

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Kenneth Christopher Shelley,
Mobile, Alabama

Respondent.

DECISION

Complaint No. C3A050003

Dated: February 15, 2007

Respondent attempted to cheat on the Series 24 examination and violated the rules of conduct governing securities examinations, in violation of NASD Conduct Rule 2110. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Helen G. Barnhill, Esq., Department of Enforcement, NASD

For the Respondent: Thomas D. Birge, Esq.

Decision

Pursuant to NASD Procedural Rule 9311, Kenneth Christopher Shelley (“Shelley”) appeals a December 7, 2005 Hearing Panel decision finding that Shelley committed separate violations of NASD Conduct Rule 2110 by attempting to cheat on his Series 24 examination and by breaching the rules of conduct governing securities examinations (“Rules of Conduct”).¹ The Hearing Panel imposed separate bars on Shelley for each violation. After a thorough review of the record, we affirm the findings and sanctions imposed by the Hearing Panel.

I. Background

In or around 1991, Shelley graduated from college with a degree in engineering.² After graduation, Shelley worked as an engineer for approximately 10 years. According to information contained in NASD’s Central Registration Depository (“CRD”)®, Shelley entered the securities industry in November 2001 and became registered as a general securities representative in March 2002. At the time of the events at issue in this case, Shelley was registered as a general securities representative for United Planners’ Financial Services of America (“United Planners” or “the Firm”), and he is currently associated with the Firm in this capacity.

II. Procedural History

On January 20, 2005, NASD’s Department of Enforcement (“Enforcement”) filed a two-cause complaint against Shelley. The first cause of the complaint alleged that Shelley attempted to cheat on the Series 24 examination in violation of NASD Conduct Rule 2110. The second cause of the complaint alleged that Shelley violated Rule 2110 by failing to comply with the Rules of Conduct. In response, Shelley filed an answer in which he contested the allegations and requested a hearing. An NASD Hearing Panel conducted a two-day hearing that began on September 27, 2005. In a decision dated December 7, 2005, the Hearing Panel found that Shelley violated NASD Conduct Rule 2110 and imposed a bar on Shelley under each cause of the complaint. Shelley’s appeal followed.

III. Facts

CA, a former colleague of Shelley, was working as a financial advisor for an NASD member. In 2001, CA had a solo office in a small town in Alabama and invited Shelley to work

¹ NASD Conduct Rule 2110 requires that NASD members shall, in conducting their business, “observe high standards of commercial honor and just and equitable principles of trade.” In addition, NASD Conduct Rule 115 makes all NASD rules, including NASD Conduct Rule 2110, applicable to both NASD members and all persons associated with NASD members.

² The record does not contain the exact date of Shelley’s graduation from engineering school.

in the office as a financial advisor. Shelley accepted CA's offer and agreed to an equal split with CA of all commissions generated by the office. In October 2003, CA and Shelley had a disagreement over these commissions that resulted in a physical altercation.³ In December 2003, Shelley ended his business relationship with CA.

Shelley then became associated with his current firm, United Planners, and started a solo office in the same small town where CA's office was located. Shelley testified that the Firm did not require him to take the Series 24 examination and that he decided to take the examination because of his "thirst for knowledge" of the securities industry. Shelley also testified that he told "quite a few people" that he planned to take the Series 24 examination.

On March 9, 2004, CA called NASD and provided an anonymous tip to Linda Harris ("Harris"), an NASD customer service representative. CA informed Harris that Shelley might cheat on an upcoming Series 24 examination and that Shelley had bragged to him at CA's office about having used a variety of techniques to cheat on previous NASD examinations.⁴ These techniques included: (1) programming exam-related information into a "high tech" engineering calculator; (2) hiding study materials in the bathroom of the testing center and reviewing the materials during restroom breaks; and (3) smuggling study notes into the examination room that were printed on colored paper matching the scratch paper distributed during the examination.

