

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

THOMAS JOHN LYKOS, JR.
(CRD No. 2017220),

Respondent.

Disciplinary Proceeding
No. 2018059510201

Hearing Officer–DDM

HEARING PANEL DECISION

May 1, 2020

Respondent is barred from associating with any member firm in any capacity for acting unethically by cheating during a qualification examination, in violation of NASD Rule 1080 and FINRA Rule 2010.

Appearances

For the Complainant: Jennifer Wang, Esq. and Penelope Brobst Blackwell, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Lawrence Rothenberg, Esq.

DECISION

I. Introduction

In a one-count Complaint, FINRA’s Department of Enforcement alleges that Respondent Thomas John Lykos, Jr. acted unethically while taking the Series 24 examination, also known as the General Securities Principal qualification examination, by cheating on the exam. Specifically, the Complaint alleges that Lykos copied and removed examination content, received assistance while taking the exam, and improperly left the testing center for an unexcused break. By doing so, Enforcement alleges, Lykos violated NASD Rule 1080, which was in effect when Lykos took the examination, and FINRA Rule 2010. Lykos denies cheating on the exam and requested a hearing. After considering the evidence admitted during a two-day hearing, along with post-hearing briefs, the Hearing Panel concludes that Lykos violated NASD Rule 1080 and FINRA Rule 2010 and imposes a bar.

II. Findings of Fact

A. Background and Jurisdiction

A graduate of Harvard College and the University of Texas School of Law, Lykos has worked extensively in the banking and securities industry.¹ He worked as an Enforcement attorney for the Securities and Exchange Commission (“SEC”) and as oversight counsel for Congressional committees and subcommittees responsible for the federal securities laws.²

Lykos first associated with a FINRA member firm in 1989. Between February 2018 and May 2019, he was associated with FINRA member firm Sanders Morris Harris, LLC (“Sanders Morris”).³ During his career in the securities industry, Lykos took and passed the Series 7, 63, and 66 qualification examinations before taking and passing the Series 24 examination that is the subject of the Complaint.⁴

On May 20, 2019, Sanders Morris filed a Uniform Termination Notice for Securities Industry Registration (Form U5) for Lykos after his voluntary departure from the firm.⁵ That filing terminated Lykos’s association with Sanders Morris and his registrations with FINRA.⁶ Although he is no longer associated with a FINRA member firm, Lykos is subject to FINRA’s jurisdiction for purposes of this proceeding because FINRA filed its Complaint within two years after the termination of his registration with FINRA, and the Complaint alleges misconduct while he was registered with FINRA.⁷

B. Lykos Joins Sanders Morris and Takes the Series 24 Exam

On February 1, 2018, Sanders Morris hired Lykos to serve as the firm’s Chief Compliance Officer and General Counsel.⁸ Part of his employment agreement with Sanders Morris required Lykos to have his Series 7 and 66 licenses.⁹ Lykos held those licenses when Sanders Morris hired him.¹⁰

¹ Hearing Transcript (“Tr.”) 35-36.

² Tr. 36-37.

³ Answer (“Ans.”) ¶ 3.

⁴ Complainant’s Exhibit (“CX-__”) 1, at 2.

⁵ Ans. ¶ 6.

⁶ Ans. ¶ 6.

⁷ See Article V, § 4 of FINRA’s By-Laws.

⁸ Ans. ¶ 4; CX-3; CX-4; CX-26, at 2.

⁹ CX-26, at 2.

¹⁰ CX-1, at 2.

As Chief Compliance Officer, Lykos had the ultimate responsibility to ensure that Sanders Morris complied with all applicable securities laws and FINRA rules.¹¹ That required a Series 24 license, which Lykos did not have.¹² Before hiring Lykos, George Ball, Sanders Morris's Chairman and Chief Executive Officer, told Lykos that he needed to obtain a Series 24 license.¹³ In fact, Sanders Morris expected Lykos to obtain his Series 24 license within his first four months of employment at Sanders Morris.¹⁴ After allowing Lykos some time to "settle into his new position" at Sanders Morris, Ball began to prompt Lykos to take the necessary steps to obtain his Series 24 license.¹⁵

That meant taking and passing the Series 24 exam. Lykos took the Series 24 exam in April 2018.¹⁶ But he failed.¹⁷ When Lykos failed the Series 24 exam, he expressed regret to Ball that he had failed,¹⁸ and was removed from the position of Chief Compliance Officer of Sanders Morris.¹⁹ Ball appointed a temporary Chief Compliance Officer, and told Lykos that he "needed to obtain the Series 24 license as soon as possible" to resume his position as Chief Compliance Officer.²⁰

C. Lykos Re-Takes the Series 24 Exam

1. Lykos Registers for the Exam

Lykos registered to re-take the Series 24 exam on July 20, 2018, at a Prometric Test Center in Houston, Texas.²¹ In the weeks leading up to the exam, Lykos received two emails that reminded him of his responsibility to abide by FINRA's Rules of Conduct governing qualification examinations:

FINRA RULES OF CONDUCT

FINRA requires that all candidates attest to the FINRA Rules of Conduct, which prohibit assistance on a test, the use of study materials, and misconduct at any time during the testing event. The FINRA Rules of Conduct strictly prohibit cellular

¹¹ CX-26, at 2.

¹² CX-26, at 2-3; Tr. 44-45.

¹³ CX-26, at 2-3.

