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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SPARTAN CAPITAL SECURITIES, LLC (CRD No. 146251), JOHN D. LOWRY (CRD No. 4336146), and KIM M. MONCHIK (CRD No. 2528972), Respondents.	Disciplinary Proceeding No. 2019061528001 Hearing Officer–MJD

ORDER DENYING RESPONDENTS' MOTION FOR LEAVE TO OFFER EXPERT TESTIMONY

I. Introduction

On May 9, 2022, Respondents filed a Motion for Leave to Offer Expert Testimony ("Motion") of 13 proposed expert witnesses, which include outside counsel and securities industry consultants. The proposed expert testimony would primarily address whether an officer of a broker-dealer, including a chief executive officer ("CEO"), is required to disclose the existence of a customer arbitration that names the officer as a respondent, in addition to the customer's registered representative, on a Uniform Application for Securities Industry Registration or Transfer (Form U4).

The Department of Enforcement filed an opposition to the Motion ("Opposition"), chiefly on the grounds that any proposed expert testimony would address legal issues properly reserved for the Hearing Panel.

For the reasons set forth below, I deny Respondents' Motion.

II. Background

Enforcement's Complaint contains three causes of action. The first cause alleges that in 223 instances Spartan Capital Securities, LLC ("Spartan" or the "Firm") willfully failed to file, or to timely file, amendments to Forms U4 and Uniform Termination Notices for Securities Industry Registration (Forms U5) of approximately 70 current or former registered representatives. According to the Complaint, the Firm failed to file, or to timely file, 162 amendments relating to the filing and resolution of certain customer arbitrations in which the registered representatives were named as a respondent or as a subject of the claim. In ten other instances, the Firm allegedly failed to disclose other customer complaints that were not the subject of an arbitration. In 51 other instances, Spartan allegedly did not disclose certain financial events, including bankruptcies and unsatisfied judgments or liens, against its registered representatives.[1] The Complaint charges that Spartan's misconduct violated Article V, Sections 2(c) and 3(b), of FINRA's By-Laws and FINRA Rules 1122 and 2010.

The Motion primarily relates to causes two and three, which allege that Respondents John D. Lowry ("Lowry"), the Firm's CEO and sole owner, and Kim M. Monchik ("Monchik"), who at different times during the relevant period served as Spartan's Chief Compliance Officer ("CCO"), willfully failed to amend, or to timely amend, their own Forms U4 to disclose the filing or resolution of an arbitration claim in which they were a named respondent or the subject of the claim.[2] Enforcement alleges that Lowry failed to make required disclosures in 38 instances and that Monchik failed to do so in 15 instances. The Complaint charges that Lowry and Monchik violated Article V, Section 2(c), of FINRA's By-Laws and FINRA Rules 1122 and 2010.[3]

In their Answer, Respondents deny the allegations. Their main defense to the charges in causes two and three is that Lowry and Monchik were not obligated to amend their own Forms U4 for the arbitration claims that Enforcement cites based on guidance they received from FINRA staff and advice given by securities professionals and counsel.[4] Respondents also state that they did not act willfully, as the Complaint alleges, but instead acted in good faith because they reasonably relied on the advice of the Firm's CCOs and outside counsel and on their discussions with FINRA staff.[5] Finally, Respondents claim that their actions were consistent with industry practice.[6]

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[1] Complaint ("Compl.") ¶¶ 100-103.

[2] Compl. ¶¶ 108-118, 123-133.

[3] Compl. ¶¶ 116, 120, 131, 135.

[4] Answer ("Ans.") ¶¶ 45-46, 54-55, 58, 111, 126. *See also* Ans. 22-24 (counterstatement of facts).

[5] Ans. 19-21 (Fourth, Fifth, Sixth, Eleventh and Eighteenth Separate Defenses), 22-24 (counterstatement of facts).

[6] Ans. 19-20 (Seventh and Tenth Separate Defenses).

