

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KRIS LYNN LEWIS
(CRD No. 4505097),

Respondent.

Disciplinary Proceeding
No. 2015047154001

Hearing Officer—DRS

**ORDER DENYING RESPONDENT'S AMENDED MOTION TO GRANT
EXPERT TESTIMONY**

A. Background

The Complaint charges Respondent Kris Lynn Lewis with (1) violating Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by willfully failing to timely amend her Form U4 to disclose that she was charged with, and pled guilty to, a felony of child abuse; and (2) violating FINRA Rule 2010 by making false attestations on a firm questionnaire and a FINRA examination-related Personal Activity Questionnaire ("PAQ") by denying that she had been charged with, or pled guilty to, a felony.

Although Lewis admits many of the Complaint's allegations, she denies acting willfully. "I did in fact inform my direct supervisor as stated in company policy," she asserts in her Amended Answer, adding "it was he who did not inform the compliance team to amend my U4." Further, she claims she did not disclose the charge on the firm's questionnaire or the PAQ because he ordered her not to do so.¹

Lewis filed a Motion to Grant Expert Testimony on October 6, 2017, almost two months after the deadline given in the May 25, 2017 Case Management and Scheduling Order ("CMSO") had passed for filing such motions.² Three days later, she filed a revised Motion to Grant Expert testimony along with an Amended Motion to Grant Expert Testimony that was identical to the revised motion.³ Lewis seeks to call as an expert witness Robert Keenan, founder,

¹ Amended Answer at 2, ¶ 15.

² CMSO at 2 (setting deadline of August 14, 2017, "for filing motions identifying experts and seeking leave to offer their testimony at hearing.").

³ The revised Motion (dated October 6) and the Amended Motion (dated October 7) were transmitted electronically to OHOCasFilings on Sunday, October 8, 2017, but I deemed them filed on Monday, October 9, 2017. See Order Setting Deadline for Enforcement's Response to Expert Motions at 1 n.1 (October 26, 2017) ("Order Setting

Chief Executive Officer, and Chief Compliance Officer of FINRA member firm St. Bernard Financial Services, Inc., Lewis's current employer. She proffers that he will testify about: "(1) The relevance of the charges against Kris Lewis in relationship to FINRA['s] stated purpose of: 'Customer Protection, Market Integrity', (2) the duty to and the ability of Lewis to update her own Form U-4, and (3) whatever else her attorney wishes him to testify on." "Keenan's testimony," according to Lewis, "is important to establish that FINRA's Department of Enforcement is in error stating that Lewis is responsible for updating her Form U4 and that when she notified her supervisor of the felony charge, her responsibility was completed for all practical purposes."⁴

On November 3, 2017,⁵ Enforcement opposed the Amended Motion on numerous grounds: (1) it is untimely; (2) it fails to provide a sufficient description of the nature, scope or purpose of the proffered expert testimony, in violation of the CMSO; (3) Lewis "failed to file an expert report as mandated by the CMSO"; (4) Lewis failed to "meet and confer" with Enforcement before filing the Amended Motion, in violation of the CMSO; (5) Keenan's testimony will not be relevant, material, reliable, or helpful to the hearing panel; and (6) he is not qualified to opine on Form U4 disclosure laws.

As explained below, I deny the Amended Motion.

B. Standards for Admitting Expert Testimony

A Hearing Officer has broad discretion to accept or reject expert testimony.⁶ FINRA Rule 9235 empowers a Hearing Officer to "do all things necessary and appropriate" to fulfill his or her duties in the conduct of the proceeding, including resolving all procedural and evidentiary issues that may arise. "With respect to evidence generally, relevance is the guiding principle in disciplinary proceedings such as this."⁷ Under FINRA Rule 9263(a), a Hearing Officer shall admit evidence that is relevant, but may exclude evidence that is "irrelevant, immaterial, unduly repetitious, or unduly prejudicial."

Deadline for Enforcement's Response to Expert Motions"). It appears that the Amended Motion was meant to supersede the revised Motion, except that Lewis did not refile with the Amended Motion the information regarding the expert that she had attached to her original motion filed on October 6. I deem the Amended Motion as superseding the original and revised motions, except that in ruling on the Amended Motion, I also considered the originally filed expert materials.

⁴ Motion to Grant Expert Testimony at 2 (filed October 6, 2017).

⁵ For the reasons set forth in my Order Setting Response Deadline, I directed Enforcement to file its response on or before November 3, 2017.