¹⁴ CX-26, at 3.

¹⁵ CX-26, at 3.

¹⁶ CX-1, at 2.

¹⁷ CX-1, at 2.

¹⁸ CX-40.

¹⁹ CX-26, at 3.

²⁰ CX-26, at 3.

²¹ CX-1, at 2; CX-9, at 1.

phones, handheld computers or any other devices, electronic or otherwise, including wrist watches, to be taken into the testing room or used during the qualification examination and/or restroom breaks. If you violate any of these rules, you will be advised of the violation and the test center administrators will report the violation to FINRA. Any violation of the FINRA Rules of Conduct will subject you to possible disciplinary action by FINRA, another self-regulatory organization, or the Securities and Exchange Commission.²²

The email also included a link to the full Rules of Conduct governing the exam.²³

2. Lykos Prepares to Take the Exam and Completes Orientation

On the day of the exam, Lykos was given a calculator, two dry-erase boards, and two dry-erase pens for writing on the boards.²⁴ After Lykos sat down at his testing station, he spent around five minutes writing study notes on the dry-erase boards.²⁵ According to the surveillance video, Lykos used only one pen to write these notes, and did not exhibit any trouble writing with the pen or the boards.²⁶

Lykos then completed a computer-based orientation, which told him he could use an on-screen calculator and notepad instead of the calculator and dry-erase boards the test center provided.²⁷ In addition, during the orientation, Lykos had to review and agree to each Rule of Conduct.²⁸ In particular, Lykos agreed to the following:

- He would not use or attempt to use any personal items, such as personal notes, study materials, or formulas, during the exam.
- He would store all personal items in the locker provided by the test center prior to entering the test room.
- He would cooperate with the test center staff if they wanted to inspect any personal items he brought into the test room.

²² CX-9, at 4; CX-10, at 4.

²³ CX-9, at 4; CX-10, at 4.

²⁴ Ans. ¶ 14.

²⁵ Ans. ¶ 15; Tr. 98-100.

²⁶ CX-31, at 11:28:38–11:33:24. CX-31 is the Prometric surveillance video of Lykos, and the times displayed on the video are in Eastern Time, even though Lykos took the test in Houston, Texas, in the Central Time Zone. So the local time was actually one hour earlier than the time displayed in the surveillance video.

²⁷ CX-15, at 29-32.

²⁸ Ans. ¶¶ 12-14; CX-15.

- He would be allowed unscheduled breaks only for restroom use, and he would not leave the building during any unscheduled breaks.
- He would not receive or attempt to receive assistance related to exam content from any person during the exam session.
- He would not remove or attempt to remove any materials from the test center other than his test score report.
- He would not reproduce or attempt to reproduce exam material through memorization or other means, a prohibition which applied before, during, and after his exam session.²⁹

Lykos also attested that he understood that cheating would subject him to possible disciplinary action by FINRA, and that he would be monitored at all times during his exam session, including by audio and video recording.³⁰

3. Lykos Writes on His Driver's License and Fingers

At various points in the morning during the exam, Lykos wrote on his driver's license.³¹ He also wrote on the fingers of his left hand, including the sides of his fingers.³² He did this periodically through the first 75 minutes of the exam.³³

Lykos testified at the hearing that he had originally intended to take a break halfway through the exam.³⁴ But he started to experience side effects from medication he had taken before the exam to alleviate pain from recent dental surgery,³⁵ along with increasing tooth pain.³⁶ He therefore decided to take a break earlier than the halfway point, he testified.³⁷

²⁹ Ans. ¶¶ 12-14; CX-15, at 2-4.

³⁰ CX-15, at 5.

³¹ Ans. ¶¶ 1, 16-17; Tr. 106, 108-09; CX-16, at 1 (images 1-2); CX-31, at 11:40:28, 11:43:20, 12:36:21, 12:45:09, 12:50:07, and 12:55:25.

³² Ans. ¶¶ 16-17; Tr. 126-27; CX-16, at 2 (images 3-5); CX-31, at 11:40:28, 11:43:20, 12:36:21, 12:45:09, 12:50:07, and 12:55:25.

³³ Ans. ¶¶ 1, 16-17; Tr. 106, 108-09, 126-27; CX-16, at 1-2 (images 1-5); CX-31, at 11:40:28, 11:43:20, 12:36:21, 12:45:09, 12:50:07, and 12:55:25.

³⁴ Tr. 225.

³⁵ Tr. 224; Ans. ¶ 43.

³⁶ Tr. 225.

³⁷ Tr. 225.

Shortly before noon, Lykos put his driver's license (with his writing on it) in his jacket's inside pocket.³⁸ About four minutes later, while on question 60 of the 160-question exam, Lykos got up from his workstation to take an unscheduled break.³⁹ As Lykos was leaving the testing room, a proctor asked to see his driver's license as part of the check-out process.⁴⁰ In response, Lykos pointed back to the testing room, showing the proctor that he had left his driver's license at his desk.⁴¹ At the hearing, Lykos testified that he thought he had left his driver's license at his workstation.⁴² Lykos then returned to the testing room, ostensibly to retrieve his driver's license.⁴³

Upon re-entering the testing room, and before he sat down at his desk, Lykos started to remove his driver's license from his jacket pocket.⁴⁴ While sitting at his desk, he licked and rubbed his driver's license to clean off the writing.⁴⁵ He answered question 60, then got up to leave the testing room again.⁴⁶ When he departed the testing room, he showed the proctor his driver's license—now rubbed and licked clean of writing.⁴⁷ Throughout the check-out process, and during all his interactions with the proctor, Lykos kept his left hand in his pocket, shielded from the proctor's view.⁴⁸

4. Lykos Leaves the Test Center for a 24-Minute Unscheduled Break

After checking out, Lykos left the test center at 12:04 p.m.⁴⁹ He was gone from the test center for about 24 minutes.⁵⁰ The test center's video cameras covered only inside the center, so there is no video footage of what Lykos did once he left. What Lykos did after he left the test center is one of the few contested facts in this case.

