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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. WILLIAM JOSEPH KIELCZEWSKI (CRD No. 4034356), Respondent.	Disciplinary Proceeding No. 2017054405401 Hearing Officer–DRS

ORDER GRANTING ENFORCEMENT'S MOTION IN LIMINE

A. Introduction

On November 13, 2019, the Department of Enforcement filed a motion in limine ("Motion") to preclude Respondent William Joseph Kielczewski from calling his wife, Jennifer Kielczewski, to testify in this proceeding. According to the description included on Respondent's witness list, Mrs. Kielczewski will testify about the "[e]ffect of FINRA discipline on Respondent's ability to work as [a] registered investment adviser in Ohio."[1] Enforcement asserts that Mrs. Kielczewski should be excluded because her testimony would be irrelevant and immaterial to both liability and sanctions.

Enforcement primarily makes two arguments. First, as to liability, "Respondent does not purport to offer Mrs. Kielczewski as a fact witness regarding liability and does not provide any basis upon which to reasonably conclude that her testimony would be pertinent to any issue of liability."[2] Second, regarding sanctions, "[i]t is well settled that collateral consequences allegedly suffered by a respondent are not mitigating."[3]

Respondent opposed the Motion on November 25, 2019 ("Opposition"), arguing that Mrs. Kielczewski's testimony would be relevant to sanctions. In the Opposition, Respondent

[1] Respondent Kielczewski's Witness List at 2.

[2] Motion at 1.

[3] Motion at 1. Enforcement also argues that if Respondent goes beyond the testimony description on his witness list and tries to "have his wife testify about his purported good character, such testimony would be inadmissible for sanctions as well," and the "proposed testimony should also be excluded as it would be cumulative to [Respondent's] testimony." Motion at 2. In light of my findings below, however, it is unnecessary for me to address these additional arguments.

represents that Mrs. Kielczewski's "testimony would turn on the effects of FINRA's discipline on Mr. Kielczewski's ability to continue to practice as a registered investment adviser . . . in Ohio."[4] Respondent further represents that Mrs. Kielczewski and her husband are current business partners in The Westchester Group, LLC, an SEC-registered investment adviser in Ohio.[5] Respondent proffers that Mrs. Kielczewski will testify that in her capacity as Chief Compliance Officer, she received a letter "from the Ohio Division of Securities (the 'Division') seeking documents and information for an investigation by the Division into the matters currently being considered by FINRA."[6] The Opposition goes on to say that she would testify about the letter; "her general knowledge of Ohio securities practice concerning reciprocal discipline;" and the "consequences for Mr. Kielczewski individually, and The Westchester Group generally, of a suspension or bar issued by the Division against Mr. Kielczewski's practice as a registered investment adviser."[7]

Respondent maintains that this testimony is admissible because, should the hearing panel find liability, it would help it tailor the sanctions to fit the conduct at issue. Specifically, the testimony would help ensure that the sanctions are remedial and would prevent a recurrence of the misconduct. Moreover, according to the Opposition, the proposed testimony is relevant because FINRA's Sanctions Guidelines authorize adjudicators to consider the "action by peer regulators."[8] And, while Respondent concedes that it "is not yet known" whether the Division will discipline him, "the potential for it to occur is sufficiently relevant to the Panel's inquiry, that evidence should be considered on that point."[9]

For the reasons below, I find the proposed testimony should be excluded.

B. Legal Standard

FINRA's Code of Procedure does not explicitly authorize motions in limine to exclude evidence. While the formal rules of evidence do not apply in FINRA disciplinary proceedings,[10] FINRA Hearing Officers may seek guidance from the Federal Rules of Evidence.[11] But those rules, like the FINRA rules, do not explicitly authorize in limine rulings. Nevertheless, motion in

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[4] Opposition at 1.

[5] Opposition at 1.

[6] Opposition at 1.

[7] Opposition at 2.

[8] Opposition at 3.

[9] Opposition at 3.

[10] FINRA Rule 9145(a) ("The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 series.").

[11] *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017) ("It is well settled that the formal rules of evidence do not apply in FINRA proceedings, but FINRA adjudicators may look to the Federal Rules of Evidence for guidance."), *aff'd*, Exchange Act Release No. 84500, 2018 SEC LEXIS 3001 (Oct. 29, 2018), *appeal docketed*, No. 18-1341 (D.C. Cir. Dec. 27, 2018).

limine "practice has developed pursuant to the district court's inherent authority to manage the course of trials."[12] Similarly, FINRA Hearing Officers are authorized "to do all things necessary and appropriate to discharge his or her duties" which include "regulating the course of the hearing."[13] Therefore, in resolving the Motion, I sought guidance from the federal case law regarding motions in limine.

