

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	
Complainant	
v.	Disciplinary Proceeding No. C3A040045
Respondent.	Hearing Officer – DMF

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL  
AND MOTION PURSUANT TO RULE 9252**

On May 13, 2005, Respondent filed a motion to compel the Department of Enforcement to produce certain documents, and on May 17 Respondent filed a motion pursuant to Rule 9252 requesting that NASD invoke Rule 8210 to obtain certain documents and testimony. Enforcement filed an opposition to the motion to compel on May 25 and an opposition to the Rule 9252 motion on May 31. On June 10, Respondent filed motions for leave to file reply memoranda in support of each motion, with the proposed replies attached, which motions are hereby granted.

1. Motion to Compel

After Enforcement made its document production pursuant to Rule 9251(a)(1), Respondent questioned whether the production was complete. After some communications between the parties, Enforcement gave Respondent a list of documents it had withheld from production. Respondent requested certain of the documents identified on the list, on the ground that they might contain material exculpatory information or impeachment materials, or were not exempt from production pursuant to Rule 9251(b). Enforcement, although continuing to argue that all the documents on the list were properly withheld, provided some of the documents that

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

Respondent requested, but refused to provide the rest. Respondent then filed his motion to compel.

The documents at issue include: (1) staff notes of conversations with some of Respondent's customers; (2) information and documents provided by NASD's Boston Office relating to a Boston examination of Linsco Private Ledger Corp. (LPL), the NASD member with which Respondent was associated at the time of his alleged misconduct; and (3) communications between the Arizona Corporation Commission (ACC) and NASD staff. These include requests from the ACC for access to NASD information, NASD approvals for the requests and the documents that NASD provided to the ACC pursuant to the requests; NASD's access request to the ACC and material that the ACC provided to NASD pursuant to that request; and notes relating to discussions between NASD staff and ACC personnel.

Respondent argues that the withheld staff notes are not covered by Rule 9251(b)(1)(B), which exempts "an examination or inspection report, an internal memorandum, or other note or writing prepared by an Association employee that shall not be offered in evidence," because the notes "do not appear to be simply notes of thoughts the staff had," but rather "contemporaneously recorded notes of conversations staff had with various individuals."

Respondent also argues that "[w]hile the inspection report from the Boston Office (if one exists) may arguably be properly withheld, the underlying documents received from the Boston Office clearly must be provided to [Respondent]. The same is true for the documents that went to and from the Arizona Corporation Commission." In addition, Respondent argues that Enforcement should be required to disclose the materials because they "may contain information that is exculpatory and/or useful impeachment material."

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

Enforcement responds that the staff notes are exempt from production under Rule 9251(b)(1)(B) because they were prepared by NASD staff and will not be offered in evidence. Although the notes relate to conversations between NASD staff and customers, Enforcement argues that they do not fall within the scope of Rule 9253(a)(1). That provision allows a respondent to obtain "any statement of any person called or to be called as a witness by [Enforcement] that pertains, or is expected to pertain, to his or her direct testimony and which is '... a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement,' as that phrase is used in 18 U.S.C. § 3500(e)(2)." Enforcement contends that the withheld notes do not meet this description because "they are either not substantially verbatim recitals of oral statements; are not contemporaneously written statements; or do not relate to the witness' anticipated testimony." Instead, Enforcement states: "By and large the staff notes are fragmentary and generally lack continuity. Further, the notes were withheld because certain of the notes disclose the mental impressions, opinions, and personal beliefs of NASD staff; and the attorney notes are privileged work product."

With respect to the Boston Office documents, Enforcement states: "The Boston examinations are unrelated to the investigation that led to the current proceeding. Enforcement did not rely on the Boston examination documents in bringing its case against [Respondent], and Enforcement will not use any of these materials at the hearing." Enforcement argues that it "is not obligated to disclose documents from separate, unrelated investigations," and further that it is authorized to withhold the documents pursuant to Rule 9251(b)(1)(C), because their disclosure might compromise the "confidentiality of unrelated investigations by the Boston Office." Enforcement argues that the communications to and from the ACC are also exempt from disclosure under Rule 9251(b)(1)(C), because they were confidential communications between

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

NASD and a state regulatory organization regarding an investigation, examination or proceeding. Finally, Enforcement acknowledges that, pursuant to Rule 9251(b)(2), it is obliged to produce any otherwise exempt materials that contain "material exculpatory evidence," but Enforcement counsel represent that they have reviewed all of the withheld documents and that none contain such evidence.

In general, the Hearing Officer agrees with Enforcement's analysis of its disclosure obligations. Staff notes are exempt from production if they will not be offered in evidence, are not substantially verbatim recitals of oral statements made by a witness, and do not contain material exculpatory evidence. Similarly, the examination reports and other materials relating to the Boston Office's unrelated examinations of LPL are not within the scope of Rule 9251(a)(1)(a) and need not be produced unless they contain material exculpatory evidence, and the communications between NASD staff and the ACC are exempt from production under Rule 9251(b)(1)(C), once again unless they contain material exculpatory evidence.

