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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT FIRM and RESPONDENT 2, Respondents.	Disciplinary Proceeding No. 2005000316701 Hearing Officer – AWH

ORDER GRANTING MOTION TO COMPEL OR ALTERNATIVELY TO PRECLUDE ORAL OR DOCUMENTARY EVIDENCE

During a February 5, 2007, pre-hearing conference, the Hearing Officer informed the parties that he would order Enforcement to produce to Respondents documents from CB and/or ["the Consulting Firm"] related to the development of the NASD breakpoint assessment, including the sampling protocol used, and notes or memoranda of CB's alleged conversations with Respondent Firm employees. CB is listed by Enforcement as a witness to appear at the hearing. The summary of his expected testimony states:

> [CB] served as an independent contractor to NASD in connection with the development of NASD's breakpoint assessment, which NASD requested hundreds of member firms to complete. He is expected to testify about the transaction sampling protocol and methodology that he helped develop, about communications with [the Respondent Firm's] personnel regarding Respondents' breakpoint submissions, and about Respondents' breakpoint assessments.

On February 13, 2007, the Respondent Firm filed its Emergency Motion to Compel or Alternatively to Preclude Oral or Documentary Evidence ("Motion to

Compel"). The Motion to Compel asserted that Enforcement informed the Respondent Firm that it had gathered documents from CB and was reviewing them. The Respondent Firm asserted that Enforcement was required immediately to turn those documents over, and that it was not appropriate for Enforcement to determine the responsiveness of third-party documents. The Respondent Firm requested an order that Enforcement immediately turn over those documents or, in the alternative, that Enforcement be precluded from introducing any oral testimony or documentary evidence related to any work performed by CB and/or the Consulting Firm in connection with the breakpoint assessment computer system, the sampling protocol or conversations with Respondent Firm employees.

On February 22, 2007, Enforcement filed its Opposition to the Motion to Compel ("Opposition"), asserting that the documents at issue (1) are not part of the investigation that led to the institution of this proceeding; (2) could disclose confidential NASD techniques and guidelines; (3) are confidential attorney-client communications and/or attorney work-product; and (4) are internal protected writings that shall not be offered into evidence. Enforcement requests that the Hearing Officer deny the Motion to Compel, or, in the alternative, review the materials *in camera*, and rule on the necessity or lack thereof for the production of those materials.

On February 23, 2007, Respondents filed a motion seeking leave to file a reply to Enforcement's Opposition. Although Enforcement opposed the motion for leave to file a reply, Respondents were granted leave to file a reply, and they filed their reply ("Reply") on March 6, 2007. The Reply asserts that the request for an *in camera* review should be denied because (1) the attorney-client privilege does not apply; (2) even if it did, it is not

absolute; (3) the attorney work-product privilege does not apply; (4) the Hearing Officer has already ruled upon the necessity of the documents; (5) there is no "Independent Contractor" privilege; (6) the documents are not protected from disclosure by NASD rules; and (7) no investigative technique is involved here. Respondents also assert that there is no ambiguity in the relief they seek: if the documents are not produced, then Enforcement should be precluded from calling (1) CB as a witness and having him testify about any matters touching upon the documents sought, and (2) any other witness (a) who spoke with CB or the Consulting Firm about the creation, application, or function of the self-assessment, or about his alleged conversations with RC, a Respondent Firm Vice-President, or (b) who employed the sampling protocol to create the self-assessment program, to testify about matters touching upon the documents sought, or about whether the system was properly created, maintained or had deficiencies or defects.

For the reasons that follow, the Motion to Compel is granted, subject to a minor modification in the alternative relief. Because the Hearing Officer is not in a position to anticipate either the full scope of CB's intended testimony, or the full scope of his cross-examination, he declines to engage in an *in camera* inspection of documents to determine the necessity of individual documents. As was noted in the February 5 telephone conference, discovery of the documents is necessary to assure "the fairness of [Respondents'] ability to cross-examine a witness on information that may only be in the possession of that witness." Respondents cannot fairly be expected to hear direct testimony "about the transaction sampling protocol and methodology that [CB] helped develop, about communications with [the Respondent Firm's] personnel regarding Respondents' breakpoint submissions, and about Respondents' breakpoint assessments,"

without the unfettered ability to cross-examine him on those subjects that go to the heart of the case against Respondents. It matters not that Enforcement does not intend to offer the documents at the hearing. It is the testimony of the witness that opens the door to the possible use of those documents by Respondents.

CB is not an attorney, and he was not engaged to render professional legal advice to a client. Accordingly, the attorney-client privilege does not apply.[1] Nor does the attorney work-product privilege apply. That privilege is intended to preserve a zone of privacy in which a lawyer could prepare and develop legal theories and strategies "with an eye toward litigation," free from unnecessary intrusion by his adversaries.[2] Here, the documents were not prepared by NASD attorneys or their agents in anticipation of litigation and are not alleged to contain the mental processes of an attorney. Finally, there is no constitutional, common-law, or statutory "independent contractor" privilege. Should CB testify in this case, any provision in his contract with NASD requiring confidentiality would be waived for the purpose of presenting that testimony.

The documents cannot be said to disclose investigatory or enforcement "techniques." To the extent that those documents relate to the methodology by which the breakpoint assessment would be conducted, they concern a one-time "self-assessment," not an ongoing, repetitious examination, investigation, or enforcement process or regime. Neither party alleges that CB was part of the investigation of this case. Finally, to the extent that Enforcement wishes to shield the documents from examination, they may exclude CB as a witness, and circumscribe the testimony of other witnesses which relates to the documents.

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[1] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).
[2] *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

Accordingly, Enforcement shall either produce the subject documents to Respondents on or before March 14, 2007, or, by that date, file a notice that it will not call CB to appear or testify in this matter, nor will it ask any other witness it presents (a) who spoke with CB or the Consulting Firm about the creation, application, or function of the self-assessment, or about his alleged -conversations with RC, a Respondent Firm Vice-President, or (b) who employed the sampling protocol to create the self-assessment program, to testify about matters touching upon the documents sought, or about whether the transaction sampling protocol and methodology that CB helped develop was properly created, maintained, or had deficiencies or defects.

SO ORDERED.

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Alan W. Heifetz
Hearing Officer

Dated: March 7, 2007