), an Allstate investigator. Eby testified that Masceri admitted to him that he forged Mr. and Mrs. SY’s signatures. Eby explained that Masceri’s confession was tape-recorded and later transcribed. Eby stated that another Allstate employee, Jude O’Rourke, an Allstate Human Resources Division Manager, was present during the interview. Eby also testified that Mr. SY had told him that he (Mr. SY) signed only one document and that Mr. and Mrs. SY did not give Masceri permission to sign their names to the other documents.

Masceri’s supervisor at Allstate, Anthony Pagano (“Pagano”), testified that Masceri had admitted to him that he forged Mr. and Mrs. SY’s signatures on the documents. Moreover, Pagano testified that Masceri later asked him whether he should change his story and say that he hired his daughter to perform clerical work and she had signed everything. In addition, Pagano testified that Masceri subsequently asked him whether he should claim that he did not remember signing the documents because of the medications that he had taken. Finally, Pagano testified that Mr. SY told him that Masceri forged Mr. SY’s signature on a number of documents and had misled him about the terms of the insurance.

Masceri testified that he suffered from a panic disorder and agoraphobia<sup>10</sup> and that there were “blank spots” between early November 2002 and the middle of January 2003. He said that he did not forge the signatures or at least did not remember forging them. He stated that he called Mr. SY to find out what was going on and to try to make things right but that, contrary to Mr. and Mrs. SY’s testimony, he never attempted to bribe Mr. SY. Masceri said that he told Pagano that he could not recall signing Mr. and Mrs. SY’s names but that Pagano told him to lie and say that he signed them for convenience. According to Masceri, Pagano told him if he made it a simple matter, it would be no big deal and at most he would get a slap on the wrist, assertions that Pagano denied during his testimony.

Masceri acknowledged that Eby asked him if he could tape the interview and that he gave his permission. However, Masceri testified that he asked whether he should have an attorney present and that Eby allegedly replied that Masceri could not have one present during the questioning. Masceri further stated that Eby never explained to him that he did not need to agree to a taped interview. Nonetheless, Masceri also testified at the hearing that he filled out and submitted the relevant forms himself, did not have any clerical help, and met Mr. and Mrs. SY on only one occasion, on August 7, 2002.

Michelle Masceri, Masceri’s wife, testified that she had overheard portions of her husband’s telephone conversation with Pagano and corroborated his version. Gina Diakomihals (“Diakomihals”), Masceri’s daughter, similarly testified that she overheard the conversation between Masceri and Pagano, during which Masceri allegedly stated that he did not feel comfortable saying he signed his customers’ names because he did not remember signing them. According to Diakomihals, Masceri stated “maybe my daughter signed it, maybe some of the other girls in the office signed it. I have no idea who signed it.” She stated that Masceri had memory lapses. Finally, she testified that she did not perform any work for Masceri regarding Allstate.

DiStaffen testified that he had known Masceri for 20 years and believed him to be a “professional person.” He had not observed any behavior on Masceri’s part that he would consider unethical. He stated that he was Mr. and Mrs. SY’s primary agent (in charge of their home and auto insurance). DiStaffen testified that Mr. SY told him that he had the following problems: “One factor was that it wasn’t a policy that he thought he was buying (it was life insurance rather than the disability insurance he thought he was buying), one was that the time that it took for the policy to be issued, and a third to be that the signatures were not his or his wife’s.” Finally, DiStaffen testified that he knew that Masceri had some health problems because he knew Masceri’s wife had to drive him to appointments.

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<sup>10</sup> Masceri’s psychiatrist described “agoraphobia” during the hearing as a condition causing a person to attempt to avoid situations that bring on panic attacks.

Dr. Gregory Nasra (“Nasra”), Masceri’s psychiatrist, testified that, in his view, Masceri suffered from a generalized anxiety disorder, panic disorder and agoraphobia.<sup>11</sup> He also stated that a panic disorder could affect a person’s attention span and memory. On cross-examination, however, he acknowledged that his notes for his session with Masceri on the day when Allstate terminated Masceri indicate that Masceri had told him that he had “lost his job due to forging a signature.” Moreover, Nasra testified that Masceri had not complained to him about significant memory lapses. Nasra noted in his initial report that he found no evidence of cognitive impairment, including memory loss. He found no evidence of a formal thought disorder, delusions or perceptual disturbances. According to Nasra, Masceri’s panic attacks usually last for only 10 to 30 minutes, and it is usually only during a panic attack that someone’s memory could be diminished. Nasra also stated that Masceri had begun taking Prozac—which helps a person’s memory—before he (Nasra) had started treating Masceri in February 2003.<sup>12</sup>