The day before Shelley's examination, CA called Harris again to remind her that Shelley was planning to cheat on his Series 24 examination.⁵ During this telephone call, Harris asked CA to reveal his identity and CA obliged. Shelley was scheduled to take the Series 24 examination at 11:45 a.m. on March 25, 2004, at the Sylvan Learning and Thomson Prometric Testing Center ("Testing Center") in Mobile, Alabama.⁶ Carolyn Alsop ("Alsop"), the owner of the Testing Center at the time, testified that she had cleaned the restroom at 8:30 a.m. on the day of Shelley's examination and that she did not find any test materials in the restroom.

³ The altercation was serious enough to cause both men to be hospitalized. No charges were filed in connection with the incident, but Shelley and CA have had a strong dislike for each other ever since.

⁴ Shelley had taken the Series 24 examination on two prior occasions and had failed both times. Before passing the Series 7 examination in March 2002, Shelley had failed the examination twice previously in January and February 2002.

⁵ The evidence is not clear on how CA learned of Shelley's test date. CA claimed that Harris told him, which Harris denied. In her notes memorializing her conversation with CA, Harris wrote that CA reminded her that Shelley would be taking the test on the following day, whereas in her testimony, she stated that CA had told her that Shelley would be taking the examination "soon."

⁶ Shelley was the only person scheduled to take the Series 24 examination that day.

On March 25, 2004, Shelley arrived at the Testing Center shortly before 10:00 a.m. Shelley testified that he brought all of his study materials to the Testing Center and that he arrived early so that he could review the materials before taking the examination. Shelley admitted that upon arriving at the Testing Center, he immediately entered the restroom with his study materials in his possession.⁷

Shortly after Shelley exited the restroom, Jennifer Humphreys (“Humphreys”), the administrator of the Testing Center, offered him the option of taking the Series 24 examination early. Shelley accepted this offer. Humphreys testified that the only other person present in the area at this time was a woman who was waiting for her child to finish taking an examination. Humphreys further testified that she was aware of everyone who entered the check-in area after 9:00 a.m. on March 25, 2004, and that she did not see CA or anyone in the Testing Center who was not actually taking an examination or who was not with someone taking an examination.

Prior to entering the examination room, Shelley signed a form acknowledging his understanding of the Rules of Conduct. By signing the form, Shelley agreed, among other things, that he would relinquish possession of any study materials before entering the examination room and that he was prohibited from having any study materials in his possession during restroom breaks. In addition, the form also indicated that a failure by Shelley to adhere to these conditions could subject him to disciplinary action that would normally result in him being barred from the securities industry. After signing the form, Shelley placed some personal items into one of the lockers provided by the Testing Center and entered the examination room.

According to records from the Testing Center, Shelley began the Series 24 examination at 10:05 a.m. Less than five minutes later, Alsop searched the restroom and found a copy of a Dearborn Passtrak Series 24 license examination manual (“Dearborn Passtrak Manual”) hidden behind the trash can. Inside the Dearborn Passtrak Manual, Alsop found nine sheets of white paper containing practice questions and answers. She also found eight pages of typed notes on colored paper. The sheets of paper were different colors but contained identical notes. Shelley admitted that all of the materials found by Alsop in the restroom were part of his study materials. Alsop testified that the study materials appeared to have been intentionally hidden behind the trash can and that they did not look like they had fallen from any surface in the restroom. Alsop promptly removed Shelley’s study materials from the restroom and gave them to Humphreys for storage while Shelley was still taking the examination.

Shelley took a bathroom break from 12:05 p.m. to 12:10 p.m. and finished the examination 10 minutes later.⁸ Shelley then signed out, retrieved his personal items from the locker, received his test results, and then left the Testing Center. Shelley failed the examination.⁹

⁷ Shelley had taken multiple examinations at the Testing Center and admitted that he was familiar with the layout of the facility.

⁸ Shelley had more than one hour of time remaining when he completed the examination.

Approximately six weeks after the examination, NASD conducted an on-the-record interview with Shelley. At this interview, Shelley initially testified that he kept all of his study materials together and that he brought all of these materials to the Testing Center.¹⁰ Later, Shelley revised his testimony, claiming that it was possible that he did not bring all of his study materials into the Testing Center and that some of them may have been “missing” prior to him taking the examination. Specifically, Shelley claimed that it was possible he did not bring the Dearborn Passtrak Manual and study notes into the Testing Center.

