

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARK SAM KOLTA
(CRD No. 5324620),

Respondent.

Disciplinary Proceeding
No. 2018057297102

Hearing Officer–MJD

**ORDER DENYING RESPONDENT’S MOTION
TO DISQUALIFY ENFORCEMENT COUNSEL**

Respondent Mark Sam Kolta filed a Motion for Recusal of Counsel (“Motion”) seeking to disqualify Payne L. Templeton, the Department of Enforcement’s lead counsel.¹ Kolta wants Templeton excluded from this disciplinary proceeding because he allegedly promised two potential customer witnesses that FINRA would recover their money for them if they agreed to testify. Enforcement filed an Opposition, supported by Templeton’s sworn declaration.²

For the reasons set forth below, I **DENY** the Motion.

I. Background

The Complaint contains four causes of action. Cause one alleges that Kolta made unsuitable recommendations to 16 customers to purchase \$4.8 million in a non-traded real estate investment trust (“REIT”), in violation of FINRA Rules 2111 and 2010. According to the Complaint, the REIT was unsuitable based on the customers’ investment profiles, including their net worth, income, investment objectives, risk tolerance, and, for some customers, their ages. The recommended purchases also allegedly over-concentrated the customers’ investment portfolios in non-traded REITs. The customers allegedly lost more than \$4.1 million from their investments in the REIT.

¹ Motion for Recusal of Counsel (May 15, 2023) (“Motion”).

² Enforcement’s Opposition to Respondent’s Motion to Recuse Counsel (May 22, 2023) (“Opposition”).

Causes two and three allege that Kolta violated FINRA Rules 4511 and 2010 by causing his customers' account records, updates to their records, and their REIT investment subscription documents to contain false and inaccurate information so that they could qualify to purchase the REIT. Cause four alleges that Kolta circulated email communications to customers about the REIT that were not fair and balanced and contained misleading, unwarranted, and promissory statements and claims that violated FINRA Rules 2210 and 2010.

II. Kolta's Motion

According to the Motion, two former clients told Kolta (not Kolta's attorney³) that Templeton promised that FINRA would get them their money back in exchange "for cooperative testimony in this proceeding."⁴ The Motion further claims that Kolta's attorney contacted four other securities attorneys for advice on how he should handle the customers' allegations. One of the attorneys told Kolta's attorney that he had the same issue with Templeton in another proceeding. The attorney allegedly told Kolta's attorney that Templeton "specifically promised witnesses" that FINRA would recover their money in exchange for their testimony.⁵

Kolta states that the two former clients and the attorney want to remain anonymous but are willing to speak to the Hearing Panel about their allegations without Enforcement being present. Kolta claims that the former customers and the attorney would fear retaliation if Templeton were to remain involved in this proceeding.⁶ Kolta does not explain why the customers and the attorney fear retaliation or how or why Enforcement would retaliate against them. Kolta charges that Templeton's alleged behavior is "both shocking and goes beyond any concept of fairness."⁷ He further alleges that the "corroborated claims" against Templeton "imply that he is making impossible promises with the intent to fraudulently influence the proceedings and tamper with witnesses."⁸

Kolta states that his attorney "questions the integrity of the proceedings" and asks that the Hearing Panel in this proceeding hear testimony from the two customers *ex parte* to determine whether Templeton should be permitted to remain in the case.⁹

³ The Motion does not state that Kolta's attorney ever spoke with the two customers.

⁴ Motion 1 ¶ 2.

⁵ *Id.* ¶ 4. On May 25, 2023, I held a pre-hearing conference with the parties. During the conference, I heard brief argument on the Motion. Kolta's attorney reiterated that another attorney had made similar allegations against Templeton. Kolta's attorney stated that he wanted to "make sure that everyone is treated fairly and ethically and that's why [Kolta] filed the motion." Transcript of Pre-Hearing Conference (May 25, 2023) ("Tr.") 36.

⁶ Motion 1 ¶ 5.

⁷ *Id.* ¶ 6.

⁸ *Id.* I note that the Complaint alleges that Kolta's former employer made restitution of about \$4.1 million to the 16 customers.

⁹ *Id.* 2 ¶ 7. The Chief Hearing Officer has not yet appointed any panelists in this disciplinary proceeding.

