

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-16 (CAF020053).

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

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| DEPARTMENT OF ENFORCEMENT, | : | |
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| Complainant, | : | Disciplinary Proceeding |
| | : | No. CAF020053 |
| v. | : | |
| | : | |
| Respondent 1 | : | Hearing Officer - AWH |
| | : | |
| | : | |
| Respondent 2 | : | |
| | : | |
| | : | |
| Respondents. | : | |

ORDER ON RESPONDENT'S EXPERT WITNESS DESIGNATION

On May 9, 2003, Respondents designated LK, Esq. as the expert witness they propose to call at the hearing in this matter. According to Respondents' Expert Witness Disclosure, Ms. LK is expected to testify: (1) about the "allocation of responsibilities within a retail brokerage firm among registered representatives, branch sales and operations managers, compliance and legal personnel for determining whether a stock certificate is 'freely tradable,'" and (2) "that respondents fulfilled their duties as registered representatives in such a situation under the facts of this case."

On May 30, 2003, the Department of Enforcement ("Complainant") submitted its Opposition to Respondents' expert witness designation, seeking to exclude the expert's testimony on the grounds that the Hearing Panel has its own relevant expertise, that the qualifications of the designated expert do not entitle her proposed testimony to be given any weight, and that it is improper to tender expert testimony on an ultimate issue of law.

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The use of expert testimony is not ordinarily necessary in NASD proceedings because hearing panels have their own relevant expertise. The Securities and Exchange Commission has recognized that expert testimony may be excluded when the tribunal has such expertise. *Pagel, Inc.*, Exch. Act Rel. No. 22280, 1985 SEC LEXIS 989 (August 1, 1985), *aff'd sub nom, Pagel, Inc. v. SEC*, 803 F.2d 942 (8th Cir. 1986).¹

Although the formal rules of evidence do not apply in a proceeding brought under the Rule 9000 Series, the Hearing Officer notes that the Federal Rules of Evidence and relevant case law provide that the party seeking to admit expert testimony bears the burden of demonstrating that such testimony will assist the finder of fact in technical areas outside the fact finder's area of expertise. *See In re Diet Drugs Products Liability Litigation*, 2000 U.S. Dist. LEXIS 9037 (E.D. Pa. 2000) at *17, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10. Moreover, expert testimony is usually only received when the witness has some scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or determine the fact in issue. *See, e.g.*, F.R.E. 702.

Here, the charges against Respondents do not involve unique or complex issues that would necessitate the use of an expert. Ms. LK's proposed testimony appears only to relate to the first cause of the Complaint that requires the Hearing Panel to determine only whether the Respondents sold their clients unregistered securities that were not

¹ In affirming the Commission's decision, the Eight Circuit Court of Appeals stated that: "[t]here is no reason to believe that the expert's testimony would have added anything to this administrative adjudication directed and decided by a person already knowledgeable in securities regulation matters." *Id.* at 947. *See also, Atlanta-One, Inc.*, Exch. Act Rel. No. 35455, 1995 SEC LEXIS 594 (Mar. 8, 1995)(Expert testimony denied on basis of panel's familiarity with securities industry); *Meyer Blinder, et al.*, Exch. Act Rel. No. 31095, 1992 SEC LEXIS 2020 (Aug. 26, 1992) (NASD itself is an expert body whose "business judgment" may be brought to bear in reaching its decision.); *DBCC No.3 v. Clinton Hugh Holland, Jr.*, 1995 NASD Discip. LEXIS 247 (NBCC February 17, 1995) (expert testimony should relate to esoteric or uncommon products or practices).

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subject to an exemption from registration. That determination is within the expertise of the Hearing Panel and, accordingly, may be reached without the assistance of expert testimony. Her anticipated testimony, that Respondents "fulfilled their duties as registered representatives in such a situation under the facts of this case," is also an issue that is properly left to the Hearing Panel for determination on the basis of its own expertise.

The Complainant also questions the qualifications of Ms. LK as an "expert" for the purposes of NASD disciplinary proceedings. In a recent opinion, the NAC agreed with the Hearing Panel's assessment not to give any weight to an "expert" witness' testimony when, *inter alia*, the expert had performed no studies on the issue and had never been published. *Dep't. of Enforcement v. Dane S. Faber*, No. CAF010009, fn 14 (NAC May 7, 2003), *appeal docketed*, No. 3-11156 (S.E.C. June 9, 2003). Ms. LK has not published any books or articles nor has she conducted any studies on the issues upon which she has been asked to testify in this case. Furthermore, her experience in the securities industry does not appear to be materially superior to that of the industry panelists who adjudicate NASD disciplinary cases on a regular basis. Accordingly, the Hearing Panel would be unable to give any weight to her anticipated testimony.

Respondents have provided no basis for the admission of expert testimony in this proceeding, and the Hearing Officer concludes that the anticipated testimony of Ms. LK

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will not be helpful to the Hearing Panel in its resolution of the issues in the case.

Accordingly, Ms. LK will not be permitted to testify as an expert in this proceeding.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

Dated: Washington, DC
July 7, 2003