

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-42 (CE3050003).

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

Respondent.

Disciplinary Proceeding  
No. CE3050003

Hearing Officer – DMF

**ORDER DEFERRING RULING ON JOINT MOTION  
FOR LEAVE TO OFFER EXPERT TESTIMONY**

The parties have filed a joint motion for leave to offer expert testimony at the hearing in this matter. The Department of Enforcement proposes to call one expert witness, while Respondent has identified two proposed experts.

NASD Rule 9263(a) gives the Hearing Officer authority to “exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.” This includes the authority to allow or to preclude expert testimony. Expert testimony is often excluded in NASD proceedings because the Hearing Panels include individuals who have substantial relevant specialized knowledge themselves. See Pagel, Inc., Exchange Act Release No. 22,280, 33 S.E.C. Docket 1003 (Aug. 1, 1985), aff’d, sub nom. Pagel, Inc. v. SEC, 803 F.2d 942, 947 (8th Cir. 1986) (affirming SEC Administrative Law Judge’s exclusion of expert testimony). On the other hand, a Hearing Panel may sometimes find expert testimony helpful on specific, narrowly defined technical issues, or on issues outside the securities industry.<sup>1</sup>

<sup>1</sup> See, e.g. District Business Conduct Committee for District No. 10 v. Lawrence P. Bruno, Jr., Complaint No. C10970007 (NAC July 8, 1998) (handwriting experts).

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The Hearing Officer is unable to determine, based on the description of the proposed testimony in the joint motion, that the parties' proposed expert testimony will be helpful to the Panel in this case. As to some of the proposed testimony, its relevance is not clear. Other proposed testimony appears to encompass legal argument, which could be better and more efficiently presented in the parties' briefs. Still other proposed testimony is contingent on the possible testimony of the other side's expert. It is not clear that any of this will be of assistance to the Panel, but that determination can best be made after the parties have filed their pre-hearing submissions, which shall include a report from each proposed expert witness. In addition to the information set forth in Rule 9242(a)(5), each report shall set forth the expert's proposed testimony in such detail that, in the discretion of the Hearing Panel, it may serve as the expert's direct testimony. After reviewing the reports of the proposed experts and consulting with the other Panelists, the Hearing Officer will issue a ruling on the joint motion.

**SO ORDERED.**

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David M. FitzGerald  
Hearing Officer

Dated: December 15, 2005