⁶ *Dep't of Enforcement v. Brookstone Securities, Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *113 (NAC Apr. 16, 2015); OHO Order 17-07 at 1 (2013035817701) (Mar. 21, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf; OHO Order 17-05, at 2 (201504421601) (Mar. 16, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-05_201504421601.pdf.

⁷ OHO Order 16-02, at 2 (2014040295201) (Jan. 29, 2016), http://www.finra.org/sites/default/files/OHO-Order16-02-2014040295201_0.pdf (citing OHO Order 12-01, at 2 (2009018771602) (Mar. 14, 2012), <http://www.finra.org/sites/default/files/OHODecision/p126068.pdf>).

It is the proponent's burden to establish that an expert's testimony satisfies the conditions for admission.⁸ Although not binding in disciplinary proceedings,⁹ Federal Rule of Evidence 702 is instructive regarding those conditions.¹⁰ Rule 702, which governs the admissibility of expert testimony in federal court, provides that a witness who is "qualified as an expert by knowledge, skill, expertise, training or education" may provide expert testimony if the witness's "specialized knowledge will help the trier of fact" and the testimony is reliable.¹¹ Here, the overarching and critical factor is whether Keenan's proposed testimony would be helpful to the Hearing Panel.¹²

In determining whether expert testimony would be helpful, the nature of the forum must be taken into account.¹³ FINRA hearing panels include two industry members. These industry panelists 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.¹⁴ In light of this collective experience, expert testimony is often unnecessary in FINRA disciplinary proceedings.¹⁵ Indeed, such testimony is typically not offered "unless novel issues or new, complex, or unusual securities products are involved."¹⁶ While an expert may opine on ultimate fact issues,¹⁷ the expert may not give an opinion on the ultimate legal issue by applying the law to the facts of the case¹⁸ or state a legal standard.¹⁹

In addition to these legal principles and requirements, requests for leave to offer expert testimony must comply with the relevant provisions in the CMSO. The CMSO requires a "party seeking permission to offer expert testimony [to] establish that the proposed expert's opinion will help the Hearing Panel understand the evidence or determine a fact in issue."²⁰ Specifically,

⁸ See, e.g., OHO Order 17-07, at 2; OHO Order 16-02, at 2.

⁹ FINRA Rule 9145(a); OHO Order 17-05, at 2.

¹⁰ See, e.g., OHO Order 17-07, at 2; OHO Order 17-05, at 2.

¹¹ OHO Order 17-05, at 2; OHO Order 16-02, at 2.

¹² OHO Order 17-07, at 2; OHO Order 17-05, at 2; OHO Order 16-02, at 3.

¹³ OHO Order 16-02, at 2.

¹⁴ *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *66-67 & n.67 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012); OHO Order 17-05, at 2.

¹⁵ *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *27-28 (NAC Sept. 9, 2003); OHO Order 17-05, at 2-3; OHO Order 16-02, at 2.

¹⁶ See, e.g., OHO Order 17-05, at 3; OHO Order 00-29, at 3 (C9B0000) (Oct. 6, 2000), <https://www.finra.org/sites/default/files/OHODecision/p007941.pdf>.

¹⁷ See, e.g., *Hurt v. Commerce Energy, Inc.*, No. 1:12-cv-00758, 2014 U.S. Dist. LEXIS 125321, at *4 (N.D. Ohio Sept. 8, 2014) ("Although an expert's opinion may 'embrace[] an ultimate issue to be decided by the trier of fact[,] Fed. R. Evid. 704(a), the issue embraced must be a factual one.") (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994)). OHO Order 17-05, at 3.

¹⁸ OHO Order 17-05, at 3 & n.12 (and cases cited therein).

¹⁹ *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.").

²⁰ CMSO at 5, § IV.B.

expert motions must include: (1) the name of the proposed expert; (2) a statement of the expert's qualifications; (3) a summary of the expert's opinions; (4) a listing of other proceedings in which the expert has given expert testimony in the last four years; (5) a list of the expert's publications the witness authored or co-authored in the last 10 years, and copies of those publications that are not readily available to the other Parties and the Hearing Panel; (6) a statement establishing that the witness's opinion will help the Hearing Panel understand the evidence or determine a material fact in issue; and (7) if the witness is a former FINRA officer, a statement that the witness is not subject to the restriction imposed by Rule 9141(c).

