

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2011026874301

Hearing Officer – Andrew H. Perkins

**MEMORANDUM ORDER DIRECTING RESPONDENT TO COMPLY
WITH RULE 8210 REQUEST FOR INFORMATION
REGARDING RESPONDENT'S RELIANCE ON COUNSEL DEFENSE**

This case is before the Hearing Officer on the Department of Enforcement's motion for entry of an order compelling Respondent to respond to the request for information Enforcement issued on November 28, 2012, pursuant to FINRA Rule 8210, seeking the factual support for Respondent's third affirmative defense. The third affirmative defense states in its entirety, "[Respondent] was advised by his Bankruptcy attorney that participation in any FINRA proceeding could threaten his Bankruptcy."¹ Respondent refused to provide the requested information, claiming that it is protected by the attorney-client privilege.

For the reasons discussed below, Respondent's objection to the Rule 8210 request for information is overruled, and Respondent is ordered to provide the requested information on or before March 29, 2013.

¹ Answer ¶ 18.

I. BACKGROUND

Enforcement initiated this disciplinary proceeding against Respondent on October 17, 2012. The Complaint alleges that Respondent violated FINRA Rules 8210 and 2010 by failing to respond to two information requests FINRA staff issued pursuant to Rule 8210. The request letters sought information relating to customer complaints that his former firm had reported to FINRA.

Respondent filed an Answer with the Office of Hearing Officers on November 14, 2012. Respondent denied that he had violated Rules 8210 and 2010 as charged in the Complaint because he claimed that the allegations in the Complaint were incomplete and inaccurate. Respondent also asserted six affirmative defenses. The third affirmative defense asserts that Respondent's bankruptcy attorney had advised him that participation in any FINRA proceeding could threaten his bankruptcy. Respondent provided no further information regarding the advice he received, nor did he state what role, if any, that advice played in his decision not to cooperate with FINRA's investigation.

Two weeks after Respondent filed his Answer, Enforcement sent him a Rule 8210 request for information regarding the third affirmative defense. Enforcement sought to determine the precise nature of the advice Respondent received. On December 13, 2012, Respondent sent Enforcement counsel an email in which he advised that he would not answer Enforcement's post-Complaint request for information regarding the advice he was given because it was protected by the attorney-client privilege.² Respondent's objection led to Enforcement filing a motion for entry of an order compelling him to respond and, if he did not comply with that order, prohibiting him from presenting any evidence in support of the third affirmative defense.

² Enforcement's Mot., Ex. A.

II. ENFORCEMENT'S POST-COMPLAINT RULE 8210 REQUEST

Enforcement requested the following information regarding Respondent's third affirmative defense:

1. Please provide a written statement signed by you describing in detail the extent to which you purportedly were provided with and relied upon advice of counsel that participation in any FINRA proceeding could threaten your Bankruptcy, including, but not limited to, the following:
 - a. the date that you sought this advice;
 - b. the name of the attorney providing such advice to you;
 - c. the attorney's contact information;
 - d. the details of all information and documents provided to the attorney in seeking such advice;
 - e. the date the attorney provided the advice to you;
 - f. how the advice was given (meeting, telephone, letter or email);
 - g. who was present when advice was given; and
 - h. the specific advice given to you including, but not limited to, whether you were advised that participation in any FINRA Enforcement proceeding could threaten your Bankruptcy.
2. Provide all documents in your possession, custody, and/or control regarding advice of counsel, including, but not limited to, documents evidencing the seeking and/or providing of such legal advice.
3. Identify all witnesses to your Bankruptcy attorney's advice to you that participation in any FINRA proceeding could threaten your Bankruptcy.

III. DISCUSSION

First, the Hearing Officer notes that although the FINRA Code of Procedure does not provide for traditional discovery, the rules do provide for the functional equivalent. Rule 9251 generally directs Enforcement to make available for inspection and copying by a respondent those documents that were produced or acquired during the investigation that led to Enforcement initiating the proceeding. In addition, Enforcement may utilize Rule 8210 during the course of a proceeding to obtain information regarding the issues in controversy, and respondents can request FINRA to utilize Rule 8210 to obtain documents for use at a hearing and to compel a witness who is subject to FINRA's jurisdiction to testify at a hearing.³

The purposes of a post-complaint Rule 8210 request for information essentially are the same as those for discovery in federal court pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure,⁴ *i.e.*, (1) to obtain evidence for use at the hearing; (2) to narrow the issues; and (3) to secure information as to the existence of evidence that may be used at the hearing.⁵ A party violates the spirit of FINRA's rules when the party attempts to use Rule 8210 as a "tactical weapon[] rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses."⁶

In this case, Respondent asserted the affirmative defense that he relied on his attorney's advice in making the decision to refuse to supply the information originally requested during FINRA's investigation into the customer complaints and arbitrations disclosed by his former

³ See Rule 9252.

⁴ Rule 26(b)(1) provides in part, "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

⁵ *Cf. Wood v. Todd Shipyards*, 45 F.R.D. 363, 364 (S.D. Texas 1968) (holding that insurance policy coverage was not discoverable because it would not be an issue at trial).

⁶ See Advisory Committee's Note to 1983 Amendment to Fed. R. Civ. P. 26.

firm. Enforcement seeks information regarding that advice to narrow the issues at the hearing and discover the existence of evidence that may be used at the hearing.

Second, the Hearing Officer notes the long-recognized importance of the attorney-client privilege in the American judicial system.⁷ However, under certain narrowly tailored circumstances courts have pierced the privilege in the furtherance of justice. One such circumstance is where a defendant asserts reliance on counsel as an affirmative defense. In such cases, courts have held that “[t]he attorney-client privilege cannot at once be used as a shield and a sword.”⁸ “Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.”⁹

In this case, Respondent has asserted as a defense that he relied on the advice of counsel. To successfully assert reliance on the advice of counsel, a respondent must establish “that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice.”¹⁰ In addition, the Securities and Exchange Commission has held that it “isn’t possible to make out” an advice-of-counsel claim “without producing the actual advice from an actual lawyer.”¹¹ Accordingly, by asserting reliance on the advice of counsel as an affirmative defense, Respondent has put in issue each of the foregoing

⁷ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁸ *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005) (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); see also *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3d Cir. 1995) (holding that the attorney-client privilege may be waived by a client who asserts reliance on the advice of counsel as an affirmative defense).

⁹ *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).

¹⁰ *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008), *pet. denied*, 347 F. App’x 692 (2d Cir. 2009); accord *Dep’t of Enforcement v. Padilla*, No. 2006005786501, 2012 FINRA Discip. LEXIS 46, at *27 (NAC Aug. 1, 2012).

¹¹ *Berger*, 2008 SEC LEXIS 3141, at *41 (quoting *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007)) (internal citation omitted); accord *Eugene T. Ichinose*, 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not “show with any specificity what advice he may have received” from counsel).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 13-02 (2011026874301).

factors, thereby waiving the attorney-client privilege with respect to any material concerning the subject matter of his attorney's advice.

IV. CONCLUSION

For the reasons stated herein, **IT IS ORDERED** that Respondent's objection to the post-complaint Rule 8210 request for information is overruled and he shall provide the requested information to Enforcement on or before March 29, 2013.

Andrew H. Perkins
Hearing Officer

Dated: March 13, 2013