

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Richard W. Possett, Sr., d/b/a The Navigator Group,

Respondent.

ODS File No. 11-076

**DEPARTMENT'S OBJECTION TO INCLUSION OF DEPARTMENT ATTORNEY ON
WITNESS LIST OF RESPONDENT AND MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF DEPARTMENT ATTORNEY**

The Oklahoma Department of Securities ("Department") respectfully objects to Respondent Richard W. Possett, Sr.'s inclusion of Terra Bonnell, the Department's attorney of record in this matter, on his preliminary witness list filed August 21, 2012. The Department also moves for the issuance of an order excluding the testimony of the Department's attorney at deposition or hearing.

Oklahoma courts have held that "the role of advocate and witness should be kept separate, and an advocate should be called as a witness only in circumstances of utmost necessity." *Boyd v. State*, 839 P.2d 1363, 1369-70 (Okla. Crim. App. 1992) (citing *Cavaness v. State*, 581 P.2d 475, 478 (Okla. Crim. App. 1978)); *See also*, Oklahoma Rules of Professional Conduct, Rule 3.7, Okla. Stat. tit. 5, Ch. 1, App. 3-A (West 2012). The practice of requiring opposing counsel to testify has long been discouraged. *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (citing *Hickman v. Taylor*, 329 U.S. 495, 513 (1947)). The practice is thought to "disrupt[] the adversarial system and lower[] the standards of the profession." *Id.*

In *Shelton*, the Eighth Circuit held that a party should be permitted to depose opposing counsel only where the party proves that the information sought (1) cannot be obtained by other means; (2) is relevant and not privileged; and (3) is crucial to the preparation of the case. *Id.* The Tenth Circuit has held that “where the *Shelton* criteria are not all met during trial it will ordinarily be permissible to protect opposing counsel from being compelled to testify at trial as well.” *Boughton v. Cotter Corp.*, 65 F.3d 823, 831 n.12 (10th Cir. 1995).

Because it is “essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties,” an attorney’s work product must be protected. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The mental impressions, conclusions, opinions, or legal theories of the attorney, in particular, “require[] heightened or special protection.” *Lindley v. Life Investors Ins. Co. of Am.*, 267 F.R.D. 382, 393 (N.D. Okla. 2010). Indeed, it has been suggested that such work product enjoys “an almost absolute protection.” *Hoffman v. United Telecomms., Inc.*, 117 F.R.D. 436, 439 (D. Kan. 1987).

The *Order to Cease and Desist* at issue is based on the conclusion of law that Respondent transacted business in the state as an unregistered broker-dealer in violation of Section 1-401 of the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§ 1-101 through 1-701 (2011). The findings of fact supporting this conclusion of law relate to Respondent’s creation, maintenance and custody of a securities account belonging to Gabriele Blankenship pursuant to a custodial agreement. These findings are based entirely on evidence obtained by the Department from Respondent and Ms. Blankenship.

Respondent has not disclosed what information is being sought through the testimony of the Department's attorney of record or why such testimony is necessary. However, any relevant information known to the Department's attorney of record consists of information provided by Respondent and/or Ms. Blankenship and counsel's mental impressions, opinions, conclusions, or legal theories drawn from it. The former fails to meet the requirement of *Shelton* that the information sought cannot be obtained by other means—the information provided by Ms. Blankenship can be obtained from her directly. The latter should be protected as attorney work product.

For the foregoing reasons, the Department objects to the inclusion of the Department's attorney of record on Respondent's witness list and moves for the issuance of an order excluding the testimony of such person at deposition and/or at hearing.

Respectfully,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing DEPARTMENT'S OBJECTION TO INCLUSION OF DEPARTMENT ATTORNEY ON WITNESS LIST OF RESPONDENT AND MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DEPARTMENT ATTORNEY was hand-delivered this 21st day of September, 2012, to:

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Terra Shamas Bonnell