

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-10933

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
March 20, 2003

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

MAR 20 2003

CTFD. NO. 1<sup>ST</sup> class

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In the Matter of :  
: ORDER ON MOTION ON  
: EXAMINING WITNESSES  
ERNST & YOUNG, LLP :  
\_\_\_\_\_

The Securities and Exchange Commission ("Commission") instituted this proceeding on November 13, 2002. The start of the hearing has been delayed until March 21, 2003, because Michael Bishko, a retired Ernst & Young, LLP partner and the first scheduled witness, refused to answer a Commission subpoena to appear on March 18, 2003.

On March 17, 2003, the Division of Enforcement ("Division") filed a Motion For Clarification And Memorandum Regarding The Use Of Leading Questions ("Motion"). I interpret the Motion as a request for a ruling that the Division be allowed to ask leading questions on direct examination to any witness who is either a present or former employee of Ernst & Young or PeopleSoft, Inc.<sup>1</sup> The Division cites Rule 611(c) of the Federal Rules of Evidence as authority.<sup>2</sup> The Division also requests that Respondent not be allowed to ask leading questions on cross-examination to these witnesses.

On March 18, 2003, I received Respondent's Response To The Division's Motion For Clarification Regarding The Use Of Leading Questions. Respondent urges that I deny the Motion and it uses the terms "untimely", "overreaching", "unreasonable", and "preposterous" to describe the Division's request. Respondent would require a showing that a witness is adverse before the Division is allowed to ask

<sup>1</sup> The Division talks about the direct examination of Ernst & Young and PeopleSoft witnesses, however, I consider witnesses called by the Division to be Division witnesses.

<sup>2</sup> Rule 611(c) of the Federal Rules of Evidence provides "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions."

leading questions on direct to anyone but current partners of Ernst & Young. Respondent argues that there is no basis for presuming that former employees of Ernst & Young and present and former employees of PeopleSoft are adverse to the Division.

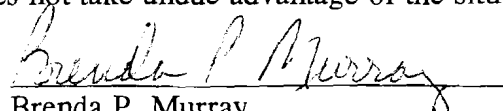
On March 19, 2003, I received the Division's Reply Concerning Motion For Clarification Regarding The Use Of Leading Questions ("Reply"). The Division cites a number of cases and authorities to support its argument that it should be allowed to ask leading questions on direct examination. See Ellis v. City of Chicago, 667 F.2d 606, 613 (7th Cir. 1981); see also Suarez Matos v. Ashford Presbyterian Cmty. Hosp., 4 F.3d 47, 50 (1st Cir. 1993); Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 13 (1st Cir. 1993); N.L.R.B. v. Southwestern Colorado Contractors Ass'n., 379 F.2d 360, 364-65 (10th Cir. 1967); Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D. Colo. 1991); Advisory Committee Note to Fed. R. Evid. 611(c); S. Rep. No. 1277, 93d Cong., 2d Sess. 1974, at 7072; Weinstein's Federal Evidence § 611App.01[3] (2d ed. 2002).

On March 19, 2003, I received Respondent's Surreply To The Staff's Motion For Clarification Regarding The Use of Leading Questions. Respondent notes that the present and former PeopleSoft employees whom the Division intends to call have met with the Division voluntarily and most of them left PeopleSoft's employment years ago. Respondent cites Morvant v. Constr. Aggregates Corp., 570 F.2d 626, 635 (6th Cir. 1978), and Alpha Display Paging, Inc. v. Motorola Communications & Elec., Inc., 867 F.2d 1168, 1171 (8th Cir. 1989), to support its right to ask leading questions on cross examination.

### **Ruling**

It appears that almost all the witnesses that the Division intends to call have some past or present association with Respondent, almost all of them have refused to talk to the Division in advance of the hearing, and Respondent's counsel represents many of them. For example, Mr. Bishko, Karen Burbage, John Fridley, and Lynn Anderson are all former Ernst & Young partners who are represented by Ernst & Young's attorneys.

In these circumstances, I GRANT the Motion and will allow the Division to ask leading questions to any witnesses it calls as part of its direct case who has refused to talk to the Division. See 17 C.F.R. §§ 201.111,.300; see also Ellis, 667 F.2d at 612-13. I DENY the Motion insofar as it requests a blanket ruling that Respondent be denied the ability to ask leading questions on cross-examination. However, given that I expect most of the Division's witnesses are sympathetic to Respondent, I expect it will be necessary to rule so that Respondent does not take undue advantage of the situation.

  
Brenda P. Murray  
Chief Administrative Law Judge