

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MATTHEW J. DODDS
(CRD No. 2176100),

Respondent.

Disciplinary Proceeding
No. 2014043020901

Hearing Officer—CC

**ORDER GRANTING ENFORCEMENT'S MOTION
FOR EXCEPTION FROM SEQUESTRATION**

The Department of Enforcement ("Enforcement") moved for an order excepting case agent Kimberly Radtke ("Radtke") from sequestration during the hearing. Enforcement represents that Radtke is a team leader in FINRA's Office of Fraud Detection and Market Intelligence and has been involved in all phases of FINRA's investigation of this matter. Enforcement states that, based on Radtke's extensive involvement in the investigation that led to the filing of the Complaint, her testimony is necessary. Enforcement further states that her presence at counsel's table throughout the hearing is important so that she can assist counsel with the presentation of Enforcement's case. Enforcement requests that I except Radtke from sequestration and argues that its request is consistent with the case-agent exception to the general rule of witness sequestration.

Dodds opposes Enforcement's request. Dodds argues that Enforcement's motion is untimely, given that the hearing commenced with the first day of testimony on May 5, 2016. He also argues that Radtke will testify regarding material facts purportedly derived from documents that FINRA obtained from third parties and that she therefore is more akin to a fact witness who should be sequestered. He contends that this case is neither document intensive nor complicated, so Radtke's assistance at counsel table should not be necessary. Dodds contends that, because witness credibility is a critical element of this case, Radtke's sequestration is particularly important. Dodds argues that, if Radtke is exempted from sequestration, she should be required to testify first to avoid harming Dodds' ability to effectively cross examine Radtke.

I first address Respondent's argument that Enforcement's motion is untimely. The Revised Case Management and Scheduling Order does not include a specific deadline for motions related to witness sequestration. Dodds correctly states that the hearing commenced on May 5, 2016. However, only one witness was scheduled for May 5, 2016. The remainder of the hearing is scheduled to commence on September 12, 2016. Enforcement filed its motion on

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August 23, 2016. I do not find that Enforcement’s motion is untimely. Additionally, Dodds has not established that he is prejudiced by the timing of Enforcement’s motion—filed nearly three weeks before the commencement of the second segment of the hearing.

A hearing officer may exclude “witnesses from the hearing so that they cannot hear the testimony of other witnesses.”¹ Exclusion serves to discourage fabrication, collusion, and the tailoring of testimony.² Although the Federal Rules of Evidence do not apply to FINRA proceedings, hearing officers may rely on the Federal Rules for guidance.³ Federal Rule 615 states that an officer or employee of a party that is not a natural person is not subject to sequestration if he is designated as the party’s representative by its attorney.⁴ Additionally, Rule 615 exempts from sequestration “a person whose presence a party shows to be essential to presenting the party’s claim or defense.”⁵ The Notes accompanying Rule 615 explain that the corporate representative exception discussed above permits an investigative agent to sit at counsel table during a trial despite being a witness. Further, hearing officers have frequently exempted examiners from sequestration.⁶

Based on Enforcement’s representation that Radtke is expected to testify about the FINRA investigation that led to these proceedings, to authenticate documents obtained or prepared in that investigation, and to explain Enforcement’s summary exhibits, it is unlikely that other witnesses would be called upon to offer similar testimony or that Radtke’s testimony could be tainted by testimony from other witnesses. I find that Radtke is the equivalent of an investigative agent and that Enforcement has reasonably characterized her presence as necessary to assist trial counsel. Consequently, I exempt Radtke from sequestration.

All other non-party witnesses expected to testify in this disciplinary proceeding will be excluded from the hearing room when they are not testifying. The party offering the

¹ OHO Order 97-12 (CMS970028) (Dec. 15, 1997), at 5, http://www.finra.org/sites/default/files/OHODecision/p007833_0_0.pdf.

² See OHO Order 06-53 (EAF0300770001) (Nov. 9, 2006), at 1, http://www.finra.org/sites/default/files/OHODecision/p018443_0.pdf; OHO Order 06-22 (CAF040079) (Mar. 9, 2006), at 2, http://www.finra.org/sites/default/files/OHODecision/p017561_0_0.pdf; OHO Order 97-12, at 5.

³ See, e.g., OHO Order 12-03 (2010024889501) (July 6, 2012), at 2, http://www.finra.org/sites/default/files/OHODecision/p150733_0_0.pdf; OHO Order 97-12, at 5.

⁴ See Fed. R. Evid. 615(b).

⁵ Fed. R. Evid. 615(c).

⁶ See OHO Order 12-03, at 2-3; OHO Order 06-53, at 2; OHO Order 06-22, at 2.

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testimony of a witness shall instruct the witness to refrain from conferring with other witnesses about their testimony until this proceeding has concluded.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: August 30, 2016