

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
For District No. 10,

Complainant,

vs.

Douglas John Mangan
Massapequa, New York,

Respondent.

DECISION

Complaint No. C10960162

District No. 10 (NY)

Dated: July 29, 1998

Pursuant to Procedural Rule 9310, Douglas John Mangan ("Mangan") has appealed the September 29, 1997 decision of the District Business Conduct Committee for District No. 10 ("DBCC"). After a review of the entire record in this matter, we find that Mangan violated NASD Conduct Rules 2110, 2120, and 3110 and NASD Procedural Rule 8210 by creating a false account statement for a customer, causing the records of his employers and his employers' clearing firms to indicate falsely the address of a customer, and failing to respond to an NASD Regulation, Inc. ("NASD Regulation") request for information. Accordingly, we impose on Mangan a censure, a bar in all capacities, a \$120,000 fine, and costs.

Background

Mangan entered the securities industry in September 1990, when he became registered with the Association as a general securities representative. During the times relevant to the complaint, Mangan worked at three member firms: From April 1993 to January 1994, Mangan was registered with Camelot Investment Corp. ("Camelot Investment"); from April 1994 to January 1995, he was registered with Vision Investment Group, Inc. ("Vision Investment"); and from January 1995 to April 1997, he was registered with Investors Associates, Inc. ("Investors Associates"). Mangan is not presently associated with any member of this Association.

Facts

In 1993, Customer DB ("DB"), then a 68 year-old widow who had not been employed since 1945, transferred approximately \$450,000 in assets into a brokerage account she had recently opened with Mangan. At the time, Mangan was associated with Camelot Investment. When DB opened the account, she advised Mangan of her home address in Westlake Village, California. DB testified that at no time did she ever provide Mangan with another residence address, nor did she authorize Mangan or anyone else at any firm at which Mangan worked to change the address associated with her account. There was no testimony or other evidence that any person other than Mangan acted as the account executive in charge of DB's account.

NASD Regulation District No. 10 staff introduced into evidence monthly account statements, which showed that, from October 1993 to January 1994, the residence address listed on DB's account at Camelot Investment was 749 South 11th Street, West Babylon, New York 11706. Mangan conceded while testifying that he had resided at that address at the time. District No. 10 staff also introduced evidence that from April 1994 to February 1995, while Mangan was associated with Vision Investment, DB's monthly account statements from that firm listed her address as 261 West Shore Drive, Massapequa, New York. The Central Registration Depository ("CRD") showed that this address was Mangan's residence at the time.

DB's adult grandson, ML, testified that he had attempted to assist his grandmother in determining the status of her account. Beginning in 1993, ML spoke with Mangan repeatedly about the fact that DB was not receiving account statements. Mangan responded that he would make copies of the statements and send them to DB. Despite Mangan's representation, however, DB did not receive an account statement until near the end of 1995.

ML testified that in the Summer of 1995 he planned to travel to New York City for a short business trip and had discussed with Mangan meeting with him in person. ML testified that Mangan said he would be glad to meet with ML. ML's purpose in arranging the meeting was to verify that DB actually had an account. On the day ML wanted to meet, he called Mangan's office eight times, but was not allowed to speak with Mangan. The two did not meet. Upon returning to California, ML called Mangan and angrily accused him of avoiding the meeting. ML told Mangan that he did not believe that DB's account existed. Mangan replied that he would send DB's account statement in the mail.

ML testified that DB received a JW Charles Clearing Corp. account statement for the period May 30, 1995 to July 30, 1995 from Mangan. The statement showed that DB had an account with a value of \$250,303.50. District No. 10 staff, however, introduced evidence that, at the end of September 1995, DB's account with Investors Associates had a value of only \$33,140.20.

Joyce Wagner ("Wagner"), Director of Compliance at JW Charles Clearing Corp., testified regarding an account statement in DB's name that District No. 10 staff provided to her. The statement purported to be for the period May 30, 1995 to July 30, 1995, and bore the "JW Charles Clearing Corp." name. Wagner testified that the account statement was not in fact a JW Charles Clearing Corp. statement. She explained that the layout of an authentic JW Charles Clearing Corp. statement in 1995 differed materially from the layout of the statement provided to her. She also testified that the account in which the statement purported to describe activity in May, June, and July 1995 had been transferred to Prudential Securities, which cleared for Investors Associates, Mangan's new employer, in February 1995.

Herman Epstein ("Epstein"), Chairman and Director of Compliance, Corporate Banking and Investment Banking at Investors Associates, testified that in November 1995 NASD Regulation Staff Supervisor Martin Weidberg ("Weidberg") called him to ask if DB had complained about Mangan's handling of her account. ML, DB, and a broker who assisted them had prepared a November 6, 1995 letter to District No. 10 complaining about Mangan's handling of DB's account.¹ Weidberg gave a copy of this letter to Epstein. Shortly thereafter, Epstein met personally with Mangan to discuss DB's complaints. Mangan said that he had lost most of DB's money through speculative investments and that he was very sorry about it. Mangan said that the account had been "haunting" him and that his handling of the account was the one big mistake he had made in his life.

