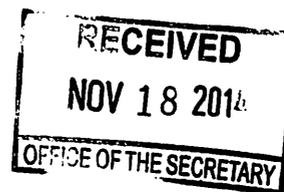


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of)
)
)

DENNIS J. MALOUF,)

Respondent.)
_____)

ADMINISTRATIVE PROCEEDING
File No. 3-15918

**RESPONDENT DENNIS MALOUF'S OPPOSITION TO DIVISION
OF ENFORCEMENT'S MOTION IN LIMINE TO EXCLUDE THE
PURPORTED EXPERT TESTIMONY OF ATTORNEY ALAN WOLPER**

Respondent, Dennis Malouf, by and through the undersigned counsel, hereby files this Opposition to The Division of Enforcement's Motion in Limine to Exclude the Purported Expert Testimony of Attorney Alan Wolper (the "Motion in Limine"). The Division seeks to exclude the expert testimony on the basis that Mr. Wolper has not worked for an investment advisor or purchased bonds for clients of the type at issue. The Division also claims his expert testimony improperly attempts to instruct the Hearing Officer on the law. Mr. Wolper is well qualified to provide the testimony he has given, and because his opinions are appropriately presented, the Motion in Limine should be denied, Mr. Wolper's expert testimony should be admitted, and Mr. Wolper should be permitted to provide such further expert testimony as required in the course of this proceeding.¹

¹ Although Motions in Limine and Rebuttal Expert Reports were due on the same day, the Division has not objected to Mr. Wolper's ability or qualifications to submit a rebuttal expert report, nor has it moved to exclude Mr. Wolper's rebuttal report. In the absence of any objection, Mr. Wolper's rebuttal expert report should be admitted.

I. Mr. Wolper is Well Qualified to Provide the Expert Testimony Given

The Division argues that Mr. Wolper's expert testimony is immaterial, irrelevant, and unreliable because UASNM is an investment adviser and Mr. Wolper has not worked for or regulated investment advisers, and has not personally purchased bonds for clients. Perhaps understandably, the Division would like to exclude Mr. Wolper's testimony because he is a former senior level securities regulator responsible for enforcing the rules and regulations promulgated by the SEC, and his opinion undermining the Division's claims is particularly damaging to their case.

Though Mr. Wolper has not worked for an investment adviser or personally placed bond trades for clients, his securities industry expert credentials were earned during his decade as a regulator, and his subsequent extensive experience as an attorney handling securities matters in private practice. As noted in Mr. Wolper's CV, he spent eleven years at the Atlanta district office of the National Association of Securities Dealers ("NASD"), five of which were spent responsible for the overall operation of the office as the District Director.² The Division's fallacious argument that Mr. Wolper is unqualified is akin to claiming that an NFL referee could not opine on the rules of football because he has not thrown the ball or made a tackle. In fact, by the Division's logic it could just as easily be said that its own expert – Gary Gibbons – is unqualified because he has no regulatory or broker-dealer experience, and therefore he does not have sufficient knowledge regarding the application of SEC rules and regulations or the trading and pricing mechanics of bond markets.

² The NASD was founded in 1939 and served as a self regulatory organization subject to the oversight of the SEC.

During his time at the NASD, Mr. Wolper was responsible for supervising or administering thousands of examinations that required him to be well versed in the rules, regulations, and common practices that govern the entire securities industry, not just broker-dealers.³ In particular, Mr. Wolper has a deep and practical working knowledge of the federal securities laws under which the Division brings its claims. Further, the issues on which Mr. Wolper opines, best execution and commissions, exist across the securities industry as a whole. They are not solely within the realm of investment advisers, and therefore Mr. Wolper's lack of direct regulatory oversight of investment advisers does not make him any less of an expert on these matters. As indicated in Mr. Wolper's CV and his expert report, he has spent the last ten years as an attorney in private practice handling regulatory and enforcement actions such as this one, and providing compliance advice to both broker-dealers and investment advisers.

