

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. CAF040079

Hearing Officer – DRP

**ORDER DENYING RESPONDENT'S MOTION TO PRECLUDE EVIDENCE AND
REQUIRING ENFORCEMENT TO FILE A DECLARATION**

At the pre-hearing conference (Conference) held on May 10, 2007, Respondent sought an order precluding Enforcement from cross-examining [Respondent's] brokers using transcripts of on-the-record interviews conducted by the Texas State Securities Board (TSSB) in October and November 2005, a year after the Complaint was filed. Respondent asserts that Enforcement was obligated to turn over the transcripts well in advance of the hearing and that its failure to do so warrants an order precluding Enforcement's use of the transcripts at the hearing for impeachment purposes.

Respondent contends that Enforcement was obligated to turn over the transcripts pursuant to: 1) an agreement by Enforcement to produce documents obtained after the filing of the Complaint, memorialized in correspondence dated March 25, 2005; 2) Enforcement's obligation to provide exculpatory evidence under the *Brady* doctrine; and 3) fundamental fairness, which Respondent believes requires Enforcement to supply all prior statements by

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Respondent's employees.¹ For the reasons stated below, Respondent's motion to preclude Enforcement from using the transcripts for cross-examination is hereby denied.

The Hearing Officer has reviewed the relevant correspondence, which the parties provided after the Conference. Contrary to Respondent's assertion, Enforcement only agreed to provide copies of customer questionnaires, declarations and related correspondence that were produced or obtained after the filing of the Complaint. There was no agreement regarding any other documents or categories of documents. Furthermore, NASD Procedural Rules do not require Enforcement to provide copies of the transcripts at issue, which were created and obtained post-Complaint.

Moreover, transcripts of prior testimony given by Respondent's employees regarding the issues in this hearing do not constitute exculpatory evidence that Enforcement was required to provide pursuant to its obligation under NASD Rule 9251(b)(2) or Brady v. Maryland, 373 US 83 (1963). Respondent was aware of the interviews conducted by the TSSB, and in fact, attended some, if not all, of the interviews. Furthermore, Respondent is calling these employees to testify in support of its defense; thus, their prior testimony would not be admissible in this proceeding.

Finally, the prosecution's obligation in a criminal proceeding to provide a defendant with evidence of his prior statements to governmental authorities arises from his Fifth and Sixth Amendment right to move for suppression of any statement obtained involuntarily or in abrogation of his right to counsel. There are no similar rights or obligations in a civil proceeding, though in some circumstances, evidence of a defendant's prior statements may be

¹ At the Conference, Respondent advanced another theory in support of this motion, namely that Enforcement was required to provide copies of these transcripts pursuant to *People v. Rosario*, 9 NY2d 286 (1961). After the Hearing Officer noted that in the context of a criminal proceeding, *Rosario* material refers to the prosecution's obligation to turn over to the defense prior statements made by *prosecution* witnesses, Respondent conceded that *Rosario* was inapplicable to the instant situation.

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obtained in discovery. However, NASD's discovery rules are much more limited in scope, and under the rules, Enforcement was not obligated to provide the transcripts at issue, which were obtained post-Complaint.

Finally, Respondent requests a hearing regarding its allegations that Enforcement circumvented NASD's Procedural Rules regarding post-Complaint discovery by allegedly providing information and documents to the TSSB, possibly supplying questions to pose during interviews of Respondent's employees (which Respondent asserts were only of use to NASD), and requesting copies of the transcripts without disclosure to Respondent.

Respondent's request for a hearing based on these bare allegations is denied. Even if true, providing information and documents to TSSB and requesting copies of transcripts does not violate any NASD rule. To establish a record, Counsel for Enforcement is hereby ordered to file a declaration describing what steps, if any, NASD took to assist the TSSB, particularly with respect to conducting interviews of Respondent's brokers. The declaration should be filed with the Hearing Officer when the hearing resumes at 9:30 a.m. on May 14, 2007.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: May 11, 2007
Washington, DC