

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STEWART GINN
(CRD No. 4503197),

Respondent.

Disciplinary Proceeding
No. 2021072167901

Hearing Officer–MJD

**ORDER DENYING RESPONDENT’S MOTION FOR
LEAVE TO PRESENT EXPERT TESTIMONY**

I. Introduction

The Department of Enforcement filed a four-cause Complaint against Respondent Stewart Ginn. In the first three causes of action, Enforcement alleges that Respondent churned and excessively traded five customers’ accounts. With respect to four of the five customers, Enforcement additionally alleges, in the fourth cause of action, that Respondent exercised discretion without written authorization. In his Answer, Respondent denies all allegations of wrongdoing.

On May 10, 2024, Respondent moved for leave to offer expert testimony on various issues relating to churning and excessive trading. Enforcement filed its opposition on May 23, 2024, arguing primarily that the proposed expert testimony would not be helpful, is irrelevant, or impermissibly addresses legal issues or purports to apply the law to the facts.

For the reasons set forth below, I deny Respondent’s Motion for Leave to Present Expert Testimony.

II. Background

Respondent’s motion relates to the first three causes of action in the Complaint. In cause one, Enforcement alleges that, during the period July 2020 through December 2022, Respondent churned the accounts of five customers, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), Exchange Act Rule 10b-5, and also in violation of

FINRA Rules 2020 and 2010.¹ According to the Complaint, Respondent engaged in “frequent in-and-out trades” in the five customers’ accounts, allegedly recommending that the customers buy and then quickly sell large equities positions.² Enforcement further alleges that Respondent disregarded the associated trading costs, which resulted in the customers incurring substantial losses while Respondent earned substantial commissions.³ The annualized cost-to-equity ratios in the five customers’ accounts allegedly ranged from approximately 14% to 27% during the relevant period.⁴

Based on these same facts, Enforcement alleges in causes two and three that Respondent excessively traded the five customers’ accounts. With respect to the four customers who are individual investors, cause two charges Respondent’s alleged conduct as a willful violation of Exchange Act Rule 15l-1(a) (“Regulation Best Interest”) and FINRA Rule 2010.⁵ With respect to the fifth customer, a profit-sharing plan for a dental practice, cause three charges Respondent’s alleged conduct under FINRA Rules 2111 and 2010.⁶

In his Answer, Respondent denies that he churned or excessively traded his customers’ accounts.

III. Standards for Admitting Expert Testimony

A Hearing Officer has broad discretion to accept or reject expert testimony.⁷ Under FINRA Rule 9263, a Hearing Officer shall receive relevant evidence but may exclude evidence that is “irrelevant, immaterial, unduly repetitious, or unduly prejudicial.” While the Federal Rules of Evidence are not applicable to FINRA proceedings, the rules and the case law applying them provide guidance on the issue of expert testimony.⁸ Rule 702 of the Federal Rules of Evidence specifies that a witness who is “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 to understand the evidence or to determine a fact in issue” and the testimony

¹ Complaint (“Compl.”) ¶¶ 104-16.

² Compl. ¶¶ 3-4, 21, 44-46, 58-63, 73-76, 86-88, 100-03.

³ Compl. ¶¶ 6, 31-32, 39-40, 44-46, 54-55, 58-63, 69-70, 73-76, 82-83, 86-88, 96-97, 100-03, 114.

⁴ Compl. ¶¶ 7, 42, 56, 71, 84, 99, 113.

⁵ Compl. ¶¶ 16, 117-30.

⁶ Compl. ¶¶ 17, 131-37.

⁷ OHO Order 24-06 (2019064508802) (Feb. 7, 2024), at 2, https://www.finra.org/sites/default/files/2024-05/OHO_Order_24-06_Kim_2019064508802.pdf; OHO Order 22-09 (2019061528001) (May 26, 2022), at 3, <https://www.finra.org/sites/default/files/2022-08/22-09-Order-Denying-Respondents-Motion-for-Leave-to-Offer-Expert-Testimony.pdf>.

