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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. E9B2003033501 Hearing Officer—Andrew H. Perkins

ORDER SUSTAINING COMPLAINANT'S OBJECTIONS TO RESPONDENT'S EXPERT WITNESS DESIGNATION AND REPORT

Respondent is charged with excessive and unsuitable trading activity in [a Customer's] securities accounts at [Firm], in violation of NASD Conduct Rules 2120, 2110, NASD IM–2310–2, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5. On February 15, 2006, Respondent designated [Witness] as his expert witness and filed a letter report that the Witness had prepared at the request of Respondent's attorney. The letter purports to provide an overview of the Witness's opinions regarding this matter that he formed from a review of "the monthly account statements, commission report, new account documents and statement of claim for the [_____] and [_____]matters." However, the Witness's overview provides little analysis and, in some instances, offers opinions that are not the proper subject of expert testimony. Indeed, his overview is so lacking that it is difficult to determine if any of his intended testimony would be helpful in resolving the issues before the Hearing Panel.

The Department of Enforcement ("Enforcement") objects to Respondent calling the Witness as an expert. Enforcement argues that the Hearing Panel has sufficient expertise to

decide this case without expert testimony and that Respondent has not demonstrated that the Witness's testimony will help the Hearing Panel.

The admissibility of evidence in NASD disciplinary proceedings is governed by Rule 9263, which provides that "[t]he Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." There is no specific NASD rule concerning expert testimony; accordingly, NASD looks to Federal Rule of Evidence 702 for guidance,[1] which provides that expert testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."

The general framework regarding the admissibility of expert testimony is set forth in the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Court made clear that expert testimony should not be considered in a case unless the expert has genuine expertise and that expertise will assist the trier of fact to understand or determine a fact issue in the case.[2] The Court elaborated on *Daubert's* framework in *Kumho* and explained that the twin requirements for expert testimony are relevance and reliability. The expert must employ at trial "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[3] Moreover, the trial court, exercising its gate keeping function, must examine (among other things) the expert's qualifications, the methodologies used by the expert, and the relevance of the results to the questions before the trier of fact. The same framework provides appropriate guidance in NASD disciplinary proceedings.[4]

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[1] *See, e.g.*, OHO Order 99-11, No. C8A990015 (June 17, 1999); OHO Order 99-03, No. C02980073 (Mar. 23, 1999).

[2] 509 U.S. at 592.

[3] *Kumho*, 526 U.S. at 152.

[4] However, unlike federal court proceedings, NASD disciplinary proceedings are not subject to formal rules of evidence. Accordingly, the principles in *Daubert* and *Kumho* are not binding.

On the other hand, the admissibility of expert opinion evidence is not governed by whether the expert's opinion is dispositive of the case. No one piece of evidence has to prove every element of a party's case; it need only make the existence of "any fact that is of consequence" more or less probable.[5] Thus, an expert's report may fall short of proving a claim yet still remain relevant to the issues in dispute.[6]

In addition, the admissibility of expert testimony in NASD disciplinary proceedings does not depend on whether the expert possesses more or less expertise than the members of the Hearing Panel. It is improper for Enforcement to submit, as it did in this case, employment and educational information about the industry panelists to demonstrate their relative expertise. The governing standard is whether the proposed witness's expertise will *assist* the trier of fact to understand or determine a fact issue in the case.

The Hearing Officer concludes that Respondent has failed to meet the foregoing standards. Accordingly, the Hearing Officer sustains Enforcement's objections. The Witness will not be permitted to testify as an expert in this proceeding.

IT IS SO ORDERED.

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Andrew H. Perkins
Hearing Officer

March 3, 2006

[5] *See* Fed. R. Evid. 401.

[6] *See, e.g., Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005) (holding that court erred in excluding expert report in employment discrimination case).