

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET  
REGULATION

Complainant,

v.

RESPONDENT 1

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding  
No. CLG050021

Hearing Officer—Andrew H. Perkins

**ORDER PARTIALLY GRANTING THE COMPLAINANT'S  
MOTION TO DISQUALIFY EXPERT WITNESS**

Respondent 2 ("Respondent") designated Michael D. Wolk ("Wolk") as one of his proposed testifying witnesses. Wolk is the former Vice President and Chief Counsel of the Department of Market Regulation (the "Department"). Wolk was an attorney with the Department from 1991 until 2001. Wolk is currently a licensed attorney with the law firm of Foley & Lardner in Washington, D.C. focusing primarily on enforcement and regulatory issues involving broker-dealers and persons associated with broker-dealers.

On January 31, 2006, the Department moved to disqualify Wolk as a potential expert witness because his testimony in this proceeding might result in the disclosure of confidential information Wolk obtained through his employment at NASD. The Department notes that, as a condition of his employment with NASD, Wolk agreed that he would not disclose confidential and privileged information that he obtained as a result of his employment.

On February 16, 2006, the Hearing Officer issued an order requiring Respondent to file a summary of Wolk's expected testimony because the record was insufficient to rule on the Department's disqualification motion. Respondent filed the summary on February 28, 2006. In short, Respondent asserts that Wolk's direct testimony will not be based on any information that he learned about Respondent's former firm ("the Firm"), and that his anticipated testimony "will not relate to any of the topics of concern raised by the Department's motion."<sup>1</sup>

On March 9, 2006, the Department filed a Reply in further support of its motion. The Department disagrees with Respondent's contention that the topics of Wolk's proposed testimony do not substantially relate to the confidential information Wolk obtained at NASD. The Department argues that several of the areas Respondent identified directly relate to NASD reviews of the Firm in which Wolk participated as the Department's Chief Counsel. Hence, the Department contends that his testimony necessarily will result in a breach of confidential information.

## **Discussion**

### **I. Standard**

Because the Department's disqualification motion presents an issue of first impression in NASD disciplinary proceedings, it is appropriate to look to federal decisions for guidance. A federal court has the inherent power to disqualify an expert witness.<sup>2</sup> "This power derives from the court's 'judicial duty to protect the integrity of the legal process.'"<sup>3</sup> However, the instances of expert disqualification are rare, and,

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<sup>1</sup> Summary of Subject Matters at 3.

<sup>2</sup> *Grioli v. Delta Int'l Mach. Corp.*, 395 F. Supp. 2d 11, 13 (E.D.N.Y. 2005) citing *Koch Ref. Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1181 (5th Cir. 1996).

<sup>3</sup> *Ambassador Group*, 879 F. Supp. at 241 (quoting *Wang Labs, Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991)).

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except where experts have “switched sides” during the litigation, courts have not developed the kind of bright line rules for expert disqualification as there are in attorney conflict cases.<sup>4</sup> Federal courts have treated expert disqualification as a drastic measure which courts should hesitate to impose except when absolutely necessary.<sup>5</sup> Courts have reasoned that “[t]his is so, in part, because sometimes disqualification motions are brought for purely strategic reasons.”<sup>6</sup>

Federal courts have employed a three-part test to determine whether an expert that had a prior relationship with an adverse party should be disqualified: (1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to the expert; and (3) does the public have an interest in allowing or not allowing the expert to testify.<sup>7</sup> “The policy objectives favoring disqualification include preventing conflicts of interest and maintaining the integrity of the judicial process.”<sup>8</sup> Policies disfavoring disqualification include “ensuring that parties have access to expert witnesses who possess specialized knowledge and allowing experts to pursue their professional calling.”<sup>9</sup> The burden is on the party seeking disqualification to establish that it is necessary.<sup>10</sup>

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<sup>4</sup> *Grioli*, 395 F. Supp. 2d at 13 (citation omitted). Where a consulting expert is hired by one party and receives confidential information, courts generally will not permit the expert to switch sides and work for the opposing party in the same litigation. *See Koch*, 85 F.3d at 1181.

<sup>5</sup> *Hewlett Packard Co. v. EMC Corp.*, 330 F. Supp.2d 1087, 1092 (N.D. Cal. 2004).

