UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 3523 / January 20, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-16155

In the Matter of NICHOLAS ROWE	ORDER ON PREHEARING MOTIONS

The hearing in this matter is scheduled to commence on February 1, 2016. Pending before me are several prehearing motions filed by the parties. Except for Nicholas Rowe's motion to compel directed to the New Hampshire Bureau of Securities Regulation, the other pending motions are addressed below.

Division of Enforcement's Renewed Motion to Introduce Prior Sworn Testimony

The Division's renewed motion to introduce prior sworn testimony of Mary Lambert is GRANTED. As established by Division counsel's declaration, Lambert will be in a remote part of Panama during the hearing and it would not be feasible for her to testify by telephone or other remote means while there. *See* 17 C.F.R. § 201.235(a)(2). Rowe does not object.

I note, however, that my granting of this motion does not permit the parties to enter into evidence the prior sworn testimony of anyone else absent a ruling from me, even if the parties otherwise stipulate to such evidence.

By the start of the hearing, the Division shall submit, and send Rowe a copy of, Lambert's prior FINRA arbitration testimony in its entirety, including her direct testimony and cross-examination. The Division's submission and copy to Rowe shall include a cover sheet designating the specific portions of Lambert's testimony it deems relevant to establishing its case-in-chief. Rowe will have an opportunity to address or rebut Lambert's prior testimony at the hearing.

Division's Motion in Limine to Exclude Expert Report

The Division moves to exclude Rowe from introducing Exhibit Focus 17, an expert report from Rowe's FINRA arbitration hearing, because Rowe is not calling the author of the report as an expert to testify. The Division contends that the report was authored by Jay Rosen

of Capital Forensics, and that Brad Daniels of Capital Forensics offered expert testimony related to the report during the FINRA hearing.

The motion is DENIED. In its motion, the Division cites to a federal appellate decision, which states that Federal Rule Evidence 702 "permits the admission of expert opinion *testimony* not opinions contained in documents prepared out of court." *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994). But the Federal Rules of Evidence do not control admissibility in Commission proceedings. *See Del Mar Fin. Servs., Inc.*, Exchange Act Release No. 48691, 2003 SEC LEXIS 2538, at *28-29 (Oct. 24, 2003) ("We have stated on numerous occasions that the Federal Rules of Evidence . . . are not applicable to our administrative proceedings which favor liberality in the admission of evidence. . . . In doubtful cases, we have expressed a preference for inclusiveness."). Rather, the admissibility of such report is governed by Commission Rule of Practice 320. Under the liberal standard of that rule, there is no basis to exclude the report as "irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320. And given Rowe's inability to hire a live expert, I will not exclude the report as a matter of discretion. *See Pagel, Inc.*, Exchange Act Release No. 22280, 1985 SEC LEXIS 988, at *16 (Aug. 1, 1985) ("[J]udges have broad discretion in determining whether to admit or exclude evidence, and this is particularly true in the case of expert testimony." (internal quotation marks omitted)), *aff'd*, 803 F.2d 942 (8th Cir. 1986).

The absence of live expert testimony and Rowe's failure to proffer the expert for cross-examination go to the report's evidentiary weight, not its admissibility. The Division's reliance on *Barry C. Scutillo, CPA*, Initial Decision Release No. 183, 2001 WL 461287 (ALJ May 3, 2001), is misplaced. In *Scutillo*, the law judge rejected the Division's attempt to proffer an expert's report on foreign law due to several deficiencies: the Division failed to identify the translator of the report or the translator's qualifications, failed to show the relevance of the report, and proffered the report at the start of the hearing without prior notice to the respondents and without an opportunity for cross-examination. *Id.* at *30-32. The law judge noted that the opportunity for the respondents to cross-examine the expert was an obligation that fell on the Division under the Administrative Procedure Act. *Id*. at *31-32; *see* 5 U.S.C. § 556(d). These circumstances are lacking here, and I reject the Division's assertion that it would be "unfairly prejudice[d]" by allowing the report into evidence; it is the Division that brought this case against Rowe and bears the burden of proof.

If the Division wishes to examine any witness from Capital Forensics about the report or to call its own expert to rebut the report, I will consider allowing the Division to amend its witness list. Lastly, Rowe's failure to comply with the requirements of Rule 222(a)(4) and (b) are not grounds for excluding the report, as Rowe is not calling an expert witness to testify. *See* 17 C.F.R. § 201.222(a)(4), (b).

