FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RONALD R. BLASCZYK (CRD No. 3065429), Respondent.	Disciplinary Proceeding No. 2016052503101 Hearing Officer–LOM

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S RULE 9252 REQUEST

I. INTRODUCTION

The hearing in this disciplinary proceeding is scheduled to begin on May 14, 2019. The Department of Enforcement ("Enforcement") alleges two causes of action, one for making an unsuitable recommendation to an elderly customer in violation of FINRA Rule 2111, the other for creating a false firm record regarding a meeting with that customer in violation of FINRA Rule 2010.

On February 26, 2019, Respondent Ronald R. Blasczyk filed and served a request for Enforcement to invoke FINRA Rule 8210 to compel the production of six categories of documents and communications ("Motion"), pursuant to FINRA Rule 9252. Respondent seeks the documents and communications from a non-party to this proceeding, RZ, a FINRA-registered financial advisor and attorney who is alleged to have advised Respondent's customer on investments, estate planning, and other legal issues.

On March 5, 2019, Enforcement filed and served a response to the Motion ("Opposition" in text; "Opp." in footnote), asking that the Motion be denied in part. Enforcement does not object to two of the requests but does object to the four remaining requests, primarily on the basis of relevance. Enforcement also objects that two of the four remaining requests seek information protected by the attorney-client privilege and attorney work-product doctrine. Enforcement proposes a modification to those two requests to narrow their scope. As for the final two requests, Enforcement asserts they are irrelevant, overbroad and objectionable.

For the reasons discussed below, I grant Respondent's request in part, with certain modifications, and deny it in part.

II. DISCUSSION

A. Nature of the Case

This case involves two meetings that Respondent had with his elderly customer, EF: the first meeting in June 2015, just between the two of them, and the second in July 2015, with EF and one of her daughters, PF. EF is now deceased, so Respondent appears to be the only person with first-hand knowledge of the first meeting. From the Complaint and Answer, it appears that Respondent and PF have different recollections of the second meeting. Much of the case is likely to turn on credibility.

The Complaint alleges that at the first meeting Respondent met with EF and made an unsuitable recommendation that she liquidate a variable annuity that she had held for ten years and use the proceeds to purchase a new variable annuity offered by a different company. According to the Complaint, after the meeting Respondent liquidated the variable annuity in EF's account and arranged to meet her a second time to effect the paperwork necessary for the purchase of the new variable annuity. At the second meeting, EF's daughter, PF, accompanied her mother. The Complaint alleges that at the second meeting EF instructed Respondent *not* to sell her existing annuity, apparently unaware that he had already done so.[1]

The Complaint alleges that Respondent then created a false record when he made an entry into his firm's Contact Management System ("CMS") regarding the second meeting. Respondent's CMS entry indicated that EF and her daughter PF were aware at the time of the meeting that he had liquidated EF's variable annuity and that they told him they were speaking with another individual, RZ, about how best to utilize the proceeds of that sale.[2]

In his Answer, Respondent asserts that EF expressed concerns at the first meeting about the heavy concentration of her assets with the company whose variable annuity she held and further expressed concerns about market volatility. According to the Answer, Respondent discussed various options in light of EF's concerns, including a variable annuity with a different company. According to the Answer, EF determined to liquidate her existing annuity.[3] After following EF's instruction to sell the existing annuity, Respondent asserts that he came to the second meeting prepared to discuss mutual funds, UITs, and other investment vehicles, including the variable annuity with a different company. He claims that PF interrupted his presentation while he was talking about the new variable annuity and announced that she and her mother were going to discuss their options with another advisor, RZ. They told him to leave the proceeds from the sale of the first variable annuity in cash until receiving further instructions. Respondent made the entry in his firm's records reflecting that they were going to talk to RZ about their options.

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[1] Complaint ¶¶ 1-5.

[2] Complaint ¶¶ 62, 69.

[3] Respondent's Answer to Complaint ("Answer") at 1.

PF and RZ are expected to testify at the hearing. In its Opposition, Enforcement asserts that neither EF nor her daughter spoke with anyone about using the money invested in EF's variable annuity for another purpose. Enforcement said that it anticipates that RZ will testify that no one spoke to him in the summer of 2015 regarding the management of EF's investments.