⁸ OHO Order 24-06, at 2; OHO Order 22-09, at 3; OHO Order 11-04 (2009017798201) (Mar. 24, 2011), at 3, https://www.finra.org/sites/default/files/OHODecision/p123470_0.pdf.

meets certain measures of reliability. “In short, expert testimony is admissible only if it is both relevant and reliable.”⁹

The critical factor is whether the proposed expert testimony would be helpful to the Hearing Panel.¹⁰ When determining whether proposed expert testimony would be helpful, the nature of the forum must be considered.¹¹ 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.¹² As a result, expert testimony is typically not offered in a FINRA disciplinary proceeding “unless novel issues or new, complex, or unusual securities products are involved.”¹³ While an expert may opine on ultimate fact issues,¹⁴ the expert may not give an opinion on an ultimate legal issue by applying the law to the facts of the case,¹⁵ or state a legal standard.¹⁶

⁹ OHO Order 17-03 (2014042059701) (Feb. 24, 2017), at 2, https://www.finra.org/sites/default/files/OHO_Order_17-03_2014042059701.pdf (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002)).

¹⁰ OHO Order 24-06, at 2; OHO Order 22-09, at 3; OHO Order 17-19 (2015047154001) (Nov. 13, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order_17-19_2015047154001_0.pdf.

¹¹ OHO Order 17-19, at 3.

¹² *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *44-45 & n.68 (May 27, 2011), *aff’d*, 693 F.3d 251 (1st Cir. 2012).

¹³ *See, e.g.*, OHO Order 17-05 (2015044921601) (Mar. 16, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order_17-05_201504421601.pdf; OHO Order 12-01 (2009018771602) (Mar. 14, 2012), at 4, https://www.finra.org/sites/default/files/OHODecision/p126068_0_0_0_0.pdf (“[B]ecause of the specialized knowledge of [FINRA panelists], expert testimony is less frequently admitted than in the federal courts.”); *Dep’t of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *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.”).

¹⁴ *See, e.g.*, *Godley v. Newark Police Dep’t*, 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 legal 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.”)).

¹⁵ OHO Order 16-20 (20120342425-01) (July 28, 2016), at 5, https://www.finra.org/sites/default/files/OHO_Order_16-20_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 n.10 (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.*, Admin. Proceedings Release No. 574, 1998 SEC LEXIS 2690, at *7 (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[.]”).

¹⁶ OHO Order 17-19, at 3 & n.19 (citing *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.”));

It is the proponent's burden to establish that an expert's proposed testimony satisfies the conditions for admission.¹⁷ As the proponent of the expert testimony, Respondent additionally must comply with the relevant provisions of the Amended Case Management and Scheduling Order ("CMSO").¹⁸ Under the CMSO, a motion seeking permission to offer expert testimony must include certain items, including "a summary of each of the expert's opinions" and "a statement establishing that the witness's opinion will help the Hearing Panel understand the evidence or determine a material fact in issue."¹⁹

IV. Respondent's Motion

Respondent requests leave to offer expert testimony from Samuel Turvey. According to the CV that is attached to Respondent's motion, Turvey has a law degree and has worked since 2020 as a "Consulting and Testifying Expert" for an outside consulting firm.²⁰ Before that, Turvey worked as the Chief Compliance Officer or in similar roles at various broker-dealers.²¹ In his role as a senior compliance officer, Respondent states that Turvey "has been responsible for analyzing the active trading of registered persons and has developed, implemented, and enforced policies and procedures for the review of trading, including reviews focused on excessive trading and churning in customer accounts."²²

Respondent identifies seven topics on which he proposes to offer Turvey's expert testimony:

- (1) computation of cost-to-equity ratios, trading frequency, turnover ratios, and transaction costs incurred for the accounts at issue;
- (2) how brokerage firms detect and supervise trading looking for excessive trading;
- (3) how brokerage firms determine whether trading is excessive in light of the customer's profile;
- (4) the emerging obligations imposed by Regulation Best Interest with regard to excessive trading and trading frequency;

OHO Order 08-02 (2005003437102) (Feb. 26, 2008), at 2, https://www.finra.org/sites/default/files/OHODecision/p038251_0_0_0.pdf ("Expert testimony on legal issues is inadmissible").