Rowe's Motions to Amend Witness List

Rowe's motions to amend his witness list to add Carvel Tefft and Richard Goudarzi are GRANTED. Tefft is an employee of the New Hampshire Bureau of Securities Regulation. Rowe's expected testimony from Tefft involves the alleged facts that Tefft was an options expert and found that use of options reduced risk in client portfolios. Tefft allegedly interviewed Rowe

and made conclusions on behalf of the Bureau about Rowe. Such testimony would be relevant; however, my ruling has no bearing on Rowe's pending motion to compel directed to the Bureau regarding, among other subjects, Tefft's interview notes.

Goudarzi, a former client of Rowe, is expected to testify about the conduct of another investor witness, Ronald Ferrante, Jr. Specifically, Goudarzi is expected to testify about Ferrante's alleged attempts to recruit him to join an action against Rowe, and Goudarzi's belief that Rowe has done nothing wrong and that Ferrante is lying. Such testimony is also relevant and would be material to Rowe's defense.

Rowe's Motion to Compel Certain Parties to Produce Subpoenaed Information

Rowe moves for an order overruling objections filed by Bruce Gabriel, Frances Straccia, Mary Beth Lambert, Ronald Ferrante, Jr., Ronald Ferrante, Sr., Anne Ferrante, Edward Duby, and Suzanne Duby (collectively, the investor witnesses), to Rowe's documentary subpoenas and compelling production of certain information.

First, Rowe's subpoenas asked for the investor witnesses to produce "lists" of certain information, including any meetings they had with others about Rowe and his firm Focus Capital. My December 2 order modified Rowe's subpoenas and provided as follows:

> To the extent that compliance with the subpoenas would require more than data compilation in the creation of lists or summaries—that is, the creation of new documents or tangible evidence where evidence does not already exist in some tangible format, or a compilation of individuals' memory or mental impressions—the subpoena recipients may indicate as such in their responses and are not required to provide such information.

Nicholas Rowe, Admin. Proc. Rulings Release No. 3364, 2015 SEC LEXIS 4919, at *6-7. As the investor witnesses stated in their subpoena responses, there is no available data in their possession, custody, or control from which the lists that Rowe seeks could be compiled. Fuller Decl., Ex. 1. Separately, Straccia confirmed in a recent letter the dates of meetings and with whom she spoke. Fuller Decl., Ex. 3. I decline to compel the investor witnesses to create lists in these circumstances, as to do so would go beyond the scope of a documentary subpoena for the reasons stated in my December 2 order.

Second, Rowe asserts that he has received limited production from the investor witnesses. I raised this issue in my January 13 order and directed counsel for the investor witnesses to provide a declaration itemizing the documents or categories of documents produced, and what steps the investor witnesses took to comply with the subpoenas. *Nicholas Rowe*, Admin. Proc. Rulings Release No. 3502, 2016 SEC LEXIS 126. On January 15, counsel Steven N. Fuller submitted a declaration and exhibits, which establish as follows: Fuller determined that a settlement agreement between several of the investor witnesses and a third-party was arguably responsive, and, subject to a confidentiality agreement, produced the settlement agreement. Fuller Decl. ¶ 4 & Ex. 2. In addition, Straccia, Ronald Ferrante, Sr., Anne Ferrante, and Mary Beth Lambert have searched their records and have no other responsive documents. *Id.* ¶¶ 6, 8, 9

& Ex. 3. Ronald Ferrante, Jr. searched his records; although he initially found no responsive documents, he later found and produced more than 200 pages of emails and attachments. *Id.* ¶ 7 & Ex. 4. The Dubys did not personally search their records because they are currently living in Florida and any such material is in storage in New Hampshire. They stated in their November 2015 subpoena responses that there would likely be little or no written record of meetings and calls, and any dates of calls or meetings would be by memory only, and that over time such memories have become "sketchy." *Id.*, Ex. 5. Fuller investigated the issue further with the Dubys and is confident that they have no responsive documents because, having represented them in a related action, the "universe of documents provided to [Fuller's] former law firm in their case contained no responsive documents." *Id.* ¶¶ 10-11. Gabriel searched his records and produced responsive documents that he found. *Id.* ¶ 12 & Ex. 6.

Based on counsel's declaration and the responses of the investor witnesses, it appears they have nothing further to produce. Rowe, however, asserts in his reply that he received no information regarding prior disputes that certain investor witnesses allegedly had with other advisers, and that the declaration regarding the production efforts of the investor witnesses is insufficient. As to the second point, Rowe argues that while my January 13 order directed for a declaration regarding what steps the investor witnesses took to comply with the subpoenas, the witnesses merely state that they reviewed their files and emails and found no responsive documents and only Straccia detailed her efforts.

My ruling on the motion is DEFERRED. Rowe may question the witnesses at the hearing regarding the completeness of their document production and subpoena compliance. The Division's request to file an opposition is DENIED as unnecessary.

