

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1801/September 12, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15858

In the Matter of	:	
	:	
STANLEY JONATHAN	:	ORDER
FORTENBERRY (A/K/A S.J.	:	
FORTENBERRY, JOHN	:	
FORTENBERRY, AND	:	
JOHNNY FORTENBERRY)	:	

The Division of Enforcement seeks a protective order barring Respondent Stanley Jonathan Fortenberry from presenting testimony from two Division of Enforcement attorneys in this matter. Mr. Fortenberry has not opposed the Division's motion.¹ For the reasons stated below, I GRANT the Division's motion. Mr. Fortenberry may not call the Division's attorneys to testify.

Ruling

On August 21, 2014, Mr. Fortenberry served the Division with a copy of his witness list. Among the witnesses he identified were Corey Schuster and Michael Baker. Mr. Schuster and Mr. Baker are counsel for the Division in this matter. In response, the Division filed a motion in limine asking that I issue a protective order barring Mr. Fortenberry from introducing testimony from either Mr. Schuster or Mr. Baker.

Under the Commission's Rules of Practice, an Administrative Law Judge is required to exclude evidence that is "irrelevant, immaterial or unduly repetitious." 17 C.F.R. § 201.320. I find that the Division has met its burden to show that testimony from its counsel would be irrelevant and immaterial. *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

¹ John C. Nimmer withdrew as Mr. Fortenberry's counsel purportedly effective September 8, 2014. Prior to his withdrawal, Mr. Nimmer sent an e-mail to an attorney in my office purporting to oppose the Division's motion. Because Mr. Nimmer's e-mail did not comply with the Commission's rules regarding service and filing of motions, *see* 17 C.F.R. §§ 201.150, .151, I did not consider it.

The Division attached three exhibits to its motion, including an e-mail exchange between Division counsel and Mr. Nimmer. *See* Motion in Limine, Exhibit 3. In that exchange, Mr. Nimmer stated that testimony from Division counsel would be relevant because “their actions as Commission investigators . . . chilled” “prospective investment” in Mr. Fortenberry’s fund. *Id.* As the Division explains, however, the actions that led to the Division’s investigation had already occurred by the time the investigation took place. Motion in Limine at 5-7. Testimony from Division attorneys is thus not relevant or material.

Furthermore, attempts to obtain testimony from an opponent’s counsel are disfavored. *E.g., Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Because this is so:

[a] party seeking to take the deposition [of opposing counsel must] show[] that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. (internal citation omitted). Mr. Fortenberry has done nothing to show that any of these factors is present in his case. Indeed, because the person whose “prospective investment” was allegedly “chilled” is on Mr. Fortenberry’s witness list, it is apparent that “other means exist to obtain the information” he wishes to present. As noted, testimony of Division counsel is not relevant. Finally, Mr. Fortenberry has not explained how testimony from Division counsel could be crucial to his case.

For the foregoing reasons, I GRANT the Division’s motion in limine. Mr. Fortenberry may not call the Division’s attorneys to testify.

James E. Grimes
Administrative Law Judge