

UNITED STATES OF AMERICA  
Before the  
COMMODITY FUTURES TRADING COMMISSION

DANIEL P. MARZANO

v.

NATIONAL FUTURES ASSOCIATION

CFTC Docket No. CFAA 05-01

OPINION AND ORDER

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REGISTRATION DIVISION

Petitioner Daniel P. Marzano (“Marzano”) appeals from the National Futures Association’s (“NFA”) denial of his application to register as a floor broker. The NFA denial was based on Marzano’s prior felony convictions for fraud and embezzlement under Section 8a(2)(D)(iii) of the Commodity Exchange Act (“Act”). Marzano contends that NFA denied his constitutional right to be represented by counsel at the hearing and failed to give full and fair consideration to his mitigation and rehabilitation evidence. He urges the Commission to review the record independently and to conclude that he has rebutted the statutory presumption that he is unfit for registration. NFA opposes his appeal and recommends that the Commission defer to the judgment of NFA’s Membership Subcommittee. For the reasons that follow, we affirm NFA’s decision.

**BACKGROUND**

On April 1, 2004, Marzano filed an application for registration as a floor trader with NFA. Three months later, NFA served Marzano with a Notice of Intent to Deny Registration (“Notice of Intent”). The Notice of Intent alleged that Marzano was found guilty of one count of the felony offense of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and four counts of the felony offense of engaging in monetary transactions in property derived

from unlawful activity, in violation of 18 U.S.C. § 1957. The Notice of Intent alleged that these felony convictions disqualified Marzano from registration under Section 8a(2)(D)(iii) of the Act.

On July 22, 2004, Marzano submitted a response to the Notice of Intent. In his response, Marzano stated that “despite the accuracy of the allegations,” he would provide mitigation and rehabilitation evidence that would establish that his registration would pose no substantial risk to the public. Several days later, Marzano filed an amended application to change the registration status he sought from floor trader to floor broker.

The NFA’s Membership Subcommittee (“Subcommittee”) held a hearing on October 25, 2004. Before opening statements at the hearing, NFA moved to exclude Marzano’s witnesses from the hearing room until they were called to testify. At that time, Marzano asked the Subcommittee if Irwin Rosen (“Rosen”), one of his rehabilitation witnesses, could stay for the hearing “sort of in the same capacity” as a lawyer. Counsel for NFA agreed, as long as Rosen did not testify. When Rosen declared that he would be a witness, the Chairman of the Subcommittee excluded him.

NFA introduced into evidence certified copies of documents from the United States District Court for the Northern District of Illinois showing that Marzano was found guilty of conspiracy to defraud the United States and conspiracy to launder illegally obtained funds through his trading firm.<sup>1</sup> Marzano was sentenced to 46 months in prison and ordered to pay \$25,000 in restitution.<sup>2</sup> On September 8, 2000, Marzano filed an unsuccessful Motion to

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<sup>1</sup> Marzano was convicted of money laundering; he used the laundered funds to buy an exchange seat. The district court’s judgment was affirmed by the United States Court of Appeals for the Seventh Circuit. *United States v. Marzano*, 160 F.3d 399 (7<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1171 (1999). The Seventh Circuit stated that “[n]ot only was the evidence of [Marzano’s] participation in the laundering scheme compelling, but there were other misstatements in the application for the CME seat that could not be explained away as memory lapses – notably, and most damning, concealing the source of the money for the seat he wanted to buy, the source being money embezzled by [his cousin’s friend] from his bank.” 160 F.3d at 403.

<sup>2</sup> Marzano served only 30 months of his sentence due to good behavior.

Terminate Restitution with the federal district court, claiming that his financial circumstances made paying restitution a hardship.

When Marzano testified, he offered an innocent explanation of the events underlying his conviction. He stated that he first became a member of the Chicago Mercantile Exchange (“CME”) in 1992. (Tr. at 12.) According to Marzano, six weeks later, Marzano’s cousin asked whether he and a friend could work with Marzano on the CME floor. (Tr. at 12-13.) Marzano testified that he told his cousin that he could not hire them, but if they would lend him \$16,000, Marzano would teach them about the market. (Tr. at 13.) The friend wrote Marzano a personal check for the money and Marzano deposited it directly into his account. *Id.*

Marzano further testified that a few weeks later this cousin and friend gave him three cashier’s checks totaling \$103,000, payable to Marzano’s corporation, Leap, Inc. (Tr. at 14.) Marzano used the \$103,000, along with \$50,000 borrowed from his partner, to purchase a seat on the CME. (Tr. at 14, 22.) Nonetheless, Marzano admitted that on his application for the CME seat purchase, he did not list his cousin and his cousin’s friend as the source of the \$103,000, but stated that his partner was the source of the entire amount. (Tr. at 20, 21.) Marzano claimed that about one month after he purchased the seat, the cousin and his friend asked him to return the \$103,000, whereupon he repaid them in small installments. (Tr. at 14-15.) In fact, the funds were embezzled from a bank and given to Marzano to launder.<sup>3</sup>

