

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

Respondent 1,

Respondent 2,

Respondents.

Disciplinary Proceeding
No. CAF040020

Hearing Officer – AWH

ORDER RULING ON PRE-HEARING MOTIONS

1. On October 12, 2004, the Department of Enforcement filed a motion to preclude Respondent 1 (“Respondent”) from introducing any exhibits in support of his defense, on the grounds of his failure to identify and produce proposed exhibits as ordered by the Hearing Officer. On October 21, 2004, Respondent 1 responded that he does not intend to offer any exhibits other than those proposed by Enforcement, except for purposes of impeachment or to refresh recollection. Accordingly, Respondent requests that the motion be denied as moot.

In his Witness and Document List, dated October 1, 2004, Respondent stated that he “intends to introduce as exhibits those documents that have previously been supplied by the Department of Enforcement or which should have been supplied by the Department of Enforcement but were not.” That statement of intention is broader than the one made in his October 21 response to the motion to preclude. While the Hearing Officer takes Respondent at his word in the October 21 response, because of his October 1 Document List, Enforcement has shown good cause for granting its motion.

2. Respondent filed a motion to preclude SK as a witness, or, in the alternative, to postpone the hearing to give him time to investigate and prepare for SK's testimony. Respondent notes that Enforcement failed to include SK's name on its witness list on the date that list was due to be filed. Enforcement opposes the motion, noting that it did not receive permission from the U.S. Attorney's Office for SK to testify until shortly before Enforcement filed an amended witness list on October 12 to include SK. Enforcement states that SK pleaded guilty to a criminal charge arising out of some of the same circumstances in this case, and that he has agreed to cooperate with the U.S. Attorney's Office.

The pleadings, including Enforcement's Motion for Summary Disposition, indicate that SK's relationship to Respondent and the circumstances surrounding his involvement in the subjects of this proceeding are well known to Respondent. Accordingly, there should be no prejudice to Respondent to allow SK to testify in this matter. The motion to preclude his testimony is denied. However, should SK's testimony reveal facts unknown and a surprise to Respondent, he may move, for good cause shown, for such relief as will give him adequate opportunity to investigate and respond to those facts.

3. Respondent filed a motion for witness statements for seven of Enforcement's proposed witnesses. Enforcement responded that it has produced all such statements in its possession. Accordingly, the motion is denied as moot. However, should any such statements come into the possession of Enforcement, it is under a continuing obligation, pursuant to Rule 9253, to produce those statements to Respondent.

4. Respondent filed objections to, and a motion to exclude, Enforcement's proposed witnesses and exhibits. Enforcement requested leave to late file its response to the objections, stating that it failed to respond timely – two days earlier – due to a clerical error. The request for leave to make a late filing is granted because there was no intent not to comply with the filing deadline, there is no prejudice to Respondent, and fundamental fairness requires consideration of a response to the objections.

A. Respondent objects to any testimony by Paul Taberner, an attorney within the Department of Enforcement, on the grounds that he is an advocate for Enforcement, he has no personal knowledge of facts to which he is presumed to testify, his testimony would be hearsay, and there is no showing that the investigator who conducted the investigation is unavailable to testify. The objection is overruled. Taberner does not represent Enforcement in this matter and, therefore, is not precluded from testifying on grounds that there is a conflict where an advocate also testifies in the same case. Documents in the record demonstrate that he was a direct participant in the investigation, and Enforcement represents that another examiner involved in this case is no longer employed by NASD. Finally, to the extent Taberner may offers hearsay evidence, it is admissible in these proceedings; the weight to be accorded to it is within the sound discretion of the Hearing Panel.

B. Respondent objects to 24 documents designated by Enforcement¹ on the bases of six grounds. The objections are overruled, except to the extent that they may be raised anew at the hearing, consistent with the rulings that follow:

¹ Exhibits 1-12, 15-21, 24-27, and 29.

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1. Objections as to authenticity.

Authentication is a condition precedent to admissibility and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *See* FED. R. EVID. 901. The Order requiring pre-hearing designation of documents sought to be admitted at the hearing does not contemplate the receipt of authentication evidence prior to the hearing. That evidence is appropriately offered at the hearing itself. Accordingly, to the extent any proffered document requires authentication, Respondent may, at the hearing, object to the document on the basis that such evidence is not offered or is insufficient.

2. Objections to hearsay.

Hearsay is not a basis for an objection to the admissibility of evidence in NASD proceedings. *See, e.g., Dep't. of Enforcement v. Puma*, No. C10000122, 203 NASD Discip. LEXIS 22 (NAC Aug. 11, 2003). However, the weight to be given it is a matter that may be argued to the Hearing Panel.

3. Objections as to the date a document was prepared, downloaded, or printed.

Where a document purports to represent historical information, the date that document was prepared, downloaded, or printed does not affect the relevance or probative value of the information contained in the document. Respondent may introduce any extrinsic evidence purporting to show that the content of the document is not accurate or what it purports to be.

4. Objections as to the completeness of documents.

Where a portion of a writing or a recorded statement is introduced, a party may not properly object to it on the basis that it is incomplete. The objection party may,

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however, require the introduction of any other part of the writing or recorded statement which ought in fairness be considered contemporaneously with it. *See* FED. R. EVID. 106.

5. Objections as to handwritten notations on documents.

To the extent that Enforcement is not offering into evidence such handwritten notations, the Hearing Panel will not consider them. Should Enforcement rely on any such notations, the Hearing Officer will consider any objection to them at the hearing.

6. Objections as to legibility

Legibility is a question of fact to be determined by the Hearing Panel after consideration of the document itself and any other evidence that may be helpful to resolve the issue.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

Dated: October 28, 2004