³⁸ Ans. ¶ 18; Tr. 133-34; CX-31, at 12:58:05.

³⁹ CX-31, at 1:01:56.

⁴⁰ Tr. 135; CX-16, at 3 (image 6).

⁴¹ CX-16, at 3 (image 6).

⁴² Tr. 135-36, 139-40.

⁴³ CX-31, at 1:02:18.

⁴⁴ Ans. ¶ 20; CX-16, at 3 (image 7); CX-31, at 1:02:20.

⁴⁵ Ans. ¶ 20; Tr. 136; CX-16, at 4 (image 8); CX-31, at 1:02:24.

⁴⁶ CX-31, at 1:02:40.

⁴⁷ Tr. 136; CX-16, at 4 (image 9).

⁴⁸ Tr. 137-38; CX-16, at 4 (image 9); CX-31, at 1:02:08-17, 1:02:49-1:03:30.

⁴⁹ Tr. 141; CX-31, at 1:03:52; *see also* CX-11, at 1 (signing out at 12:05 p.m.).

⁵⁰ Tr. 147; CX-11, at 1.

Lykos testified at the hearing that he left the test center to visit a bank office in the same building.⁵¹ He testified that he knew the bank teller who worked in that bank office.⁵² The teller was working at the bank counter, Lykos testified, and he asked her if he could go back to her office.⁵³ At the hearing, Lykos testified that he rested in her office for about 15 minutes⁵⁴ and took another painkiller.⁵⁵ Lykos testified at the hearing that he took no notes while he was in the teller's office⁵⁶ and had no access to any information about the Series 24 exam.⁵⁷

After resting, Lykos testified, he left the bank and walked back toward the test center.⁵⁸ On the way back, he passed a desk for the leasing agent for the building.⁵⁹ He picked up a business card from the leasing agent, he testified,⁶⁰ because he knew two people looking for office space, and he was curious about the cost per square foot for leasing space next to the test center.⁶¹ At the hearing, Lykos denied there was any writing on the business card.⁶²

During Lykos's on-the-record testimony ("OTR"), however, he provided a different version of his actions at the bank. In his OTR, Lykos testified that he "may have made notes on a business card" while he was in the bank teller's office.⁶³ According to Lykos at his OTR, his notes related to subjects on the Series 24 exam,⁶⁴ though he could not remember specifically what he wrote, or why he wrote it.⁶⁵ Lykos also testified in his OTR that he remembered using "an engraving pen"⁶⁶ while sitting at the bank teller's desk.⁶⁷ In fact, Lykos offered in his OTR to return to the bank to get an engraving pen from the bank teller's desk because "[s]he probably

⁵¹ Tr. 142, 224.

⁵² Tr. 142-43.

⁵³ Tr. 265-66.

⁵⁴ Tr. 225.

⁵⁵ Tr. 146.

⁵⁶ Tr. 144.

⁵⁷ Tr. 225-26.

⁵⁸ Tr. 148-49.

⁵⁹ Tr. 226.

⁶⁰ Tr. 226-27; Respondent's Exhibit 1.

⁶¹ Tr. 230.

⁶² Tr. 150, 227.

⁶³ CX-33, at 7.

⁶⁴ CX-33, at 7.

⁶⁵ CX-33, at 8.

⁶⁶ CX-33, at 8.

⁶⁷ CX-33, at 7.

[had] a ton of them.”⁶⁸ At the hearing, Lykos tried to explain why his testimony at the OTR differed from his testimony at the hearing by saying that, after the OTR, “[he] went back and retraced [his] steps.”⁶⁹ He said, “[T]he more I think about it, the more I think I did not sit down and make notes at that point in time.”⁷⁰ He never notified FINRA that his OTR testimony was inaccurate before the hearing, however.⁷¹

5. Lykos Returns to the Exam from His 24-Minute Unscheduled Break

While there is some dispute about when Lykos picked up the business card and whether he wrote on it, there is no dispute about what happened next. Lykos returned from his unscheduled break to the Prometric test center—and its video surveillance—at 12:28 p.m.⁷² Prometric’s video cameras captured his later actions during the exam.

When he returned to the test center, Lykos showed his driver’s license to a proctor and signed in.⁷³ During the screening process, the proctor saw the business card in Lykos’s front jacket pocket and told him to throw it into a trash can.⁷⁴ Lykos tore the business card in half and threw the pieces into the trash can.⁷⁵ The pieces of the business card were never retrieved, and a Prometric account manager later wrote in an email to FINRA that he “[did] not recall any extra writing being on the business card that was found.”⁷⁶

Lykos returned to his workstation at 12:31 p.m.⁷⁷ After returning to his workstation, Lykos answered one new question and then spent about 14 minutes reviewing his answers to previous questions.⁷⁸ During those 14 minutes, Lykos reviewed the answers to 17 separate questions, including one question three times and another question twice.⁷⁹ He changed the answers to two questions—he corrected one wrong answer, and he changed one incorrect answer to another incorrect answer.⁸⁰

⁶⁸ CX-33, at 8.