Marzano offered four rehabilitation witnesses. Rosen, a member of the CME for 34 years, an attorney, a teacher, and a member of the CME board from 1997 through 2001, testified

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<sup>3</sup> At the hearing, Marzano testified that he had been working for CME members for the last few years in various capacities and has had floor access without incident. (Tr. at 46.) Marzano also noted that he continued to work on the CME floor for five years (1992-1997) while the criminal matter was pending. Marzano stated that he was not charged with any customer-related violations during that time period.

that he knew Marzano before and after his incarceration. Rosen stated that he had known Marzano as a fellow trader and that Marzano has been a technology consultant for one of his companies after his release. (Tr. at 24-26.) He asserted his belief that Marzano is completely rehabilitated. (Tr. at 28.) Rosen acknowledged, however, that he never anticipated that Marzano would be involved in criminal activity and that he did not “know what happened here because I have not had the ability to read all through its history.” (Tr. at 26.) Rosen also testified that Marzano found religion, was awarded custody of his daughter and performed charitable deeds. (Tr. at 28-29.)

Robert Cihlar, who works in business development at a clearing firm, testified that he has known Marzano for two years and that all of his dealings with Marzano have been “forthright, upfront, legitimate, [and] compliant.” (Tr. at 33.) Cihlar testified that Marzano had been a consultant for his firm and assisted in structuring the business so that it could enter the futures industry. Cihlar admitted that he had no supervisory responsibilities over Marzano. (Tr. at 34-36.)

Daniel Burich, a member of an introducing broker, testified that he worked with Marzano from 1990 through 1997 and found him to be loyal and honorable. (Tr. at 37.) According to Burich, because Marzano goes to great lengths to help others, his cousin and his friend were able to take advantage of him. *Id.* Burich also testified that he was willing to pledge money so that Marzano could be reinstated to the CME.<sup>4</sup> *Id.*

Finally, Stanley Simpson, a pork belly broker at the CME since about 1982, testified that he had known Marzano for fifteen years, and had worked with him on a daily basis for seven of

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<sup>4</sup> At the hearing, Marzano explained that Burich planned to “put up the requirements [for the clearing firm] and the trading money to get me started again if I’m accepted in that capacity.” (Tr. at 37-38.)

those years. (Tr. at 40.) Before Marzano's incarceration, Simpson knew him as another trader in the pork belly pit. Simpson became acquainted with Marzano on a personal level just prior to the time Marzano was sent to prison. At that time, Simpson said he encouraged Marzano to join a Bible study group in prison, and Marzano ultimately did so. Simpson asserted that Marzano's religious conversion would ensure his trustworthiness. Since Marzano's release from prison, Simpson hired him to do odd jobs around a house that he was renovating. Simpson explained that before Marzano went to prison, he was somewhat wild, but since he has been released he has been "as straight as any guy that I know." (*See generally* Tr. at 41-43.)

On January 10, 2005, the Subcommittee issued an order denying registration, finding that Marzano's felony convictions presumptively disqualify him under Section 8a(2)(D)(iii) of the Act. *In re Marzano*, NFA Case No. 04-REG-019 (NFA Jan. 10, 2005). After considering Marzano's mitigation and rehabilitation evidence, the Subcommittee found that Marzano did not meet his burden of proving that, despite his statutory disqualification, his registration would not pose a substantial risk to the public. The Subcommittee rejected Marzano's mitigation evidence that he accepted and used the funds received from his cousin without knowing that the funds were stolen. The Subcommittee held that this issue had been fully litigated against Marzano in the criminal proceedings, and that he was estopped from arguing otherwise. *Id.* at 10.

The Subcommittee also addressed Marzano's argument that the minimum prison sentence imposed under the federal sentencing guidelines lessened the severity of his offense. It acknowledged that the Commission has held that the length of a registrant's sentence for the disqualifying conduct can be considered relevant. Nonetheless, it found that the sentence imposed did not materially reduce the severity of the crime, because the felonies were serious and the sentence was still substantial. *Id.* at 11.

In addressing Marzano's rehabilitation evidence, the Subcommittee pointed out that Marzano's four witnesses spoke very generally of their belief that Marzano was trustworthy and had been rehabilitated. The Subcommittee found that none of these witnesses provided any testimony indicating that they fully understood Marzano's past violations, and that these witnesses lacked insight into how Marzano had changed. *Id.* It also held that a witness's character testimony is not accorded much weight unless the witness was qualified as an expert in rehabilitation. *Id.* In addition, the Subcommittee found that although some of the witnesses had significant industry experience that might give some weight to their opinions, none of them testified that they had supervised Marzano or provided any testimony about their day-to-day dealings with Marzano. Further, the Subcommittee found that none of the witnesses provided any examples of Marzano's behavior that would support their opinion or testified that they had observed Marzano interacting with customers.