III. Standards for Admitting Expert Testimony

A Hearing Officer has broad discretion under the general standard for the admissibility of evidence set forth in FINRA Rule 9263 to accept or reject expert testimony. Under Rule 9263, a Hearing Officer shall receive relevant evidence but may exclude evidence that is "irrelevant, immaterial, unduly repetitious, or unduly prejudicial." It is the proponent's burden to establish that an expert's proposed testimony satisfies the conditions for admission.[7] The conditions for admission of expert testimony are well established. Expert testimony, like other evidence, must be relevant to the case. While the Federal Rules of Evidence are not applicable to FINRA proceedings, the rules and the case law applying them provide guidance on the issue of expert testimony.[8] Rule 702 of the Federal Rules of Evidence specifies that a witness who is "qualified as an expert by knowledge, skill, experience, training, or education" may give opinion testimony if his or her "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue" and the testimony meets certain measures of reliability. "In short, expert testimony is admissible only if it is both relevant and reliable."[9]

FINRA hearing panels include two industry members who typically possess considerable industry experience and expertise. A hearing panel therefore acts as an "expert" body whose "businessman's judgment" is based on the panel's collective experience in the securities industry.[10] The critical factor is whether the proposed expert testimony would be helpful to the Hearing Panel.[11] As a result, expert testimony is typically not offered in a FINRA disciplinary proceeding "unless novel issues or new, complex, or unusual securities products are involved."[12]

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[7] *See* OHO Order 17-07 (2013035817701) (Mar. 21, 2017), at 2, https://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf.

[8] *See* OHO Order 11-04 (2009017798201) (Mar. 24, 2011), at 3, https://www.finra.org/sites/default/files/OHODecision/p123470_0.pdf.

[9] OHO Order 17-03 (2014042059701) (Feb. 24, 2017), at 2, https://www.finra.org/sites/default/files/OHO_Order_17-03_2014042059701.pdf (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002)).

[10] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *44-45 & n.68 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[11] OHO Order 17-19 (2015047154001) (Nov. 13, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order_17-19_2015047154001_0.pdf.

[12] *See, e.g.*, OHO Order 17-05 (2015044921601) (Mar. 16, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order_17-05_201504421601.pdf; OHO Order 12-01 (2009018771602) (Mar. 14, 2012), at 4, https://www.finra.org/sites/default/files/OHODecision/p126068.pdf ("[B]ecause of the specialized knowledge of [FINRA panelists], expert testimony is less frequently admitted than in the federal courts."); *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *27-28 (NAC Sept. 9, 2003) ("[I]n matters that are before a tribunal that includes two or more individuals with experience in the securities industry, expert testimony is often unnecessary and rarely accepted.").

While an expert may opine on ultimate fact issues,[13] the expert may not give an opinion on an ultimate legal issue by applying the law to the facts of the case.[14]

IV. Respondents' Motion

Respondents state that a part of their defense is that the customer arbitrations identified in the Complaint were not reportable because Lowry and Monchik were named as respondents solely because they were the owner and a manager of Spartan, and not because they were the broker or direct supervisor directly involved in the transactions that resulted in the arbitrations.[15] Respondents rely on FINRA guidance that addresses instances when a supervisor or senior officer of a firm is obligated to report an arbitration claim in which he or she is named. According to the Motion, after conferring with outside attorneys, outside securities industry consultants, and Firm compliance personnel, Respondents made a good faith determination they were not required to report the customer arbitrations on their Forms U4.[16]

The Motion identifies by name 13 potential expert witnesses—six outside attorneys, two consultants, and five Firm compliance personnel.[17] Respondents state that they do not believe that the testimony from the attorneys, consultants, and Spartan compliance personnel would constitute expert testimony "because their testimony will attest to information provided to Respondents which formed the basis of [Respondents'] decision not to report"[18] the arbitrations on the Forms U4. However, Respondents add that testimony from these persons "will **also** be relied upon by Respondents as evidence as to the interpretation of the FINRA Rules and

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[13] *See, e.g.*, *Godfrey v. Newark Police Dep't*, No. 05-806 (SRC), 2007 U.S. Dist. LEXIS 5718, at *15-16 & n.2 (D.N.J. Jan. 26, 2007) ("The expert may not testify as to the ultimate issue of liability or to relevant subsidiary conclusions.") (citing *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) ("Although an expert's opinion may 'embrace[] an ultimate issue to be decided by the trier of fact[,]' the issue embraced must be a factual one.")).