¹⁷ OHO Order 17-07 (2013035817701) (Mar. 21, 2017), at 2, https://www.finra.org/sites/default/files/OHO_Order_17-07_2013035817701.pdf.

¹⁸ OHO Order 24-06, at 2; OHO Order 17-19, at 3.

¹⁹ CMSO 10.

²⁰ Respondent's Motion for Leave to Present Expert Testimony ("Mot.") at Exh. 1.

²¹ Mot. 4; *id.* at Exh. 1.

²² Mot. 4.

- (5) how broker-dealers are designing and implementing supervisory procedures to detect, supervise, and enforce excessive trading and suitability policies subsequent to the passage of Regulation Best Interest;
- (6) how and why Respondent's trading was not excessive based on the trading information; and
- (7) that Respondent had a reasonable basis to believe the transactions were in his customers' best interest.²³

Respondent states that Turvey's testimony on these topics would be helpful to the Hearing Panel because it will "assist the [P]anel in understanding and determining the quantitative metrics that have historically been employed to gauge the frequency of trading, including, among other things, cost-to-equity ratios;" "assist the Panel in understanding the facts that are appropriately considered in determining whether a registered representative should be deemed to control the trading in a non-discretionary account;" "assist the Panel in determining the reasonableness of the trading under Regulation Best Interest;" "explain to the Hearing Panel the applicable industry standard for detecting and defining trading in customer accounts that should potentially be deemed to be excessive;" and "discuss the supervision provided by [Respondent's] broker-dealer during the time period at issue and how it aligns or deviates from that practice."²⁴

V. Enforcement's Opposition

In its opposition, Enforcement argues that Respondent's motion should be denied based both on his failure to comply with the CMSO and on the merits. In particular, Enforcement argues that, although the motion identifies general topics on which Turvey plans to testify, Respondent fails to provide any summary of Turvey's proposed opinions on most of those topics, as is required by the CMSO.²⁵ Enforcement further argues that the testimony would not be helpful to the Hearing Panel, is irrelevant to the charges in this disciplinary proceeding, or encompasses legal issues that are not appropriate for expert testimony.²⁶

VI. Discussion

As a threshold matter, Respondent has not complied with the CMSO's requirement that he provide a "summary of each of the expert's opinions."²⁷ Instead, he identifies seven general

²³ Mot. 2.

²⁴ Mot. 3-4.

²⁵ Department of Enforcement's Opposition to Respondent's Motion for Leave to Present Expert Witness Testimony ("Opp.") 6-7.

²⁶ Opp. 3-6. Enforcement also argues that Turvey is not qualified to testify as an expert. Opp. 6. However, I find it unnecessary to reach this issue in light of my denial of Respondent's motion on the other grounds described below.

²⁷ CMSO 10.

subject areas on which Turvey plans to testify.²⁸ For at least the first five of those seven general subject areas, Respondent fails to provide any summary of Turvey's opinions. Respondent's motion may be denied on this basis alone.²⁹

Moreover, based on even the limited description that Respondent provides of Turvey's anticipated testimony, it appears that the proffered testimony either would not be helpful to the Hearing Panel or is otherwise impermissible.

First, with respect to topic (1)—which the motion describes as “computation of cost-to-equity ratios, trading frequency, turnover ratios, and transaction costs incurred for [the] accounts at issue”³⁰—Respondent fails to show that expert testimony on this subject would be helpful to the Hearing Panel. These computations are not unique or novel. Indeed, Respondent acknowledges that these “quantitative metrics ... have historically been employed to gauge the frequency of trading.”³¹ Nor has Respondent suggested these computations will be unusually complex in this matter, which, according to the Complaint, involves the purchase and sale of equity securities.³² As a result, I find that a typical FINRA hearing panel is likely to have sufficient expertise to understand these computations without assistance from an expert witness.³³

Respondent likewise fails to satisfy his burden to establish the admissibility of Turvey's proposed testimony on topics (2), (3), and (5)—all of which relate to the issue of how broker-dealers supervise for excessive trading.³⁴ Given that this case does not involve any supervision charges, I fail to see how the proffered testimony by Turvey on these topics would be relevant to any material issue.