The Subcommittee also noted that Marzano does not appear to have accepted responsibility for his past conduct. *Id.* at 12. In this regard, the Subcommittee noted that Marzano suggested that he had been treated wrongfully, made light of his conduct, and attempted to avoid paying full restitution. In light of the foregoing, the Subcommittee concluded that Marzano failed to meet his burden of proof that he does not pose a substantial risk to the public.

On January 14, 2005, Marzano filed a notice of appeal from NFA's order with the Commission. On appeal, he argues that his constitutional right to counsel was denied, his witnesses' testimony was discounted because they were not experts, and that evidence that he worked handling electronic orders without problems or complaints was disregarded. In reply, the NFA argues that the Subcommittee properly found that Rosen could not be both a witness for Marzano and act as his lawyer at the hearing. It contends that the weight of the evidence

supports the conclusion that Marzano's mitigation and rehabilitation evidence did not overcome the presumption of unfitness for registration arising from his felony convictions.

## DISCUSSION

Marzano admits that he is subject to a statutory disqualification under Section 8a(2)(D)(iii) of the Act. Proof that a statutory disqualification exists raises a rebuttable presumption that the applicant is unfit for registration. The burden then shifts to the applicant to show by clear and convincing evidence that, notwithstanding his statutory disqualification, his registration will not pose a substantial risk to the public. *In re Antonacci*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,835 at 36,930 (CFTC Apr. 18, 1990); *In re Horn*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,836 at 36,939 (CFTC Apr. 18, 1990) ("*Horn II*").

When we review NFA registration decisions, we consider whether the underlying proceeding has been conducted in a manner consistent with fundamental fairness and the rules of the NFA; whether the weight of the evidence supports NFA's findings; whether NFA's determination rests on a reasonable interpretation of the NFA rules at issue and is consistent with the purposes of the Act; and whether the sanctions are excessive or oppressive in light of the violation having due regard for the public interest. *See* Commission Rule 171.34(a), 17 C.F.R. § 171.34(a)(2003); *In re Horn*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,731 at 33,888 (CFTC July 21, 1987) ("*Horn I*").

### Fundamental Fairness and the Right to Counsel.

Marzano contends that his constitutional right to counsel was denied.<sup>5</sup> There is no constitutional right to counsel in a civil administrative proceeding. NFA's regulations provide for the opportunity to be represented by counsel. No more is required. *See, e.g., Mendenhall v.*

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<sup>5</sup> The Subcommittee did not address this issue in its final order.

U.S., 556 F. Supp. 444, 450 (D. Nev. 1982), *aff'd mem.*, 735 F.2d 1371 (9<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985), *citing Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

While NFA's rules allow for representation by an attorney, the roles of attorney and witness are incompatible. A witness submits to questioning about his or her knowledge of the facts, whereas an attorney advocates for his or her client. "[O]ne person trying to do both things is apt to be a poor witness, a poor advocate, or both." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1148 (7<sup>th</sup> Cir. 1993). The separation of functions eliminates the possibility that an attorney will not be a fully objective witness and reduces the risk that a trier-of-fact will confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's arguments. *See, e.g., United States v. Morris*, 714 F.2d 669, 671 (7<sup>th</sup> Cir. 1983) *citing United States v. Johnston*, 690 F.2d 638 (7<sup>th</sup> Cir. 1982) (*en banc*). Typically, a lawyer is prohibited from acting as a witness and an advocate at the same trial, unless substantial hardship would result. *Cf. Model Rules of Professional Conduct Rule 3.7(a)(3)*.

Marzano did not demonstrate that the Subcommittee's ruling caused him substantial hardship. The record shows that the Subcommittee granted him substantial leeway in presenting his case. (Tr. at 12, 31.) In any event, Marzano had the option to have Rosen remain as his attorney since other witnesses also testified to Marzano's rehabilitation. In this circumstance, we find that the Subcommittee did not abuse its discretion in requiring Marzano to elect which role Rosen would fill at the hearing.

#### Mitigation.

Mitigation evidence establishes the presence of circumstances that lessen the seriousness of the wrongdoing. *In re Ashman*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH)

¶ 27,336 (CFTC Apr. 22, 1998). To establish mitigating circumstances, Marzano testified at his hearing that he did not know the money he received was stolen. We find that the Subcommittee properly found that the issues of Marzano's intent, knowledge and state of mind were fully litigated in the criminal proceeding. See *In re Lama*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,294 at 35,287 (CFTC Aug. 2, 1998) (NFA can, in appropriate circumstances, apply collateral estoppel to preclude relitigation of issues that were fully litigated in the previous proceeding). Quite clearly, Marzano's attempt to show mitigating circumstances by showing that he lacked the requisite intent contradicted the findings of a jury, which were upheld on appeal.

