

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA	)
Complainant,	)
	)
v.	) 8 U.S.C. §1324a Proceeding
	) Case No. 92A00268
ROSARIO STRANO D/B/A	)
STRANO FARMS,	)
Respondent.	)
_____	)

SECOND PREHEARING CONFERENCE REPORT AND  
ORDER

(August 27, 1993)

The second telephonic prehearing conference was held as scheduled on August 27, 1993 at 10:00 a.m. The principal focus was on disposition of Strano's August 16, 1993 Motion for a protective order and to sequester potential witnesses. Discussion of the motion addressed also Strano's August 18 Response, and Respondent's August 20 Motion for leave to file a reply.

Strano invokes Federal Rule of Evidence (FRE) 615 to obtain an order to the following effect:

- (a) excluding all fact witnesses from the court room when not actually testifying;
- (b) that fact witnesses may not listen to, or read the transcript of, the depositions of other fact witnesses;
- (c) that fact witnesses cannot discuss the case with, or within hearing of, any other fact witness.

By virtue of 28 C.F.R. §68.40(a), FRE 615 applies to adjudications pursuant to 8 U.S.C. §1324a. FRE 615 provides,

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rules does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its

representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Understanding Respondent's August 20 pleading to incorporate its proposed reply to Complainant's response, I granted the motion for leave to file the reply. In light of the pleadings and discussion of caselaw cited by the parties, there is no essential dispute concerning the first two of Strano's three requests.

In any event, as to (a), sequestration with respect to the hearing itself, the command of FRE 615 is unequivocal; exclusion of witnesses is mandatory except as provided in the second sentence of the Rule. The parties agree that Border Patrol Agent Louis Posada can be present to assist Complainant's counsel throughout the hearing. Any doubt there might be that an INS case agent, *e.g.*, Posada, can qualify generically for the second exception to exclusion, *i.e.*, a person designated as its representative by its attorney is satisfied by the notes accompanying FRE 615, Notes of Committee on the Judiciary, Senate Report No. 93-1277. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, West Pub. Co. (compilation) (1993 ed.) at 348.

As to (b), prohibition against reading one and another's deposition, I am inclined to adopt the view that extends the reach of FRE 615 to depositions. Lumpkin v. Bi-Lo, Inc., 117 F.R.D. 451 (M.D. Ga. 1987). It is less clear whether FRE 615 controls between the deposition and the hearing. Naismith v. Professional Golfers Assoc., 85 F.R.D. 552 (N.D. Ga. 1979). See also Federal Rule of Civil Procedure (Fed.R. Civ.P.) 30(c) (FRE applies to depositions). Because, however, INS does not oppose the prohibition generally, I need not decide whether FRE 615 applies. But see Fed.R.Civ.P. 26(c)(5) (judicial designation, invoked on showing of good cause, of who may attend deposition). INS asserts a reservation, with which I concur, and with which Strano does not now appear to take issue, that if INS counsel Nancy R. McCormack becomes a witness she shall remain outside the ambit of (b).

Addressing FRE 615 expansively, the Fifth Circuit has commented that

the purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion.

Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981).

The applicability of FRE 615 to the (c) scenario is, nevertheless uncertain. As developed at the conference, it may not be necessary to reach decision. This is so because the parties are in substantial agreement. However, it remains for them to settle out the precise scope of the intended prohibition against exposure by one witness or potential witness to discussion of the case with another such witness. Counsel have agreed to a joint effort to draft an agreed order to achieve a level playing field in respect both of individuals and subject matter to be covered.

Accordingly, as agreed, counsel will meet on or about September 1. They will promptly forward a proposed joint order. A telephonic conference will be held at 9:30 a.m. on Friday, September 3, 1993, principally to focus on (c).

A status conference in preparation for the evidentiary hearing will be held at 9:30 a.m. on Thursday, November 4, 1993.

**SO ORDERED.**

Dated and entered this 27th day of August, 1993.

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MARVIN H. MORSE  
Administrative Law Judge