In his reply memorandum, Respondent states that he "does not intend to suggest that [Enforcement] would intentionally withhold material exculpatory evidence," but argues that based on the history of Enforcement's production in this case he is "left to wonder, whether through inadvertence or through a different focus on which documents may be material, [Enforcement] is keeping from [Respondent] documents that would be helpful to his defense of his case." Respondent argues that, accordingly, Enforcement should be required to disclose the withheld documents or, at a minimum, submit them to the Hearing Officer for in camera review.

Respondent has not identified any circumstances that cast doubt on Enforcement's good faith or diligence in disclosing documents. On the contrary, the Hearing Officer finds no evidence that Enforcement withheld any documents that it was required to produce, or that it was

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

disingenuous about its production. The Hearing Officer notes that Enforcement gave Respondent an index of withheld documents, even though it was not required to do so under the rules; that Enforcement's letter of March 17, 2005, indicates that Enforcement provided, at its own expense, copies of computer disks and other materials that it had previously made available to Respondent; and that with its letter of March 31, 2005, Enforcement, "in the interest of cooperation and courtesy," provided copies of documents that were arguably exempt from production. These actions indicate that Enforcement has been diligent in fulfilling its disclosure responsibilities, and provide no basis for ordering Enforcement to disclose the remaining withheld documents, or to submit them for in camera review.

Respondent also asserts in his reply that the withheld documents are exculpatory, but he fails to articulate any specific basis for that claim. Indeed, he frankly acknowledges that he "can only surmise that some of the statements made by the customers, and recorded by [Enforcement] staff, may be beneficial." And although he suggests that "the documents from both the Boston examination and the ACC are material and likely to be exculpatory," he merely speculates about the types of information that might be found in those documents, suggesting that such information, if present, "may be highly relevant to [Respondent]'s defense." Speculation, however, is insufficient to support a requirement that Enforcement disclose the documents, or even submit them for in camera review, where Enforcement counsel have certified that they contain no material exculpatory evidence. See, e.g., OHO Order 03-20 (CAF030008) (Oct. 16, 2003) ("The Respondent has not made a plausible showing that the underlying documents contain facts that are both favorable and material to his defense.").

Respondent's motion to compel, therefore, is denied.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

2. Rule 9252 Motion

Rule 9252 provides a mechanism for a Respondent to request that NASD invoke Rule 8210 to obtain the production of documents or testimony from an individual or firm that is subject to NASD's jurisdiction. In his motion, Respondent requests that NASD invoke Rule 8210 to (1) ensure that two NASD staff members will be available to testify at the hearing regarding questionnaires that Enforcement used to obtain information from Respondent's customers during the investigation leading to this proceeding, and to obtain "any drafts of the questionnaire, e-mails or other correspondence related to the questionnaire, and/or other notes concerning the formulation of the questionnaire," and (2) obtain account statements for the period 1990 to the present from the past and present brokerage firms of the customers to whom Respondent allegedly made unsuitable recommendations. In addition, Respondent asks to "reserve the right to seek 8210 requests" to some 35 individuals who "have had conversations with the five customers referenced by [Enforcement] in its complaint" and who "may or may not be called by [Respondent] as witnesses." Respondent asks that he be allowed to seek to compel these individuals to testify, pursuant to Rule 8210, "at the time the parties exchange their witness and exhibit lists."

Enforcement opposes Respondent's first request on the ground that Rule 8210 cannot be invoked to obtain testimony or information from NASD employees. Enforcement correctly notes that Rule 8210 applies only to NASD members and associated persons, and that NASD employees are, therefore, not subject to the rule. It does not follow, however, that the Hearing Officer lacks any authority to compel the attendance and testimony of NASD employees who have relevant and material information. On the contrary, the Hearing Officer concludes that Rule 9235, which provides that the Hearing Officer "shall have authority to do all things

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

necessary and appropriate to discharge his or her duties,” would allow the Hearing Officer to order the appearance and testimony of an NASD employee if it appeared that such testimony was necessary, in a particular case, to “provide a fair procedure for the disciplining of members and persons associated with members,” as required by Section 15A(b)(7) of the Securities Exchange Act of 1934.

Respondent, however, has failed to demonstrate that it would be appropriate for the Hearing Officer to exercise that authority in this case. Respondent has not established good cause for enquiring into the questionnaire process. Although Respondent asserts that the staff's use of the questionnaire to gather information was “highly prejudicial,” and that “the manner in which the investigation was conducted is relevant to [Respondent]'s defense in this case,” the Hearing Officer disagrees. The questionnaire, on its face, appears perfectly proper, setting out a number of relevant questions in generally neutral language; the objections to various portions of the questionnaire set forth by Respondent in his motion are unpersuasive. Moreover, relevant evidence in this case will pertain to whether or not Respondent committed the violations alleged in the Complaint, not to how the investigation was conducted.

