

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. 2006005523401

Hearing Officer – LBB

**ORDER GRANTING ENFORCEMENT'S MOTION TO PERMIT COUNSEL
FOR NON-PARTY WITNESSES TO APPEAR AT HEARING**

The Department has moved to permit AR, in-house counsel for Respondent's former firm (the "Firm"), to appear and represent six current Firm employees at the hearing.¹ Respondent opposes the motion, arguing that AR should be prohibited from appearing because she is a potential witness,² that her presence in the hearing room might intimidate the witnesses, and that AR might coach future witnesses based on what she has heard in the hearing room, effectively circumventing the sequestration order (the "rule on witnesses"). Enforcement's motion is granted.

The concern that counsel will improperly coach witnesses based on prior witnesses' testimony is not a basis for exclusion, because it assumes that counsel will behave unethically as

¹ The six witnesses are RH, JC, AG, MG, PS, and AE. The focus of their testimony is expected to be on the Firm's requirements with respect to reporting of volunteer activities. To the extent that their testimony is duplicative, it is possible fewer than six will actually testify.

² The parties submitted their witness lists after Enforcement's motion and Respondent's opposition were filed. Neither party listed AR as a witness, so this argument is moot.

a result of hearing witness testimony.³ There is no reason to believe that counsel would behave unethically by counseling the witnesses to give testimony that is not truthful.

[L]awyers are not like witnesses, and there are critical differences between them that are dispositive in this case. Unlike witnesses, lawyers are officers of the court, and, as such, they owe the court a duty of candor, Model Rules of Professional Conduct Rule 3.3 (1995) [A]n attorney may not "counsel or assist a witness to testify falsely."

Rhynes at 318.

There is also not a substantial risk that AR's presence will have a substantial chilling effect on witnesses in this case. Furthermore, it does not seem likely that a witness would risk his or her career by lying to a FINRA hearing panel over the firm's policies with respect to disclosure of volunteer activities, nor does it seem likely that counsel's presence would increase that risk.

Respondent's argument suggests that counsel for a corporation can never represent multiple employee witnesses, and that sharing counsel among multiple employees is likely to lead to untruthful testimony. In fact, it is possible that counsel's presence will encourage truthful testimony. Lawyers typically counsel their clients to testify truthfully, and the corporation's lawyers might well know the truth and discourage an employee's inclination to deviate from it.

³ There does not appear to be a uniform view among the courts as to whether it is proper for counsel to discuss the testimony of previous witnesses with future witnesses. Compare *People v. Villalobos*, 159 P.3d 624, 628-629 (Col. App. 2006) ("Defendant argues that an attorney's discussion of one witness's testimony with a prospective witness violates [Colorado Rule of Evidence] 615. We are not persuaded.") and *United States v. Rhynes*, 218 F.3d 310, 317-18 (4th Cir. 2000) (*en banc*) ("the relevant authorities interpreting Rule 615, including court decisions and the leading commentators, agree that sequestration orders prohibiting discussions between witnesses should, and do, permit witnesses to discuss the case with counsel for either party....") with *United States v. Buchanan*, 787 F.2d 477, 484 (10th Cir. 1986) ("Counsel know, and are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses."). See also 4-615 *Weinstein's Federal Evidence* §615.06 ("These instructions, however, usually permit the witnesses to discuss their own or other witnesses' testimony with counsel for either side.").

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 08-13 (2006005523401).

For the foregoing reasons, Enforcement's motion to permit AR to appear and represent the Firm witnesses is granted.

SO ORDERED.

Lawrence B. Bernard
Hearing Officer

Dated: September 8, 2008
Washington, DC