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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT, Respondent.	Disciplinary Proceeding No. 2014040968501 Hearing Officer—DW

ORDER GRANTING IN PART AND DENYING IN PART ENFORCEMENT'S MOTION IN LIMINE TO PRECLUDE THE RESPONDENT FROM INTRODUCING TESTIMONY AND EVIDENCE AT THE HEARING

A. Introduction

The Department of Enforcement brought this action against Respondent alleging that in the midst of a dispute over commissions and back pay, Respondent violated FINRA Rules 2010 and 5240 by sending abusive and threatening emails and other communications to individuals at his former member firm employer, [BC].

On November 6, 2015, Enforcement moved to preclude Respondent from presenting at the hearing the testimony of Dr. Emad Mounir, a physician who Respondent intends to call on the subject of his "medical diagnosis and ongoing treatment."[1] The motion also seeks to exclude the following proposed exhibits: (1) copies of various prescriptions written to Respondent (RX-1); (2) an advertisement regarding the conditions treated by the medication (RX-2); (3) a printout from the National Institute of Mental Health regarding the diagnosis (RX-4); and (4) an exhibit—not supplied in Respondent's pre-hearing disclosures—that, according to Respondent, will contain "relevant sections of Respondent's medical history regarding mental health and treatment" (RX-3).

Enforcement argues that Dr. Mounir's proffered testimony and the exhibits pertaining to Respondent's medical condition should be precluded for two reasons: first, they are irrelevant. Second, the testimony was not properly disclosed as expert testimony by the deadline required by the Scheduling Order. Respondent opposes the motion. For the reasons that follow, the motion is granted in part and denied in part.

[1] Respondent's Witness List.

B. Discussion

Respondent represents that the medical testimony and evidence will demonstrate that following the relevant period, he was treated for a psychological condition and this treatment remediated certain behavioral issues. He offers this evidence not as a defense to the conduct, but to explain (or at least mitigate) his alleged misconduct in the determination of what sanctions are warranted for any violations ultimately proven. A serious mental or psychological condition may be considered as a mitigating factor in assessing any violation ultimately proven to the extent that "such problems interfered with an ability to comply with FINRA rules or that violations resulted from, or were exacerbated by, such problems."[2] Given Respondent's proffer that the evidence will bear on this question, I will not foreclose the potential relevance of the evidence to any determination of sanctions[3] at this juncture.

Enforcement objects to Respondent's failure to raise his mental condition as an affirmative defense in his Answer.[4] But an affirmative defense is "a respondent's assertion raising facts and arguments that, if true, will defeat the claims against the respondent, even if all of the allegations in the Complaint are proven."[5] The challenged evidence is not offered to defeat the claim against Respondent. It is not an affirmative defense, or a "defense" at all – it is simply offered to explain and potentially mitigate his conduct in the context of potential sanctions.[6]

More persuasive is Enforcement's argument that, whatever the purpose of the evidence, medical testimony is expert evidence that Respondent should have (a) sought leave from the Hearing Officer to present, and (b) provided fair disclosure of the substance of the testimony to the opposing party.

Before presenting expert testimony at the hearing, Respondent was required by FINRA Rule 9242(a)(5) to disclose in advance: (1) a statement of the expert's qualifications; (2) a listing of other proceedings in which the expert has given expert testimony; and (3) a list of the expert's

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[2] *Dep't of Enforcement v. Saad*, No. 200801201960, 2015 FINRA Discip. LEXIS 49, at *23 (NAC Mar. 16, 2015) *aff'd*, Exchange Act Release No. 76118, 2015 SEC LEXIS 4176 (Oct. 8, 2015), *appeal docketed*, No. 15-1430 (D.C. Cir. Nov. 20, 2015); *cf. Dist. Bus. Conduct Comm. v. Klein*, No. C02940041, 1995 NASD Discip. LEXIS 229, at *13 (NBCC June 20, 1995), *aff'd*, Exchange Act Release No. 36595, 1995 SEC LEXIS 3418 (Dec. 14, 1995) (finding mitigation present given Respondent's "efforts to take responsibility for his conduct and address his psychological and substance abuse problems").

