

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 11-01 (2008014621701).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT FIRM,

and

RESPONDENT 2,

Respondents.

Disciplinary Proceeding
No. 2008014621701

Hearing Officer – Rochelle S. Hall

**ORDER GRANTING ENFORCEMENT'S MOTION TO PERMIT CERTAIN
WITNESSES TO HAVE COUNSEL PRESENT**

Enforcement filed a motion on January 28, 2011, requesting an order allowing counsel for certain witnesses to be present during the witnesses' testimony at the hearing in this matter. Attached to Enforcement's motion were: (1) a letter from JK, counsel for MR, the former CFO of Company 1, and (2) a letter from DS, counsel for MB and MS, employees of Company 2. Both attorneys state that their corporate clients are engaged in litigation against the Respondent Firm, and that they want to be present during the witnesses' testimony to protect their respective clients' attorney-client privileges.

Respondents oppose the request, arguing that it is untimely, and that the undersigned Hearing Officer denied a similar motion at the final pre-hearing conference. They also dispute that Company 1's or Company 2's attorney-client privileges will be implicated by the witnesses' testimony. Finally, Respondents argue that allowing

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counsel to be present will give them access to confidential information and will prejudice the Respondent Firm in its upcoming litigation against them. For the reasons stated below, Enforcement's motion is GRANTED.

Counsel for the witnesses state that they have had discussions with the witnesses about the same issues being raised in this disciplinary proceeding. Counsel for Company 1 and MR states that he and his partner have had numerous communications with MR "that have constituted attorney-client privileged communications, as well as communications protected by the work product doctrine." Similarly, counsel for Company 2 employees states that he wants to "interpose an objection to any question that touches upon [Company 2's] attorney-client privilege." Counsel for the Company 2 employees further states that the Company 2 employees, who are testifying voluntarily, will not testify at the hearing without counsel present.

While FINRA proceedings are generally non-public, the Code of Procedure does not address whether counsel for a witness may attend the hearing while the witness is testifying. Instead, the issue falls within the Hearing Officer's general authority under Rule 9235(a) (2) to "regulat[e] the course of the hearing." In appropriate cases, counsel for witnesses in FINRA disciplinary hearings have been allowed to attend the hearing to protect the attorney-client privilege.ⁱ Because a witness may not be aware of the operation of certain legal privileges, such as the attorney-client privilege, he may unwittingly waive the privilege by divulging protected communications. Thus, in the interest of fairness, such witnesses should be allowed to have counsel present while they testify.

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The Hearing Officer hereby grants Enforcement's request; however, the role of the witnesses' attorneys will be strictly limited. The attorneys may attend the hearing as observers of the testimony of MR and Company 2 employees. The attorneys may not ask questions or otherwise participate in the hearing, **except** to raise objections to questions that may elicit privileged information, e.g., attorney-client communications or material protected by the attorney work product doctrine. The witnesses' attorneys may not collaborate or consult with Enforcement or Respondent attorneys during witness testimony. In addition, the attorneys may not consult with the witnesses during their testimony unless allowed by the Hearing Officer.

SO ORDERED.

Rochelle S. Hall
Hearing Officer

Dated: January 28, 2011

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ⁱ *See e.g.*, OHO Order 06-42 (E8A200309150); OHO Order 05-32 (CLG050049); OHO Order 00-03 (C9A990007).