Marzano also argued in mitigation that he received the minimum sentence possible for his felony offenses. This circumstance does not materially lessen the seriousness of his crime. A sentence of 46 months in prison and the imposition of \$25,000 in restitution are substantial penalties. Thus, we find that the weight of the evidence supports the Subcommittee's conclusion that Marzano's mitigation evidence did not overcome the presumption of unfitness for registration.

#### Rehabilitation.

Rehabilitation evidence is evidence showing that an applicant has changed the direction of his or her activities since the time of the wrongful conduct. *Horn II*, ¶ 24,836 at 36,940. The first step in rehabilitation is taking responsibility for past actions. *In re Ryan*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,049 at 44,982 (CFTC Apr. 25, 1997). Marzano's insistence that he did not know the source of the funds is inconsistent with his conviction and shows that he has not taken that important first step. *In re Fetchenhier*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,055 at 45,014-15 (CFTC May 8, 1997);

*In re Hirschberg*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,573 at 43,523 (CFTC Dec. 27, 1995).

In evaluating rehabilitation evidence, the Commission looks for character witnesses who are not motivated by bias and who are fully aware of the applicant's disqualifying conduct. *In re Bryant*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,847 at 36,998-36,999 (CFTC Apr. 18, 1990). Evidence that the applicant has been placed in a position of trust and has faithfully discharged his duties also may demonstrate rehabilitation. Marzano produced testimony from futures industry participants who had known and worked with him in the industry and in a personal capacity, and had the opportunity to observe him in a variety of settings. Some of these witnesses also knew Marzano for long periods of time. These are factors that the Commission considers favorably when weighing rehabilitation evidence.

Nevertheless, the quantum of this favorable evidence was outweighed by other evidence of record. In this case, none of the witnesses testified that Marzano has been placed in a position of trust since his release from prison, only that he had done "odd jobs" and worked as a consultant. Also, the witnesses may not have come to grips fully with the severity of Marzano's conduct. Rosen was not even aware of the nature of Marzano's underlying disqualifying conduct and acknowledged that he never anticipated that Marzano would be involved in criminal activity. Similarly, Barich, who knew Marzano for 30 years, also stated that Marzano "has always been an honorable and loyal person." (Tr. at 37.) Consequently, their opinions that Marzano is rehabilitated now do not deserve significant weight.<sup>6</sup>

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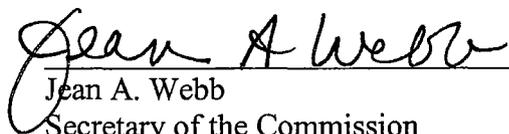
<sup>6</sup> Although the outcome of this case is not affected, we note that the Subcommittee placed undue emphasis on the need for expert testimony to show rehabilitation. The Subcommittee stated that, "as a general rule, a witness's character testimony is not accorded significant weight unless the witness was qualified as an expert" in rehabilitation citing *In re LaCrosse*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,944 at 45,576 (CFTC Jan. 21, 1997). We held subsequently, however, that an expert's views may be entitled to greater deference in some circumstances, but may prove to be of little or no value in others. *Ashman*, ¶ 27,336 at 46,549 n.55 (observing that "the weight to be accorded to [an expert's] testimony will depend on what the expert says and what basis the expert

As noted above, Marzano has not affirmatively accepted responsibility for his misconduct, and continues to minimize his role in the scheme. Moreover, he used instrumentalities of the futures industry in the course of his misconduct and used laundered money to buy his CME seat. Marzano has not introduced sufficient probative evidence of his rehabilitation which directly relates to the wrongful conduct at issue and shows that he would not pose a risk to the public.

Accordingly, we affirm NFA's Final Order denying Marzano's application to become registered as a floor broker.

IT IS SO ORDERED.

By the Commission (Chairman JEFFERY and Commissioners LUKKEN, BROWN-HRUSKA, HATFIELD and DUNN).

  
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Jean A. Webb  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: January 4, 2006

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has for saying it, and not solely on his or her credentials"). Compare *In re Walter*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,215 at 35,010 (CFTC Apr. 14, 1988)) ¶ 24,215 at 35,015 (probation officer, who worked closely with respondent for a significant period following his conviction, had the type of experience and expertise that buttressed the reliability of his opinion on the likelihood of future violations).

More recently, we held that there may be situations in which the opinions of a lay witness may significantly aid the decisionmaker, depending on the particular facts of the case. We held that lay testimony may be used to establish rehabilitation because the focus of our analysis is on the basis for the witness's opinion, not whether the witness is an expert. *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 at 47,834 (CFTC Apr. 15, 1999).