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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. Respondent.	Disciplinary Proceeding No. 2007010580702 Hearing Officer – RSH

ORDER GRANTING ENFORCEMENT'S MOTION CONCERNING THE TESTIMONY OF MO, MB, AND JF, AND DENYING THE RESPONDENT'S MOTION TO EXCLUDE THEIR TESTIMONY

Both parties have filed motions *in limine* concerning the testimony of MO, MB, and JF. On March 28, 2011, Enforcement filed a Motion (which was opposed by the Respondent) for a ruling that testimony of MO, MB, and JF is admissible at the hearing. On April 15, 2011, the Respondent filed a Motion (which was opposed by Enforcement) to exclude the testimony of MO, MB, and JF.[1] For the reasons discussed below, Enforcement's Motion is granted, and the Respondent's Motion is denied.

Discussion

Enforcement alleges in its Second Cause of Action that the Respondent gave false answers to MO (RLLC's general counsel), MB (RLLC's chief compliance officer), and JF (RSLLC's chief compliance officer) when they asked him whether he used stock finders. MO, MB, and JF each gave investigative testimony describing their discussions with the Respondent.

[1] On May 6, 2011, the Respondent filed a motion (opposed by Enforcement) for leave to file a reply to Enforcement's opposition to the Respondent's motion to exclude testimony. The Hearing Officer has received sufficient briefing on this subject, and therefore, the Respondent's motion for leave to reply is hereby denied.

Enforcement seeks to use investigative testimony or live testimony from these individuals as part of the proof for its Second Cause of Action at the hearing.

The Respondent's Motion seeks an order excluding MO, MB, and JF's testimony because he claims that their testimony violates his attorney-client privilege and his right to conflict-free counsel. Enforcement requests a ruling that the witnesses' testimony—both in transcripts of their OTRs and in person—will be admissible at the hearing.

A. Attorney-Client Privilege

The Respondent claims that MO, who is RLLC's general counsel, was also his individual attorney, and that his communications with her about FINRA's requests for information about his and RLLC's use of stock finders are protected by the attorney-client privilege. He also claims that his discussions with MB and JF are privileged because they were MO's agents. The Respondent has failed to present facts sufficient to support his claim of privilege.

With respect to communications between a corporation's employees and the corporation's counsel, "any privilege that exists as to a corporate [employee's] role and functions within a corporation belongs to the corporation, not the [employee]."[2] RSLLC waived—as was its right—any privilege that might have protected conversations between the Respondent and MO, MB, and JF by permitting them to testify about the substance of those conversations.[3] Although the Respondent was part of those conversations, he could not prevent RLLC from waiving its privilege: "[a] corporate [employee] . . . may not prevent a corporation from waiving its privilege arising from discussions with corporate counsel about corporate matters."[4]

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[2] *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986). S*ee also CFTC v. Weintraub et al.*, 471 U.S. 343, 349 (1985).

[3] *See, e.g.*, *Nguyen v. Excel Corp.*, 197 F.3d 200, 206–07 (5th Cir. 1999).

[4] *Bevill*, 805 F.2d at 125; *see also In re Grand Jury Investigation*, 599 F.2d 1124, 1236 (3d Cir. 1979).

Nevertheless, the Respondent seeks to suppress their testimony based on a purported *individual* attorney-client privilege between him (an employee) and MO (his employer's counsel). But it is not enough for an individual to claim that he understood he had an individual attorney-client relationship with his employer's counsel because "a party cannot create [an attorney-client] relationship based on his or her own beliefs or actions."[5] His beliefs must be reasonable. The Respondent points to a single comment MO made—that she was there (among other reasons) "as his counsel." It was not reasonable for the Respondent to have believed that this one phrase was sufficient to create an attorney-client relationship with his employer's attorney, particularly when the subject of their discussions was the work he did on behalf of his employer.

Indeed, several courts confronting a claim like Respondent's have set a high threshold for employees who seek to assert a personal attorney-client privilege:

> ***First***, they must show they approached [counsel] for the purpose of seeking legal advice. ***Second***, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. ***Third***, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. ***Fourth***, they must prove that their conversations with [counsel] were confidential. And, ***Fifth***, they must show that the substance

[5] *Pellegrino v. Oppenheimer & Co.*, 49 A.D.3d 94, 99, 851 N.Y.S.2d 19 (NY 1st Dep't 2008); *see also Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 380 (N.Y. 2d Dep't 2001) ("The unilateral belief of [an individual] alone does not confer upon him or her the status of a client[.] Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task.") (citations omitted). *See also Jane St. Co. v. Rosenberg & Estis*, 192 A.D.2d 451, 597 N.Y.S.2d 17 (1993).

> of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.[6]

The Respondent has failed to meet these requirements.