²⁸ Mot. 2.

²⁹ See OHO Order 17-19, at 4 (finding that the respondent's summary of expert's proposed testimony was “more in the nature of a statement of testimonial topics”); OHO Order 16-02 (2014040295201) (Jan. 29, 2016), at 3, https://www.finra.org/sites/default/files/OHO-Order16-02-2014040295201_0.pdf (“[i]dentifying the topic” on which an expert is expected to testify “is not sufficient to establish that his testimony on that topic would be helpful to the Hearing Panel”).

³⁰ Mot. 2.

³¹ Mot. 3.

³² See Compl. ¶ 4.

³³ See *Cody*, 2011 SEC LEXIS 1862, at *46 (finding that FINRA hearing panel had the expertise to evaluate trading evidence in excessive trading case without expert testimony); see also 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”).

³⁴ Mot. 2.

The remaining topics identified in Respondent's motion suggest that he seeks to have Turvey testify regarding applicable legal standards or opine on ultimate legal issues. These are not appropriate topics for expert testimony.

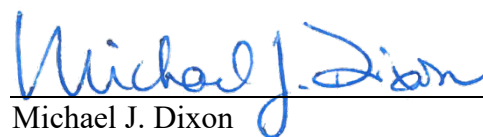
Specifically, any testimony by Turvey regarding topic (4)—“the emerging obligations imposed by [Regulation Best Interest] with regard to excessive trading and trading frequency”³⁵—would amount to impermissible testimony on legal standards.³⁶ Respondent nonetheless argues that expert testimony on this topic may be helpful to the Hearing Panel because “Regulation Best Interest only recently became effective” and “[f]irms and their supervisory persons have only limited experience with the new rule.”³⁷ However, nothing in Turvey's credentials suggests that he has any special expertise regarding Regulation Best Interest that any typical hearing panelist lacks. Indeed, according to his CV, Turvey appears to have left the securities industry in 2020, around the time that Regulation Best Interest took effect.³⁸

Additionally, as described in topics (6) and (7), Respondent proposes to have Turvey testify that his trading was not excessive and that he had a reasonable basis to believe the transactions were in his customers' best interest.³⁹ This testimony would amount to an impermissible opinion on ultimate legal issues. Such an application of the law to the facts is a matter that is reserved for the Hearing Panel.⁴⁰

VII. Order

For the foregoing reasons, Respondent's Motion for Leave to Present Expert Testimony is **DENIED**. However, Respondent may identify Turvey as a proposed fact witness. If allowed to testify, his testimony will not be treated as expert testimony.

SO ORDERED.



Michael J. Dixon
Hearing Officer

Dated: June 6, 2024

³⁵ Mot. 2.

³⁶ See *Dep't of Enforcement v. Fiero*, No. CAF980002, 2002 NASD Discip. LEXIS 16, at *90-92 (NAC Oct. 28, 2002) (expert opinion was properly excluded where proposed testimony would have addressed legal requirements of NASD rule and legal elements of market manipulation, “both of which are legal standards and are not appropriate topics for expert testimony”).

³⁷ Mot. 4.

³⁸ See Mot. at Exh. 1. Regulation Best Interest took effect on June 30, 2020.

³⁹ Mot. 2.

⁴⁰ OHO Order 17-05, at 4 (“[I]t is the hearing panel that is charged with applying the law to the facts of a case.”).

Copies to:

Alan M. Wolper, Esq. (via email)
Heidi VonderHeide, Esq. (via email)
Payne L. Templeton, Esq. (via email)
John R. Baraniak, Jr., Esq. (via email)
Justin W. Arnold, Esq. (via email)
Jessica Moran, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)