On July 8, 2005, the Hearing Panel issued a decision finding that Masceri committed the violations as alleged in the complaint. The Hearing Panel stated that Masceri “told Mr. Pagano that he did not remember signing Mr. and Mrs. SY’s names to the applications because of his medical condition, but he ‘acquiesced to’ Mr. Pagano’s statement that he must have signed the documents.” The Hearing Panel further found “the testimony of Mr. and Mrs. SY credible that they did not authorize [Masceri] to sign their names to the applications.” The Hearing Panel concluded that “although neither [Masceri] nor Enforcement presented the testimony of a handwriting expert, and the Hearing Panel’s comparison of Mr. SY’s signature on the January 7, 2003 check to the November 2002 and January 2003 application documents was inconclusive, the Hearing Panel finds that (i) the signatures on the November 2002 and the January 2003 insurance applications were not those of Mr. and Mrs. SY, and (ii) respondent signed Mr. and Mrs. SY’s names, without their permission or consent, and therefore violated NASD Conduct Rule 2110.”

The Hearing Panel also found that Masceri’s response to Enforcement’s Rule 8210 request for information was untruthful. The Hearing Panel focused on the following facts: In responding to Enforcement’s questions concerning whether he had signed his customers’ names, Masceri “answered ‘no’ although he knew (i) that he had completed the insurance documents and submitted them without a second or third meeting with Mr. and Mrs. SY, (ii) that he had told the Allstate investigators that he had forged his customers’ signatures and had been terminated for such admission, (iii) that Mr. and Mrs. SY denied signing the documents, and (iv) that he had conducted no investigation to ascertain how the signatures were affixed to the documents other than by his hand.” In addition, the Hearing Panel found it significant that Masceri signed an affidavit on December 15, 2004, in a lawsuit that he brought against Mr. and Mrs. SY, in which Masceri stated that Mr. SY had given him “constructive authorization to sign his name.” The Hearing Panel found that the affidavit implied that Masceri “remember[ed] signing the documents, which was contrary to both [Masceri’s] October 2003 and the March 2004 responses

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<sup>11</sup> Masceri began seeing Nasra in February 2003. According to Nasra, Masceri had been suffering from generalized anxiety disorder for about 20 years.

<sup>12</sup> Masceri testified that he had begun taking Prozac regularly at the end of December 2002.

to the NASD staff's requests for information." The Hearing Panel concluded that Masceri violated Conduct Rule 2110 and Procedural Rule 8210 "by answering 'no' to the question did you affix the customers' signatures, without any qualification."

As to sanctions, the Hearing Panel imposed a bar for Masceri's untruthful response to Enforcement's initial request for information. The Hearing Panel imposed the bar because of "(i) the subject matter of the false information, . . . (ii) [Masceri's] knowledge of the importance of providing accurate information because of his 28 years of experience in the insurance industry; (iii) [his] failure to correct the false information until NASD requested that he do so; and (iv) the fact that, by October 2003 when he initially responded to the NASD staff's request for information, Respondent's panic attacks were under control through medication."

The Hearing Panel held that, but for the bar imposed for the untruthful 8210 response, it would have imposed a two-year suspension and a \$25,000 fine for the forgery violations. The Hearing Panel stated that, although forgery is a very serious violation, certain mitigating factors existed that warranted imposition of a sanction less than a bar. The Hearing Panel stated that Masceri's actions could be explained, in part, by his medical condition, which, at the time of the forgeries, was not fully treated. The Hearing Panel also stated its belief that his actions appeared aberrant and not part of a pattern of conduct and that Masceri sincerely believed that Mr. and Mrs. SY wanted the VUL insurance policy. According to the Hearing Panel, when Masceri forged his customers' signatures, his primary motivation was to achieve his customers' goal of obtaining a VUL insurance policy, rather than to earn the \$700 commission.

#### **IV. DISCUSSION**

Masceri appeals the Hearing Panel's findings of violations and the sanctions it imposed. We shall address each in turn.

##### **A. Findings of Violations**

As discussed above, the Hearing Panel found that Masceri forged his customers' signatures and then lied about his actions to Enforcement. On appeal, Masceri claims that Enforcement failed to meet its burden of proving that he forged the signatures at issue. He argues that, as a result, he cannot be found to have committed either alleged violation because without the forgery there can be no finding that he responded untruthfully by stating that he did not forge the signatures. After reviewing the record, we uphold the Hearing Panel's findings of violations.