[3] *See* FINRA Sanction Guidelines at 3 (2015) ("Sanctions in disciplinary proceedings are intended to be remedial and to prevent the recurrence of misconduct.").

[4] Affirmative defenses are required to be pleaded in the Answer by FINRA Rule 9215(b).

[5] *Dep't of Enforcement v. Bullock*, No. 2005003437102, 2011 FINRA Discip. LEXIS 14, at *56 (NAC May 6, 2011).

[6] *Dep't of Enforcement v. Coleman & Co.*, No. CAF980022, 1999 NASD Discip. LEXIS 52, at *3 (OHO June 25, 1999) (striking Respondent's affirmative defense where it "asserted factors in mitigation of sanctions if a violation were found, but they did not constitute defenses to the charged violation"); OHO Order 98-29 (CAF980022) at 8 (Oct. 2, 1998), http://www.finra.org/sites/default/files/OHODecision/p007762.pdf ("Facts to be presented solely in mitigation of sanctions do not constitute a defense to the charge; therefore, they are not properly raised in the pleadings as an affirmative defense.").

publications. The Scheduling Order required these disclosures, along with an application to the Hearing Officer seeking leave to permit any such testimony, by October 30, 2015. Respondent made no such application or disclosure regarding Dr. Mounir.

Respondent claims that he was not required to make advance disclosure of the medical evidence, relying on the so-called "treating physician" exception to expert disclosure requirements under the federal rules. Although the rules of evidence applicable in federal courts do not apply to FINRA disciplinary proceedings,[7] the Federal Rules of Evidence can provide helpful guidance.[8] Within this guidance there is substantial authority for the proposition that "[a] treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party."[9]

But, of course, a primary reason for advance disclosure of the substance of expert testimony is that the evidence draws upon the witness's specialized training and expertise beyond the ken of the ordinary individual. Advance notice provides the opposing party the ability to present (or consult with) other experts who can more readily recognize the strengths and weaknesses of the testimony, facilitating fair cross-examination of the evidence.[10] In recognition of the need for proper advance disclosure, the Federal Rules of Evidence were amended in 2000 to specifically require that purportedly non-expert "lay" testimony be treated as expert evidence where the testimony is based on scientific, technical, or other specialized knowledge. "Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge. . . ."[11] Expert disclosure requirements should not "be evaded through the simple expedient of proffering an expert in lay witness clothing."[12]

Consistent with these principles, "a treating physician who has not been identified as an expert witness . . . may not provide testimony beyond the scope of her treatment of plaintiff and

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[7] *See* FINRA Rule 9145(a).

[8] *Dep't of Enforcement v. Ahmed*, No. 2012034211301, 2015 FINRA Discip. LEXIS 45 at *112, n. 98 (NAC Sept. 25, 2015), *appeal docketed,* No. 3-16900 (SEC Oct. 13, 2015); OHO Order 12-07 (2010020846601) at 2 n.3 (Nov. 9, 2012), http://www.finra.org/sites/default/files/OHODecision/p229431.pdf

[9] *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir. 1999); *and see Blameuser v. Hasenfang*, 345 F. App'x 184, 187, 2009 U.S. App. LEXIS 20421 (7th Cir. 2009) (physician testimony regarding treatment of patient and his putative diagnosis reached during the course of his treatment "does not require an expert report"); *Cent. States Health & Life Co. v. Brewer*, 2003 U.S. App. LEXIS 29444, at *9 (5th Cir. June 4, 2003) ("Generally, a treating physician is not considered an expert witness if he testifies about observations based on personal knowledge."); *United States v. Wells*, 211 F.3d 988, 997-98 (6th Cir. 2000) (affirming a decision allowing doctors to testify as fact witnesses that a person was cancer-free based on first-hand observations).

[10] *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (expert disclosure rules generally serve to "allow[] both sides to prepare their cases adequately and efficiently and to prevent the tactic of surprise from affecting the outcome of the case").

[11] *See* Advisory Committee Notes to Fed. R. Evid. 701 (2000 Amendment).