[14] OHO Order 16-20 (20120342425-01) (July 28, 2016), at 5, https://www.finra.org/sites/default/files/OHO_Order 16-20_20120342425-01_0.pdf (denying expert testimony on standards of supervision and the duties owed by a registered representative to customers when recommending investments in bonds) (citing *Dep't of Enforcement v. Skelly*, No. CAF000013, 2003 NASD Discip. LEXIS 40, at *13 n.10 (NAC Nov. 14, 2003) ("Although testimony concerning the ordinary practices in the securities industry may be received to enable a fact finder to evaluate [a party's] conduct against the standards of accepted practice … testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissible.") (quoting *Marion Bass Sec. Corp.*, Admin. Proceedings Release No. 574, 1998 SEC LEXIS 2690, at *7 (Nov. 13, 1998)); *U.S. v. Bedford*, 536 F.3d 1148, 1158 (10th Cir. 2008) ("An expert may not state legal conclusions drawn by applying the law to the facts[.]"); *U.S. v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) ("[O]pinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts is generally inadmissible.").

[15] Respondents' Motion for Leave to Offer Expert Testimony ("Mot.") 1-2.

[16] Mot. 2-3.

[17] During a case management conference that I held with the parties on May 10, 2022, Respondents' counsel stated that he did not believe he would call all 13 witnesses to testify at the hearing. Transcript of Case Management Conference (May 10, 2022), at 12-13, 30-31. Respondents identify a fourteenth person, Respondent Monchik "in her capacity as interim CCO," as a potential expert witness. Mot. 3.

[18] Mot. 3.

Guidance upon which Respondents relied."[19] According to the Motion, each of the proposed experts opined to Lowry and Monchik that they did not need to report the arbitrations, thereby "providing the good faith basis for the decision not to report."[20] These persons are thus fact witnesses. But Respondents acknowledge that such evidence "may be interpreted as expert testimony." Therefore, "as a matter of over inclusiveness [sic]," Respondents seek permission to treat the witnesses' testimony as expert testimony.[21]

According to the Motion, Respondents further intend to introduce testimony concerning a written survey prepared by outside counsel Joseph Lucosky (the "Lucosky Report"). The Lucosky Report, the Motion claims, is relevant to (a) Respondents' decision not to disclose the arbitrations on the Forms U4, and (b) "FINRA's own interpretation of the enforcement of the Reporting Rules and Guidance."[22] The Lucosky Report purports to have reviewed Forms U4 associated with nearly 1,000 registered broker-dealers in the New York City area. It claims that over a ten-year period from 2010 through 2019 there were only four instances involving an alleged "failure to supervise" reported on the Form U4 of a firm CEO.[23] Respondents argue that, because the information in the Lucosky Report was in part the basis for their decision to not disclose the arbitrations on the Form U4, a hearing officer's permission to use the information is not required. But Respondents concede that the survey might be considered an expert report and "thus it is being brought to the Hearing Officer's attention to the extent it might be deemed as expert in nature."[24]

V. Enforcement's Opposition

Enforcement states that the Motion should be denied because Respondents have not complied with the requirements of a motion for expert testimony as set forth in the Case Management and Scheduling Order ("CMSO") that I issued on December 14, 2021. Enforcement further argues that the interpretation and application of FINRA's Rules and guidance concerning what must be disclosed on a Form U4 is a legal question, and therefore they are solely for the Hearing Panel to determine, without the aid of expert testimony. It also argues that the testimony would not be helpful to the Panel.[25]

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[19] *Id.* (Emphasis in original.)

[20] *Id.* at 3-4.

[21] *Id.* at 4.

[22] *Id.* at 5.

[23] *Id.* at 4-5. With their Motion, Respondents included a copy of their Wells submission to FINRA. The Lucosky Report, dated June 30, 2020, is an exhibit to the Wells submission. The Lucosky Report consists of a two-page transmittal letter and includes a 31-page list of 972 broker-dealer disclosures from 2010 to 2019, together with a brief description of the four instances in which a CEO was implicated in a firm's alleged disclosure event.

[24] *Id.* at 5.

