

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

EUGENE H. KIM  
(CRD No. 2264940),

Respondent.

Disciplinary Proceeding  
No. 2019064508802

Hearing Officer– DRS

**ORDER DENYING ENFORCEMENT'S MOTION TO USE LEADING QUESTIONS**

**I. Introduction**

On May 8, 2024, the Department of Enforcement moved for permission to use leading questions during its examination of witness Roger Monteforte, who appears on both parties' witness lists.<sup>1</sup> In making this request, Enforcement relies on Federal Rule of Evidence 611(c). Under that provision, federal courts are instructed to generally "allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party."

According to Enforcement, Monteforte is "identified" with Kim, within the meaning of Federal Rule of Evidence 611(c), because: (1) Kim works for him at the investment advisor Monteforte founded and operates; and (2) they have worked together at two FINRA member firms consecutively for nine years. Further, Enforcement argues that Monteforte "may not just be identified with Respondent, but may also be, in fact uncooperative and hostile to Enforcement."<sup>2</sup> The basis for this argument is that Monteforte failed to respond to Enforcement's recent telephone call to him, voicemail, and email, while apparently being willing to communicate with Kim's counsel about the hearing.

On May 15, 2024, Kim filed its opposition to the motion, claiming that Enforcement has not met its burden to show that Monteforte is a hostile or adverse witness subject to leading questions during testimony. Kim concedes that he and Monteforte have a business relationship as

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<sup>1</sup> It appears that when Enforcement references "its" examination of Monteforte, it is referring to its direct examination of him. I hereby inform the parties that I will permit Enforcement to use leading questions if it cross examines Monteforte, should he be permitted to testify in Kim's case in chief.

<sup>2</sup> Mot. 5.

work colleagues, but maintains that this “can hardly be a sufficient basis to determine that Monteforte should be designated as a ‘hostile’ witness.”<sup>3</sup> Nor, according to Kim, has Enforcement shown that “Monteforte is adverse to Enforcement or will testify in a manner that will demonstrate bias or unwillingness to provide information.”<sup>4</sup> Regarding Monteforte’s purported lack of cooperation with Enforcement, Kim asserts that “Enforcement’s attempts to contact Monteforte were at best half-hearted and apparently not undertaken in a manner to actually reach” him.<sup>5</sup> Kim did not address Enforcement’s argument that I should deem Monteforte a “witness identified with an adverse party.”

## II. Discussion

The formal rules of evidence do not apply in FINRA proceedings.<sup>6</sup> Nevertheless, Hearing Officers may look to those rules for guidance,<sup>7</sup> which I do here. Enforcement’s motion rests largely on its argument that Monteforte is a witness identified with Kim, within the meaning of Rule 611(c) of the Federal Rule of Evidence. “The precise meaning of ‘identified with an adverse party’ has not been clearly defined.”<sup>8</sup> Still, it “has come to mean, in general, an employee, agent, friend, or relative of an adverse party.”<sup>9</sup>

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<sup>3</sup> Opp. 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> FINRA Rule 9145(a).

<sup>7</sup> Dep’t of Enforcement v. Brookfield, No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at \*9 n.5 (NAC Aug. 3, 2017).

<sup>8</sup> *Doe v. Russell Cty Sch. Bd.*, Case No. 1:16CV00045, 2018 U.S. Dist. LEXIS 32085, at \*1 (W.D. Va., Feb. 28, 2018).

<sup>9</sup> *Id.*, at 2; *see also Pryor v. Corrigan*, Case No. 17-cv-1968, 2023 U.S. Dist. LEXIS 15122, at \*58 (N.D. Ill., Jan. 30, 2023) (explaining that “[a] witness is ‘identified with an adverse party’ when the witness is an employee, agent, friend, or relative of an adverse party.”).

The record does not reflect that Monteforte is an agent, friend, or relative of Kim. Additionally, Enforcement does not contend that Monteforte is Kim's employee. And the mere fact that they have worked together—or that Kim works for a firm that Monteforte heads—is not enough for me to find that Monteforte is identified with Kim. Finally, the evidence of hostility by Monteforte is minimal and insufficient for me to rule, at this time, that he should be treated by Enforcement as a hostile witness. “Courts often wait until trial to make a determination concerning hostility in order to observe whether a particular witness shows hostility or seems uncooperative.”<sup>10</sup> I will follow that course in this case.

Accordingly, the motion is **DENIED**.

**SO ORDERED.**

  
David R. Sonnenberg  
Hearing Officer

Dated: May 17, 2024

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<sup>10</sup> *Russell Cty Sch. Bd.*, 2018 U.S. Dist. LEXIS 32085, at \*3.