Epstein confronted Mangan with the purported JW Charles Clearing Corp. account statement, and Mangan admitted it was "false." He told Epstein either "don't pay attention to it" or that "it doesn't mean anything." Epstein understood Mangan to mean that the account statement was a fraudulent statement. Mangan explained that he sent DB the false statement because he could not let her know that her account was worthless.

At the DBCC hearing, the attorney for District No. 10 called Mangan as a witness and attempted to ask him questions about his dealings with DB. Mangan refused to answer these questions, stating that he was invoking his Fifth Amendment rights under the Constitution of the United States. Mangan's attorney objected to questions regarding "fraud and falsifying firm records" because there was a "pending federal criminal complaint" that related to virtually identical issues. The DBCC hearing panel overruled Mangan's objection. They explained that Procedural Rule 8210 required Mangan to answer the questions and that Mangan's refusal to testify could lead the panel to draw an adverse inference from Mangan's failure to answer. Nevertheless, Mangan continued to refuse to answer questions regarding his dealings with DB.

¹

This complaint letter prompted the investigation of this matter.

Failure to Respond to NASD Regulation's Requests for Information. District No. 10 staff introduced into evidence three letters chronicling staff's requests for Mangan to appear for an on-the-record interview. First, District No. 10 staff sent a November 28, 1995 letter requesting Mangan's appearance at NASD Regulation's office on December 8, 1995. The request was made pursuant to Procedural Rule 8210, and a copy of the letter was sent to Epstein, the Chairman of Mangan's firm. District No. 10 staff sent the November 28 letter by first-class and certified mail, return receipt requested. The U.S. Postal Service returned the certified letter, which was marked "moved, left no address."

District No. 10 staff also introduced into evidence a December 6, 1995 staff letter, requesting Mangan's appearance at an on-the-record interview on December 15, 1995. The letter related that NASD Regulation Staff Examiner Tina Wolfolk ("Wolfolk") had discussed the on-the-record interview with Gerald Adler ("Adler"), Mangan's attorney, and that consequently District No. 10 was rescheduling the interview for December 15, 1995. The request for an interview contained in the December 6 letter was also made pursuant to Procedural Rule 8210. Wolfolk sent the letter by both first-class and certified mail, return receipt requested, to Mangan's last known address as reflected in the records of the Association, and she also sent a copy of the letter to Adler. The U.S. Postal Service returned the letter that had been sent to Mangan by regular mail, marked "returned to sender: forwarding order expired."

Finally, District No. 10 staff introduced into evidence a December 14, 1995 staff letter, acknowledging a conversation between Wolfolk and Adler about rescheduling the on-the-record interview to December 20, 1995, and directing Mangan to appear at NASD Regulation's office for an on-the-record interview on that date. The letter stated that the request was being made pursuant to Procedural Rule 8210. Wolfolk testified that she sent the letter to Mangan at his last known address, as reflected in the records of the Association, by both regular and certified mail, and that copies were also sent to Adler and Epstein. Wolfolk testified that the certified mail receipt was not returned, but that the first-class envelope that had been directed to Mangan was returned. The mailing envelope was marked "returned to sender; undeliverable as addressed; forwarding order expired."

At the DBCC hearing, Mangan testified that he recalled having been aware of a request from District No. 10 in November 1995 for an on-the-record interview. He testified he presumed that he had received a letter in the mail about the on-the-record interview. Mangan confirmed that, at the time, he was represented by Adler and that Mangan had discussed with Epstein on two or three occasions Mangan's being called in to testify concerning DB. Mangan testified that he had believed that Adler, on three occasions in November and December 1995, obtained adjournments of the on-the-record interview.

District No. 10 also introduced a December 19, 1995 letter from Herbert M. Jacobi, Esq. ("Jacobi") to Weidberg. Jacobi's letter began by advising that he represented Mangan, and it stated that Mangan would not appear at the interview on December 20, 1995, on the grounds that his "testimony would be premature and might be prejudicial in light of subject matter interest from certain government agencies in Mangan's narration of events." Weidberg testified that Jacobi advised him by telephone that Mangan would not appear before District No. 10 staff, since his on-the-record interview could be subpoenaed by "higher government officials."²

Mangan testified that he replaced Adler with Jacobi as his attorney. Mangan conceded that he did not appear at the on-the-record interview on December 20, 1995, but he claimed that he had understood, after speaking with Jacobi, that his appearance was not required.

Discussion³

Falsification of Records. We find that the evidence proved that Mangan changed the address on DB's account to his home address, both while her account was with Camelot Investment and while it was with Vision Investments. The evidence showed, without dispute, that the two addresses used were Mangan's home addresses. In addition, there was no evidence that any person other than Mangan acted as the account executive for DB's account.