Rowe's Motion for Reconsideration

On January 4, 2016, Rowe submitted a motion for reconsideration of my December 2, 2015, order on motions to quash. That order modified Rowe's documentary subpoenas as follows:

> To the extent that the subpoenas seek information regarding disputes, controversies, claims, complaints, or settlements with or against persons who are not in the securities industry, the subpoena recipients are not required to provide such information. Although it is probative to Rowe's defense whether certain former clients brought claims against other investment advisers and other securities industry participants, the scope of information regarding "any person you have had any controversy with," for example, is unreasonable.

Nicholas Rowe, 2015 SEC LEXIS 4919, at *7.

In his present motion, Rowe claims that a prospective witness informed Rowe that he had disputes with three ministers and his neighbor. Rowe claims to "ha[ve] knowledge of these disputes as [the prospective witness] used these as threats in an extortion attempt, informing [Rowe] that he would do the same to him." Rowe avers that such disputes bear on the witness's credibility and use of litigation as a threat.

Rowe waited over a month to seek reconsideration of the December 2 order. In any event, it appears that the relevance of the alleged disputes, if any, relates to the conversation Rowe claims to have had with the witness and how that conversation made Rowe feel threatened. As Rowe asserts in his reply, "[t]he witness made these prior disputes relevant by attempting to use them to get [Rowe] to settle with the witness." How a documentary subpoena relates to that conversation, however, is not apparent.

The relevance and reasonable scope of the documentary subpoena request is not established, and therefore the motion for reconsideration is DENIED without prejudice. *See* 17 C.F.R. § 201.232(b). Subject to a reasonable scope of examination, Rowe may question the witness at the hearing about these disputes, as well as testify in his own defense about this conversation with the witness. If, upon questioning, it comes to light that there are relevant documents, I will consider whether to compel production.

I will not exclude examination on the alleged disputes on the grounds of relevance, as the Division requests. To do so now would be premature. Whether and to what extent such alleged disputes bear on the question of credibility may be explored at the hearing and in post-hearing briefs.

Rowe's Motion to Remove Witnesses or Exclude Witness Testimony

Rowe moves to remove Alfred Yezbick, Joseph Hayden, and Susan Hayden as witnesses in this matter or alternatively to limit their testimony. The Division's witness list disclosed that these witnesses would testify about their investment experience with Rowe. Rowe objects to their expected testimony on certain subjects, arguing that no risk analysis was performed on their accounts during separate arbitration proceedings and thus they should not be allowed to testify about Rowe's alleged disregard for their risk tolerance, failure to disclose the risks of certain investment strategies, or refusal to acknowledge the inappropriateness of certain investment strategies and products. In its opposition, the Division represents that it will call these three witnesses to rebut Rowe's contention that the other investor witnesses conspired against him, as the Division alleges that these three witnesses were similarly victimized by Rowe.

The motion is DENIED without prejudice to Rowe's ability to object at the hearing. Contrary to Rowe's argument, there is no basis for the wholesale exclusion of the expected testimony as "irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320; *see City of Anaheim*, Exchange Act Release No. 42140, 1999 SEC LEXIS 2421, at *4 (Nov. 16, 1999) ("Our law judges should be inclusive in making evidentiary determinations."). The witnesses' recollections of what they conveyed to Rowe about their risk tolerance and how they believe Rowe disregarded their risk tolerance is relevant and material. That an expert risk analysis was not previously performed on their accounts does not render their testimony irrelevant. As Rowe acknowledges, these witnesses will appear as fact witnesses. Nothing indicates that these witnesses will appear as experts. Thus, the fact that Rowe does not have an expert to rebut their expected testimony is of little bearing.

Nor is their expected testimony unfairly prejudicial to Rowe; the same way these witnesses may testify about their experience with Rowe and what they believe was his disregard for their risk tolerance, Rowe may testify in his defense to rebut their testimony.

Rowe's Motion in Limine to Assert Common-Law Spousal Privilege

Rowe moves to assert the common-law spousal privilege with regard to the Division's plan to call his wife, Lisa Rowe, as a witness and seeks to have his wife removed from the Division's witness list. My ruling on the motion is DEFERRED. At the hearing, Rowe may object to specific questions posed by the Division to his wife on the grounds of an applicable privilege.

Evidentiary privileges hinder the search for truth and therefore their scope must be construed narrowly. *See Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992). Federal common law recognizes two types of marital privileges, of which one is applicable outside of criminal cases: the confidential marital communications privilege that "protects from disclosure private communications between the spouses in the confidence of the marital relationship." *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (citing *Blau v. United States*, 340 U.S. 332, 333 (1951); *Wolfle v. United States*, 291 U.S. 7, 14 (1934)). However, to come within the scope of the marital communications privilege, four prerequisites must be established. *See id.* (there must have been a communication, there must have been a valid marriage at the time of the communication, the communication must have been made in confidence, and the privilege must not have been waived).

