

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL JOSEPH CLARKE
(CRD No. 1078211),

Respondent.

Disciplinary Proceeding
No. 2016050938301

Hearing Officer—RES

**ORDER GRANTING DEPARTMENT OF ENFORCEMENT'S UNOPPOSED MOTION
REGARDING SEQUESTRATION**

The hearing in this disciplinary proceeding is scheduled to begin February 5, 2019 and last four days. The Complaint charges Respondent Michael Clark with violating FINRA Rule 2010 by allegedly converting funds, misrepresenting facts, writing bad checks, and making electronic funds transfers that failed to clear because of insufficient funds. In his Answer, Respondent denies he violated any FINRA Rule.

The Department of Enforcement has filed a motion ("Motion") requesting the sequestration of witnesses in the hearing. Sequestration is commonly used in hearings and trials to ensure a witness's testimony is not influenced by the testimony of other witnesses whom the witness has heard while sitting in the hearing room or courtroom, and that a witness is not influenced by conversations with others in hearing breaks, adjournments, or recesses.¹ Testimony that is a witness's own, not influenced by others, promotes fairness to the parties and accuracy in the truth-seeking process. Sequestration discourages fabrication, collusion, and tailoring of testimony.² Good cause exists for sequestration in this case.

Enforcement requests that Heidi Brown, the FINRA investigator assigned to this matter, be excepted from sequestration and allowed to be present in the hearing even though she will be

¹ A request for the sequestration of witnesses is so well known that counsel routinely call upon a court or administrative body to "invoke the Rule." OHO Order 06-53 (EAF0300770001) (Nov. 9, 2006), at 1, www.finra.org/sites/default/files/OHODDecision/p018443.pdf.

² OHO Order 18-08 (2014039775501) (May 3, 2018), at 2, www.finra.org/sites/default/files/OHODDecision/No.2014039775501.pdf; OHO Order 16-24 (2014043020901) (Aug. 30, 2016), at 2, www.finra.org/sites/default/files/OHODDecision/No.2014043020901.pdf.

a witness. Rule 615 of the Federal Rules of Evidence provides guidance.³ That Rule requires sequestration when requested, but excepts an employee, investigator, officer, or representative of a party.⁴ The Senate Judiciary Committee Notes accompanying the Rule construe this exception to permit government counsel to have an investigative agent at counsel table throughout the trial even though the agent may be a witness.⁵ The exception should apply to Ms. Brown.⁶

Enforcement avers that Ms. Brown has been involved in the investigation and hearing preparation of this matter, including the review of documents and participation in interviews of potential witnesses. Ms. Brown is expected to testify generally about the investigation, to authenticate the documents obtained or created by Enforcement, to explain the summary exhibits and, as needed, to provide evidence with regard to prior statements of witnesses. There is negligible risk her testimony will be influenced by the assertions and testimony of other witnesses in the hearing.⁷ Good cause exists for keeping Ms. Brown in the hearing room and excepting her from sequestration.

It is therefore ordered that all non-party witnesses shall be sequestered in the hearing and shall not be allowed to discuss with anyone (other than their own attorneys) their testimony or the facts of this proceeding, until they are excused from their testimony by the Hearing Officer. Individuals on either party's Witness List shall not be allowed in the hearing room while other witnesses are testifying, shall not be allowed to discuss their testimony with other witnesses, and

³ Federal and state rules of evidence do not apply to FINRA proceedings. FINRA Rule 9145(a). However, the Federal Rules of Evidence are instructive to a FINRA Hearing Officer deciding a motion pertaining to evidence or trial procedure. *Dep't of Market Regulation v. Respondent*, No. 20090174025-02, 2015 FINRA Discip. LEXIS 41, at *2 (OHO Aug. 19, 2015).

⁴ Fed. R. Evid. 615(b) & (c).

⁵ Fed. R. Evid. 615, Notes of Committee on the Judiciary, Senate Report No. 93-1277.

⁶ OHO Order 17-16 (2016051925301) (Sept. 5, 2017), at 1 ("there is precedent for excluding Enforcement staff investigators from sequestration at hearings, and that doing so is consistent with Federal Rule of Evidence 615"), www.finra.org/sites/default/files/OHODecision/2016051925301.pdf.

⁷ OHO Order 16-24 (2014043020901) (Aug. 30, 2016), at 2, www.finra.org/sites/default/files/OHO_Order16-24_2014043020901.pdf; ; OHO Order 12-03 (2010024889501) (July 6, 2012), at 3, www.finra.org/sites/default/files/OHODecision/p0150733.pdf.

shall not follow the hearing by reading transcripts of the hearing. Investigator Brown shall be excepted from sequestration and shall be permitted to be present in the hearing.

Dated: January 9, 2019

SO ORDERED.



Richard E. Simpson
Hearing Officer

Copies to:

Stefan Savic, Esq. (via email and first-class mail)
Melissa K. DePetris, Esq. (via email and first-class mail)
Colleen O'Loughlin, Esq. (via email)
Savvas A. Foukas, Esq. (via email)
Lara Thyagarajan, Esq. (via email)