

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2011025706401

Hearing Officer—DMF

**ORDER GRANTING
DEPARTMENT OF ENFORCEMENT'S
MOTION FOR LEAVE TO OFFER EXPERT TESTIMONY**

I. Introduction

On November 21, 2014, the Department of Enforcement filed its Motion for Leave to Offer Expert Testimony of R. Stephen Ganis. According to the Motion and supporting Appendix, Ganis is a lawyer with extensive experience dealing with anti-money laundering ("AML") issues. One count of the Amended Complaint filed by Enforcement in this proceeding alleges that, in various respects, Respondent failed to implement an AML program tailored to its business that was reasonably designed to monitor for, detect and cause the reporting of suspicious transactions as required under 31 U.S.C. § 5318(g) and regulations thereunder. The Amended Complaint alleges that Respondent thereby violated FINRA Rule 3310(a), which addresses the AML obligations of FINRA members, and Rule 2010. According to the Motion, "Enforcement intends to elicit testimony from Mr. Ganis to testify [sic] regarding: (a) the law and regulations governing AML programs and written procedures; (b) why [Respondent's] AML program was inadequate to monitor for and detect potentially suspicious activity; (c) why certain account activity should have been viewed as a red flag of potentially suspicious activity; and (d) why the Firm's response to certain red flags was inadequate."

Respondent filed its Opposition to the Department of Enforcement's Motion Seeking Leave to Offer Expert Testimony on December 5, 2014. Respondent does not contest Ganis' qualifications as an expert on matters related to FINRA's AML Rule. Rather, Respondent asserts that "Enforcement has failed to demonstrate that Mr. Ganis' testimony, no matter how erudite, will be helpful to the Hearing Panel." More specifically, Respondent argues that Enforcement has failed to "state any basis to conclude that the AML-related issues that are the subject of Mr. Ganis' proposed testimony present any novel issues outside of the Panel members' expertise as participants of the securities industry." Because all FINRA members are

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required to implement AML procedures, Respondent contends that “every FINRA member, including Panel members, likely has at least some familiarity with the AML rules, programs and procedures.” Finally, Respondent argues that insofar as Mr. Ganis’ testimony would address the relevant law and regulations regarding AML procedures, it “is being proffered for the improper purpose of instructing the Panel on the law and for providing ultimate conclusions about the facts that may be presented at Hearing,” which would “attempt[] to substitute the expert’s judgment for that of the Panel’s [sic].”

II. Discussion

As both parties acknowledge, Hearing Officers have broad discretion to accept or reject expert testimony if the expert is qualified to address the proposed topics and the evidence meets the general standard for admissibility set forth in FINRA Rule 9263.¹ While the Federal Rules of Evidence are not applicable to FINRA proceedings, those rules and the case law applying them can provide guidance on the issue of expert testimony.² 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” and the testimony meets certain measures of reliability. The overarching and critical factor is whether the proposed testimony would be helpful to the Hearing Panel.³ “In short, expert testimony is admissible only if it is both relevant and reliable.”⁴ It is the proponent’s burden to show that the expert’s testimony satisfies the conditions for admission.⁵

In this case, it is undisputed that Ganis is qualified to offer expert opinions on the topics listed by Enforcement. The question raised by Respondent is whether expert testimony on those topics will be helpful to the Panel. That question cannot be answered definitively until Ganis offers his opinions and the Panel has an opportunity to evaluate them in the context of the specific issues raised at the hearing. In general, however, AML procedures are a sufficiently specialized area that expert testimony from an acknowledged expert such as Ganis may well assist the Panel in evaluating the AML-related allegations in the Complaint, notwithstanding the Panelists’ generalized expertise in securities industry issues. On the other hand, the Panelists’ expertise will allow them to critically evaluate the opinions that Ganis offers, and that expertise

¹ See OHO Order 12-01 (2009018771602) (Mar. 14, 2012), available at <http://www.finra.org/Industry/Enforcement/Adjudication/OHO/DisciplinaryOrders/2012/P126069>; *Dep’t of Enforcement v. Fiero*, Complaint No. CAF980002, 2002 NASD Discip. LEXIS 16, at *89-90 (NASD NAC Oct. 28, 2002).

² See OHO Order 11-04 (2009017798201) (Mar. 24, 2011), available at <http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p123470.pdf>; FINRA Rule 9145(a) (specifying that the Federal Rules of Evidence do not apply in FINRA disciplinary proceedings).

³ See OHO Order 12-01.

⁴ *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. Apr. 18, 2002).

⁵ See OHO Order 12-01.

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also substantially alleviates any concern that the Panelists will be unduly influenced by Ganis' opinions as to either the ultimate issues in the case or the applicable law.

Accordingly, Enforcement's motion will be granted.

III. Order

Enforcement's Motion for Leave to Offer Expert Testimony of R. Stephen Ganis is **GRANTED**.

Enforcement shall submit an expert report prepared by Ganis containing the information required by Fed. R. Civ. P. 26(a)(2)(B), as well as the information required by FINRA Rule 9242(a)(5), insofar as such information was not contained in Enforcement's Motion and supporting Appendix. The report shall be included as an exhibit in Enforcement's pre-hearing submission.

Further, the report shall constitute the substance of Ganis' direct testimony at the hearing. At the hearing, Enforcement will be permitted to conduct a summary direct examination in which it may present Ganis' opinions, the facts or data considered by Ganis in forming those opinions, and any exhibits to summarize and support the opinions, all as set forth in Ganis' report. Enforcement should plan to complete its direct examination of Ganis within approximately one hour.

Following Ganis' direct examination, Respondent will have an opportunity to conduct a cross-examination and the Hearing Panel may also question Ganis.

SO ORDERED.

David M. FitzGerald
Hearing Officer

Dated: February 3, 2015