##### **1. Forgery**

The Hearing Panel found that Masceri violated Conduct Rule 2110 by committing forgery. Rule 2110 states that a "member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."<sup>13</sup> As the Securities

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<sup>13</sup> NASD Rule 115 makes all NASD rules, including Rule 2110, applicable to both NASD members and persons associated with NASD members.



and Exchange Commission has emphasized, the “commission of forgery is inconsistent with just and equitable principles of trade, and we have sustained NASD findings of forgery where the forged documents defrauded another person or otherwise resulted in a benefit to the forger.” *Mark F. Mizenko*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655, at \*11-12 (Oct. 13, 2005); *see also Donald M. Bickerstaff*, 52 S.E.C. 232, 235 (1995) (upholding finding of forgery even though respondent forged customer’s name because he “thought it was the clients’ wish and in their best interests”). Masceri argues, however, that Enforcement did not prove that he committed forgery. In large part, he relies on Enforcement’s failure to introduce expert testimony on the issue. According to Masceri, without such testimony, there is no reliable evidence that he forged the documents.<sup>14</sup> In addition, Masceri argues that we should not consider his taped confession because it allegedly was obtained in violation of his “Weingarten right” under the NLRA. We disagree with his analysis of both issues.

**a. *Expert Testimony and Proof of Forgery***

As an initial matter, NASD proceedings are not governed by formal rules of evidence. *See* NASD Procedural Rules 9145(a) and 9346(g). The SEC, moreover, has upheld NASD findings of forgery in cases where Enforcement did not present expert testimony. *See, e.g., Mizenko*, 2005 SEC LEXIS 2655, at \*11-12 (upholding finding of forgery where respondent “admitted throughout [the] proceedings that he signed another person’s name on a document without permission or authority to do so”); *Eliezer Gurfel*, 54 S.E.C. 56, 62 (1999) (upholding forgery finding in large part because of testimony by a third party that the respondent had admitted the forgery to him), *aff’d*, 205 F.3d 400 (D.C. Cir. 2000). Indeed, even in federal litigation, where formal rules of evidence do apply, the trier of fact may determine on its own whether a defendant has committed forgery. There is no requirement that an expert must be used in such a case. *See United States v. Brown*, No. 03-1542, 2005 U.S. App. LEXIS 22703, at \*7 (2d Cir. Oct. 18, 2005) (noting that documents sometimes permit analysis by jury without expert) (*citing United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1994)); *United States v. Saadey*, 393 F.3d 669, 679-80 (6th Cir. 2005) (“The district court did not abuse its discretion by allowing the

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<sup>14</sup> In a related argument, Masceri claims that the Hearing Panel cannot make its own findings on forgery because to do so would allow it to act in the capacity of an expert without the proper qualifications. Masceri also claims that, under such circumstances, the Hearing Panel should be viewed as a “prosecution witness” and thus biased. As we discuss *infra*, the initial trier of fact (here the Hearing Panel) generally may determine whether a signature has been forged without the aid of an expert. In any event, in this case, the Hearing Panel stated that it could not determine the authenticity of the signatures merely by looking at them and instead relied on other evidence in finding that Masceri committed forgery.

Masceri further argues that the Hearing Panel took impermissible “judicial notice” that he had committed forgery. Ostensibly, Masceri’s claim is based on his view that the Hearing Panel’s finding of violation had no basis in the record evidence. As discussed below, there is overwhelming evidence supporting the finding that Masceri forged signatures on the forms.

jury, pursuant to Rule 901(b)(3), to make lay comparisons between the signatures on each of these documents and Saadey's signature on the tax forms.”).

Masceri relies on an initial decision of an administrative law judge (“ALJ”) in *H.J. Meyers & Co.*, Initial Decision Rel. No. 211, 2002 SEC LEXIS 2075 (Aug. 9, 2002), to support his argument that an expert is needed. That case, however, is inapposite. The *H.J. Meyers* decision discusses the standards that an adjudicator should apply when a party is seeking to use the testimony of a purported expert. The case does not discuss, let alone require, the use of an expert witness to prove forgery in a self-regulatory organization disciplinary proceeding.