B. Applicable Legal Standards

FINRA Rule 9252 creates an avenue for discovery by a respondent in a FINRA disciplinary proceeding. The Rule allows a respondent to request that FINRA invoke its authority under Rule 8210 to compel the production of documents or testimony from a FINRA member firm or an associated person of a member firm. Under this Rule, the request must be filed and served in writing, and it must contain the following information:

- A description—with specificity—of the testimony, documents or category or type of documents sought;
- An explanation of why the testimony or documents are material;
- A description of the requesting party's previous good faith efforts to obtain the testimony or documents through other means; and
- A statement as to whether the person requested to testify or the custodian of the documents sought is subject to FINRA's jurisdiction.[4]

Under Rule 9252, a Hearing Officer may grant a request upon a showing that:

- The information sought is relevant, material, and non-cumulative;
- The requesting Party has previously attempted in good faith, but unsuccessfully, to obtain the desired testimony or documents through other means; and
- Each person from whom the testimony or documents are sought is subject to FINRA's jurisdiction.[5]

In considering a request made under Rule, the Hearing Officer shall also consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.[6] If, after considering all the circumstances, the Hearing Officer determines that a request is unreasonable, oppressive,

[4] FINRA Rule 9252(a).

[5] FINRA Rule 9252(b).

[6] *Id.*

excessive in scope, or unduly burdensome, then the Hearing Officer "shall deny the request, or grant it only upon such conditions as fairness requires."[7]

In evaluating the relevance and materiality of the proposed testimony, I am guided by the Federal Rules of Evidence, which, though not binding in this forum, are frequently relied upon in FINRA disciplinary proceedings.[8] The Federal Rules of Evidence address relevance explicitly. Under the definition of relevance contained in Rule 401 of the Federal Rules of Evidence, evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.[9] While not referenced specifically, the concept of materiality is embodied in part (b) of the relevance test. Although evidence may tend to make the existence of a fact more probable or less probable than it would be without the evidence, the evidence is not relevant unless the fact to be proved or disproved is material.[10]

C. Respondent's Motion

Respondent's Motion seeks the following:

a) communications between RZ and EF regarding or relating to her investments held at Wells Fargo, Family Wealth Advisors, or elsewhere;

b) all communications between RZ and EF's daughter, PF, regarding or relating to EF;

c) all communications between RZ and another of EF's daughters, KS, regarding or relating to EF;

d) all documents regarding or relating to EF's investments held at Wells Fargo, Family Wealth Advisors, or elsewhere;

e) all communications between RZ and EF regarding or relating to her estate planning, her powers of attorney, or any medical directives, including any communications copying a third party such as one of EF's children; and

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[7] FINRA Rule 9252(c).

[8] *See* FINRA Rule 9145(a) stating that "[t]he formal rules of evidence" do not apply in FINRA. *See also*, *e.g.*, OHO Order 16-34 (2014042690502) (Dec. 28, 2016), at 2-3, http://www.finra.org/sites/default/files/OHO_Order%2016-34_2014042690502.pdf ("Federal Rules of Evidence are frequently relied upon" in this forum).

[9] *Dep't of Enforcement v. Respondent*, No. 2013038333001, 2016 FINRA Discip. LEXIS 27, at *9 (OHO May 20, 2016) (quoting from the Federal Rules of Evidence).

[10] *See*, *e.g.*, *United States v. Shomo*, 786 F.2d 981, 985 (10th Cir. 1986) (concept of materiality is embodied in Rule 401 by requiring that relevant evidence bear on a fact that is of consequence to the determination of the action).

f) all documents regarding or relating to EF's estate planning, her powers of attorney, or any medical directives.[11]

Respondent asserts that the information sought is relevant and material to the case because the documents "are likely to provide significant evidence demonstrating whether EF or one of her daughters communicated with [RZ] regarding the liquidation of her account or how to invest her cash holdings at or around the time of the July 2015 meeting."[12] Respondent further asserts, "The communications between [RZ] and EF (or her children) have the potential to demonstrate that Mr. Blasczyk's notes are accurate and that EF did authorize the liquidation of her variable annuity."[13]

Respondent meets the basic conditions required to review a request under FINRA Rule 9252. He has filed and served his request in writing. He has identified the documents and communications he requests with sufficient specificity. He has provided an explanation of why he thinks they are relevant and material to the case. He has described his efforts to obtain the documents by other means. His counsel has attempted to contact RZ to request that he provide the documents voluntarily. RZ did not return counsel's call. Respondent has no way to obtain the documents other than through the procedure set forth in Rule 9252. Finally, Respondent has indicated that RZ is subject to FINRA's jurisdiction.