[cont’d]

⁹ After receiving his test results, Shelley testified that he immediately traveled to Hope, Alabama by car.

¹⁰ When NASD staff asked Shelley which study materials he brought to the Testing Center, the following exchange occurred:

Q: Doubling back just a little bit, did you bring the Dearborn study guide to the testing center?

A: I kept all my study materials together. I arrived to the test center . . . about two hours early from my scheduled time. My intent was to go in and study, so yes, I had everything.

Q: So you brought the documents into the testing center?

A: Yes . . .

Q: What did you bring on that day?

A: All my testing material.

Q: Which consisted of what?

A: The Dearborn book, sample tests. There was probably even a CD stuck in there. The review book from the class in Atlanta with Dearborn that was the primary one I was studying. It was a—per Dearborn, if you know it, you make an A.

Q: How about any other notes? Did you type anything, hand-write any other notes?

A: I don’t know. I did use my book as kind of a filing system, just anything associated with it, I stuck in there.

At the on-the-record interview, NASD staff also questioned Shelley about the eight pages of study notes printed on colored paper that were found in the Testing Center restroom. When asked if he had brought these notes into the Testing Center, Shelley admitted that he stuck them in the back of the Dearborn Passtrak Manual and that he brought both the notes and the Dearborn Passtrak Manual into the Testing Center. Before the Hearing Panel, however, Shelley backed away from his on-the-record interview testimony, stating that his admission to bringing these particular study materials into the Testing Center was not a factual statement, but an “opinion” that was “inaccurate” at the time he made it.

Although Shelley admitted that the notes found in the restroom belonged to him, he denied that he printed the notes on colored paper so that he could use them to cheat on the examination. Shelley testified that his five-year-old daughter would regularly play on his computer and print things out using colored paper. Shelley claimed that on one occasion, his daughter printed his study notes on the colored paper by accident. Rather than disposing of these notes, Shelley testified that he placed them in his Dearborn Passtrak Manual, which he claimed was used as a “file cabinet” for his notes. Shelley also denied hiding the Dearborn Passtrak Manual and notes in the Testing Center restroom in order to cheat on the examination. Instead, Shelley asserted that CA stole the study materials from Shelley’s car and planted them in the restroom as a means of getting revenge against Shelley.¹¹

IV. Discussion

After reviewing the record, we affirm the Hearing Panel’s finding that Shelley attempted to cheat on the Series 24 examination and breached the Rules of Conduct in violation of NASD Conduct Rule 2110. As discussed below, we also affirm the sanctions imposed by the Hearing Panel for Shelley’s violations.

A. Shelley’s Conduct Violated Rule 2110

NASD Conduct Rule 2110’s purpose is to protect investors from unethical behavior, and it is well settled that NASD’s disciplinary authority under Rule 2110 is broad enough to cover a wide range of unethical conduct. *See Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (concluding that Rule 2110 prohibits conduct that does not directly involve securities or the violation of a specific securities law) (citations omitted); *Daniel D. Manoff*, 55 S.E.C. 1161-63 (2002) (affirming NASD’s finding that respondent’s unauthorized use of a co-worker’s credit card numbers constituted unethical business conduct that violated Rule 2110). Here, both Shelley’s

¹¹ O’Neal Jones (“Jones”), a mutual acquaintance of both Shelley and CA, testified that CA told him that he planned to “get even” with Shelley using Shelley’s “own book” and that CA was motivated to do so because Shelley was in competition with CA for business.

attempt to cheat on the Series 24 examination and his failure to comply with the Rules of Conduct run afoul of Rule 2110's high ethical standards.¹²

The Commission has stated that “[NASD’s] examination process provides a basic protection for the investing public, ensuring that salespersons are qualified to perform the functions they undertake on the public’s behalf.” *L.C. Thomas*, 49 S.E.C. 1052, 1054 (1989); *see also Ronald H.V. Justiss*, 52 S.E.C. 746, 750 (1996) (discussing how cheating on an examination “threatens the integrity of NASD’s registration process” and cannot be tolerated). The record supports the Hearing Panel’s finding that Shelley brought his study materials into the Testing Center restroom with the intention of cheating on his Series 24 examination. The record also shows that despite the clear prohibition in the Rules of Conduct against it, Shelley attempted to possess forbidden study materials during a restroom break.

