

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C07020067
v.	:	
	:	Hearing Officer - AWH
	:	
	:	
	:	
Respondent.	:	

ORDER GRANTING MOTION IN LIMINE

On January 29, 2003, Complainant filed a Motion in Limine seeking a ruling on the admissibility of two tape recordings and a transcript of one of those recordings. The Motion was supported by the affidavit of staff examiner David Ogle. On February 6, 2003, Respondent filed his reply to the Motion, seeking to have the Motion denied.

Respondent was employed by an NASD member firm that was the first member firm to become subject to NASD Conduct Rule 3010(b)(2), the "Taping Rule." Pertinent to this case, the member recorded 16 hours of conversations over the period March 25-29, 1999. Those conversations were recorded on standard 120-minute cassette tapes on specialized tape machines that move at 1/8th speed, with 8 hours of conversation taped on each side of the cassette tape. As noted in the affidavit supporting the Motion, examiner David Ogle copied the original tape on a blank 120-minute cassette tape while he was at the offices of the member firm. He used a standard speed dual deck cassette recorder provided by the member. The copy of the tape (the "original speed duplicate") is playable on a specialized 1/8th speed tape player. Because locating specific conversations

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on the original speed duplicate would involve a time-consuming manual trial and error methodology, examiner Ogle also made copies of portions of those duplicates at standard speed (the "standard speed duplicates"). The standard speed duplicates are indexed so that specific conversations may be located with relative ease. The staff arranged to have the standard speed duplicates transcribed. Examiner Ogle reviewed the transcriptions, made certain corrections, and completed certain blanks left by the transcription service.

Respondent has not been provided with a transcript of the original tape or a transcript of the original speed duplicate. Indeed, there is no evidence or assertion that a transcription of anything other than the standard speed duplicate has been made. Moreover, Respondent has not been provided with the original tape for inspection. Accordingly, Respondent objects to the admission of the standard speed duplicate tape and the transcription of that tape.

Under Federal Rule of Evidence 1003,¹ a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances, it would be unfair to admit the duplicate in lieu of the original. Respondent raises "the possibility of tampering and the lack of objective proof regarding the proper chain of ownership" with respect to the original tape, its handling, and the procedures followed in making the original speed and standard speed duplicates. However, Respondent raises no "genuine question" as to the authenticity of the original which was required to be created and maintained under procedures to ensure compliance with all applicable securities laws and regulations, as well as NASD rules. Because the

¹ Although the Federal Rules of Evidence do not apply to NASD Disciplinary Proceedings, they are customarily referred to for guidance.

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affidavit provides information with respect to the process² by which the duplicates were made, and because the examiner can be made available for cross-examination on that process, there has been no showing why admission of the original speed duplicate would be unfair, under the circumstances.

Complainant seeks to admit into evidence the standard speed duplicate as a summary exhibit, and Respondent objects to its admission on that ground, arguing that 16 hours of conversations should not be considered voluminous enough to trigger the necessity for a summary exhibit. However, the standard speed duplicate is not a summary exhibit; it contains selected parts of the original speed duplicate. Accordingly, Respondent will have the right to introduce any other part of the original speed duplicate "which in fairness ought to be considered contemporaneously."³

Finally, to the extent that Respondent finds the transcription of the tape, which will be offered only as an aid in the Hearing Panel's review of the standard speed duplicate, to be inaccurate, counsel may point out such inaccuracies to the Hearing Panel. The Hearing Panel will make findings of fact based on its review of the standard speed duplicate, not on its transcription.

Good cause having been shown, Complainant's Motion in Limine is hereby *granted*.

SO ORDERED.

Alan W. Heifetz
Hearing Officer

Dated: Washington, DC
February 7, 2003

² See Federal Rule of Evidence 901(b)(9).

³ See Federal Rule of Evidence 106.