That case law is well settled. Motions in limine "'aid the trial process' by enabling the Court 'to rule in advance of trial on the relevance of certain forecasted evidence,' without lengthy argument at or interruption of the actual trial."[14] They "serve important gatekeeping functions by allowing the trial judge to eliminate from consideration evidence that should not be presented to the jury."[15] Even so, motions in limine "are disfavored, as courts prefer to resolve questions of admissibility as they arise."[16] SEC Administrative Law Judges[17] and FINRA Hearing Officers have adopted similar views.[18]

A party seeking "to exclude evidence on relevancy grounds by way of a pretrial motion *in limine* faces an exceptionally high obstacle."[19] Specifically, "[o]nly evidence that is clearly inadmissible for any purpose should be excluded pursuant to a motion in limine,"[20] a position

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[12] *Flores v. FCA US LLC*, 2019 U.S. Dist. LEXIS 120115, at *1–2 (E.D. Calif. July 18, 2019) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).

[13] FINRA Rule 9235(a)(2).

[14] *Ruiz v. Safeco Ins. Co*., 2019 U.S. Dist. LEXIS 109067 at *3 (S.D. Fla. Apr. 23, 2019) (quoting *Highland Capital Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 176 (S.D.N.Y. 2008)) (citing *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996)); *see also Zanakis v. Scanreco, Inc*., 2019 U.S. Dist. LEXIS 90088, at *2–3 (S.D. Fla. Apr. 11, 2019) ("A motion in limine allows the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence") (citing *Luce,* 469 U.S. at 40 n.2 (1984)).

[15] *United States v. Verges*, 2014 U.S. Dist. LEXIS 17969, at *6 (E.D. Va. Feb. 12, 2014).

[16] *Abernathy v. E. Ill. R.R*., 2017 U.S. Dist. LEXIS 160316, at *1 (C.D. Ill. Sept. 26, 2017); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 (same); *Flores,* 2019 U.S. Dist. LEXIS 120115, at *2 (same).

[17] *See Christopher M. Gibson*, Exchange Act Release. No. 3-17184, 2016 SEC LEXIS 3379, at *4 (CALJ Sept. 9, 2016) ("[A] party filing a motion in limine faces an uphill battle because the Commission has not been enthusiastic about orders by administrative law judges granting motions in limine."). As the Chief Administrative Law Judge explained, "[t]he Commission's long standing position is that its 'law judges should be inclusive in making evidentiary determinations,' quoting the proposition 'if in doubt, let it in.'" *Id.* at *4 (quoting *City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 & n.7 (Nov. 16, 1999)).

[18] OHO Order 16-18 (2014043020901), at 2 (May 24, 2016) ("FINRA Hearing Officers generally disfavor motions in limine seeking to exclude broad categories of evidence and testimony."), http://www.finra.org/sites/default/files/OHO-Order-16-18-2014043020901.pdf (citing OHO Order 16-04 (2012033393401), at 2 (Feb. 3, 2016), http://www.finra.org/sites/default/files/OHO_Order16-04_2012033393401.pdf).

[19] *Abernathy,* 2017 U.S. Dist. LEXIS 160316, at *2 (quoting *Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc*., 867 F. Supp. 686, 695–96 (N.D. Ill. 1994)).

[20] *Id.*, at *1 (quoting *Tzoumis v. Tempel Steel Co*., 168 F. Supp. 2d 871, 873 (N.D. Ill. 2001)); *see also Zanakis*, 2019 U.S. Dist. LEXIS 90088, at *3 ("A motion in limine should only exclude evidence when it is clearly inadmissible on all potential grounds.").

that FINRA Hearing Officers have also espoused.[21] "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context."[22]

FINRA Rule 9263 states that the Hearing Officer shall receive relevant evidence and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. "The Hearing Officer is granted broad discretion to accept or reject evidence under this rule,"[23] including expert testimony.[24] The Federal Rules of Evidence define evidence as 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."[25] In assessing the relevance of Mrs. Kielczewski's proposed testimony, I considered whether it could be relevant for either liability or sanctions purposes, or both. As the Case Management and Scheduling Order ("CMSO") informed the parties, "[t]he Hearing Panel will not hold a separate hearing to determine the appropriate remedial sanction if a violation is found. Thus, all evidence bearing on both liability and sanctions must be presented at the hearing . . . ."[26]

C. Discussion

After reviewing the Motion and Opposition, I find that Enforcement has shown that the proposed testimony would be clearly inadmissible for any purpose. Enforcement argues that the proposed testimony is irrelevant to liability and sanctions. The Opposition does not dispute Enforcement's argument regarding the testimony's irrelevance to liability, and I see no basis for concluding otherwise. So, the remaining issue is whether the proposed testimony is relevant to sanctions.

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[21] OHO Order 16-18, at 2 (quoting OHO Order 16-04, at 2) ("A Hearing Officer should grant such motions only if the evidence at issue is clearly inadmissible for any purpose.") (citing *Miller UK Ltd. v. Caterpillar, Inc.,* 2015 U.S. Dist. LEXIS 156874, at *5 (N.D. Ill. Nov. 20, 2015)) (internal quotation marks omitted).