A. Best Execution

Rather than seek to exclude Mr. Wolper's opinion on any valid grounds, the Division unilaterally asserts that his opinion is "wrong" because they disagree with it. However, it is not the Division's place, nor is the Motion in Limine an appropriate mechanism, to bluntly (and incorrectly) challenge the basis of Mr. Wolper's opinion. It is the Division's obligation to put forth testimony of its own expert who may disagree with Mr. Wolper, and who has been given an opportunity to do so in his rebuttal report. By commenting on Mr. Wolper's opinion as it has, the Division seeks to do exactly what it argues is improper in the Motion in Limine, i.e. instruct the Hearing Officer on the law.

³ It should be noted that Mr. Wolper is aware of the scope of his expert knowledge when it comes to issues exclusively related to investment advisers, and he acknowledges as much in paragraph 12 of his expert report stating that an opinion regarding UASNM's Form ADV disclosures is beyond the scope of his report.

The fact that Mr. Wolper has not worked for or regulated investment advisers does not diminish his expert knowledge of best execution, which is a concept that exists throughout the securities industry. In fact, the definition and general requirements for obtaining best execution are substantially similar for broker-dealers and investment advisers. The main difference is the source of the obligation and the standard of care owed.

An investment adviser's duty to obtain best execution is not codified in any securities law or regulation, but derived from the fiduciary duty owed to its customers. *See* Exchange Act Release No. 23170 (April 23, 1986). The SEC has stated that an investment adviser must "execute securities transactions for clients in such a manner that the client's total cost or proceeds in each transaction is the most favorable under the circumstances." *Id.* Best execution requires consideration of a number of different qualitative and quantitative factors, and it does not mean seeking the lowest possible commission cost, but whether the transaction represents the best qualitative execution for the managed account. *Id.*

The definition of best execution applicable to broker-dealers, which is codified in NASD Rule 2320 or FINRA Rule 5310,⁴ is substantially similar to the SEC definition. NASD Rule 2320 requires a member to buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Rule 2320 is also similar in that it requires a number of qualitative and quantitative factors to be considered in obtaining best execution.

The primary difference between a broker-dealer's obligations to its customers and an investment adviser's obligations is the standard of care owed. The Division claims Mr. Wolper has failed to recognize that a fiduciary standard applies to investment advisers. However, Mr.

⁴ NASD Rule 2320 was in effect through May 2012, when it was replaced by FINRA Rule 5310.

Wolper states in paragraph 8 of his expert report, attached to the Motion in Limine, that investment advisers have a fiduciary relationship with their customers, and he has considered the best execution obligation in light of that fiduciary relationship. His many years of experience representing investment advisers in his private practice more than adequately qualify him to opine on such issues.

B. Commissions

The Division argues that Mr. Wolper's expert report and CV are "devoid" of any reference to expertise regarding IM-2420-2. However, the fact that Mr. Wolper spent more than a decade as regional counsel and district director enforcing the rules promulgated by the NASD is ample evidence of his expertise. IM-2420-2 is part of NASD Rule 2420. Mr. Wolper worked for the NASD from 1993 through 2004, and was employed there as of the date (November 19, 1998) Rule 2420 was last amended. Based upon his extensive experience supervising, administering, and conducting examinations of NASD members subject to the rules promulgated by the NASD, he is well versed in those rules including Rule 2420. Due to his extensive working knowledge of the NASD rules, Mr. Wolper is well qualified to opine on Rule 2420, and the interpretive material issued thereunder.

II. Mr. Wolper's Expert Opinion is Not Improper

The Division takes issue with just one sentence of Mr. Wolper's expert opinion and argues that it purportedly expresses an ultimate legal conclusion. Though Respondent disputes the Division's attempted mischaracterization of Mr. Wolper's opinion, it is hypocritical of the Division to assert such a claim when its own expert (who is not an attorney) has taken liberties to assert ultimate legal conclusions repeatedly throughout his 78-page report. Gibbons offers, or rather advocates, numerous legal conclusions regarding breaches of fiduciary duty and failure to

achieve best execution.⁵ In fact, the heading of Section V of his report – “Did Malouf Fulfill his Duties to Clients?” – indicates that the entire section is nothing more than Gibbons’ application of the law to the facts to improperly draw legal conclusions with respect to Mr. Malouf’s purported duties. If the allegedly offending sentence in Mr. Wolper’s report constitutes an improper legal conclusion that should be excluded, then so too do numerous portions of Gibbons’ report, including the entirety of Section V, and Respondent would move for them to be excluded as well.

