

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-11 (20090174025-02).

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

DEPARTMENT OF MARKET REGULATION,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 20090174025-02

Hearing Officer—DRS

**ORDER DENYING RESPONDENT'S MOTION FOR LEAVE TO PERMIT
EXPERT TESTIMONY**

I. Introduction

On July 15, 2015, Respondent moved for leave to permit the expert testimony of James L. Rothenberg. According to the motion, Rothenberg, a securities attorney with the Law Office of James L. Rothenberg, “is expected to testify about the alleged market manipulation and other issues involved in this proceeding.” The Department of Market Regulation opposed the motion on August 14, 2015, because it did not: (1) provide a meaningful summary of the proposed testimony; (2) demonstrate that Rothenberg is qualified to give an expert opinion regarding the alleged manipulative trading at issue; and (3) explain why Rothenberg’s testimony is necessary in this case or how it would help the Hearing Panel.¹ For the reasons below, I deny the motion.

II. Governing Standards

The Hearing Officer has broad discretion whether to permit expert testimony.² In applying that discretion, as with all proffered evidence, the guiding principal is relevance.³ The Hearing Officer may admit evidence that is relevant, but may exclude evidence that is “irrelevant, immaterial, unduly repetitious, or unduly prejudicial.”⁴ In determining whether to

¹ Market Regulation also states that Respondent did not consult with it before filing the motion, as required by the Case Management and Scheduling Order.

² See, e.g., OHO Order 15-04 (2011025706401) (Feb. 3, 2015) at 2, <http://www.finra.org/sites/default/files/OHO-Order-15-04-ProceedingNo.2011025706401.pdf>; OHO Order 12-07 (2010020846601) (Nov. 9, 2012) at 1, <http://www.finra.org/sites/default/files/OHODecision/p229431.pdf>.

³ OHO Order 12-01 (2009018771602) (Mar. 14, 2012) at 2, <http://www.finra.org/sites/default/files/OHODecision/p126068.pdf>.

⁴ FINRA Rule 9263.

permit expert testimony, the Federal Rules of Evidence, and related case law, though not binding in this proceeding,⁵ are instructive.⁶ Under Rule 702(a), a witness who is “qualified as an expert by knowledge, skill, experience, training or education” may provide opinion testimony if the witness’s “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,” and if the testimony is reliable.⁷ The key factor is whether the proposed testimony would help the Hearing Panel.⁸

Movants have the burden of establishing the conditions for admissibility of expert testimony.⁹ They must also comply with the Case Management and Scheduling Order’s (“CMSO”) provisions governing motions for expert testimony. Under the CMSO, an expert testimony motion must, among other things, “set forth an explanation of why the expert testimony is necessary and how it would be helpful to the Hearing Panel” and include “a brief summary of the expert’s expected testimony” and “a statement of the expert’s qualifications.”¹⁰

III. Discussion

After reviewing the motion and opposition, I conclude that Respondent did not establish that Rothenberg’s testimony would help the Hearing Panel understand the evidence or determine a fact in issue. I reach this conclusion for three reasons:

First, Respondent has not provided a sufficient description of the proposed subject of Rothenberg’s expert testimony. The motion states only that he will testify “about the alleged market manipulation and other issues involved in this proceeding.” The motion does not identify the specific aspects of, or issues relating to, market manipulation that Rothenberg will address. This omission renders the motion too general and vague for me to conclude that Rothenberg will provide helpful testimony.

Second, the motion does not explain how Rothenberg’s testimony would be helpful to the Hearing Panel. Instead, the motion rests upon: (1) general legal propositions (“[e]xpert testimony has been used in numerous cases involving market manipulation;”¹¹ “expert testimony is helpful in cases involving [the] securities industry”¹²) and (2) the conclusory statement that based on his

⁵ FINRA Rule 9145(a).

⁶ OHO Order 12-07 (2010020846601) (Nov. 9, 2012) at 2 n.3.

⁷ See also OHO Order 15-04 (2011025706401) (Feb. 3, 2015) at 2, (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. Apr. 18, 2002) (“In short, expert testimony is admissible only if it is both relevant and reliable.”)).

⁸ OHO Order 15-04 (2011025706401) (Feb. 3, 2015) at 2; OHO Order 12-01 (2009018771602) (Mar. 14, 2012), .

⁹ OHO Order 12-01 (2009018771602) at 4 (“It is the proponent’s burden to show that the expert’s testimony satisfies the conditions for admission.”).

¹⁰ CMSO at 4.

¹¹ Resp. Mot. at 4.

¹² Resp. Mot. at 5.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-11 (20090174025-02).

extensive experience in stock fraud and manipulation issues, his testimony will be helpful to the Panel. These statements fail to demonstrate that Rothenberg's testimony will be helpful in this proceeding.

Third, the motion does not show that Rothenberg is qualified to give expert testimony regarding facts in issue. The motion summarizes Rothenberg's experience as follows:

Earlier in his career, Mr. Rothenberg was [a] Securities and Exchange Commission Enforcement Attorney. He successfully prosecuted stock fraud and manipulation cases against NASD Market Makers. Later on, Mr. Rothenberg was the Chief Counsel and Manager of [the] N.Y.S.E. Market Surveillance Division where he investigated, drafted and prosecuted N.Y.S.E cases of stock fraud and manipulation. Mr. Rothenberg also served as Expert Witness/Legal Consultant to N.Y.S.E. Member Firms-Stock Fraud & Manipulation issues in arbitration. Currently, he is a consultant and lecturer on Securities Market Structure, Exchange Specialists and NASD Market-Makers.¹³

But neither this description, nor Rothenberg's attached resume, indicates whether his experience in manipulation cases includes the type of manipulative activity alleged here.¹⁴ Indeed, the motion does not provide any information about the types of manipulation cases with which Rothenberg has been involved. Moreover, the motion does not explain how Rothenberg's experience qualifies him to opine on any issues in this case. Therefore, Respondent has not shown that Rothenberg is qualified to provide expert testimony in this case.

Accordingly, for the above reasons, I **DENY** the motion.¹⁵

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Dated: August 19, 2015

¹³ Resp. Motion at 5.

¹⁴ The Complaint alleges that Respondent marked the opening and closing prices of a security and engaged in matched trading in the stock in an attempt to manipulate its price.

¹⁵ In its opposition, Market Regulation represents that Respondent did not consult with it before filing his motion. I remind Respondent that he must comply with the consultation and certification provision in the CMSO at 3. Any motion that fails to include the required certification "may be summarily denied."