

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1,

and

RESPONDENT 2

Respondents.

Disciplinary Proceeding  
No. 2014040295201

Hearing Officer—KBW

**ORDER DENYING RESPONDENTS' MOTION FOR  
EXPERT TESTIMONY**

Respondents in this FINRA proceeding are Respondent 1, a FINRA member firm, and Respondent 2, the President, CEO and CCO of Respondent 1. The Complaint charges, among other things, that Respondent 1, acting through Respondent 2, failed to conduct reasonable due diligence in connection with the sale of certain Senior Secured Notes issued in a private placement.

On January 6, 2016, Respondents moved for an order permitting them to offer expert testimony from Hank Sanchez "on the issue of whether Respondents conducted reasonable due diligence in connection with the offering" of the Senior Secured Notes.<sup>1</sup> The Department of Enforcement opposed the motion on January 20, 2016. Enforcement argued that Respondents failed to: (1) establish that expert testimony would be helpful to the Hearing Panel; (2) comply with the requirements of the Scheduling Order issued in this proceeding; and (3) establish that Sanchez qualifies as an expert.

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<sup>1</sup> Respondents' Motion To Introduce Expert Testimony ("Respondents' Motion") at 1.

## A. Legal Framework

A Hearing Officer has broad discretion to accept or reject expert testimony.<sup>2</sup> 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.”<sup>3</sup> 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.”

It is the proponent's burden to establish that the expert's testimony satisfies the conditions for admission.<sup>4</sup> Although not binding in disciplinary proceedings,<sup>5</sup> Federal Rule of Evidence 702 is instructive regarding those conditions.<sup>6</sup> 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.<sup>7</sup> Here, the overarching and critical factor is whether Sanchez's proposed testimony would be helpful to the Hearing Panel.<sup>8</sup>

In determining whether expert testimony would be helpful, the nature of the forum must be taken into account.<sup>9</sup> 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.<sup>10</sup> In light of this collective experience, expert testimony is often unnecessary in disciplinary proceedings.<sup>11</sup>

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<sup>2</sup> See, e.g., OHO Order 12-07 (2010020846601), at 1 (Nov. 9, 2012), <http://www.finra.org/sites/default/files/OHODecision/p229431.pdf>.

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

<sup>4</sup> OHO Order 12-01, at 4.

<sup>5</sup> FINRA Rule 9145(a).

<sup>6</sup> OHO Order 12-07, at 2 n.3.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *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).

<sup>11</sup> *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 12-01, at 4 (Mar. 14, 2012).

**This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-02 (2014040295201).**

To assist the Hearing Officer in evaluating whether the conditions for admission of expert testimony have been satisfied, the Scheduling Order sets forth several requirements for a motion seeking permission to offer expert testimony, including that the motion set forth “a brief summary of the expert’s expected testimony.”<sup>12</sup> Such a summary can assist a Hearing Officer in assessing whether the movant has established that the expected testimony would be helpful to the Hearing Panel. The Scheduling Order further provided that the Hearing Officer may exclude an expert witness if the motion did not comply with its requirements pertaining to the submission of information with respect to expert witnesses.<sup>13</sup>

**B. Analysis**

Respondents have not established that the offered testimony would help the Hearing Panel. First, in violation of the Scheduling Order, Respondents did not provide a summary of Sanchez’s expected testimony. Identifying the topic on which Respondents expect Sanchez to testify is not sufficient to establish that his testimony on that topic would be helpful to the Hearing Panel. Second, Respondents have not established that the reasonableness of the due diligence procedures that Respondent 1 performed is outside the expertise of typical industry hearing panelists.<sup>14</sup>

**C. Order**

Respondents’ Motion is **DENIED**.

**SO ORDERED.**

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Kenneth Winer  
Hearing Officer

Date: January 29, 2016

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<sup>12</sup> Scheduling Order, at 5.

<sup>13</sup> Scheduling Order, at 8.

<sup>14</sup> Because Respondents did not summarize Sanchez’s expected testimony and have not established that the expected testimony would help the Hearing Panel, it is not necessary to address whether Respondents established that Sanchez qualified as an expert.