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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHNNY E. BURRIS (CRD No. 2850953), Respondent.	Disciplinary Proceeding No. 2015044921601 Hearing Officer–MJD

ORDER DENYING RESPONDENT'S MOTION FOR LEAVE TO PRESENT EXPERT TESTIMONY

I. Background

The Department of Enforcement filed a three-cause Complaint against Respondent Johnny E. Burris. Enforcement alleges that in April 2012 Respondent failed to timely execute his customers' (a married couple) order to sell a security so they had enough money in their account to make an income tax payment to the Internal Revenue Service. The alleged failure to execute the sell order caused the IRS to reject the customers' attempted payment because of insufficient funds. The customers incurred over $600 in penalties and interest for late payment of their taxes. Enforcement further alleges that Respondent settled the customers' complaint away from his firm and failed to get his firm's approval before sending correspondence to the customers and the IRS.

Each cause of action alleges that Respondent failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. In his Answer, Respondent admits he "inadvertently" failed to place the requested trade and the IRS rejected the customers' tax payment for insufficient funds. Respondent also admits he sent correspondence to the customers and the IRS but denies that it was not approved by his supervisor. He also denies that he settled the customers' complaint away from his firm.[1]

On March 3, 2017, Respondent moved for leave to offer the expert testimony of Hans-Linhard Reich and Robert Masi to opine that Respondent's conduct, even assuming all the

[1] Complaint ¶¶ 1, 4, 12-14, 34-36, 41-43, 52; Answer ¶¶ 1, 4, 12-14, 34-36, 41-43, 52.

factual allegations in the Complaint, was not unethical.[2] Enforcement filed its opposition on March 15, 2017, arguing primarily that Respondent's proposed expert testimony will impermissibly address legal issues.

For the reasons discussed below, I deny Respondent's motion.

II. Standards for Admitting Expert Testimony

Hearing Officers have broad discretion to accept or reject expert testimony even where the expert is qualified to address the proposed topics and the evidence meets the general standard for admissibility set forth in FINRA Rule 9263.[3] While the Federal Rules of Evidence are not applicable to FINRA proceedings, those rules and the case law applying them provide guidance on the issue of expert testimony.[4] Rule 702 of the Federal Rules of Evidence specifies that a witness "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" and the testimony meets certain measures of reliability. "In short, expert testimony is admissible only if it is both relevant and reliable."[5] The proponent of the testimony has the burden of establishing that the expert's testimony satisfies the conditions for admission.[6] The critical factor is whether the proposed testimony would be helpful to the Hearing Panel.[7]

The nature of the forum must also be considered in determining whether expert testimony would be helpful. 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.[8] Accordingly, expert testimony is often unnecessary in FINRA disciplinary

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[2] On March 14, 2017, to comply with FINRA Rule 9242(a)(5) and the Case Management and Scheduling Order (¶ IV.B.) entered in this case, Respondent supplemented his motion by filing an addendum in which he disclosed that his proposed experts had not authored published papers in the past ten years and that only Mr. Reich had testified as an expert in the past four years.

[3] *See* OHO Order 12-01 (2009018771602) at 2-3 (Mar. 14, 2012), http://www.finra.org/sites/default/files/OHODecision/p126068.pdf; *Dep't of Enforcement v. Fiero*, No. CAF980002, 2002 NASD Discip. LEXIS 16, at *89-90 (NAC Oct. 28, 2002).

[4] *See* OHO Order 11-04 (2009017798201) (Mar. 24, 2011), http://www.finra.org/sites/default/files/OHODecision/p123470.pdf; FINRA Rule 9145(a) (specifying that the Federal Rules of Evidence do not apply in FINRA disciplinary proceedings).

[5] *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002).

[6] *See* OHO Order 12-01, a 4 ("It is the proponent's burden to show that the expert's testimony satisfies the conditions for admission.").

[7] *See* OHO Order 12-01, at 3 ("a primary focus is on whether the offered [expert] testimony would be helpful to the fact-finder").

[8] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *66–67 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

proceedings.[9] Indeed, such testimony is typically not offered "unless novel issues or new, complex, or unusual securities products are involved."[10] While an expert may opine on ultimate fact issues,[11] the expert may not give an opinion on an ultimate legal issue by applying the law to the facts of the case.[12]

III. Discussion

In his motion, Respondent states that the allegations as to what he did (aside from whether he sent correspondence that was not approved by his firm) "will be largely uncontested" at the hearing. "Therefore, the pivotal issue in this case will be whether any of [Respondent's] conduct, singly or together, rises to the level of a Rule 2010 violation."[13] Respondent adds that his experts will opine that his forgetting to execute a trade, his efforts to correct his error once

[9] *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"); OHO Order 12-01, at 4, ("[B]ecause of the specialized knowledge of [FINRA panelists], expert testimony is less frequently admitted than in the federal courts.").

[10] *See, e.g.*, OHO Order 00-29 (C9B000013), at 3 (Oct. 6, 2000), https://www.finra.org/sites/default/files/OHODecision/p007941.pdf (in a case alleging a firm operated below net capital, denying motion for expert testimony on the customary practices of an offsite financial operations principal).

[11] *See, e.g.*, *Godfrey v. Newark Police Dep't*, Civil 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.")

[12] OHO Order 16-20 (C20120342425-01) at 5 (July 28, 2016), http://www.finra.org/sites/default/files/OHO_Order16-20_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 (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*., 1998 SEC LEXIS 2690, at *7, Admin. Proceeding Release No. 574 (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.").

[13] Respondent's Motion ("Mot."), at 3. Respondent incorrectly states that Rule 2010 addresses only "conduct that in some material way benefited [] the registered representative and was either deceptive or amounted to some species of fraud." Mot., at 3. He misunderstands the elements necessary to find a violation of Rule 2010. Rule 2010 states a "'broad ethical principle' and center[s] on the 'ethical implications' of . . . conduct." *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *17 (Jan. 6, 2012) (quoting *Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *13 (Jan. 9, 209), *aff'd*, 586 F.3d 122 (2d Cir. 2009). A violation of Rule 2010 "need not be premised on a motive or scienter finding." *Heath*, 2009 SEC LEXIS, 14, at *15. Instead the rule "set[s] forth a standard intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *DiFrancesco*, 2012 SEC LEXIS 54, at *18 (internal quotation marks omitted).

discovered, and writing to the customers owning up to his mistake and to the IRS asking it to waive its penalties were not unethical.

I find that Respondent impermissibly seeks to have his experts opine on an ultimate issue of law – whether his conduct constituted unethical, or otherwise improper, behavior in violation of Rule 2010. Such testimony is not allowed because it is the hearing panel that is charged with applying the law to the facts of a case.

Furthermore, Respondent has not established that expert testimony would assist the Panel. This case does not involve "novel issues or new, complex, or unusual securities products." There is nothing in the proposed experts' credentials suggesting they have some special expertise that the typical industry hearing panelist lacks.[14] Their anticipated testimony 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.[15]

IV. Conclusion

Respondent's proposed expert testimony concerns primarily legal issues. Such testimony is not permitted because it encroaches on the role of the Hearing Panel. It also would not be helpful to the Hearing Panel. Accordingly, Respondent's motion for leave to present expert testimony is **DENIED.**

SO ORDERED.

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Michael J. Dixon
Hearing Officer

Dated: March 16, 2017

[14] Respondent states that Reich and Masi "have had long associations with the industry in general, with the compliance function as seen from the perspective of broker-dealer firms, and the compliance and enforcement functions as seen from the perspective of the regulators." Mot., at 3.

[15] *See* Order 08-02 (2005003437102), at 3 (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.").