<sup>6</sup> *Grant Thornton v. FDIC*, 297 F.Supp.2d 880, 882 (S.D. W.Va. 2004).

<sup>7</sup> *Grioli*, 395 F. Supp. 2d at 13-14 (citation omitted).

<sup>8</sup> *English Feedlot, Inc. v. Norden Lab., Inc.*, 833 F. Supp. 1498, 1504 (D. Col.1993).

<sup>9</sup> *Id.* at 1504-05.

<sup>10</sup> *Grioli*, 395 F. Supp. 2d at 12.

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## **II. Existence of Confidential Relationship**

There is no question (and indeed Respondent does not dispute) that the Department has met the first element. Wolk worked at NASD for 10 years during which time he unquestionably had access to confidential information. Thus, NASD had a "confidential relationship" with Wolk. In fact, Wolk acknowledged this confidential relationship through his agreement to be bound by NASD's Code of Conduct, which prohibits the disclosure of non-public information obtained in the course of NASD's business.<sup>11</sup>

## **III. Disclosure of Confidential Information Relevant to Proceeding**

As both Parties point out, the critical question then is whether Wolk received confidential information that is relevant to the present case. The Department has demonstrated through the Declaration of Richard G. Wallace, Vice President and Chief Counsel for the Department, that Wolk did obtain such confidential information. In summary, Wolk participated in various examinations of the Firm concerning potential regulatory violations between 1997 and 2001, including reviews of the Firm's trading activities and written supervisory procedures. Indeed, Wolk participated directly in a formal disciplinary action that charged the Firm with supervisory violations. Having participated in such reviews and analyses, Wolk cannot switch sides and offer testimony about those same subjects in this proceeding without divulging NASD confidential information. His use of that confidential information would give the Respondents an unfair advantage in this case. Accordingly, Wolk shall not be permitted to testify regarding the Firm's supervisory system and procedures or any of the analytic methods the Department used to examine the Firm.

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<sup>11</sup> *Cf. Eastman Kodak Co. v. Agfa-Gevaert, N.V.*, 2003 U.S. Dist. LEXIS 23260, at \*4 (W.D.N.Y. 2003) (confidential relationship found where employee had access to confidential information during 18-year career at company and the terms of employment agreement prohibited disclosure of classified company confidential information).

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The summary of subject matters upon which Wolk is expected to testify demonstrates that his testimony is likely to involve NASD confidential information. For example, Respondent has proposed that Wolk may testify on “the adequacy of [the Firm]’s supervisory and compliance oversight of its institutional sales desk in 1999 and 2000” and on “[Respondent]’s exercise and delegation of supervisory responsibilities in 1999 and 2000.” These topics overlap with the work Wolk performed as the Department’s Chief Counsel in those years concerning the Firm’s supervisory procedures.

On the other hand, many of the topics Respondent wants to address through Wolk do not involve NASD confidential information. For example, Respondent indicates in the summary he filed that Wolk may be asked to testify concerning market conditions in the NASDAQ market in 1999 and 2000 and standard industry practices and procedures and governing rules regarding supervision and compliance oversight of institutional trading. By definition, such information is not confidential. To the contrary, Respondent proposes that Wolk testify regarding industry accepted and known standards that apply to the issues in this case. Accordingly, the extreme remedy of complete disqualification is not appropriate. To the extent that Wolk’s testimony is relevant and helpful, he should not be disqualified simply because he gained some or all of his general industry expertise while employed by NASD.

#### **IV. Protective Order**

For the foregoing reasons, the Department’s motion is granted in part and denied in part. If otherwise permitted to testify,<sup>12</sup> Wolk shall be precluded from testifying regarding the Firm’s supervisory practices and procedures, including Respondent’s delegation of supervisory responsibilities, and the operation of its institutional sales

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<sup>12</sup> Respondent has not filed Wolk’s report. Therefore, the Hearing Officer is not able to determine at this point if his proposed testimony is otherwise admissible.

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desk. The Department is granted leave to renew its motion if Wolk's expert report discusses or is based on NASD confidential information.

**IT IS SO ORDERED.**

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Andrew H. Perkins  
Hearing Officer

March 17, 2006