[12] *Id*.

[the physician's] conclusions must fall within the province of a lay witness."[13] Because Respondent has not followed the procedures necessary for the presentation of expert testimony, the hearing testimony of Dr. Mounir will be limited to his personal observations within the scope of his treatment and will not be permitted to extend into any testimony regarding the causation of any medical condition,[14] or any resultant diagnosis or prognosis regarding the condition.[15] This limitation is consistent with Respondent's proffer that "the purpose of Dr. Mounir's testimony is to present the Hearing Officer with information regarding his treatment of Respondent and the observations he's made regarding Respondent's behavior and response to treatment."[16]

Moreover, as Respondent represents that he will not present expert testimony, he may not present the substance of an expert's evidence in alternate form. He may not circumvent the expert disclosure requirements provided in the Scheduling Order by offering the substance of expert opinion through a diagnostic manual, treatise, or Internet synopsis. The use of learned treatise evidence is an adjunct to—and not a substitute for—expert testimony.[17] Exhibits RX-2 and RX-4, which do not pertain to Respondent's medical treatment and purport to provide information and explanation regarding certain medical conditions and treatments generally, are excluded.

And while Respondent intends to offer certain medical records as an exhibit at the hearing, he did not disclose these records at the time prescribed by the Scheduling Order and in fact *still* has not disclosed the records. His Exhibit RX-3 is presently an empty placeholder that Respondent promises to supplement at such time as he receives relevant records from his medical provider. This matter has been pending for more than eight months. Disclosure of hearing exhibits was required by October 30, 2015. Inasmuch as Respondent has failed to comply with the Scheduling Order's disclosure requirements, and is unable to represent when the

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[13] *Parker v. Cent. Kansas Med. Ctr.*, 57 F. App'x 401, 404 (10th Cir. 2003) (quoting *Parker v. Cent. Kansas Med. Ctr.*, 178 F. Supp. 2d 1205, 1210 (D.Kan. 2001)).

[14] *Brooks v. Union Pacific RR*, 620 F.3d 896, 900 (8th Cir. 2010) ("A treating physician's expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation."); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756, n.2 (7th Cir. 2004) ("we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony regarding causation.") (quotation omitted).

[15] *Peshlakai v. Ruiz*, 2013 U.S. Dist. LEXIS 173622, at *52 (D.N.M. Dec. 7, 2013) ("A treating physician's opinions regarding diagnosis of a medical condition are almost always expert testimony."); *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 88 (D. N.H. 2009) (treating physician's "diagnoses, prognoses, or other conclusions as to the patient's condition" are expert testimony); *Ferris v. Pennsylvania Fed'n Bhd. of Maint. of Way Emps.*, 153 F. Supp. 2d 736, 746 (E.D. Pa. 2001) (treating psychologist could not "testify regarding any specific medical diagnosis of [the plaintiff's] mental ailments as the conditions from which he suffers—depression and anxiety disorder—are complex injuries beyond the knowledge of the average layperson").

[16] *See* Respondent's Opposition to Enforcement's Motion *In Limine* to Preclude Testimony, at 4.

[17] *See* Fed. R. Evid. 803(18) (statements in learned treatises admissible *only* when "called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination"). *And see* Advisory Committee Notes to Fed. R. Evid. 803(18) (collecting pre-rule authorities "demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts," and observing that a treatise might be "misunderstood and misapplied without expert assistance and supervision").

records will become available or even if the records will be provided to Enforcement at all prior to the hearing, his Exhibit RX-3 is excluded.

C. Order

For the reasons set forth above, the motion is **GRANTED IN PART AND DENIED IN PART**. The motion to exclude is granted with respect to Exhibits RX-2, RX-3, and RX-4. As to Dr. Mounir's testimony, the motion is denied, subject to the limitations set forth above, and without prejudice to Enforcement's right to object to particular testimony on appropriate grounds at the hearing. The motion is denied as to Exhibit RX-1, which relates to Respondent's medical treatment.

SO ORDERED

David Williams
Hearing Officer

Dated: December 22, 2015