If the customers testify, Respondent will have an opportunity to cross-examine them; if Enforcement seeks to offer the questionnaires of customers who do not testify, Respondent will have an opportunity for appropriate cross-examination of the witnesses through whom the questionnaires are offered. No more is required to ensure that this proceeding is fair.

Respondent argues that the customers' prior and subsequent account statements are relevant because “it is essential to know the five customers' investing history and risk tolerances prior to becoming customers of [Respondent]'s and after they left [Respondent].” Enforcement responds that Respondent's request should be denied because he has not requested that the

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

customers' brokerage firms provide the information voluntarily, and because the information is not relevant and is unduly burdensome. In his reply, Respondent points out that, because of privacy concerns, the brokerage firms would not supply the account statements voluntarily, so it would make no sense to require that Respondent go through the formality of requesting them. The Hearing Officer agrees that Respondent need not request voluntary production of the account statements. Absent compulsory process, the firms would not and should not provide highly confidential customer financial information.

Rule 9252 requires a showing that "the information sought is relevant, material and non-cumulative," and also directs the Hearing Officer to consider "whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified." Enforcement argues that the customers' prior and subsequent investing history is not relevant to whether Respondent's recommendations were suitable, citing various NASD and SEC decisions, while Respondent argues Rule 2310 makes a customer's investment objectives and "other information used or considered to be reasonable by such ... registered representative in making recommendations to the customer" relevant to a suitability evaluation.

The issue under Rule 2310(a) is whether Respondent had "reasonable grounds for believing that the recommendation [was] suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other securities holdings and as to his financial situation and needs." The customers' prior investing experience could be relevant to a resolution of this issue only if the customers provided that information to Respondent at or before the time he made recommendations and the information shed light on the factors that Respondent was required to consider – *i.e.*, their securities holdings, financial situation and needs. Thus, at most,



**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

account statements for the periods contemporaneous with the transactions that are the subject of this proceeding would be relevant if they confirmed information that the customers gave Respondent; statements from as much as 10 years prior to the transactions at issue, account statements evidencing securities holdings that were not disclosed to Respondent and account statements showing the customers' activities after the transactions in question would plainly not be relevant to whether Respondent had a reasonable basis for the recommendations he made.

The language Respondent cites is found in Rule 2310(b) and describes the obligation of a member firm to make reasonable efforts to obtain from its customers information relevant to a suitability determination. Once again, the information described in the rule is relevant to this proceeding only insofar as it was conveyed to Respondent, and, at most, contemporaneous account statements might confirm the accuracy of a customer's financial status, tax status, investment objectives or other information as communicated to Respondent at or before the transactions at issue. On the other hand, account statements from prior or subsequent periods, or holdings that were not communicated to Respondent could not support the reasonableness of his recommendations.

Moreover, the Rule 8210 requests that Respondent seeks would be highly burdensome for the member firms that would be required to search for and provide the customer account statements, and oppressive to the customers, whose confidential financial information would be disclosed. Given the, at best, limited relevance of this information – insofar as it confirmed information that the customers communicated to Respondent – this burden on the firms and intrusion into the financial privacy of the customers is unwarranted.

Enforcement opposes Respondent's request that he be allowed to reserve the right to seek Rule 8210 requests for individuals who he may or may not wish to call as witnesses at the

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-28 (C3A040045).**

hearing. Enforcement argues that Respondent has not made the required showing under Rule 9252 that the witnesses' testimony would be relevant, material and non-cumulative, and that he is unable to obtain their testimony voluntarily. Respondent answers that, at present, he is merely seeking to preserve his right to file a Rule 9252 request as to these individuals at a later date, when he has decided whether he wishes to call some or all of them as witnesses. Thus, in essence Respondent is seeking a limited extension of the deadline for filing Rule 9252 motions under the stipulated pre-hearing schedule.

The Hearing Officer will grant a limited extension of the deadline for Respondent to file a Rule 9252 motion as to these individuals. To ensure sufficient time to consider any such motion, Respondent may file the motion on or before July 22, 2005, and Enforcement may file its response on or before August 5, 2005. Any such motion must meet the requirements of Rule 9252, and in particular must demonstrate that the expected testimony of each witness would be relevant, material and non-cumulative; that Respondent has attempted in good faith, but unsuccessfully, to obtain the testimony through other means; and that each witness is subject to NASD's jurisdiction. In all other respects, Respondent's Rule 9252 motion is denied.

**SO ORDERED.**

---

David M. FitzGerald  
Hearing Officer

Dated: June 23, 2005