III. Enforcement's Opposition

Enforcement's Opposition includes a sworn declaration from Templeton. He denies that he has ever made promises to potential customer witnesses. Templeton worked on the investigation in this case before the initiation of the disciplinary proceeding.¹⁰ He denies, under penalty of perjury, however, that he ever told any witness in this or any other matter that FINRA would get them their money back in exchange for their testimony.¹¹ Furthermore, during conversations with potential witnesses in which Templeton participated, Templeton declares that no other FINRA employee ever told any potential witness that FINRA would recover their money in exchange for testimony.¹²

Enforcement argues that Kolta's Motion fails to meet the high burden needed to disqualify counsel. Enforcement notes that it is not supported by any sworn statements or exhibits.¹³ Instead, the Motion consists of "vague and unsupported claims" from two former customers who allegedly contacted Kolta. Enforcement highlights that Kolta does not provide details of the contacts with the customers, including when Kolta's alleged conversations with them took place, what else was said, and who participated.¹⁴ He also fails to provide details about when Templeton's purported conversations with the customers took place, what else was said between them, and the customers' responses, if any, to Templeton.¹⁵ Enforcement further points out that the Motion offers no details about Kolta's attorney's supposed conversation with the other securities attorney who allegedly told him that Templeton had engaged in similar conduct before.¹⁶

IV. Discussion

Although Kolta did not cite it in his Motion, the standard for disqualifying an attorney in a FINRA disciplinary proceeding is found in Rule 9150. Rule 9150(a) provides that a hearing officer may exclude an attorney "for contemptuous conduct under Rule 9280 or unethical or improper conduct." Rule 9280 gives a hearing officer authority to discipline parties or counsel who engage in contemptuous conduct or in conduct in violation of an order of the hearing officer.

¹⁰ Declaration of Payne L. Templeton in Support of Enforcement's Opposition to Respondent's Motion to Recuse Counsel (May 22, 2023) ¶ 2.

¹¹ *Id.* ¶ 3.

¹² *Id.* ¶ 4.

¹³ Opposition 2. During the pre-hearing conference, Templeton emphasized the fact that he submitted a sworn declaration rejecting the allegations and Kolta submitted no supporting evidence. Tr. 36-37.

¹⁴ Opposition 2.

¹⁵ *Id.*

¹⁶ *Id.* at 2-3.

In FINRA disciplinary proceedings, motions to disqualify counsel for unethical conduct are rare. When they are considered, hearing officers consult federal judicial precedents to decide the issue.¹⁷ Such motions are disfavored and must meet a high burden to be granted.¹⁸ Motions to disqualify are disfavored because they deprive parties of the counsel of their choice and because they are often filed to achieve a tactical advantage.¹⁹ Disqualification is the proper remedy only in instances where the alleged misconduct would affect the integrity of the proceeding.²⁰

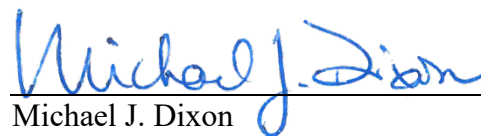
I find that Kolta has not met the high burden required to disqualify an attorney. He has not offered any evidence or exhibits to support his allegations against Templeton. The only evidence before me is provided by Enforcement: Templeton's sworn declaration, signed under penalty of perjury, denying that he has ever made promises to customers in exchange for favorable testimony. Under the circumstances presented, I credit Templeton's statements.

There is also no basis for Kolta's request that the Hearing Panel hear testimony from the two customers without Enforcement's participation. FINRA's Rules do not provide such authority. In any event, it would be demonstrably unfair to hear *ex parte* testimony without permitting Enforcement to challenge the witnesses or present testimony from its own witnesses.

V. Conclusion

For the foregoing reasons, Kolta's Motion to disqualify Payne L. Templeton is denied.

SO ORDERED.



Michael J. Dixon
Hearing Officer

Dated: June 14, 2023

¹⁷ OHO Order 03-10 (CMS020143) (Apr. 3, 2003), at 3, https://www.finra.org/sites/default/files/OHODecision/p007706_0_0_0.pdf (denying Enforcement's motion to disqualify respondent's counsel).

¹⁸ OHO Order 16-16 (2014041724601) (Feb. 26, 2016), at 15, https://www.finra.org/sites/default/files/OHO-Order-16-16-2014041724601_0.pdf (denying respondents' motion to disqualify Enforcement counsel).

¹⁹ *Id.*; OHO Order 03-10, at 3.

²⁰ OHO Order 98-14 (CAF970011) (Jan. 29, 1998), at 3, https://www.finra.org/sites/default/files/OHODecision/p007701_0_0_0_0.pdf (denying respondent's motion to disqualify Enforcement counsel) (citing *Bd. of Education of the City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1978)).

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