

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES RANDALL CLAY
(CRD No. 5748560),

Respondents.

Disciplinary Proceeding
No. 2014039775501

Hearing Officer—CC

**ORDER GRANTING ENFORCEMENT'S
MOTION REGARDING SEQUESTRATION OF WITNESSES**

The Complaint alleges that Respondent James Randall Clay ("Clay") engaged in outside business activities involving a firm customer without providing his firm, U.S. Bancorp Investments Inc. ("U.S. Bancorp"), prior written notice in the manner required by firm procedures. The Complaint also alleges that Clay made false statements to U.S. Bancorp and responded and testified falsely in response to FINRA Rule 8210 requests for information and testimony. Clay denies the allegations of misconduct and states that the outside business was not his business pursuit. Rather, he contends that he was proceeding on behalf of his sister.

The Department of Enforcement ("Enforcement") seeks to call as witnesses: Clay, the customer's two sons, Clay's manager at U.S. Bancorp, and Enforcement's Principal Examiner Stephen Littman ("Littman"). Clay seeks to call two members of Enforcement's legal team¹ and his sister.

Enforcement moves for an order excluding all witnesses, except Principal Examiner Littman, from being present at the hearing during other witnesses' testimony. Enforcement contends that Littman is the equivalent of an investigative agent, as referenced in Federal Rules of Evidence 615(b). Enforcement contends that Littman has been involved in Enforcement's investigation and hearing preparation, including reviewing documents and participating in interviews of potential witnesses. Enforcement expects Littman to testify generally about Enforcement's investigation, authenticate documents, explain Enforcement's summary exhibits, and testify about prior witness statements. Enforcement seeks to allow Littman to remain in the

¹ Enforcement has moved to strike the members of its legal team from Clay's witness list.

hearing room, sit at counsel's table, and assist Enforcement in presenting the case in the most efficient and effective manner.

Clay indicated to Enforcement that he opposed Enforcement's motion, although he did not timely file an opposition.

A Hearing Officer may exclude "witnesses from the hearing so that they cannot hear the testimony of other witnesses."² Exclusion serves "to discourage fabrication, collusion, and tailoring of testimony" and to "improve the quality and integrity of the hearing."³ Witness sequestration is routinely ordered in FINRA disciplinary proceedings,⁴ and particularly where, as here, "there is a likelihood of substantial duplication in questions asked both on direct and cross-examination of" witnesses.⁵ I grant Enforcement's request for witness sequestration.

I also grant Enforcement's request to exempt Littman from the sequestration order. Although the Federal Rules of Evidence do not apply in FINRA proceedings, they may be looked to for guidance.⁶ Under Federal Rule of Evidence 615(b), "an officer or employee of a party that is not a natural person" is not subject to sequestration "after being designated as the party's representative by its attorney."⁷ Additionally, Rule 615(c) exempts from sequestration "a person whose presence a party shows to be essential to presenting the party's claim or defense."⁸ Notes accompanying Rule 615 explain that the corporate representative exception permits an investigative agent to sit at counsel table during a trial despite being a witness, especially in

² OHO Order 97-12 (CMS970028) (Dec. 15, 1997), at 5, http://www.finra.org/sites/default/files/OHODecision/p007835_0_0.pdf; *see also* OHO Order 16-24 (2014043020901) (Aug. 30, 2016), at 2, http://www.finra.org/sites/default/files/OHO_Order16-24_2014043020901.pdf; OHO Order 06-22 (CAF040079) (Mar. 9, 2006), at 2, <http://www.finra.org/sites/default/files/OHODecision/p017561.pdf>.

³ OHO Order 97-12, at 5; *see also* OHO Order 16-24, at 2.

⁴ *See, e.g.*, OHO Order 16-24; OHO Order 12-03 (2010024889501) (July 6, 2012), at 2-3, http://www.finra.org/sites/default/files/OHODecision/p150733_0_0_0.pdf; OHO Order 08-03 (20070077587) (Feb. 29, 2008), at 3, http://www.finra.org/sites/default/files/OHODecision/p038254_0_0.pdf; OHO Order 06-53 (EAF0300770001) (Nov. 9, 2006), at 1-2, http://www.finra.org/sites/default/files/OHODecision/p018443_0.pdf.

⁵ *See* OHO Order 97-12, at 5.

⁶ *See* FINRA Rule 9145 (formal rules of evidence do not apply in FINRA disciplinary proceedings). FINRA's disciplinary proceedings are governed by FINRA's own procedures and evidentiary rules, as established in the FINRA Rule 9000 Series. Although the Federal Rules of Evidence are not binding in FINRA disciplinary proceedings, they and the case law developed under the auspices of these rules may be consulted for guidance as appropriate. *See* OHO Order 16-24, at 2.

⁷ Fed. R. Evid. 615(b).

⁸ Fed. R. Evid. 615(c).

complex cases or ones involving specialized subject matter.⁹ Hearing Officers have frequently exempted examiners from sequestration.¹⁰

Here, based on Enforcement's representations, the Hearing Officer finds that Littman is the equivalent of an investigative agent, and that Enforcement has reasonably characterized his presence as necessary to assist trial counsel at the hearing. Additionally, based on Enforcement's description of Littman's anticipated testimony, it is unlikely that other witnesses would be called upon to offer similar testimony or that Littman's testimony is likely to be tainted by the testimony of other witnesses. Consequently, I exempt Littman from sequestration.

Based on the foregoing, Enforcement's motion is granted. Witnesses are excluded from the hearing room except when they testify, with the exception of Enforcement Principal Investigator Stephen Littman.

All witnesses subject to sequestration are precluded from conferring with any other witness about the subject matter of any other witness's testimony until all the witnesses have finished testifying and are not subject to recall. The party calling a witness subject to sequestration shall advise the witness of this prohibition and shall notify the witness when all witnesses have completed their testimony and are not subject to recall.

SO ORDERED.



Carla Carloni
Hearing Officer

Dated: May 3, 2018

Copies to: James R. Clay (via email and first-class mail)
Savvas A. Foukas, Esq. (via email and first-class mail)
Kevin E. Pogue, Esq. (via email)
Richard Chin, Esq. (via email)
Tiffany A. Buxton, Esq. (via email)
David Monachino, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)

⁹ See OHO Order 16-24, at 2.

¹⁰ See OHO Order 16-24, at 2 (exempting examiner from sequestration); OHO Order 12-03, at 2-3 (exempting two examiners from sequestration); OHO Order 06-53, at 2 (exempting Enforcement's "case-agent witness" from sequestration).