[25] Enforcement's Opposition to Respondents' Motion for Leave to Offer Expert Testimony ("Opp.") 2.

In addition, Enforcement specifically objects to allowing expert testimony from Lucosky about the report he compiled on the grounds that it is irrelevant and would be of no assistance to the Hearing Panel. Enforcement also notes that the Lucosky Report was prepared in 2020, after all but one of the arbitrations against Lowry and Monchik at issue in this proceeding took place.[26]

VI. Discussion

As a preliminary matter, Respondents have not complied with the CMSO's requirements for a motion to present expert testimony with respect to any of the 13 persons they have identified as potential experts. On that basis alone, the Motion may be denied. Section V.B. of the CMSO requires that a party seeking leave to offer expert testimony must provide (1) a statement of the witness's qualifications; (2) a summary of the expert's opinions; (3) a list of the other proceedings in which the witness has given expert testimony in the last four years; (4) a list of the publications the witness has authored or co-authored in the last ten years; and (5) a "statement establishing that the witness's opinion will help the Hearing Panel understand the evidence or determine a material fact in issue." Aside from asserting that the proposed experts "specialize in broker-dealer regulation,"[27] Respondents do not provide a statement of the qualifications for any of the witnesses. The Motion also does not provide lists of proceedings in which they have given expert testimony or identify their publications. In short, Respondents have completely failed to provide even a minimal amount of information about any of the witnesses sufficient to determine whether they are qualified to provide an expert opinion and how their testimony could assist the Hearing Panel.[28]

As for the substance of the Motion, Respondents do not conceal the fact that their intent is for the proposed experts to state a legal standard or to provide an opinion on an ultimate legal issue. As Respondents put it, testimony from the proposed experts will "be relied upon … as evidence as to the interpretation of the FINRA Rules and Guidance."[29] The application of the law to the facts is a matter for the Hearing Panel to decide, not an expert.[30]

More fundamentally, this case is not one that requires expert testimony. The principal issues, as they relate to the proposed expert testimony, concern whether Lowry and Monchik were obligated to disclose arbitrations on their Forms U4. These issues are not so novel or

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[26] Opp. 1-2, 8-9.

[27] Mot. 3.

[28] *See, e.g.*, OHO Order 06-20 (E9B2003033501) (March 3, 2006), at 1, https://www.finra.org/sites/default/files/OHODecision/p017563_0.pdf, (denying a respondent's motion for expert testimony, in part, because the proposed expert's overview of his opinion was "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"); OHO Order 17-19, at 4 (denying respondent's motion for expert testimony, in part, on the grounds that he failed to comply with the CMSO and the summary of the opinions was "short, vague, and inadequate, making it difficult to discern the substance of his expected testimony").

[29] Mot. 3.

[30] OHO Order 17-05, at 4 ("[I]t is the hearing panel that is charged with applying the law to the facts of a case.")

complex to require an expert to resolve. They involve instead Respondents' compliance with FINRA by-laws and rules governing required disclosures. The typical FINRA hearing panel is equipped to evaluate whether the arbitrations in question should have been disclosed.[31] Given the allegations in this case, I find that Respondents have failed to meet their burden of showing that expert testimony from any of the proposed experts Respondents have identified in their Motion would be helpful to the Hearing Panel in this matter.

Finally, because I find that the proposed expert testimony concerns legal interpretations and conclusions, I also deny Respondents' request to treat the Lucosky Report as an expert report. I also find that the Lucosky Report would not be helpful to the Hearing Panel. Additionally, expert reports are permissible and may be filed only after a hearing officer grants leave for a party to offer expert testimony.[32]

VII. Order

For the foregoing reasons, Respondents' Motion for Leave to Offer Expert Testimony is **DENIED**. However, Respondents may list the persons identified in the Motion as proposed fact witnesses. If allowed to testify, their testimony will not be treated as expert testimony.

SO ORDERED.

Michael J. Dixon
Hearing Officer

Dated: May 26, 2022

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[31] *See* OHO Order 17-03, at 3 (denying respondent's motion for expert testimony on the issue of Form U4 disclosures).

[32] Also, as stated above concerning all of the proposed experts, Respondents have failed to demonstrate that Lucosky is qualified to serve as an expert.