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NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent 1

Respondent 2

and

Respondent 3

Respondents.

Disciplinary Proceeding
No. CAF040002

Hearing Officer—Andrew H. Perkins

**ORDER DENYING COMPLAINANT'S OBJECTION TO
EXPERT TESTIMONY OF PAUL MASON**

On March 14, 2005, the Department of Enforcement filed an objection to portions of the proposed expert testimony of PM. Enforcement objected that Mr. M was offered to testify regarding the "ultimate issues in the case: whether Respondent 1 complied [with] the suitability requirements of Conduct Rule 2310, or as to what Conduct Rule 2310 requires." Enforcement argued that this proffered testimony would go to the ultimate legal question, an area out-of-bounds for expert testimony.

On March 31, 2005, the Respondents' filed their response. The Respondents requested that the objection be denied for two reasons. First, the Respondents pointed out that the Order

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dated January 14, 2005, governing expert witnesses in this case, states that all substantive objections to the parties' expert testimony will be addressed in the post-hearing briefs.

Accordingly, the Respondents argued that Enforcement's objection is premature. Second, the Respondents argued that due to the novel and difficult issues presented by this case, Mr. M's proposed testimony would be helpful to the Extended Hearing Panel and, therefore, should be permitted.

The Hearing Officer concludes from a review of the papers and Mr. M's report that the record is not sufficiently developed to exclude or radically limit Mr. M's testimony at this time. Indeed, it was with just such difficulties in mind that the Hearing Officer directed the parties to reserve substantive objections to expert testimony to the post-hearing stage of the proceeding. Moreover, the Federal Rules of Evidence have abandoned the "ultimate issue" rule because its application often deprived the trier of fact of useful information and was difficult to apply.¹ Federal Rule of Evidence 704(a) permits expert testimony that "embraces an ultimate issue to be decided by the trier of fact." In addition, an expert may "refer to the law in expressing his or her opinion."² The limiting principles are whether the testimony will be helpful (*See Fed. R. Evid. 702*) and whether the expert provides a solid foundation and explanation grounded in the facts of the case to support his or her opinion. An expert, however, may not give testimony stating the ultimate legal conclusions.³ Generally, testimony concerning legal conclusions is prohibited

¹ *See Fed. R. Evid. 704 advisory committee's notes.*

² *See, e.g., Evans v Independent Sch. Dist.*, 936 F.2d 472, 476 (10th Cir. 1991).

³ *See, e.g., United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

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because it is seen as an encroachment on the judge's role to instruct the jury on the applicable legal standard.⁴

In this case, the substance of Mr. M's proffered testimony centers on Respondent 1's compliance and supervisory procedures and their consistency with industry customs, practices, and standards with respect to issue of suitability determinations for variable annuities.⁵ Mr. M further states that he will apply NASD Conduct Rules 2310 and 3010 to the facts, taking into consideration guidance provided to the industry by NASD.⁶ Such an analysis stops short of the ultimate legal conclusion of whether the Respondents violated the applicable rules.

For the foregoing reasons, the Hearing Officer denies Enforcement's objection to Mr. M's proposed testimony.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

April 5, 2005

⁴ See, e.g., *In re Air Disaster at Lockerbie Scotland*, 37 F. 3d 804, 827 (2d Cir. 1994).

⁵ M Report at 2.

⁶ *Id.* at 3.