C. Discussion

After applying the above principles and requirements to the Amended Motion, I find that Lewis has not established that Keenan should be permitted to offer expert testimony. As a threshold matter, the Amended Motion did not comply with the CMSO. Its summary of Keenan's opinions was short, vague, and inadequate, making it difficult to discern the substance of his expected testimony. In fact, the summary is more in the nature of a statement of testimonial topics, than a summary of his opinions on those topics.

In any event, based on the description in the summary, it does not appear that Keenan's testimony will be helpful. Most of the proffered testimony would likely state a legal standard, or, by applying law to the facts, constitute an opinion on an ultimate legal issue or draw a legal conclusion. Also, Lewis's request that Keenan testify about "[w]hatever her attorney wishes him to testify on" is improper, as it effectively seeks an overly-broad testimonial blank check.²¹ Moreover, and fundamentally, this case does not warrant expert testimony. The key issues relate to the reason the Form U4 was not timely updated and why Lewis provided certain answers on the questionnaires. These issues are not unique, novel, or complex. A typical FINRA hearing panel is likely to have sufficient expertise to understand and resolve them without assistance from an expert witness.²²

Accordingly, based on the forgoing, the Amended Motion is **DENIED**.²³ In light of the denial, I decline to reach the issue of whether Keenan is qualified to give the expert testimony proffered by the Amended Motion.

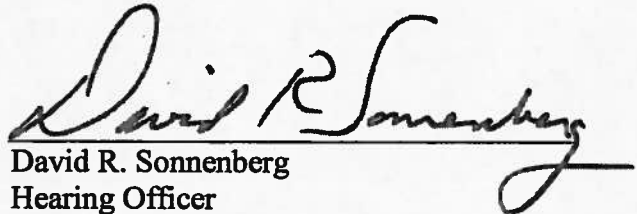
²¹ This request is baffling; Lewis is appearing *pro se* in this proceeding and has not indicated that she plans to hire counsel.

²² See OHO Order 17-05, at 4 (denying request for expert testimony when it "would cover subjects that are within the expertise of seasoned professionals in the securities industry and the Hearing Panel will have sufficient knowledge with respect to industry practices"); Order 08-02, at 3 (2005003437102) (Feb. 28, 2008), http://www.finra.org/sites/default/files/OHODecision/p038251_0_0.pdf. ("Testimony that is within the expertise of a hearing panel is also not helpful and is generally excluded.")

²³ Although I deny the Amended Motion, I reject certain arguments advanced by Enforcement. Regarding the Amended Motion's untimeliness, Lewis explains that she did not timely file the expert motion because Keenan was unable to testify at the hearing, as originally scheduled, but because the hearing date was continued, he is now available. Given these changed circumstances, and because Enforcement did not demonstrate prejudice by virtue of the untimely filing, I do not deny the Amended Motion on these grounds. I also reject the argument that the

Finally, Lewis's Amended Motion did not include a certification that she had "made a reasonable, good faith effort to meet and confer with the opposing party to resolve each issue in the motion informally," as required by the CMSO.²⁴ Moreover, Enforcement represents in its opposition that Lewis did not conduct a "meet and confer" before filing the Amended Motion. This is not the first time Lewis has failed to comply with the "meet and confer" requirement: Lewis's motion and revised motion seeking to invoke Rule 8210 did not contain the required certification,²⁵ an omission I noted in my order denying, on other grounds, the revised motion.²⁶ The CMSO states that "[m]otions that do not contain this certification may be rejected." Therefore, given Lewis's previous failures to comply with the requirement, she is hereby informed that I will reject any future motions that do not contain the "meet and confer" certification.

SO ORDERED.


David R. Sonnenberg
Hearing Officer

Date: November 13, 2017

Copies to: Kris Lynn Lewis (via email and first-class mail)
Jennifer L. Crawford, Esq. (via email and first-class mail)
R. Michael Vagnucci, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)

Amended Motion should be denied because Lewis has not included an expert report. Expert reports were not required to be filed in connection with a request for leave to call an expert. (Expert reports are later filed if leave is granted). Finally, I do not deny the request on the grounds that Lewis has failed to comply with the "meet and confer" requirement in the CMSO; instead, I address this issue, above.

²⁴ CMSO at 4, § III. D.

²⁵ See Motion to Invoke Rule 8210 Information (filed July 5, 2017); [Revised] Motion to Invoke Rule 8210 Information (filed July 25, 2017).

²⁶ See Order Denying Motion to Invoke Rule 8210 Information, at 1 n.2 (Aug. 22, 2017).