

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 11-03 (2007011413501).

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

RESPONDENT FIRM,

RESPONDENT 2,

RESPONDENT 3,

RESPONDENT 4,

Respondents.

Disciplinary Proceeding
No. 2007011413501

Hearing Officer – RSH

ORDER DENYING THE RESPONDENTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS; FOR PRODUCTION OF A LIST OF WITHHELD DOCUMENTS; AND TO EXTEND DEADLINES AND HEARING DATES

On January 19, 2011, the Respondents filed a Motion to Compel Discovery and Production of Withheld Documents List (the "Motion"). In summary, the Motion seeks an order (1) directing Enforcement to produce all documents it provided to its testifying expert, HF, (2) directing Enforcement to produce a list of all documents it has withheld from production, and (3) extending pre-hearing deadlines and the dates of the hearing of this matter.

The Department opposes the Motion on the grounds that it has complied with its discovery obligations under Rules 9251 and 9253, it has no obligation to produce all of the documents it provided to its expert, and the Respondents have not made an adequate showing to justify any of the other requested relief.

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For the reasons discussed below, the Respondents’ Motion is denied.

Discussion

1. Expert-Related Documents

On January 5, 2011, Enforcement served the Expert Report of HF (“HF Report”) on Respondents. In Appendix B of the HF Report, HF provided a list entitled “List of Documents Relied Upon.” Items 3 to 21 of Appendix B contain Bates numbers for “hundreds” of pages (according to Respondents, but not disputed by Enforcement) of documents that Enforcement withheld from production pursuant to Rule 9251(b). In a letter dated January 10, 2011, the Respondents requested that Enforcement produce “complete and unredacted copies of all documents listed in Items 3 to 21 of Appendix B.” Enforcement first responded by denying that it had any obligation to turn over the documents; however, it ultimately provided all of the documents as requested.

On January 19, 2011, the Respondents filed the Motion, seeking “all documents [Enforcement] provided to its expert.” On February 9, 2011, Enforcement filed its Opposition. In support of Enforcement’s arguments that it has fully complied with its discovery obligations, Enforcement attached a sworn Declaration of HF. In his Declaration, HF states, “In the interest of completeness and transparency, I listed the full range of documents that I reviewed in connection with this matter in Appendix B of [his expert] report. However, not all of the documents that I reviewed were considered and relied upon to form my basis and opinions [*sic*].” HF included in his Declaration two exhibits—Exhibit 1 lists “the specific documents that [he] considered and relied upon in forming [his] opinions,” and Exhibit 2 lists the “specific documents that [he] did not consider or rely upon in forming [his] opinions.”

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Inasmuch as Enforcement and the Respondents seem to agree that Enforcement produced all of the documents listed in Exhibit B to the HF Report, it is not altogether clear what documents remain to be produced. The Respondents seem to suggest that Enforcement provided other, as yet undisclosed documents to HF that should be produced. The Respondents also speculate that Enforcement may not have complied with its obligations under Rule 9251(b)(2) (material exculpatory evidence or “Brady material”) and Rule 9253 (certain witness statements). The Respondents therefore request a list of all withheld documents.

In its Opposition, Enforcement argues that the Motion should be denied because: (1) Enforcement properly withheld documents pursuant to Rule 9251(b); (2) there is no requirement under FINRA rules for Enforcement to produce to Respondents all documents that it provides to its expert witness; (3) Rule 26 of the Federal Rules of Civil Procedure (“FRCP”), which is not controlling in FINRA disciplinary proceedings, has been amended to expand work-product protections to all communications between attorneys and experts, with limited exceptions; and (4) Enforcement has produced to Respondents all documents required to be produced under amended Rule 26.

Although Enforcement is correct that there is no FINRA rule that requires it to produce to the Respondents all documents that it provides to its expert witness, Rule 9251(a)(3) gives the Hearing Officer discretion, in the interest of fundamental fairness, to broaden the category of documents that Enforcement must produce.¹ In addition, the Hearing Officer has the inherent authority, under Rule 9235, to “do all things necessary and appropriate to discharge his or her

¹ OHO Order 08-01 (20005003437102) at p. 3; OHO Order 03-21 (CAF030011).