We next examine the evidence that Enforcement introduced to determine whether the Hearing Panel's finding that Masceri committed forgery is supported by a preponderance of the evidence. We find that there are three reasons to affirm the Hearing Panel's finding. First, Mr. and Mrs. SY testified that they did not sign their names to the insurance forms at issue.<sup>15</sup> Nor did they give Masceri permission to sign their names to the forms. In addition, they testified that they met with Masceri on only one occasion, during their initial consultation. The Hearing Panel found their testimony to be credible and persuasive. We have no reason to unsettle those determinations.<sup>16</sup>

Second, Masceri was the only person who had access, opportunity, and motive to sign the forms. Masceri acknowledged that he filled out the relevant forms himself, submitted the forms, and did not have any clerical help.<sup>17</sup> His adult daughter, whom Masceri intimated at one point might have signed the forms, testified that she did not perform Allstate-related work for him. Masceri eventually explained that he was only speaking in hypothetical terms when he mentioned that his daughter might have signed the customers' names. Masceri and Mr. and Mrs. SY also all agree that they met only once, when the original application was signed. Thus, they were not all present together on the other occasions when all three purportedly signed the various forms. Masceri also had motive to forge the signatures. He had taken so long to finalize the transaction that some of the required forms had expired or otherwise become outdated and new ones had to be prepared. Forging the documents would avoid the embarrassment and

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<sup>15</sup> Mr. SY testified that he signed only one insurance form and that was during the original meeting on August 7, 2002. Mrs. SY testified that she did not sign any of the insurance forms.

<sup>16</sup> “An initial factfinder's assessments of credibility deserve ‘special weight.’” *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997).

<sup>17</sup> Masceri consistently acknowledged that he did not have clerical help. For instance, Masceri testified, “See I had no clerical support. So I was – I was the secretary—I was, you know, I was everything. I was the chief cook and bottle washer, you know, and so it presented some challenges.” Masceri also stated, “I always complete the forms myself.” Nonetheless, during oral argument on appeal, Masceri's attorney opined, without elaboration or support, that Masceri had clerical help who could have forged the forms at issue. Counsel's assertion is not evidence and is contradicted by Masceri's own testimony. We reject this unfounded argument.

inconvenience of having to go back to his customers for additional signatures. Of course, he also would have benefited from completing the sale, increasing his production, and collecting the commission,<sup>18</sup> which could have fallen through for a number of reasons, including the policy's lack of an actual disability feature.<sup>19</sup>

Third, Masceri repeatedly admitted that he signed Mr. and Mrs. SY's names without their permission. Mr. SY testified that Masceri stated to him that he signed Mr. and Mrs. SY's names to the forms. Pagano and Eby similarly testified that Masceri had told them that he had forged Mr. SY's signature. Finally, Masceri admitted during a tape-recorded interview that he had signed Mr. and Mrs. SY's names on the forms.

Admissions generally are considered strong evidence. See *United States v. Persico*, 621 F. Supp. 842, 871 (S.D.N.Y. 1985) ("An admission by a defendant constitutes the strongest possible evidence of his guilt."). We find that to be particularly true in a case where, as here, unrelated individuals testify about separate occasions when the respondent made similar admissions against interest. Of course, the testimony of these witnesses also is supported by the respondent's taped and transcribed confession, which presents an extremely difficult hurdle for Masceri to overcome.

**b. Weingarten Right**

Masceri attempts to reduce the impact of his admissions by asserting the inadmissibility of his taped confession because of a claimed violation of his "Weingarten right." According to

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<sup>18</sup> Masceri would have received approximately \$700 for the sale of the policy. We note that the Hearing Panel's emphasis on the commission's not being Masceri's "primary motivation" indicates that the Hearing Panel found that it was a factor, just not the main one. We generally concur that Masceri's desire to earn a commission likely was not his "primary" motivation for engaging in the misconduct. However, the Hearing Panel's approach of focusing on Masceri's desire to help his customers achieve their goal of obtaining a VUL insurance policy versus his desire to earn a commission is too narrow. The real concern is whether Masceri forged the documents for his own business or economic reasons rather than at the customers' behest for their convenience. Thus, although Masceri may have wanted to assist his customers in obtaining a VUL insurance policy, it also is likely that he wanted to (1) avoid being embarrassed by having to repeatedly go back to his customers for their signatures, (2) complete a sale, (3) increase his business production and (4) collect a commission. He did not sign Mr. and Mrs. SY's names on the documents at their request for their convenience.

<sup>19</sup> Mr. and Mrs. SY were particularly interested in disability insurance. Mr. SY understood from speaking with Masceri that his policy would include an actual disability provision. It did not. Furthermore, the so-called "poor man's disability" feature, such as it was, changed from one application to another. The November 2002 VUL Application indicated a disability waiver of \$2,000 *per month* whereas the January 2003 VUL Application indicated a disability waiver of \$2,000 *per year*.