There is significant evidence in the record, including evidence arising from Shelley’s own testimony, that establishes Shelley’s Rule 2110 violations. Specifically, Shelley testified that he brought all of his study materials into the Testing Center restroom. All parties agree that none of Shelley’s study materials were in the restroom before he entered. It is also undisputed that shortly after Shelley left the restroom, the Testing Center owner discovered Shelley’s materials hidden behind a garbage can and removed them. During the examination, Shelley left the examination room to go to the restroom at a time where he would have been able to review his study materials if they had not been removed. Minutes after leaving the restroom that no longer contained his study materials, Shelley submitted his examination and left the Testing Center even though he had more than one hour remaining to take the examination.

On these facts alone, we could reasonably conclude, as the Hearing Panel did, that Shelley hid his study materials in the Testing Center restroom prior to starting his Series 24 examination with the intention of cheating on the examination. These facts also show that Shelley did not comply with the Rules of Conduct that forbid persons taking the examination to have access to study materials during restroom breaks. The documentary, testimonial, and circumstantial evidence in the record fully support the Hearing Panel’s conclusion that Shelley’s conduct violated Rule 2110. Consequently, we affirm the Hearing Panel’s finding of liability against Shelley.

B. A Preponderance of the Evidence Supports the Hearing Panel’s Determination that Shelley Was Not Credible

It is well settled that “[c]redibility determinations are the prerogative of the trier of fact, and are ordinarily entitled to great weight in [the] review of the record.” *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *see also Litwin Sec., Inc.*, 52 S.E.C. 1339, 1342 n.13 (1997) (stating that the Commission will reject initial fact-finder’s determination as to credibility only when the record contains “substantial evidence” to the contrary). Shelley argues that the

¹² *See Ronald H.V. Justiss*, 52 S.E.C. 746, 749 (1996) (finding a violation of Rule 2110’s predecessor for possession of unauthorized material while taking an NASD qualification examination); *Helene R. Schwartz*, 51 S.E.C. 1207, 1209 (1994) (same).

Hearing Panel's decision is based on an unsupported determination that certain portions of Shelley's testimony were not credible. We disagree. The facts in the record provide ample support for the Hearing Panel's decision not to credit Shelley's testimony.

First, the Hearing Panel did not credit Shelley's contention that he did not bring the Dearborn Passtrak Manual and study notes into the Testing Center. The record, however, does not support Shelley's contention. This is because Shelley initially testified that he brought "all" of his materials into the Testing Center and later claimed that he could not be sure if the Dearborn Passtrak Manual and study notes were in his possession when he entered the Testing Center. Shelley contends that this damaging testimony was due in part to allegedly imprecise questioning on the part of Enforcement staff regarding which Dearborn materials Shelley brought with him into the Testing Center. During his investigative testimony, however, Shelley testified that the materials he brought into the Testing Center included "the Dearborn book *and notes in the book*, sample tests, and the Dearborn review book." (emphasis added). Since Shelley has consistently testified that he used the Dearborn Passtrak Manual as a "file cabinet" for his notes, Shelley's own testimony suggests that he was referring to the Dearborn Passtrak Manual and study notes when he was identifying the materials that he brought into the Testing Center.