⁶⁹ Tr. 145.

⁷⁰ Tr. 144.

⁷¹ Tr. 145.

⁷² CX-31, at 1:28:07.

⁷³ CX-31, at 1:28:28.

⁷⁴ Tr. 149-50; CX-31, at 1:29:54.

⁷⁵ Ans. ¶ 26; Tr. 150; CX-31, at 1:29:54.

⁷⁶ CX-23, at 3.

⁷⁷ CX-31, at 1:31:10.

⁷⁸ CX-19, at 3.

⁷⁹ CX-19, at 3.

⁸⁰ CX-20, at 2-3.

Lykos also cleaned his left hand by licking a finger on his right hand and rubbing it on the fingers of his left hand.⁸¹ After cleaning his fingers, Lykos wrote on them again while viewing exam questions.⁸² He also unfastened and rolled up his left sleeve, and began writing on his forearm while viewing exam questions.⁸³ Lykos continued to write on his fingers and forearm until he noticed a video surveillance camera mounted above his exam workstation.⁸⁴ Shortly before he finished the exam, he rolled his left sleeve back down and refastened it, concealing the writing on his arm.⁸⁵

After Lykos completed the exam, Lykos received a score report showing that he passed the exam.⁸⁶ He then left the testing room to check out.⁸⁷ During the check-out process, a proctor asked to see his hands because, during a walk through the testing room, she had noticed that Lykos may have written on his left hand.⁸⁸ She also told Lykos that she wanted to take photographs of his hand.⁸⁹

Lykos first denied that he had ink on his hands.⁹⁰ Then he denied he had writing on his hands,⁹¹ and told the proctor that the marks on his left hand were from a leaking pen.⁹² When he failed to persuade the proctor not to photograph his hand, Lykos began licking and rubbing his hand and fingers, and stopped only when she reminded him that he was being recorded.⁹³ Lykos admitted at the hearing that he was licking and rubbing his hand and fingers so that the proctor could not see the writing on them.⁹⁴

Lykos allowed the proctor to photograph his hand but asked her not to make a report to FINRA because “[his] job depend[ed] on this.”⁹⁵ The proctor did not photograph Lykos’s

⁸¹ CX-16, at 5 (images 10 & 11); CX-31, at 1:37:21.

⁸² CX-16, at 5 (image 12); CX-31, at 1:37:31.

⁸³ CX-16, at 6 (image 13); CX-31, at 1:46:47.

⁸⁴ CX-16, at 6 (image 14); CX-31, at 1:50:36.

⁸⁵ CX-31, at 3:08:42.

⁸⁶ Tr. 105; CX-15.

⁸⁷ CX-31, at 3:28:07.

⁸⁸ CX-22, at 4.

⁸⁹ Tr. 170-71; CX-22, at 4; CX-31, at 3:29:12.

⁹⁰ Tr. 170.

⁹¹ Tr. 177.

⁹² Tr. 176-77; CX-31, at 3:29:12-51.

⁹³ Tr. 178; CX-16, at 6 (image 15); CX-22, at 4; CX-31, at 3:29:57.

⁹⁴ Tr. 180-81.

⁹⁵ Tr. 178-79.

forearm because she did not know that Lykos had written on it.⁹⁶ In fact, Lykos left the test center with the writing on his left forearm concealed by his sleeve, a fact discovered upon a subsequent review of the surveillance video.⁹⁷

D. Lykos's Credibility

This case hinges on Lykos's credibility. He asserts that his behavior during the exam, while unusual and erratic, was not tantamount to cheating. But Lykos's arguments for an innocent interpretation of his conduct are implausible. His testimony about his actions, most of which were captured on video, was not credible. The most straightforward and obvious inference from his conduct is that he acted unethically, as alleged, by cheating on the Series 24 exam.

Lykos testified at the hearing that he struggled to use the pens because they were dry and did not have a fine tip.⁹⁸ As a result, he testified, it was easier for him to write on his driver's license and hands after he had moistened them with perspiration or by licking them.⁹⁹ While he admitted that this conduct conflicted with the Rules of Conduct governing the examination,¹⁰⁰ Lykos denied writing on his driver's license or fingers to cheat.¹⁰¹ Instead, Lykos testified, his conduct was simply a result of the pens "not working properly."¹⁰²

But multiple undisputed facts contradict this assertion. Lykos was given two pens but made no attempt to use the second pen before he started writing on his driver's license.¹⁰³ He admitted that he did not alert the proctors or anybody else at the test center that he was having trouble with the pens.¹⁰⁴ He never asked for replacement pens or boards at any point during the exam, including after he returned from a long, unscheduled break.¹⁰⁵ Indeed, he exhibited no problems using the pen at the start of the exam, when he took extensive notes for over five minutes on the dry-erase board supplied by the test center.¹⁰⁶ Nor did he have to use the pens; he could have made notes on the electronic notepad on the workstation's computer.¹⁰⁷

⁹⁶ CX-22, at 5.

⁹⁷ CX-21, at 8-9.

⁹⁸ Tr. 107-08.

⁹⁹ Tr. 107-08.

