

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CHRISTOPHER CACACE
(CRD No. 4308782),

Respondent.

Disciplinary Proceeding
No. 2020065599103

Hearing Officer–MC

ORDER GRANTING MOTION BY WITNESSES TO APPEAR WITH COUNSEL

I. Introduction

The hearing in this disciplinary proceeding is scheduled to start March 10, 2025. The central issue is whether Respondent Christopher Cacace supervised registered representatives at former FINRA member firm SW Financial. Both parties propose to call [redacted] to testify, and Respondent proposes to call [redacted] to testify in his defense. Both witnesses are subject to FINRA's jurisdiction and the Department of Enforcement has served each with a letter pursuant to FINRA Rule 8210 requiring them to appear and to testify.

II. The Witnesses' Motion

Charles M. O'Rourke, Esq. represents both witnesses. On March 6, 2025, Mr. O'Rourke filed a motion on their behalf to appear with counsel ("Motion"). In the Motion, Mr. O'Rourke explains that he formerly represented SW Financial, where the witnesses and Respondent were registered. The Motion states that they entered a joint representation and conflicts waiver agreement pursuant to which Mr. O'Rourke appeared with and represented each of them during FINRA examinations and on-the-record testimony. The Motion further states that [redacted], [redacted], and Cacace were informed of their right to engage separate counsel and that, if any of them did so, Mr. O'Rourke could continue to represent the others.¹

Subsequently, Respondent engaged separate counsel, Thomas J. McCabe, Esq., who represents him in this proceeding.

¹ Motion at 1.

The Motion asks that [redacted] and [redacted] be allowed to have Mr. O'Rourke present as counsel when they testify, solely for the limited purpose of safeguarding their right to protect the confidentiality of the privileged attorney-client communications they had with him when he represented them along with SW Financial. The motion acknowledges that Mr. O'Rourke and the witnesses have been informed of and will abide by the witness sequestration order issued on February 13, 2025.²

III. Respondent's Opposition

Respondent objects and on March 6, filed an opposition to the Motion ("Opposition"). In it, he argues that Mr. O'Rourke should not be able to appear with these witnesses because he represented them, and Respondent, during the investigative phase of this proceeding. He points out that [redacted] and [redacted] testified that Respondent was responsible for supervising the brokers at SW Financial, conflicting with Respondent's testimony, in on-the-record interviews.³ Respondent asserts that Mr. O'Rourke, "now working against [Respondent] by acting as counsel to adverse witnesses . . . should not be permitted to represent [redacted] and [redacted]."⁴ With regard to Mr. O'Rourke's reference to a joint representation and conflicts waiver agreement entered into by Respondent, he argues that Mr. O'Rourke has not provided a copy of it to establish the validity of the waiver,⁵ and even if it is valid, it should not be accepted here.⁶ As Respondent's counsel stated in the final pre-hearing conference in this proceeding:

So Mr. Cacace testified, Mr. [redacted] testified and Mr. [redacted] testified. All were represented by Mr. O'Rourke. I believe Mr. Cacace testified first. Mr. Cacace testified that he was not the supervisor of brokers at the SWF audit. Mr. [redacted] and Mr. [redacted] testified after with Mr. O'Rourke in attendance as counsel . . . in a di[a]metrically opposite position saying that Mr. Cacace was the supervisor. In my view, that is a clearcut conflict.⁷

IV. Discussion

The Opposition quotes the American Bar Association's Model Rules of Professional Conduct, Rule 1.9(a) which states, in part:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests

² Motion at 2.

³ Opposition at 2.

⁴ Opposition at 1.

⁵ Opposition at 3.

⁶ Opposition at 4.

⁷ Transcript, Final Pre-Hearing Conference, at 10.

are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Respondent's Opposition also cites a Comment to Conduct Rule 1.9(a) stating, in relevant part, that matters are "substantially related for the purposes of this Rule if they involve the same transaction or legal dispute."⁸ Respondent further asserts that the duty of a lawyer's loyalty to a former client is "broader than the attorney-client privilege *and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client.*"⁹

Respondent's concerns are understandable. But his objections miss their mark.

At root is Respondent's proper concern about the indisputable impropriety of a lawyer who previously represented a client and later, "in a substantially related matter," represents another person, whose "interests are materially adverse to the interests of the former client," and attacks that former client armed with privileged information from the former representation.