Masceri, once he asked Eby during the Allstate investigative interview whether he needed a lawyer, Allstate should have stopped the interview until Masceri had a lawyer present. In Masceri's view, we should now exclude the taped confession. We disagree for a number of reasons.

The "Weingarten right," named after the U.S. Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), provides that an employee has a right to refuse to submit to an interview without a union representative being present if he or she reasonably fears that the interview may result in discipline. If an employee has a Weingarten right to representation and makes a valid request for representation, the burden is upon the employer to take one of three actions: (1) grant the request, (2) discontinue the interview, or (3) offer the choice between continuing the interview without a representative or having no interview at all.

Although a nonunion employee could have invoked the Weingarten right under certain circumstances during the relevant period,<sup>20</sup> there is no evidence that Masceri properly did so in this case. Moreover, even assuming, *arguendo*, that Allstate violated Masceri's Weingarten right during the interview that culminated in his taped confession, there is no basis to preclude Enforcement's use of the confession in the NASD proceeding.

The NLRB has held that, in a nonunion setting, a request for a representative other than a coworker is *not* a valid request for representation. See *Int'l Bhd. of Elec. Workers*, 339 N.L.R.B. 1199, 2003 NLRB LEXIS 504, at \*8 (2003) (holding that an employee's request for a person who was not a coworker was not a valid request for a representative). Similarly, the NLRB has held that a request for a lawyer is not a valid request for a representative. *Consolidated Casinos Corp.*, 266 N.L.R.B. 988, 1008, 1983 NLRB LEXIS 328, at \*105 (1983) ("An employee who requests the presence of his personal lawyer . . . is not invoking the support of the lawyer as part of a common cause with others. The lawyer is for his personal assistance."). Masceri, who asked whether he needed a lawyer, thus did not make a valid request for a representative.

However, even if Masceri had made a valid request and Allstate had violated his Weingarten right, the remedy would not be to exclude the evidence from the NASD proceeding. In an NLRB proceeding, the appropriate remedy for a Weingarten violation normally is an order requiring the employer to cease and desist from further such violations and to post a notice to that effect. *Barnard College*, 340 N.L.R.B. 934, 2003 NLRB LEXIS 697, at \*12 (2003). A

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<sup>20</sup> Masceri's taped confession occurred in March 2003. In 2000, the National Labor Relations Board ("NLRB") held that the Weingarten right could be available to nonunion employees under certain circumstances. *Epilepsy Found. of Northeast Ohio*, 331 N.L.R.B. 676, 2000 NLRB LEXIS 428 (2000), *aff'd in relevant part, reversed in part*, 268 F.3d 1095 (D.C. Cir. 2001). In 2004, the NLRB overturned its decision in *Epilepsy Found.* and held that an employer need not accede to the request by an employee in a nonunion setting to be accompanied by a representative. *IBM Corp.*, 341 N.L.R.B. 1288, 2004 NLRB LEXIS 301, at \*3 (2004). The D.C. Circuit has stated, however, that changes in how the NLRB interprets the Weingarten right cannot be given retroactive effect. *Epilepsy Found.*, 268 F.3d at 1102-03.

make-whole remedy is appropriate *only* if the employee can prove an additional violation, i.e., that the employee was disciplined, at least in part, for asserting his or her Weingarten right. *Id.*

More important, Masceri has not identified, and we have not found, any authority supporting his claim that evidence gained in violation of an employee's Weingarten right (assuming an actual violation has occurred) should be excluded from an NASD disciplinary proceeding. Indeed, analogous court cases demonstrate that it would not be appropriate to exclude evidence obtained through an unfair labor practice from an NASD proceeding. In *Velasquez-Tabir v. INS*, 127 F.3d 456 (5th Cir. 1997), the court of appeals held that "evidence [about an employee] obtained through [an] employer's unfair labor practice" should not be excluded or suppressed in an INS administrative proceeding. *Id.* at 459. The court stated that the question of "whether evidence obtained through a violation of a regulatory statute is excludable in an administrative proceeding conducted to assess a civil penalty under an unrelated statute" appeared to be a matter of first impression. The court found it significant that obtaining the evidence did not implicate "a constitutional violation" and that there was no "provision of the NLRA indicating a Congressional intent to provide for exclusion . . . of evidence obtained in violation of the NLRA." *Id.* at 460. The court stated that "there may be little deterrence to employers by excluding evidence in proceedings not involving the employers." *Id.*<sup>21</sup> We hold that an adjudicator generally need not exclude from an NASD proceeding evidence obtained through a Weingarten violation, even if one occurred.