[22] *Zanakis,* 2019 U.S. Dist. LEXIS 90088, at *3 (quoting *Haller v. AstraZeneca LP* (*In re Seroquel Prods. Liab. Litig*.), 2009 U.S. Dist. LEXIS 134900, at *1762 (M.D. Fla. Feb. 4, 2009)); *Clipco, Ltd. v. Ignite Design, LLC*, 2005 U.S. Dist. LEXIS 26044, at *2 (N.D. Ill. Oct. 28, 2005) ("[I]f evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial to allow questions of foundation, relevancy, and prejudice to be resolved in context.") (citing *Hawthorne Partners v. AT&T Technologies*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993)).

[23] *Dep't of Enforcement v. Brookstone Sec., Inc*., No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *110 (NAC Apr. 16, 2015).

[24] *Dep't of Enforcement v. Murphy*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *63 (NAC Oct. 11, 2018) ("FINRA Rule 9263 gives Hearing Officers broad discretion to accept or reject expert testimony."), *appeal docketed*, SEC Admin. Proc. No. 3-18895 (Nov. 9, 2018).

[25] OHO Order 16-18, at 2 (quoting Fed. R. Evid. 401).

[26] CMSO at 11 § VIII.

I find that the proposed testimony is irrelevant for sanctions' purposes. I begin with the FINRA Sanction Guidelines ("Guidelines").[27] They address when actions by another regulator can be mitigative. The Guidelines instruct that "[w]here appropriate, Adjudicators should consider sanctions previously imposed by other regulators . . . ."[28] The Guidelines also include the following guidance in applying this principle:

> A final action by another regulator against an individual respondent for the same conduct is a potentially mitigating circumstance. When Adjudicators consider a respondent's claim of sanctions imposed by another regulator, the respondent must show that the conduct at issue before the other regulator was essentially identical and that any fine has already been fully paid, any suspension has been fully served, and any other sanction has been satisfactorily completed. When another regulator's sanction applies to misconduct that is not substantially similar to violations found by FINRA, Adjudicators should accord commensurately less mitigative weight, if any, based on their assessment of the extent of the overlap between the two cases.[29]

Respondent has not satisfied any of these conditions. Indeed, not only has no sanction been imposed upon Respondent by another regulator, but no disciplinary action has even been instituted against him at this point. Thus, Respondent's reliance on this principle in the Guidelines is misplaced.

Further, testimony regarding the consequences to Respondent or to The Westchester Group of a suspension or bar issued by the Division against Respondent's practice as a registered investment adviser is irrelevant. It is well established that collateral consequences allegedly suffered by a respondent arising from his misconduct or from a disciplinary proceeding that followed are not mitigating.[30] Here, Respondent's relevance argument is further attenuated because Mrs. Kielczewski's testimony would relate not to collateral consequences that have occurred or are likely to occur, but to *possible* collateral consequences from a *potential*

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[27] FINRA Sanction Guidelines (2019), https://www.finra.org/rules-guidance/oversight-enforcement/sanction-guidelines.

[28] Guidelines at 5 (General Principles Applicable to All Sanction Determinations, No. 7).

[29] Guidelines at 5 (General Principles Applicable to All Sanction Determinations, No. 7).

[30] *See, e.g., Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *35–36 (Mar. 15, 2016) ("[T]he fact that McCune's suspension may make it more difficult to find another job in the securities industry is a collateral consequence arising from his misconduct, which we have made clear is not mitigating."), *aff'd*, 672 F. App'x 865 (10th Cir. 2016); *Dep't of Enforcement v. McGuire*, No. 20110273503, 2015 FINRA Discip. LEXIS 53, at *55 (NAC Dec. 17, 2015) (citing *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *35–36 (Feb. 20, 2014) (rejecting applicant's argument that he had "suffered enough" as a result of the disciplinary proceeding and finding that "any collateral consequence that Houston may have suffered as a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor").

disciplinary action[31] that *might* be brought by another regulator based on a sanction that *might* be imposed by FINRA on the Respondent.

Finally, testimony by Mrs. Kielczewski about "her general knowledge of Ohio securities practice concerning reciprocal discipline" would be in the nature of expert testimony. Even if relevant, this testimony is impermissible because Respondent failed to seek, and obtain, leave to offer expert testimony from her, as required by the CMSO.[32]

D. Conclusion

For the foregoing reasons, the Motion is **GRANTED.** Respondent shall not be permitted to call Mrs. Kielczewski as a witness.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Dated: November 29, 2019

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[31] *See* Opposition at 3 (characterizing action by the Division against Respondent as a "potential action by a peer regulator").

[32] CMSO at 5 § IV. B. ("A party may not offer expert testimony (including expert testimony by FINRA staff) without the Hearing Officer's approval."). The deadline for seeking leave was October 12, 2019. CMSO at 2.