¹⁰⁰ Tr. 108-09.

¹⁰¹ Tr. 242.

¹⁰² Tr. 219.

¹⁰³ Tr. 404. In fact, there was no credible evidence introduced at the hearing that Lykos ever used the second pen.

¹⁰⁴ Tr. 100-01, 108.

¹⁰⁵ Tr. 248.

¹⁰⁶ Ans. ¶ 15; Tr. 98-100.

¹⁰⁷ Tr. 293-95; CX-15, at 31-32.

Lykos also claimed that he did not write questions or answers on his driver's license, fingers, or forearm.¹⁰⁸ Instead, Lykos testified, he was writing letters, "like A, B, or C," to eliminate wrong answers to the multiple-choice questions on the exam.¹⁰⁹ Lykos testified, he wrote "just a word or a symbol, a short thing, and [he] would keep that in [his] mind in case that word came up . . . that concept came up in a subsequent question."¹¹⁰ But the Prometric video showed Lykos writing extensively on his fingers, forearm, and driver's license,¹¹¹ and the photographs taken of Lykos after the exam show that the smeared writing on his fingers was clearly more than just A, B, or C.¹¹²

In addition, Lykos concealed his conduct from the proctors. He wrote *on the sides* of the fingers of his left hand, and then kept his left hand inside his pocket during the check-out process.¹¹³ He pretended that he left his driver's license at his desk when the proctors asked for it, then started licking and rubbing it before he sat back down at his desk.¹¹⁴

Throughout the exam, he demonstrated consciousness of guilt. He saw two people approach his work station as he was writing on one side of his driver's license, so he flipped his license over and pulled it in close to his body.¹¹⁵ He leaned forward in his workstation to write on the sides of his fingers, then stopped writing when he saw a proctor walk behind him.¹¹⁶ He covered his left hand as a proctor approached him.¹¹⁷ He waited for a proctor to walk past him before he pulled out his driver's license to resume writing on it.¹¹⁸ He unfastened his sleeve and wrote on the inside of his forearm—an area that the proctors did not examine during the check-in or check-out process.¹¹⁹ He stopped writing on his arm only when he noticed a surveillance camera installed above his workstation.¹²⁰

¹⁰⁸ Tr. 219-20.

¹⁰⁹ Tr. 219-20, 266-67.

¹¹⁰ Tr. 267.

¹¹¹ *See, e.g.*, CX-31, at 1:46:47–1:50:36.

¹¹² CX-16, at 7-10 (images 17–23).

¹¹³ Tr. 137-38; CX-16, at 4 (image 9); CX-31, at 1:02:08-17, 1:02:49–1:03:30.

¹¹⁴ CX-16, at 3-4 (images 6-8); CX-31, at 1:02:20.

¹¹⁵ CX-31, at 11:43:40.

¹¹⁶ CX-31, at 12:49:45.

¹¹⁷ CX-31, at 1:39:03.

¹¹⁸ CX-31, at 1:34:20.

¹¹⁹ CX-31, at 1:46:46.

¹²⁰ CX-16, at 6 (image 14); CX-31, at 1:50:36.

At the end of the exam, when Lykos checked out, the proctors confronted him about the writing on his hands. At first, Lykos claimed he had no writing on his hands.¹²¹ When that proved unpersuasive, he claimed the pens were leaky.¹²² And then he said that the pens were dried out.¹²³ Finally, after asking the proctor not to photograph his hand, he licked and smeared his fingers to prevent the proctor from taking a clear photograph of the writing on them.¹²⁴

III. Conclusions of Law: Lykos Violated NASD Rule 1080 and FINRA Rule 2010

When Lykos took the Series 24 exam in July 2018, he was subject to NASD Rule 1080.¹²⁵ That Rule provided:

NASD considers all of its Qualification Examinations to be highly confidential. The removal from an examination center, reproduction, disclosure, receipt from or passing to any person, or use for study purposes of any portion of such Qualification Examination, whether of a present or past series, or any other use which would compromise the effectiveness of the Examinations and the use in any manner and at any time of the questions or answers to the Examinations are prohibited and are deemed to be a violation of Rule 2110 [now FINRA Rule 2010]. An applicant cannot receive assistance while taking the examination. Each applicant shall certify to the Board that no assistance was given to or received by him during the examination.

Cheating on qualification examinations constitutes unethical conduct that violates both NASD Rule 1080 and FINRA Rule 2010.¹²⁶ In addition, violating the Rules of Conduct surrounding FINRA qualification examinations violates FINRA Rule 2010.¹²⁷ The Rules of Conduct in effect for Lykos's exam permitted unscheduled breaks only for restroom use; they prohibited the removal of any test center material, the capture and reproduction of examination content, and seeking assistance during the exam session.¹²⁸

¹²¹ Tr. 170.

¹²² Tr. 176.

¹²³ Tr. 171.

¹²⁴ CX-16, at 6 (image 15); CX-22, at 4; CX-31, at 3:29:57.

¹²⁵ NASD Rule 1080 was effective through September 30, 2018, when it was superseded by FINRA Rule 1210.05.

