

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION,		
	Complainant,	
v.		Disciplinary Proceeding No. CLG050049
	Respondent.	Hearing Officer - SNB

**ORDER REGARDING ATTENDANCE OF
WITNESSES' COUNSEL AT HEARING**

On September 30, 2005 Market Regulation requested that counsel for certain witnesses be allowed to observe their client's testimony at the hearing in this matter, on the condition that counsel will not ask questions, make objections, or participate in the hearing, and that any consultations occur outside the hearing room. Market Regulation notes that Respondent has sued these witnesses in a \$10 million civil lawsuit, and the witnesses wish to have their counsel present and available to advise them, if necessary.

On October 4, 2005 Respondent filed an opposition to this request, arguing that the presence of counsel for the witnesses could hinder fact-finding, particularly if counsel coached witnesses. Moreover, Respondent argues that the presence of the witnesses' counsel would violate his civil rights, because it will give the witnesses an unfair advantage in the defense of the civil case. Respondent also suggests that Market Regulation is attempting to assist the witnesses in the legal defense of the civil action, and if OHO grants this request, the Hearing Officer would "shift from a neutral to an active participant in the civil litigation."

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-32 (CLG050049).

NASD proceedings are generally non-public, but the Code of Procedure does not address whether counsel for a witness may attend the hearing while the witness is testifying. Instead, the issue appears to fall within the Hearing Officer's general authority under Rule 9235(a)(2) to "regulat[e] the course of the hearing."

With respect to Respondent's argument that the presence of counsel may hinder fact-finding, the role of a witness's counsel during a hearing is quite narrow, and the counsel cannot be allowed to exceed that role and interfere improperly in the conduct of the hearing. There is no basis, however, to presume that a witness's counsel will behave improperly. If a concrete problem arises during the course of the hearing, the Hearing Officer retains authority to address the problem. Moreover, because the witnesses will be appearing voluntarily and are defendants in a \$10 million lawsuit filed by Respondent, they may be reluctant or unwilling to testify if their counsel is not permitted to attend.

The Hearing Officer rejects Respondent's argument that counsel should not be permitted to attend because the witnesses will gain an unfair advantage at the civil trial, and in that vein, the Hearing Officer would no longer be neutral if she determines that counsel may attend. The Hearing Officer's ruling is without regard to other pending matters, and is motivated solely by preservation of the integrity of this proceeding, with reasonable accommodations to witnesses who are appearing voluntarily.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-32 (CLG050049).

Accordingly, counsel for the witnesses will be allowed to attend the hearing in this proceeding while their clients are testifying, with the understanding that counsel's role will be limited to observing his clients testify, and he will not participate in the hearing, ask questions, or interpose objections.

SO ORDERED.

Sara Nelson Bloom
Hearing Officer

Dated: October 5, 2005