The record also plainly shows that Shelley backed away from investigative testimony by claiming that his answer was an expression of his "opinion" that he had the Dearborn Passtrak Manual and study notes in his possession when he entered the Testing Center, rather than a statement of fact. If Shelley does not even credit his own testimony as factual rather than merely an expression of opinion, it is quite understandable that the Hearing Panel would find that portions of his testimony lack credibility. Moreover, Shelley's departure from his initial testimony provides a basis for finding that his later testimony was not credible. *Cf., e.g., Terrance Yoshikawa*, Exchange Act Rel. No. 53731, 2006 SEC LEXIS 948, at *24-25 (Apr. 26, 2006) (finding that Hearing Panel's determination that respondent lacked credibility was supported by respondent's failure to stand by explanation provided at the early stages of NASD's investigation); *Charles F. Kirby*, 2003 SEC LEXIS 46, at *18 n.27 (Mar. 21, 2003) (refusing to overturn determination made by lower tribunal that respondent was not credible where respondent had a selective memory regarding particular facts surrounding earlier testimony).

Second, the Hearing Panel did not credit Shelley's testimony that someone could have stolen his Dearborn Passtrak Manual and study notes without his knowledge and that he would have been unaware that these study materials were missing prior to taking the examination. Shelley testified that the Dearborn Passtrak Manual was not the primary book that he used to study for the examination, but that he stored his notes in the Dearborn Passtrak Manual as a makeshift file cabinet. In light of Shelley's own testimony that he stored his study notes in the Dearborn Passtrak Manual, the Hearing Panel concluded that it was unlikely that Shelley would have failed to notice whether or not his Dearborn Passtrak Manual and study notes were missing for a substantial period of time. Moreover, the Dearborn Passtrak Manual was produced into evidence, along with Shelley's other study materials. The Dearborn Passtrak Manual was more than 400 pages long and was by far the largest book among Shelley's study materials. We find, as did the Hearing Panel, that both Shelley's testimony and the size of the Dearborn Passtrak

Manual support the Hearing Panel's conclusion that it is unlikely that Shelley would have failed to notice whether the book was missing prior to the examination.

Third, the Hearing Panel did not credit Shelley's testimony that he realized he was missing the Dearborn Passtrak Manual and study notes shortly after the examination. The Hearing Panel's decision not to credit this testimony was based on testimony from Jeannie Perry ("Perry"), the compliance director at Shelley's firm. Perry testified that Shelley, when questioned about the allegations, told her that he thought that he may have inadvertently left some books in the Testing Center restroom, but because the examination was over, he was "not looking for" the books. In addition, Shelley's own testimony that, upon failing the examination for the third time, he "really wasn't thinking about [his] various materials"¹³ supports the idea that he did not discover that some of his study materials were missing shortly after he completed the examination.¹⁴

Finally, the Hearing Panel did not credit Shelley's explanation that the reason his Dearborn Passtrak Manual and study materials were found in the Testing Center was because CA had planted the materials there as a means of seeking revenge against Shelley. As with all of Shelley's assertions regarding CA's alleged scheme to frame him, Shelley has offered little evidence to support these assertions, and there is evidence that substantially contradicts this possibility.

For example, there is undisputed testimony from the witnesses at the Testing Center that they did not see CA or any unauthorized persons in the Testing Center at the time of Shelley's examination. CA also testified that he was at his office at the time when Shelley was taking the examination. In addition, the Hearing Panel credited the testimony of CA's office assistant, who corroborated CA's statement and testified that on the morning of Shelley's examination, CA was at his office, which is approximately 90 miles away from the Testing Center. This evidence was

¹³ Shelley testified that he was disappointed upon hearing that he had failed the examination and that he was not interested in trying to go over his study materials to see what he could learn from this failure.

¹⁴ The Hearing Panel concluded that Shelley failed to mention in his on-the-record interview that he was aware that his Dearborn Passtrak Manual and notes were missing shortly after the examination. The record, however, indicates that Shelley did testify at his on-the-record interview that when he was done with the examination, he "knew" that he was missing his "main Dearborn manual" because it "didn't make it back" with him from the trip he made to Hope, Alabama, following the examination. A close reading of this testimony does not suggest that Shelley was asserting that he was immediately aware that his Dearborn Passtrak Manual and study notes were missing, but only that he discovered they were missing after returning from his trip. Even if Shelley's statement could be interpreted to show that Shelley was aware that some of his study materials were missing shortly after taking the examination, we find that Shelley's inconsistent testimony that he was not concerned with these materials in the moments immediately following the examination supports the Hearing Panel's conclusion that Shelley's testimony regarding this purported awareness was not credible.