D. Resolution of the Motion

1. Uncontested Requests

Enforcement does not object to the requests designated (a) and (d) in Respondent's Motion. Accordingly, I grant Respondent's request for Enforcement to issue a Rule 8210 request to RZ for all communications between RZ and EF regarding or relating to her investments, and all documents regarding or relating to EF's investments.

2. Modified Requests by Consent

Although Enforcement objects to the remaining four requests on the basis of relevance, it distinguishes between items (b) and (c) and the other two outstanding requests. Enforcement states that it would not object to requests (b) and (c) if they were limited to communications related to EF's investments, rather than extending to all communications between RZ and PF and RZ and KS regarding or relating to EF. In so doing, Enforcement acknowledges that communications RZ had with either of the sisters about their mother's investments could be relevant.

[11] Motion ¶ 7.

[12] Motion ¶ 10.

[13] Motion ¶ 12.

Accordingly, I grant Respondent's request for Enforcement to issue a Rule 8210 request to RZ for all communications between RZ and PF or RZ and KS "regarding or relating" to EF's investments. I note that "regarding" and "relating" are broad terms. The phrase "relate to," for example, is generally interpreted as broad and expansive.[14] As explained by the Supreme Court, "relating to" ordinarily means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."[15] I interpret the modified request for communications regarding or relating to EF's investments as encompassing not only discussions of specific investment options, various possible investment strategies, and the like, but also possible discussions regarding the status of EF's various investment accounts and her relationships with her various investment advisers.

The modified requests are tied to EF's investments. They do not cover communications that do not relate in to EF's investments. The request for "all" communications RZ had with the sisters about their mother, whatever the topic, is overbroad and would encompass matters not relevant to the proceeding.

3. Contested Requests

This leaves items (e) and (f). Item (e) requests all communications between RZ and EF regarding or relating to her estate planning, her powers of attorney, or any medical directives. Item (f) requests all documents relating to such matters.

On their face, these items do not appear relevant to the issues in this case. The information requested—about EF's estate planning, medical directives, powers of attorney, and other legal issues—has no obvious bearing on whether Respondent recommended the exchange of variable annuities without a suitable basis or his truthfulness when he entered the note about the second meeting into his firm's records.[16] The Complaint is limited to the claim that Respondent improperly recommended substituting one variable annuity for another and then covered it up with a false record.[17]

Furthermore, to the extent Respondent seeks information about communications that RZ had with EF in his capacity as her legal advisor, RZ may assert that the information is confidential and privileged. Respondent contends that FINRA has broad authority over RZ as an associated person, and that FINRA may nevertheless order him to produce books, records, and accounts, even if privileged. Respondent argues that RZ should be required to produce a privilege log as to those documents that RZ might maintain are privileged. It is unnecessary here

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[14] *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). *See also Salko v. Sibelius*, 2013 U.S. Dist. LEXIS 22265, at *12-14 (M.D. Pa. 2013) (collecting cases).

[15] *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th Ed. 1979)).

[16] Opp. at 4.

[17] Enforcement also argues that the contested requests are "cumulative" to RZ's testimony. Opp. at 4. But we have not yet heard RZ's testimony and cannot say whether the information requested would be "cumulative."

to resolve whether FINRA could require the production of the privileged documents, because the information sought is not relevant or material to the issues in this proceeding. There is no reason to impose the potentially heavy burden on RZ to produce a privilege log. The Rule 9252 request is denied as to items (e) and (f).

III. ORDER

Consistent with the above-described determinations, Respondent's Motion is hereby GRANTED in part and DENIED in part. Enforcement will issue a FINRA Rule 8210 request to RZ no later than March 20, 2019, compelling the production of the following:

- Communications between RZ and EF regarding or relating to her investments held at Wells Fargo, Family Wealth Advisors, or elsewhere;
- All documents regarding or relating to EF's investments held at Wells Fargo, Family Wealth Advisors, or elsewhere;
- All communications between RZ and EF's daughter, PF, regarding or relating to EF's investments; and
- All communications between RZ and EF's daughter, KS, regarding or relating to EF's investments.

SO ORDERED.

Lucinda O. McConathy
Hearing Officer

Dated: March 13, 2019

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