We also concur with Enforcement's assertion that it was entirely fair and consistent with NASD Procedural Rule 9263(a) for the Hearing Officer to admit the interview transcript into evidence. Masceri acknowledged during the interview that the taping was done with his consent and that no threats or promises had been made to secure his consent. He acknowledged that he fully understood the questions put to him and that his ability to answer them was unimpaired. He did not complain about anything during the interview or testify in a manner indicating that he was confused. There also is no evidence that the interview was in any way coercive or that there was anything else about the way it was conducted and recorded that would call its reliability into question.

In sum, we affirm the Hearing Panel's finding that Masceri committed forgery in violation of Rule 2110. Mr. and Mrs. SY testified credibly that they did not sign or authorize Masceri to sign the forms. Masceri acknowledged that he completed the forms and did not have any secretarial or clerical help. As Masceri himself stated, he was "the chief cook and bottle

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<sup>21</sup> See also *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997) (holding that evidence obtained from an employer's violation of labor laws did not necessitate exclusion of the evidence in an employee's deportation hearing); *United States v. Edgar*, 82 F.3d 499 (1st Cir. 1996) (holding that suppression of evidence is not required for government's violation of the Fair Credit Reporting Act); *United States v. Kington*, 801 F.2d 733, 737 (5th Cir. 1986) (declining to suppress evidence obtained in violation of the Right to Financial Privacy Act and noting that there was no constitutional violation and "suppression of the evidence is nowhere mentioned as a remedy for violation of the" Right to Financial Privacy Act).

washer.” Masceri also admitted on several occasions to various individuals that he had signed Mr. and Mrs. SY’s names to the forms. A preponderance of the evidence clearly supports the Hearing Panel’s finding.

## 2. Untruthful Response to a Rule 8210 Request

The Hearing Panel found that Masceri violated Conduct Rule 2110 and Procedural Rule 8210 by providing an untruthful response to Enforcement’s initial request for information regarding whether he had signed his customers’ names to the insurance documents.<sup>22</sup> Conduct Rule 2110 and Procedural Rule 8210 are crucial components of NASD’s examinations and investigations. Again, Conduct Rule 2110 requires the observation of just and equitable principles of trade. Providing false or misleading information to NASD is conduct inconsistent with just and equitable principles of trade. *See Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006) (upholding violation of Rule 2110 where respondent provided false and misleading information to NASD); *Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996) (“Providing misleading and inaccurate information to the NASD is conduct contrary to high standards of commercial honor and is inconsistent with just and equitable principles of trade.”), *aff’d*, 112 F.3d 516 (9th Cir. 1997). Procedural Rule 8210 gives NASD the right to require a member or person associated with a member to provide information, orally or in writing, in connection with an examination or investigation. The rule further states that no member or person shall fail to provide such information. It is axiomatic that Procedural Rule 8210 prohibits an associated person from providing false or misleading information to NASD in connection with an examination or investigation. *See John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at \*36-38 (Jan. 22, 2003) (upholding NASD’s finding that respondents violated Procedural Rule 8210 by giving false testimony during an on-the-record interview).

As discussed above, Masceri’s defense to the charge that he provided untruthful information to Enforcement is that he did not forge the forms at issue. Having already found that the Hearing Panel correctly determined that he had in fact forged the forms, we now uphold the Hearing Panel’s finding that Masceri’s response to Enforcement’s Rule 8210 request was misleading.

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<sup>22</sup> Enforcement sent an initial Rule 8210 request for information on September 9, 2003. Masceri responded to that initial request by letter dated October 3, 2003. Enforcement sent a second request for information on March 16, 2004. Masceri responded to that request on March 24, 2004. The complaint alleged that Masceri responded untruthfully to both of Enforcement’s requests for information. The Hearing Panel’s finding that Masceri made untruthful statements to Enforcement focuses on Masceri’s response to Enforcement’s initial request for information. It is unclear whether the Hearing Panel similarly found that Masceri was untruthful regarding the second Enforcement request for information. Because we find that Masceri clearly provided an untruthful response to Enforcement’s initial request for information and that such misconduct alone warrants a bar, discussed *infra*, we need not address his second response.