further corroborated by telephone records indicating that CA placed a call from his office at 8:04 a.m. and again at 9:35 a.m.¹⁵ We see no reason to reject the Hearing Panel's decision to credit documented, corroborated evidence in the record over Shelley's speculative theories. *See Jacob Wonsover*, 54 S.E.C. 1, 9 (1999) (finding no basis to reject lower tribunal's decision to credit testimony that was supported by documentary evidence or the testimony of other witnesses), *aff'd*, 205 F.3d 408 (D.C. Cir. 2000).

Shelley claims that the Hearing Panel disregarded key evidence supporting his theory that CA planted Shelley's study materials in the Testing Center restroom. First, Shelley asserts that the Hearing Panel did not give enough weight to Harris's testimony that she did not provide CA with the date of Shelley's examination. Shelley claims that the *only* way that CA could have obtained information regarding the location and date of Shelley's examination was by unlawfully using Shelley's Social Security number to access Shelley's testing records. Shelley further asserts that CA must have obtained this information illegally as part of a larger effort by CA to frame Shelley because CA testified that Harris provided him with this information.¹⁶

¹⁵ Shelley objected to the Hearing Officer's decision to allow Enforcement to call a rebuttal witness on short notice and introduce phone records showing that CA was at his office during the time that Shelley was taking his examination. Under NASD Procedural Rule 9263, a Hearing Officer "shall receive all relevant evidence" into the record. Here, the phone records and testimony of CA's office assistant were relevant because Shelley contended that CA was at the Testing Center on the day of Shelley's examination, and this evidence tended to show that CA was 90 miles away at the time. Consequently, we reject Shelley's argument that the Hearing Officer abused his discretion by allowing this evidence into the record. In any event, the Hearing Panel's findings of liability do not require consideration of this evidence as there is other evidence in the record that supports the proposition that CA was not present at the Testing Center on the date of Shelley's examination, including testimony from both CA and Humphreys, who did not see anyone resembling CA on the day of the examination.

¹⁶ Shelley also contends that the Hearing Panel failed to address testimony by Jones that CA was angry with Shelley and planned to get even with Shelley for competing with him. Shelley claims that CA's statement that he would use Shelley's own book to "get even" with Shelley shows an "intent and plan on the part of [CA] to do something with Shelley's book which [would] get Shelley in trouble" and adds credibility to Shelley's testimony that CA planted the study materials at the Testing Center. There is no evidence in the record, however, that CA was at the Testing Center on the day of Shelley's examination or even had possession of Shelley's Dearborn Passtrak Manual and study notes prior to the examination. Moreover, Jones's testimony is wholly consistent with the notion that CA would "get even" with Shelley by informing NASD that Shelley planned to cheat on the Series 24 examination by hiding his Dearborn Passtrak Manual and study notes in the Testing Center restroom. In our *de novo* review of this matter, we have considered Jones's testimony and find that it is not enough for us to overturn the Hearing Panel's determination that Shelley's testimony lacked credibility. *See Valicenti Advisory Servs.*, 53 S.E.C. 1033, 1040 n.9 (1998).

The Hearing Panel considered the conflicting testimony of Harris and CA on this issue, but did not find that this contradiction bolstered Shelley's theory that CA obtained the information illegally as part of a plot to frame Shelley. There is evidence in the record of a more plausible explanation of how CA discovered the date of Shelley's examination, including Shelley's own testimony that he told "quite a few people" that he was taking the examination. Shelley also testified that he worked in a very small town with a population of fewer than 6,000 people, and we find that it is more likely that CA obtained the information from another resident of the town. On balance, there is support in the record that CA lawfully obtained the information regarding Shelley's examination date, and we see no reason to overturn the Hearing Panel's determination that Shelley's theory regarding CA's alleged attempt to sabotage Shelley was not credible. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) (citations omitted); *Anthony Tricarico*, 51 S.E.C. 457, 460-61 (1993) (refusing to overturn a Hearing Panel's credibility determination of witness even though respondent had identified certain inconsistencies in witness's testimony).