Regardless, Mr. Wolper’s opinion regarding the terms and scope of IM-2420-2 is not an improper legal conclusion drawn from the facts of this case. Mr. Wolper is an expert regarding NASD rules, including Rule 2420 and the interpretive material thereunder. His opinion, based upon his extensive experience, regarding what is proper or improper thereunder is appropriate in this case. Mr. Wolper has offered no legal conclusion with respect to the existence of a contract necessary to satisfy Rule 2420 or whether, by complying with Rule 2420, Respondent has or has not violated any of the securities laws which form the basis for the SEC’s claims. Mr. Wolper has simply offered the opinion that, if a contract existed that met the requirements of IM-2420-2, then payment of commissions would not be improper. An opinion is not objectionable just because it embraces an ultimate issue, and experts may refer to the law in expressing his or her opinion. *See* Federal Rule of Evidence 704; *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir.

⁵ For example, Gibbons states that: “[u]sing only one broker-dealer exclusively would likely constitute a breach of fiduciary duty . . .” *See* Gibbons Report at 21; “. . . delay in execution would usually be viewed as a breach of the broker-dealer’s duty.” *Id.* at 25; “[Malouf’s] duty was . . . a matter of personal fiduciary responsibility.” *Id.* at 31; “. . . Malouf failed to seek best execution on certain bond trades.” *Id.*; “. . . Malouf has a common law duty of diligence and fidelity . . .” *Id.* at 37; “. . . Malouf violated his fiduciary duty. . .” *Id.*; and “[t]he disclosures relating to UASNM’s best execution process were misleading to clients . . .” *Id.* at 41.

1988) (stating that an expert's testimony is proper if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function)

III. Excluding Mr. Wolper's Testimony is Inappropriate

Despite the lack of any compelling reason to do so, excluding Mr. Wolper's testimony would be inappropriate under any circumstance. The Division will have an opportunity to cross-examine Mr. Wolper about his expert credentials at the hearing. *See* In re: Morgan Asset Management, Inc., *et al.* Administrative Proceeding No. 3-13847, Order Addressing the Division of Enforcement's Renewed Motion in Limine⁶ (denying motion in limine to exclude testimony of two experts in advance of the hearing and allowing Respondents to offer testimony subject to cross examination). Mr. Wolper's expert testimony should not be excluded simply because the Division disagrees with it or finds it damaging to their case. At most, the Division's arguments regarding Mr. Wolper's expert testimony go to the weight it should be given. *Id.*; In re: Thomas C. Gonella, Administrative Proceedings Rulings Release No. 1579/July 2, 2014⁷ (finding that the Division's objection related to an expert's qualifications goes to the weight to be given his testimony.) With respect to Mr. Wolper's purportedly improper "legal conclusions," the authority cited by the Division is concerned only with the effect that such testimony would have on a jury. There is no jury in this proceeding, and Respondent is confident that the Hearing Officer is fully capable of applying the relevant law to the facts.

WHEREFORE, because the Motion in Limine fails to assert a meritorious reason why Mr. Wolper's expert testimony should be excluded, the Motion in Limine should be denied, Mr.

⁶ <https://www.sec.gov/alj/aljorders/2010/3-13847.pdf>

⁷ <https://www.sec.gov/alj/aljorders/2014/ap-1579.pdf>

Wolper's expert testimony should be admitted, and Mr. Wolper should be permitted to provide such further expert testimony as required.

Respectfully submitted,



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DENNIS J. MALOUF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served via E-Mail and/or U.S. Mail to the following this 10th day of November, 2014:

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