¹²⁶ See, e.g., *Dep't of Enforcement v. Shelley*, No. C3A050003, 2007 NASD Discip. LEXIS 8, at *27-29 (NAC Feb. 15, 2007) (affirming the hearing panel's finding that respondent's attempt to cheat on a Series 24 examination was unethical); *Dist. Bus. Conduct Comm. v. Harris*, No. C10960149, 1998 NASD Discip. LEXIS 56, at *13 (NAC Dec. 22, 1998); *Dep't of Enforcement v. Rubino*, No. 2008014873201, 2010 FINRA Discip. LEXIS 36 (OHO June 15, 2010).

¹²⁷ *Shelley*, 2007 NASD Discip. LEXIS 8, at *28.

¹²⁸ CX-15, at 2-4; CX-17, at 1-3.

Lykos subverted the integrity of the examination process. He violated multiple rules of conduct that governed the examination. He took an unscheduled break and, instead of using the restroom, he left the test center premises. He wrote exam material on his fingers and forearm and left the test center with that information, and also wrote exam material on his driver's license. He obstructed the proctors' efforts to photograph the writing on his fingers by licking and smearing his fingers. In short, he cheated.

There is no direct evidence that Lykos accessed outside material to assist him in the exam. But that is only because he left the test center premises (and the video cameras located there), in violation of the Rules of Conduct. And there is compelling circumstantial evidence that Lykos received assistance on the exam. He tried to leave the test room with handwriting on his driver's license, which he then licked and rubbed clean so the proctor would not see it. He left for his unscheduled break with writing on the fingers of his left hand, which he hid from the proctors as he checked out. Lykos was gone for about 24 minutes. While he testified that he used those 24 minutes only to rest in a bank teller's office, this was neither credible nor permissible under the Rules of Conduct. When he returned to the exam after his unscheduled break, he answered one new question, then spent the next 14 minutes reviewing 17 questions he had already answered. During that 14-minute review, he changed his answers to two questions. And this was the only time he changed an answer during the nearly four-hour exam.¹²⁹

The SEC and FINRA's National Adjudicatory Council ("NAC") have found violations of NASD Rule 1080 and FINRA Rule 2010 without direct evidence of cheating.¹³⁰ The SEC has also held that circumstantial evidence can be enough to prove a violation of the federal securities laws¹³¹ and Rule 2010.¹³² There was ample evidence adduced at the hearing to support such findings. The Hearing Panel finds that Lykos violated NASD Rule 1080 and FINRA Rule 2010.

We have already addressed Lykos's credibility. He makes four other main arguments in his defense. None are persuasive.

His first argument relates to his conduct upon his return from his unscheduled break. Lykos points out that, when he returned, he was thoroughly inspected by the proctors, who found no writing on him. One answer he changed was still wrong. He answered 12 of the next 20 questions on the exam wrong. This negates any inference that he cheated, Lykos argues.

But these facts do not prove as much as Lykos claims. That he correctly changed only one answer, and incorrectly changed another, is immaterial. A respondent can violate NASD

¹²⁹ CX-19.

¹³⁰ See *Helene R. Schwartz*, 51 S.E.C. 1207, 1209 (1994); *Shelley*, 2007 NASD Discip. LEXIS 8, at *28; *Harris*, 1998 NASD Discip. LEXIS 56, at *13.

¹³¹ *Keith Springer*, 55 S.E.C. 632, 643 (2002).

¹³² *Donald M. Bickerstaff*, 52 S.E.C. 232, 238 (1995).

Rule 1080 and FINRA Rule 2010 even if that respondent did not successfully cheat.¹³³ Further, his incorrect answers on new questions after he returned from the break are also immaterial; he had not reviewed those questions *before* he left the test center with writing on his fingers. And he ceased writing on his body parts only *after* he noticed the surveillance camera at his workstation.

Second, Lykos argues that Enforcement failed to prove that the business card he attempted to bring into the test center had writing on it. The proctors made no attempt to retrieve the business card, and a Prometric account manager wrote in an email that he did not recall any writing being on it. But finding that Lykos wrote on the business card is unnecessary to find that he violated NASD Rule 1080 and FINRA Rule 2010. His behavior at the test center constituted deceptive and unethical conduct.

Third, Lykos argues that Enforcement failed to prove that he had sufficient motive to cheat on the exam. Lykos testified that he did not believe he would lose his job if he failed the exam because he was serving as Sanders Morris's General Counsel and still had one more attempt to pass the Series 24 exam.¹³⁴ But Lykos expressed regret to Sanders Morris management after failing the Series 24 exam in April 2018.¹³⁵ In addition, Sanders Morris specifically hired Lykos to be the firm's Chief Compliance Officer,¹³⁶ and his employment at Sanders Morris depended upon him obtaining his Series 24 exam.¹³⁷ This was sufficient motivation for Lykos to have cheated on the exam.¹³⁸

Fourth, Lykos argues that the Hearing Panel should disbelieve the evidence presented by Enforcement because Enforcement's investigation was not conducted in good faith, "had a predetermined goal from the outset," and was otherwise flawed.¹³⁹ As an example, Lykos points to an affidavit, which Enforcement submitted as an exhibit, from Ball,¹⁴⁰ who did not appear in person at the hearing. Lykos claims it was "one-sided"¹⁴¹ because certain facts favorable to

¹³³ See *Rubino*, 2010 FINRA Discip. LEXIS 36, at *8 ("The fact that his search [for a term that would have assisted him on the exam] was unsuccessful does not excuse his conduct: reviewing a study guide during the course of a qualification examination.").

¹³⁴ Tr. 204, 213-14.

¹³⁵ CX-40.