Indeed, even assuming, *arguendo*, that Masceri had not actually forged the documents, his response still would have been incomplete and misleading. In his October 3, 2003 response to Enforcement's questions concerning whether he had affixed his customers' signatures, Masceri answered "no" without qualification. He did so notwithstanding his earlier admissions to three separate individuals that he had signed his customers' names. He answered unequivocally "no" despite his customers' complaint that he had forged their signatures and Allstate's firing of him after its investigation concluded that he had committed forgery. An explanation to Enforcement beyond his "no" answers clearly would have been required for his response to be complete and accurate, even if he had not committed forgery.<sup>23</sup> Again, however, we find that the preponderance of the evidence proves that Masceri forged the forms, making his October 3 response false.

Full and accurate responses to Rule 8210 requests are critical to NASD's ability to effectively regulate the securities industry. Masceri chose instead to provide false responses. In doing so, he violated Rules 2110 and 8210.

## **B. Sanctions**

Having found that Masceri committed forgery and then lied about his actions to Enforcement, we must now determine appropriate sanctions. We begin with a review of the relevant NASD Sanction Guidelines ("Guidelines") and the Hearing Panel's discussion of sanctions before performing our own analysis based on the facts of the case and the nature of the violations.

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<sup>23</sup> Masceri also signed an affidavit, dated December 15, 2004, in relation to his unsuccessful lawsuit against Mr. and Mrs. SY wherein he stated that Mr. SY "gave [him] constructive authorization to sign his name." Masceri's sworn statement implies that he remembers signing the documents, which is contrary to his response to Enforcement's request for information. In this regard, Masceri's brief on appeal inaccurately claims that Enforcement's request for information merely addressed forgery. Thus, he claims that his negative response was not inconsistent with his December 15, 2004 affidavit because he could legitimately answer "no" to a question about forgery if he had obtained his customers' authorization to sign their names. Masceri's assertion fails on a number of levels. First, Masceri is wrong when he suggests that Enforcement's original request for information asked solely about forgery. Although the letter mentions forgery once in an introductory paragraph, the specific questions to which Masceri was asked to respond focused on whether Masceri had signed Mr. and Mrs. SY's names to certain documents and, if so, whether he had their authorization to do so. Masceri's unqualified negative responses to those questions are inconsistent with his suggestion in his affidavit that he had the customers' authorization to sign their names. Second, Masceri's claim fails to consider Mr. and Mrs. SY's credible testimony that they never gave him authorization to sign their names.

The Guidelines for forgery recommend a fine of \$5,000 to \$100,000, and, where mitigating factors exist, consideration of a suspension for up to two years.<sup>24</sup> In egregious cases, the Guidelines recommend a bar. There are two principal considerations: (1) the nature of the documents forged, and (2) whether the respondent had a good faith, but mistaken, belief of express or implied authority.

The Hearing Panel stated that it would have imposed a two-year suspension and a \$25,000 fine for Masceri's forgery violation. The Hearing Panel found that the documents that respondent forged were important, involving not only choosing investment options for the policy, but also providing consent to HIV testing. The Hearing Panel further stated that Masceri's belief in his customers' desire to obtain the insurance policy did not constitute, by itself, an express or implied authorization to sign their names without their knowledge or permission, especially in light of Allstate's absolute prohibition on the signing of customers' names. Nonetheless, the Hearing Panel found that a two-year suspension rather than a bar was warranted. The Hearing Panel found that Masceri's actions were explained, in part, by his untreated medical condition and that they were aberrant and not part of a pattern of conduct. In addition, the Hearing Panel found that, based on Mr. SY's two telephone calls asking about the status of his insurance policy and his submission of a premium payment, Masceri sincerely believed that his customers wanted the VUL insurance policy. Accordingly, the Hearing Panel found that when Masceri forged his customers' signatures, his primary motivation was to achieve his customers' goal of obtaining a VUL insurance policy, rather than to earn the \$700 commission on the sale of the VUL insurance policy. The Hearing Panel also found that, with his panic attacks under control through medication, Masceri is unlikely to engage in future misconduct. The Hearing Panel then concluded that, in view of the seriousness of the misconduct, a substantial sanction was warranted.

The Guidelines treat a failure to respond and a failure to respond truthfully as egregious violations. The Guidelines provide that, absent mitigating factors, "a bar should be standard."<sup>25</sup> The Hearing Panel found that Masceri's failure to respond truthfully to Enforcement's request for information warranted a bar for a number of reasons. First, the Hearing Panel found that the subject matter of the false information (i.e., forgery) was a key factor. Second, the Hearing Panel opined that Masceri should have known better in light of his "knowledge of the importance of providing accurate information because of his 28 years of experience in the insurance industry." The Hearing Panel also noted that Masceri failed to correct the false information until Enforcement explicitly requested that he do so. Finally, the Hearing Panel stated that, in October 2003 when he responded to Enforcement's initial request for information, Masceri's panic attacks were under control through medication.