Rowe's claim that every possible question that the Division might pose to his wife would fall within the marital communications privilege is premature. The Division intends to question Rowe's wife about certain business dealings and entities related to Rowe's trading strategies. Communications about business matters are usually not considered privileged as marital confidences. *See, e.g.*, *Key Bank of Maine v. Latshaw*, 633 A.2d 952, 956-57 (N.H. 1993) ("Communications or transactions between husband and wife with respect to purely business matters are usually held not privileged, on the ground that these are not marital confidences." (collecting case-law)); 1 McCormick on Evidence § 80 (7th ed. 2013) ("The fact that the communication relates to business transactions may show that it was not intended as confidential. Examples are statements about business agreements between the spouses, or about business matters transacted by one spouse as agent for the other . . . . Usually such statements relate to facts that are intended later to become publicly known. To cloak them with privilege when the transactions come into litigation would be productive of special inconvenience and injustice."). Accordingly, the marital communications privilege may be asserted "in response to specific questions as appropriate," and I will rule on such privilege assertions at the hearing. *Abbott v. Kidder, Peabody & Co.*, No. 97-cv-3251, 1997 WL 337228, at *4 (N.D. Ill. June 16, 1997); *see United States v. Manfredi*, 628 F. Supp. 2d 608, 646 (W.D. Pa. 2009) ("Defendants are not entitled to a blanket order precluding all testimony of a spouse . . . ."); *cf. United States v. Thornton*, 733 F.2d 121, 125-26 (D.C. Cir. 1984) ("[A] trial court cannot speculate whether all relevant questions would or would not tend to incriminate the witness; accordingly, the court normally requires the privilege to be asserted in response to specific questions.").

Rowe's arguments that his wife's testimony would be irrelevant, prejudicial, immaterial, and unduly repetitious are premature, and in part simply bootstrap his privilege contention. *See, e.g.*, Motion in Limine at 2 ("It will unfairly prejudice Respondent because Lisa Rowe was not involved in these dealings and does not have this information outside of the information obtained through her marriage to Respondent that is privileged."), 3 ("Again, any of Lisa Rowe's knowledge of these dealings came from confidential communications with Respondent."). His wife's knowledge of Rowe's business dealings and trading strategies would be relevant evidence and admissible if it is not privileged. Moreover, and contrary to Rowe's contention, the fact that his wife was not previously part of an investigation or deposed does not render her testimony "speculative." She either does or does not have knowledge of these issues, which is more properly determined through live testimony. Nor is it unduly repetitious for Rowe's wife to testify about matters that Rowe can also testify to and expects to be asked about by the Division. A party may call more than one witness to testify about the same issues, to either corroborate or undermine other evidence or testimony.

Lastly, Rowe contends that the Division's naming of his wife as a potential witness amounts to harassment, as she suffers from certain medical issues and being a potential witness "has caused her much angst and stress." Considering Rowe's pro se status, I construe this aspect of his motion as asserting that his wife would be unable to testify at the hearing on medical grounds. As the Division sets forth in its opposition, it is willing to discuss with Lisa Rowe what limitations she may have and address them. In his reply, Rowe sets forth no further information about his wife's health and has provided no documentation corroborating his claim. Accordingly, I decline to excuse Rowe's wife from testifying and this aspect of Rowe's motion is DENIED.

Rowe's Motion to Clarify Scope of Trial

Rowe moves to limit the scope of the hearing to the consent order entered by the New Hampshire Bureau of Securities Regulation and to exclude anything that is outside the scope of the consent order. The motion is DENIED without prejudice to Rowe's ability to object to the Division's presentation of evidence that he believes should be excluded.

The Commission specifically directed that I "may admit and consider additional evidence from any relevant source, subject to challenge by either party, and, based on such additional evidence, determine an appropriate sanction, if any." *Nicholas Rowe*, Exchange Act Release No. 75982, 2015 SEC LEXIS 3928, at *18 (Sept. 24, 2015). Evidence outside the scope of the consent order may be relevant to determining the appropriate sanction, if any, and is not subject to blanket exclusion. *See Timbervest, LLC*, Advisers Act Release No. 4197, 2015 SEC LEXIS 3854, at *81 & n.114 (Sept. 17, 2015), *appeal filed*, No. 15-1416 (D.C. Cir.). Thus, Rowe's attempt to broadly exclude any and all evidence that is not specifically within the scope of the consent order is premature. Accordingly, I will consider Rowe's objections to the Division's presentation of evidence on a case-by-case basis at the hearing.

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Jason S. Patil
Administrative Law Judge