¹³⁶ Ans. ¶ 4; CX-3, at 1.

¹³⁷ CX-4, at 1; CX-26, at 2-3.

¹³⁸ See *Rubino*, 2010 FINRA Discip. LEXIS 36, at *8 (Respondent "had a motive to cheat because he had failed the examination on two prior occasions, and his employment . . . was contingent on his successful completion of the Series 7 examination.").

¹³⁹ Respondent's Post-Hearing Brief ("Lykos Br.") at 10.

¹⁴⁰ CX-34.

¹⁴¹ Lykos Br. at 11.

Lykos were not included in the affidavit,¹⁴² which Enforcement had drafted.¹⁴³ But the fact that Enforcement drafted the affidavit, rather than Ball, is not evidence of bad faith.¹⁴⁴ In addition, Enforcement also submitted the entire transcript of Ball's OTR, during which Lykos's attorney questioned Ball.¹⁴⁵ And at the hearing Lykos highlighted portions of the OTR transcript that he found favorable, as was his right.¹⁴⁶ In any event, Ball's sworn statements do not bear on Lykos's conduct during the exam.

Finally, Lykos claims the investigation was flawed because Enforcement did not present testimony from any Prometric employees or the bank teller whose office Lykos claims to have visited during his unscheduled break,¹⁴⁷ and Enforcement did not obtain from Prometric the pens and dry-erase boards Lykos used during the exam.¹⁴⁸ None of these potential witnesses was subject to FINRA's jurisdiction, and there is no evidence that Lykos tried to call them as witnesses at the hearing. And given the overwhelming evidence of Lykos's misconduct, the absence of the actual pens Lykos claims did not work is not dispositive.

IV. Sanctions

The violations of NASD Rule 1080 and FINRA Rule 2010 stem from the same conduct, so we impose a unitary sanction.¹⁴⁹ A bar is a standard sanction for cheating during a qualification examination, according to the Sanction Guidelines.¹⁵⁰ The only principal consideration in the Guideline for this violation is whether it is clear, based on the content of the material the respondent used, that the respondent did not intend to cheat.¹⁵¹ That consideration does not apply here: it is clear that Lykos intended to cheat.

¹⁴² Tr. 466.

¹⁴³ Tr. 456-57.

¹⁴⁴ See, e.g., *Dep't of Enforcement v. Calandro*, No. C05050015, 2007 FINRA Discip. LEXIS 17, at *64-65 (NAC Dec. 14, 2007) (finding that "[t]he fact that the Affidavit was drafted by an Enforcement attorney" rather than the witness was not evidence of fraud). Lykos did not object to the admission of the affidavit at the hearing.

¹⁴⁵ CX-35.

¹⁴⁶ Tr. 155-64; Lykos Br. at 11-12.

¹⁴⁷ Lykos Br. at 10.

¹⁴⁸ Lykos Br. at 9-10.

¹⁴⁹ *Meyers Assocs., L.P.*, Exchange Act Release No. 86193, 2019 SEC LEXIS 1626, at *62 n.77 (June 24, 2019) (upholding imposition of unitary sanction because violations stemmed from single cause or course of conduct); *Dep't of Enforcement v. Milberger*, No. 2015047303901, 2020 FINRA Discip. LEXIS 4 (NAC Mar. 27, 2020) (same); FINRA Sanction Guidelines at 4 (2019), <https://www.finra.org/sanctionguidelines>.

¹⁵⁰ Guidelines at 40.

¹⁵¹ *Id.*

The Guidelines “are not intended to be absolute,” however.¹⁵² They “merely provide a ‘starting point’ in the determination of remedial sanctions.”¹⁵³ We must consider each case on its own facts¹⁵⁴ and tailor sanctions to respond to the misconduct at issue.¹⁵⁵

There are several aggravating factors. First, while Lykos expressed contrition at the hearing for his behavior, he never acknowledged—and, indeed, he denied—the scope of his misconduct and the true nature of his actions. As an example, he persisted at the hearing in characterizing his conduct in ways that directly contradicted the video footage.¹⁵⁶ In addition, he tried to conceal his misconduct from the proctors (by licking and rubbing his driver’s license)¹⁵⁷ and by obstructing their investigation (by licking and smearing his fingers so that his writing could not be photographed clearly).¹⁵⁸ He also received multiple reminders, in registration emails and the pre-exam orientation, to abide by the Rules of Conduct.¹⁵⁹

Lykos argues that a bar can be imposed as a sanction only if there is “clear and convincing evidence of actual cheating.”¹⁶⁰ In support, he cites another Hearing Panel decision about a respondent who intentionally took computer source code belonging to his former employer.¹⁶¹ Although the Hearing Panel in *Department of Enforcement v. Doni* found that the respondent violated Rule 2010 by committing conversion, it did not impose a bar on Doni, even though such a sanction is standard in conversion cases. Because it was considering “a case of first impression,” the *Doni* Panel conducted a “particularized analysis, rather than automatically applying the standard sanction for conversion.”¹⁶² After conducting that particularized analysis, the *Doni* Panel concluded that a \$10,000 fine and a two-year suspension in all capacities—not a bar—was a “sufficiently remedial” sanction under the facts and circumstances of that case.¹⁶³

¹⁵² *Id.* at 1.

¹⁵³ *Hattier, Sanford & Reynoir*, 53 S.E.C. 426, 433 n.17 (1998) (quoting *Peter C. Bucchieri*, 52 S.E.C. 800, 806 (1996)).