To begin with, the Respondent did not approach MO seeking legal advice; rather, *MO* approached the *Respondent* to make sure he provided the information RSLLC needed in order to respond to a Rule 8210 request served on the firm. Further, Respondent has not demonstrated that he made it clear that he was seeking legal advice in his individual rather than in his representative capacity, or that MO communicated with him in his individual capacity. Nor has the Respondent shown that the substance of his conversations with counsel concerned matters outside of his work for RLLC. To the contrary, the conversations Enforcement seeks to offer relate specifically to the Respondent's use of finders in connection with RSLLC's stock lending business.

Perhaps most importantly, for the attorney-client privilege to apply, a communication must, among other things, be "made in confidence"—*i.e.*, it must be made with expectation that it will not be disclosed to third parties.[7] Under the circumstances of his conversations with MO, MB, and JF, the Respondent could not reasonably have expected that such conversations would be kept confidential. Those conversations took place after RLLC had received from FINRA two Rule 8210 requests seeking information relating to stock finders. The Respondent knew the conversations were taking place in connection with FINRA's investigation, and with RLLC's

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[6] *Bevill*, 805 F. 2d at 123 (3d Cir. 1986) (citing *In re Grand Jury Investigation*, 575 F. Supp. 777, 780 (N.D. Ga. 1983)). In years since the Third Circuit first enunciated this test in *Bevill*, it has been cited with approval or expressly adopted by several U.S. Courts of Appeals, including the Second Circuit. *See In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001) (adopting the reasoning and test in *Bevill*); *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997) (quoting *Bevill* requirements and stating they were not met in that case); *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1041 (10th Cir. 1998) (finding that the district court incorrectly applied the fifth prong of the *Bevill* standard). *See also generally U.S. v. Norris*, 2010 U.S. Dist. LEXIS 69031 (E.D. Pa. July 12, 2010) (discussing the development and adoption of the *Bevill* rule).

[7] *Ruehle*, 583 F.3d at 607, 609; *see also Bevill*, 805 F. 2d at 123.

efforts to respond to a regulatory request. Therefore, Respondent reasonably should have understood that some or all of the information he was conveying would be submitted to FINRA.

The Respondent has thus failed to meet his burden of establishing the existence of an individual attorney-client privilege with respect to the information provided to MO, MB, and JF.

B. Right to Conflict-free Counsel

The Respondent argues that "adverse" testimony from MO, MB, and JF—*i.e.*, testimony supporting Enforcement's Second Cause of Action—should be suppressed because his former counsel represented those three witnesses during their investigative testimony. The Respondent argues that suppression is appropriate because his former counsel had a conflict of interest in that there was an adversity of interests between the Respondent on the one hand, and MO, MB, and JF on the other. The Respondent's argument is without merit and cannot preclude the testimony of MO, MB, and JF.

As an initial matter, the Sixth Amendment right to counsel—which provides criminal defendants with the right to assistance of counsel, including the right to conflict-free counsel[8]—does not apply to FINRA disciplinary proceedings. The Securities and Exchange Commission has repeatedly held that respondents in FINRA disciplinary proceedings do not have a "constitutional or statutory right to the assistance of counsel."[9] Moreover, courts have consistently held that the Sixth Amendment right applies only in *criminal* proceedings.[10] As the

[8] *See United States v. Moscony*, 927 F.2d 742, 748 (3d Cir. 1991) ("the Sixth Amendment guarantee of effective assistance of counsel includes two correlative rights, the right to adequate representation by an attorney of reasonable competence and the right to the attorney's undivided loyalty free of conflict of interest") (internal quotation and citation omitted).

[9] *See, e.g., Sheen Financial Services Inc.*, Exchange Act Rel. No. 35477, 1995 SEC LEXIS 613, at *15 (Mar. 13, 1995); *Daniel Turov*, Exchange Act Rel. No. 31649, 1992 SEC LEXIS 3332, at *7–*8 (Dec. 23, 1992).

[10] *See, e.g., Bell v. Eastman Kodak Co.*, 214 F.3d 798, 802 (7th Cir. 2000).

subject of a FINRA investigation, the Respondent is allowed to be represented by counsel, but he does not have the "right" he claims was violated.

Finally, the Respondent does not suggest that MO, MB, and JF testified about something they learned through an improper disclosure by the Respondent's former counsel. Rather, each testified—under oath and pursuant to Rule 8210—based on their first-hand knowledge of conversations they had with the Respondent. Thus, any conflict the Respondent's former attorney may have had does not provide a basis to exclude the testimony of MO, MB, and JF.

For these reasons, the Respondent's motion is denied. MO, MB, and JF's testimony is admissible at the hearing. The Respondent may renew his objection to their testimony at the hearing, if he obtains new evidence, in accordance with the standards articulated in this order, to support his claim that his communications with MO, MB, and JF are protected by a valid attorney-client privilege.

S**O ORDERED**.

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Rochelle S. Hall
Hearing Officer

Dated: May 18, 2011