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duties,” including ordering Enforcement to produce documents it might not otherwise be required to produce.

The Federal Rules of Civil Procedure do not apply in FINRA proceedings; however, Hearing Officers may look to those rules for guidance in appropriate cases, such as this. The parties cite as guidance Rule 26(a)(2), which governs expert testimony. Prior to its amendment at the end of 2010, Rule 26(a)(2) provided that “data and other information considered by the [expert] witness in forming” his opinion must be disclosed. Since 1993, the disclosure provisions in Rule 26 have generally been read, by many courts and counsel, to authorize discovery of all communications between counsel and expert witnesses, including draft reports.² In an effort to restrict disclosure of attorney-expert communications and draft reports, Rule 26(a)(2) was amended to require the disclosure of “facts or data” considered by the expert in forming his opinion. Further, Rule 26(b)(4)(C) was amended to extend additional work product protection to draft reports and attorney-expert communications.³

The amendments to Rule 26 apply to cases filed after December 1, 2010, and to pending proceedings “insofar as just and practicable.”⁴ Although Enforcement filed this case on December 30, 2009, the parties’ motions for leave to call experts were not filed until July 2010, and their expert reports were not filed until January 2011. While declining to apply the amended Rule 26 in its entirety, the Hearing Officer finds that it is fair, and would not prejudice either party, to adopt the reasoning behind the Rule’s amendment. It appears that Enforcement has already produced to the Respondents all of the documents that its expert “reviewed in connection

² See Notes Fed. R. Civ. P. 26, Notes of Advisory Committee on 2010 Amendments.

³ *Id.*

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with this matter.” The expert stated, under penalty of perjury, that he did not “consider or rely upon” many of those documents. Thus, Enforcement has already provided to the Respondents, albeit later than they should have, more documents than would be required under either the former or amended Rule 26. The Respondents may use any of those documents to cross-examine HF about his opinions at the hearing.

While not clear, it appears that the Respondents are seeking some additional documents that were provided to HF, and/or communications between FINRA staff and attorneys and HF. With respect to the former category, the Respondents are only entitled to receive those documents that HF considered in forming his opinions. Enforcement represents in its Opposition that it has produced to the Respondents all such documents. The Hearing Officer rules that all other communications between Enforcement and HF are protected by the work product doctrine, and need not be produced.

2. List of Withheld Documents

In their Motion, the Respondents suggest that because Enforcement improperly withheld from the Respondents the documents it had provided to HF, it is more likely that Enforcement is improperly withholding other documents. In particular, the Respondents speculate that Enforcement may not have complied with its obligations under Rule 9251(b)(2) (material exculpatory evidence or “Brady material”) and Rule 9253 (certain witness statements). The Respondents therefore request a list of all withheld documents.

In its Opposition, Enforcement attached the sworn Declaration of Karen E. Whitaker, a FINRA Senior Regional Counsel and an attorney of record in this case. She declared that (i) all

⁴ April 28, 2010, Order of the Supreme Court of the United States.

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witness statements as defined by Rule 9253(a)(1) have been produced to Respondents; (ii) she has reviewed the investigative file and determined that no notes consisting of substantially verbatim recodation of witness statements to which Respondents are entitled exist; and (iii) based upon her personal review of the investigative file, it contains no material exculpatory evidence.

Rule 9252(c) permits a Hearing Officer to require Enforcement to submit a list of withheld documents or any withheld documents and, upon review, to compel Enforcement to produce the list or documents to other parties. The Rule requires a party to base such a motion "upon some reason to believe" that Enforcement is improperly withholding documents. The Respondents have not provided any evidence sufficient to overcome Enforcement's sworn declaration that it has complied with its disclosure obligations under Rules 9251 and 9253. Therefore, their Motion for additional documents and a list of withheld documents is denied.

3. Extension of Pre-Hearing Deadlines and Hearing Dates

Because the Respondents' other motions for documents are denied, there is no need to extend pre-hearing deadlines or hearing dates. Therefore, the motion is denied.

SO ORDERED.

Rochelle S. Hall
Hearing Officer

Dated: March 18, 2011