But here Mr. O'Rourke represents witnesses, not parties. [redacted] is being called to testify by both parties. [redacted] is being called to testify by Respondent. The Comments to Conduct Rule 1.9(a) focus on situations in which a lawyer represents an adverse party against the former client. The classic example given is that of a lawyer who represented several clients in a case and then seeks to represent one of the clients against the others in a "substantially related matter."¹⁰ That is not this case. [redacted] and [redacted] are not adverse *parties*. Although their testimony may prove to be adverse to Respondent, they are non-party witnesses.

As the Comment points out:

The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client . . . *The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.*¹¹

⁸ Opposition at 2.

⁹ Opposition at 2, quoting *U.S. v. Falzone*, 766 F.Supp. 1265, 1279 (W.D.N.Y. 1991) (quoting *New York v. Liuzzo*, 562 N.Y.S.2d 303, 304 (1990) (emphasis added).

¹⁰ ABA Model Rules of Professional Conduct, Rule 1.9 Duties to Former Clients – Comment, at [1].

¹¹ *Id.* at [2] (emphasis supplied).

As reflected in the Comment, the concern is whether “there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”¹²

Here, Mr. O’Rourke is not advocating for the witnesses’ interests or attempting to advance any position on their behalf. He is restricted to the role of solely safeguarding the confidentiality of privileged communications from exposure by questions posed to the witnesses by the parties to this proceeding. His representation does not involve a “changing of sides in the matter in question.” He will not, given his narrowly limited role, be “free to attack a former client with respect to the subject matter of the earlier representation.”

FINRA’s Code of Procedure does not give guidance on whether a witness may on request be permitted to be accompanied by counsel when testifying. However, FINRA Rule 9235 authorizes a hearing officer “to do all things necessary and appropriate” to discharge the duty to regulate the course of a hearing.¹³ This includes the authority to allow counsel to accompany a non-party witness testifying at a hearing.¹⁴ In the interest of fairness, because a witness may be unaware of the operation of the attorney-client privilege and, without counsel, unwittingly waive it by divulging protected communications, allowing counsel to accompany the witness is appropriate.¹⁵

In this case, the witnesses are being compelled to appear and testify pursuant to FINRA Rule 8210. Their request to be accompanied by counsel for a narrowly limited purpose is reasonable. Mr. O’Rourke is aware of and accepts the limited nature of the purpose for his appearance, and the obligation to conform to the sequestration order. Furthermore, Mr. O’Rourke will not be present for the testimony of Respondent or for any witnesses except [redacted] and [redacted].

V. Conclusion

For these reasons, and good cause shown, the Motion is granted, with the following restrictions:

¹² *Id.* at [3].

¹³ FINRA Rule 9235(a)(2).

¹⁴ *See, e.g.*, OHO Order 19-23 (2016051493704) (June 25, 2019), at 11, https://www.finra.org/sites/default/files/2019-10/OHO_Order_19-23_2016051493704.pdf.

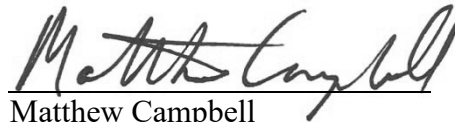
¹⁵ OHO Order 17-17 (2016051925301) (Sep. 5, 2017), at 1, https://www.finra.org/sites/default/files/OHO_Order_17-17_2016051925301.pdf

Mr. O'Rourke:

- may attend the hearing only during [redacted] and [redacted]'s testimony;
- may not ask questions or otherwise participate in the hearing except to raise objections only to questions that reasonably may elicit privileged information, such as attorney-client communications;
- may not consult or collaborate with the parties, or counsel for the parties, during the hearing. Furthermore, [redacted] and [redacted] may not consult with Mr. O'Rourke during their testimony unless specifically allowed to do so and may not discuss their testimony with anyone until after the hearing has concluded.

Mr. O'Rourke also represents that he will be unable to travel to appear with his clients and asks to be allowed to participate by videoconference. For good cause shown, Mr. O'Rourke may appear with his clients by videoconference.

SO ORDERED.


Matthew Campbell
Hearing Officer

Dated: March 7, 2025

Copies to:

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