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<sup>24</sup> *NASD Sanction Guidelines* 39 (2006), [http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw\\_011038.pdf](http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf).

<sup>25</sup> *Id.* at 35.



We have carefully reviewed the facts and the Hearing Panel's discussion of sanctions. We agree with the Hearing Panel's imposition of sanctions—i.e., a bar in all capacities for the failure to respond truthfully and, absent the bar, a two-year suspension and \$25,000 fine for forgery. However, our analysis differs somewhat from that of the Hearing Panel.<sup>26</sup>

With regard to the sanctions for forgery, we agree with the Hearing Panel that the nature of the forged documents is an aggravating factor in this case. Masceri forged documents that included options for investments in sub-accounts, consents to be tested for HIV, acknowledgments of receipt of risk disclosures and illustrative materials and a W-9 federal tax form. We also agree that forgery is an extremely serious violation and that Masceri did not have express or implied authority to sign his customers' names.

We disagree, however, with some of the Hearing Panel's findings of mitigation. In light of Masceri's forgery of multiple documents on multiple occasions, we cannot agree with the Hearing Panel's conclusion that his actions appeared aberrant and not part of a pattern of misconduct. We also reject as mitigating the Hearing Panel's prediction that "with his panic attacks under control through medication, Masceri is unlikely to engage in future misconduct." The Hearing Panel's prediction is internally inconsistent with other parts of the Hearing Panel's decision and not supported by the record evidence. As the Hearing Panel emphasized in another part of its decision, Masceri's "panic attacks were under control through medication" when he first made untruthful statements to Enforcement about his customers' signatures.

Thus, we concur with the Hearing Panel's conclusion that absent the bar for his untruthful response to NASD's request for information, Masceri should be suspended for two years and fined \$25,000 for the forgery violation. We find that a sanction less than a bar for this violation is warranted because Masceri's main motivation for forging the names likely was not a desire to receive \$700 in commissions.

As to the sanctions for Masceri's untruthful responses, we agree with the Hearing Panel that a bar in all capacities is appropriate. We find Masceri's untruthful responses to Enforcement's questions about having signed his customers' names without their permission to be egregious, and we do not find any facts in mitigation. Masceri, an experienced securities and insurance professional, forged crucial documents and then attempted to affirmatively mislead Enforcement. Moreover, we find troubling Mr. SY's testimony that Masceri offered to settle a lawsuit in exchange for an affidavit by Mr. SY that "contained a lot of untruths." We thus determine that the standard sanction of a bar is appropriate. See *Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, \*15-16 (April 1, 2005) (emphasizing that untruthful

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<sup>26</sup> We note that, on *de novo* review, we owe "no special deference" to hearing panel "inferences and conclusions that do not hinge upon findings of credibility." *Local 259, United Auto., Aerospace & Agric. Implement Workers v. NLRB*, 776 F.2d 23, 27 (2d Cir. 1985). We may make our "own findings based on a review of all material in the record." *Keith Springer*, 55 S.E.C. 839, 841 (2002).

responses “are more damaging than a refusal to respond to a request for information since they mislead NASD and can conceal wrongdoing”), *aff’d*, 444 F.3d 1208 (10th Cir. 2006).

## V. CONCLUSION

We affirm the Hearing Panel’s findings of violations and imposition of sanctions. A preponderance of the evidence proves that Masceri forged his customers’ signatures and then lied about his actions to Enforcement. We also uphold the Hearing Panel’s imposition of a bar in all capacities on Masceri for his untruthful response to Enforcement’s Rule 8210 request for information.<sup>27</sup> In addition, we concur with the Hearing Panel that, but for the bar in relation to his untruthful response, Masceri should be suspended for two years and fined \$25,000 for forging his customers’ signatures. Finally, we uphold the Hearing Panel’s imposition of \$7,190.92 in hearing costs and we impose an additional \$1,450.17 for the costs of this appeal.<sup>28</sup>

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President  
and Corporate Secretary

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<sup>27</sup> The bar is effective as of the date of this decision.

<sup>28</sup> We have considered and reject without discussion all other arguments advanced by Masceri and Enforcement.