¹⁵⁴ *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005).

¹⁵⁵ Guidelines at 3.

¹⁵⁶ Guidelines at 7 (Principal Consideration 2). As an example, Lykos maintained at the hearing that he had forgotten his driver’s license when the proctors asked to see it during the check-out process. Tr. 135-36, 139-40. As we addressed earlier, however, the video footage clearly showed that Lykos was simply pretending to have forgotten his license so that he could clean it before presenting it to the proctors.

¹⁵⁷ Guidelines at 7 (Principal Consideration 10).

¹⁵⁸ Guidelines at 8 (Principal Consideration 12).

¹⁵⁹ Guidelines at 8 (Principal Consideration 14).

¹⁶⁰ Lykos Br. at 18.

¹⁶¹ *Dep’t of Enforcement v. Doni*, No. 2011027007901, 2016 FINRA Discip. LEXIS 10, at *67 n.157 (OHO Apr. 18, 2016), *aff’d*, 2017 FINRA Discip. LEXIS 46 (NAC Dec. 21, 2017).

¹⁶² *Id.* at *65.

¹⁶³ *Id.* at *76.

Neither the *Doni* Panel nor the NAC, in affirming the sanction on Doni,¹⁶⁴ adopted a “clear and convincing” standard of proof for a bar. FINRA cases imposing a bar have been repeatedly upheld based upon a “preponderance of evidence” standard.¹⁶⁵ Instead, the Hearing Panel and NAC in *Doni* identified several mitigating factors that warranted a departure from the standard sanction of a bar. None of those factors are present here.

Doni engaged in “unflinching self-criticism” that reflected true remorse for his misconduct,¹⁶⁶ from when his supervisor first questioned him about his conduct “up to and throughout” his appeal.¹⁶⁷ In addition, “Doni testified in a straightforward, consistent manner”;¹⁶⁸ he did not “diminish the serious nature of his misconduct”;¹⁶⁹ and he “did not hedge or qualify his admissions as to the wrongful nature of his conduct.”¹⁷⁰ We cannot say the same here.

There are only three violations for which the Sanction Guidelines recommend a bar as the standard sanction, and cheating on a qualification examination is one of them.¹⁷¹ This is due to the “vital importance of examinations in the program of upgrading the level of competence in the securities business.”¹⁷² Because of that “vital importance,” the SEC has held that “a deception in connection with the taking of those examinations [is] so grave that we would not find the extreme sanction of revocation or expulsion to be excessive or oppressive unless the most extraordinary mitigative facts were shown.”¹⁷³ There are no extraordinary mitigating facts here. Lykos is an accomplished, sophisticated securities lawyer who was hired to perform an important gatekeeping function at Sanders Morris as Chief Compliance Officer. His unethical conduct and efforts to cheat during a Series 24 examination suggest that his serving in that role could place

¹⁶⁴ *Doni*, 2017 FINRA Discip. LEXIS 46.

¹⁶⁵ See, e.g., *Jay Michael Fertman*, 51 S.E.C. 943, 949 n.26 (1994) (upholding bar on preponderance of evidence standard); *Ernest Cipriani, Jr.*, 51 S.E.C. 1004, 1006 (1994) (same); *Kirk A. Knapp*, 50 S.E.C. 858, 859 (1992) (same); *Dep’t of Enforcement v. Springsteen-Abbott*, No. 2011025675501r, 2017 FINRA Discip. LEXIS 23, at *71 (NAC July 20, 2017) (“Springsteen-Abbott is mistaken that ‘clear and convincing’ evidence is the appropriate standard for FINRA disciplinary proceedings.”), *modified*, Exchange Act Release No. 88156, 2020 SEC LEXIS 394 (Feb. 7, 2020), *petition for review filed*, No. 20-1092 (D.C. Cir. Mar. 27, 2020).

¹⁶⁶ *Doni*, 2017 FINRA Discip. LEXIS 46, at *46 (quoting Hearing Panel decision).

¹⁶⁷ *Id.* at *44.

¹⁶⁸ *Id.* at *45.

¹⁶⁹ *Id.* at *46 (quoting Hearing Panel decision).

¹⁷⁰ *Id.*

¹⁷¹ *John Edward Mullins*, Exchange Act Release No. 66373, 2012 SEC LEXIS 464, at *73-74 (Feb. 10, 2012); *Doni*, 2016 FINRA Discip. LEXIS 10, at *67 n.157.

¹⁷² *Hugh M. Casper*, 42 S.E.C. 471, 473 (1964).


¹⁷³ *Id.*

investors at risk. As such, we find that a bar serves “to protect the investing public by deterring misconduct and upholding high standards of business conduct.”¹⁷⁴

V. Order

We find that Respondent Thomas John Lykos, Jr. violated NASD Rule 1080 and FINRA Rule 2010 by engaging in unethical misconduct during a qualification examination. For his violations, he is barred from associating with any member firm in any capacity.¹⁷⁵

He is also ordered to pay costs in the amount of \$5,110.44, which includes a \$750 administrative fee and \$4,360.44 for the cost of the transcript. If this decision becomes FINRA’s final disciplinary action, the bar shall take effect immediately.



Daniel D. McClain
Hearing Officer
For the Hearing Panel

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¹⁷⁴ Guidelines at 2.

¹⁷⁵ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.