Shelley also argues that the Hearing Panel disregarded testimony from CA's co-workers indicating that they did not hear Shelley discussing with CA the idea of cheating on NASD examinations when they worked together at CA's office. Shelley claims that this evidence shows that CA's testimony regarding how Shelley confided in him at the office about cheating was not credible and part of an elaborate scheme to frame Shelley on the day of his Series 24 examination.¹⁷ We find that such testimony neither adds to nor detracts from the credibility of Shelley's theory that he was "set up" by CA, because CA never claimed that his co-workers were present during the conversations between CA and Shelley about cheating.

There is ample evidence in the record that supports the Hearing Panel's determination that Shelley's testimony lacked credibility. Under these circumstances, we see no reason to reject the Hearing Panel's credibility determinations, which are supported by the evidence in the record, including Shelley's own inconsistent testimony.

C. The Application of Rule 2110 Was Fair

The Securities Exchange Act of 1934 ("Exchange Act") requires that a self-regulatory organization "provide a fair procedure" for the disciplining of its membership. 15 U.S.C. §78o-3(b)(8). Shelley challenges the fairness of these proceedings, arguing that the Hearing Panel's application of Rule 2110 was unfair for a number of reasons. Circumstantial evidence is not

¹⁷ Shelley also claims that the Hearing Officer unfairly denied Shelley the opportunity to attack CA's credibility by asking CA questions about his possible substance abuse and extramarital affairs. We disagree. Under NASD Procedural Rule 9263, a Hearing Officer "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." Here, Shelley claimed that he wanted to question CA to demonstrate CA's lack of credibility on the issue of whether CA secretly arranged to have Shelley's study materials placed in the Testing Center restroom. We find that both CA's alleged substance abuse and alleged extramarital affairs were irrelevant to these proceedings and only served to unduly prejudice CA's testimony.

only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. (citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

First, Shelley claims that there is no evidence that he was “caught in the act” of using his study materials to cheat on his examination and that we therefore cannot find a violation of Rule 2110 under these circumstances. Shelley’s claim is not supported by the case law. The Commission has explicitly recognized the importance of maintaining the integrity of NASD’s examination process and does not require NASD to catch individuals “red handed” in its disciplinary actions involving allegations of cheating. See *Schwartz*, 51 S.E.C. at 1209 (stating that “the NASD does not have to demonstrate actual cheating [and] . . . may properly discipline an individual for bringing unauthorized test materials into the test center” in a case where respondent inadvertently brought prohibited materials into the examination room). See also *Donald M. Bickerstaff*, 52 S.E.C. 232, 238 (1995) (affirming violation of the predecessor to Rule 2110 where NASD relied on circumstantial evidence to establish violation); Cf. *Keith Springer*, 2002 SEC LEXIS 364, at *19 (Feb. 13, 2002) (stating that “circumstantial evidence can be more than sufficient to prove a violation of the securities laws”) (citations omitted).

Shelley also argues that a finding of liability is improper because there are possible “benign” explanations for how his study materials ended up in the Testing Center restroom, including that he may have dropped or misplaced them in the restroom. We do not find any of these explanations to be credible. Moreover, even if these explanations were credible, we would not find Shelley’s “accidental” access to his study materials during a restroom break of the Series 24 examination to be benign conduct. *Schwartz*, 51 S.E.C. at 1209 (concluding that because NASD must ensure the integrity of its testing process, “possession of unauthorized material while taking an NASD licensing examination is clearly not ‘benign’ conduct”).

