

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-17 (CAF040070).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent 1 Respondent 2 Respondent 3 And Respondent 4 Respondents.	Disciplinary Proceeding No. CAF040070 Hearing Officer – DRP
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**ORDER DENYING RESPONDENTS' MOTION FOR LEAVE
TO INTRODUCE EXPERT TESTIMONY**

I. Introduction

This proceeding arises from Respondents' communications with the public between May 2001 and May 2003. Enforcement alleges that Respondents' advertising and marketing vehicles, including investment seminars, radio and print advertisements, and a website, included numerous statements and claims that were misleading, exaggerated, unwarranted, or false, or omitted information that caused statements and claims to be misleading, exaggerated, unwarranted or false. In so doing, Enforcement charges Respondents with violating NASD Conduct Rules 2210 and 2110. Respondents contend that the communications at issue were accurate and balanced. A disciplinary hearing is scheduled to commence on July 19, 2005.

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On April 11, 2005, Respondents filed a motion seeking leave to introduce expert testimony of an unnamed "investment management professional/financial analyst," who would "provide historical context to the [firm's] advertisements in question" and assist the Hearing Panel "in determining the fairness, accuracy, and balance of those advertisements." Respondents assert that it would be helpful to the Panel to consider an expert opinion regarding statements contained in Respondents' advertisements.

Specifically, Respondents expect to elicit expert testimony to evidence factual support for the following propositions: that during the stock market "bubble," many investors were over-concentrated in speculative securities; that counseling diversification was an appropriate philosophy for the firm's customers; that regularly reviewing asset allocations in conjunction with a customer's investment objectives is sound investment management; and that recommending customers invest in fixed-income securities sold by the firm was appropriate.

On April 18, 2005, Enforcement filed its opposition to the motion, noting that expert testimony is generally neither offered nor necessary in NASD disciplinary matters unless novel issues, or new, complex, or unusual securities products are involved, because Hearing Panels include experienced securities professionals. Enforcement further argues that Respondents, in failing to identify their prospective expert witness, cannot demonstrate that he or she possesses expertise or experience that the Hearing Panelists lack. On April 19, 2005, Respondents filed a reply brief.¹

For the reasons discussed below, Respondents' motion is denied.

¹ On December 15, 2004, the Hearing Officer issued a Scheduling Order, which states that "no reply briefs may be filed without leave and a showing of good cause." Nevertheless, Respondents filed a motion for leave to reply, which included a two-page substantive response to Enforcement's opposition. The Hearing Officer reviewed the filing in this instance, but Respondents are cautioned that any future filings that fail to comply with the Scheduling Order and/or NASD Rules will be rejected.

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II. Discussion

To establish that expert testimony should be permitted, Respondents must show that the proposed expert has experience or expertise that the Hearing Panel lacks. *Cf. Dist. Business Conduct Comm. v. Holland*, No. C3B930015, 1995 NASD Discip. LEXIS 247 (NBCC Feb. 17, 1995). Because NASD Hearing Panels include individuals from the securities industry with substantial relevant expertise, expert testimony is not ordinarily necessary in NASD proceedings. *See Meyer Blinder*, Exch. Act Rel. No. 31095, 1992 SEC LEXIS 2019 (Aug. 26, 1992) (NASD is an expert body whose "businessman's judgment" may be brought to bear in reaching its decision); *Pagel, Inc.*, Exch. Act Rel. No. 22280, 1985 SEC LEXIS 988 (Aug. 1, 1985), *aff'd*, 803 F.2d 942 (8th Cir. 1986).

Though Respondents failed to name the proposed expert or provide a description of his or her training and qualifications, the testimony Respondents seek to elicit involves general investment concepts that are well within the expertise of any NASD Hearing Panel. Moreover, Enforcement does not take issue with the general concepts Respondents seek to address (e.g., regular review of asset allocations in connection with a customer's investment objectives is sound investment management). The proposed expert testimony would not be helpful, and is thus unnecessary.

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Under Rule 9263(a), which permits the Hearing Officer to “exclude all evidence that is irrelevant, immaterial, unduly repetitious or unduly prejudicial,” Respondents’ motion for leave to offer expert testimony is denied.²

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: April 21, 2005
Washington, DC

² The Scheduling Order required all pre-hearing motions, including motions for leave to introduce expert testimony, to be filed by April 11, 2005. Respondents were required to name their proposed expert in this motion, notwithstanding the June 3, 2005 deadline for exchanging and filing a list of proposed witnesses, and were so informed by the Case Administrator.