Finally, Shelley makes the argument that the proceedings were unfair because Rule 2110, as applied to this case, is unconstitutionally vague. Shelly asserts that we have never disciplined anyone under Rule 2110 for “attempting” to cheat on an examination and that the application of the rule for this purpose is not fairly implied from the rule or the Exchange Act. Shelley’s argument has no merit. As the Tenth Circuit has determined in a recent challenge to Rule 2110, “any vagueness objections can be overcome if a reasonable person should know that his conduct is contrary to NASD rules.” *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006). Here, Shelley signed a form obligating him to follow the Rules of Conduct. The Rules of Conduct explicitly prohibited him from having study materials in his possession during restroom breaks and exposed him to disciplinary action if he failed to comply. Moreover, a reasonable person should not be surprised that “attempting to cheat” on an NASD examination by possessing unauthorized study materials violates NASD’s high ethical standards. See NASD Conduct Rule 2110. Consequently, we find that Shelley’s objection to the application of Rule 2110 to his misconduct is wholly without merit.

V. Sanctions

The Hearing Panel barred Shelley from associating with any NASD member for each of his Rule 2110 violations. In determining sanctions, the Hearing Panel found that Shelley intentionally violated the Rules of Conduct and that he also demonstrated an “intent to cheat” on the examination. The Hearing Panel did not find that Shelley’s conduct was inadvertent or that

there were any other possible mitigating factors that would justify allowing Shelley to remain in the securities industry. We affirm the Hearing Panel's sanctions.

There is no specific sanction guideline for attempted cheating or failing to comply with the Rules of Conduct. NASD's Sanction Guidelines ("Guidelines") encourage adjudicators to look to the most analogous guideline when determining sanctions for violations not addressed specifically by the Guidelines.¹⁸ The most analogous guideline covering Shelley's misconduct, "Cheating, Using an Imposter, or Possessing Unauthorized Materials in Qualifications Examinations or in the Regulatory Element of Continuing Education," provides that a bar is a standard sanction for such a violation.¹⁹

More than 40 years ago, the Commission stated that "[i]n view of the importance of examinations in the program of upgrading the level of competence in the securities business, we regard a deception in connection with the taking of those examinations . . . to be so grave that we would not find the extreme sanction of revocation or expulsion to be excessive or oppressive unless the most extraordinary mitigative facts were shown." *Hugh M. Casper*, 42 S.E.C. 471, 473 (1964). Here, the Hearing Panel did not find, nor did Shelley argue, that there were any mitigating factors associated with his misconduct.²⁰ We also do not find that there were any mitigating factors in the record that would justify imposing a sanction less than a bar. Accordingly, we affirm the bars imposed by the Hearing Panel for each of Shelley's Rule 2110 violations.²¹ We also order Shelley to pay appeals cost of \$1,333.77.

VI. Conclusion

¹⁸ *NASD Sanction Guidelines* 1 (2006 ed.), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*]; see also *Charles E. Kautz*, 52 S.E.C. 730, 736 n.20 (1996) (rejecting respondent's argument that, because there was no sanction guideline covering his specific conduct, that there should be no sanctions imposed).

¹⁹ *Guidelines* at 43.

²⁰ Shelley did argue that a bar is a serious penalty and should only be imposed upon findings based on "clear and convincing" evidence. It is well-settled, however, that liability for a violation of NASD rules must only be proven by a preponderance of the evidence, and there are no limitations on the sanctions that NASD can impose under this standard. See *Mark James Hankoff*, 48 S.E.C. 705, 708 n.11 (1987) (citations omitted) (stating that "the proper standard of proof in proceedings before . . . the NASD is preponderance of the evidence" and rejecting respondent's contention that the evidence against him in an NASD disciplinary action must be clear and convincing).

²¹ This sanction will also act as a deterrent to other brokers who may consider cheating on future NASD examinations.

We find that Shelley attempted to cheat on the Series 24 examination, and failed to comply with the Rules of Conduct. Each of these actions constituted a separate violation of Rule 2110. We reject Shelley's argument that he was framed by CA and that there is not substantial evidence in the record to support a conclusion that Shelley violated Rule 2110.²² Accordingly, we bar Shelley from associating with any NASD member firm in any capacity for each of his Rule 2110 violations. The bars are effective upon service of this decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith, Vice President and Corporate Secretary

²² We have also considered and reject without discussion all other arguments advanced by the parties.