Likewise, we find that the evidence proved that Mangan created a fraudulent JW Charles Clearing Corp. account statement for DB. Wagner's testimony that the statement was not an authentic JW Charles Clearing Corp. statement was unchallenged. In addition, Mangan admitted to Epstein that the account statement was false, and he explained that his motive was to prevent DB from learning the true state of her investments. Mangan's conduct created the false impression that DB had an account with JW Charles Clearing Corp. and that she had investments worth approximately \$250,000. Neither of these facts was true.

Based upon the evidence, we find that Mangan falsified records and that he thereby violated Conduct Rules 2110, 2120 and 3110, as alleged in the first cause of complaint.

² Mangan's attorney at the DBCC hearing, Philip S. Raible, admitted during his opening statement that Mangan was, at the time of the hearing, the subject of a federal criminal complaint, sworn by an agent of the Federal Bureau of Investigation, charging him "in connection with virtually the same matters" as were set forth in the DBCC's complaint.

³ Mangan has waived no issues in this appeal.

Mangan's Fifth Amendment Claim. The DBCC's decision noted that Mangan knowingly and voluntarily refused to answer numerous direct questions relating to the allegations in the first cause. The DBCC then drew the adverse inference that Mangan actually had engaged in the falsification of DB's account statement and records. We uphold this ruling as a correct application of the law.⁴

We disagree, however, with the DBCC's comment that Mangan's refusal to answer questions at the hearing through his assertions of his Fifth Amendment rights was "contemptuous conduct which in itself would merit the institution of formal charges against him for [f]ailure to [r]espond." Although Mangan's refusal to answer questions could have served as the basis for a complaint, that matter is not before us. Thus, we do not find any measure of contempt in Mangan's refusal to answer questions at the DBCC hearing. We also do not consider his assertion of Fifth Amendment rights as either mitigating or aggravating his conduct for purposes of assessing sanctions.

Failure to Respond. Procedural Rule 8210 authorizes the Association, in the course of its investigations, to require Association members to "report, either informally or on the record, orally or in writing with regard to any matter involved in any such investigation." Because the NASD lacks subpoena power over its members, a "failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." In re Brian L. Gibbons, Exchange Act Rel. No. 37170 (May 8, 1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (unpublished table decision); In re Michael David Borth, 51 S.E.C. 178, 180 (1992). When Mangan became a person associated with a member of the Association, he agreed to abide by the NASD's rules.

We find that Mangan failed to respond to District No. 10 staff's requests for an on-the-record interview. As demonstrated by the evidence, District No. 10 staff repeatedly attempted to arrange an on-the-record interview with Mangan. The record shows both that Mangan was given the notice required under our rules⁵ and that he

⁴ See In re John Kilpatrick, 48 S.E.C. 481, 486 (1986) (SEC drew an adverse inference against a respondent who invoked the Fifth Amendment and refused to testify); In re Raymond L. Dirks, 48 S.E.C. 200, 205 (1985), aff'd, 802 F.2d 1468 (D.C. Cir. 1986) (same); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962) (same); cf. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

⁵ The version of NASD Procedural Rule 9134 that was in effect at the time stated that "[a]ny person shall be deemed to have received notice to which he is entitled under any provision of this Code by the mailing of the notice to that person at his last known address as reflected on the Association's records." The evidence

received actual notice. Mangan admitted that he was aware of District No. 10's requests for his appearance. Furthermore, he has never asserted that District No. 10 staff failed to notify him of the interview. Based on the uncontroverted evidence, we find that Mangan failed to appear for the on-the-record interview on December 20, 1995.

Mangan asserts in his brief to us that he relied on advice of counsel. Advice of counsel, however, is not a valid defense because the DBCC did not have to find any intent to violate the rule on Mangan's part. See In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994) (advice of counsel to refuse an NASD request for information is no defense because, when respondent registered with the NASD, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with the NASD"); In re Darrell Jay Williams, 50 S.E.C. 1070, 1072 (1992); cf. In re John Thomas Gabriel, 51 S.E.C. 1285, 1292 n.31 (1994) (advice of counsel is usually not available as a defense where intent is not an element of the violation), aff'd, 60 F.3d 812 (2d Cir. 1995) (unpublished table decision). Therefore, Mangan's assertion is unavailing.

Based on our review of the record, we conclude that Mangan failed to appear for an on-the-record interview as requested by District No. 10 staff, and that he thereby violated Procedural Rule 8210 and Conduct Rule 2110, as alleged in the second cause of the complaint.

Sanctions

In arriving at appropriate sanctions, we have consulted the NASD Sanction Guidelines ("Guidelines") for falsification of records and failure to respond. Based on the discussion that follows, in addition to the other sanctions, we bar Mangan from associating with any member of the Association.

As to Mangan's falsification of DB's account statement and his changing the mailing address on her statements to his home addresses, we find that the circumstances surrounding these events are an aggravating factor in assessing sanctions. First, Mangan's falsification of DB's mailing address continued for more than one year. Second, Mangan admitted that he created the fraudulent JW Charles Clearing Corp. statement to conceal from DB that he had lost the vast majority of DB's money in speculative investments. We consider Mangan's conduct egregious because he created false records and issued a fraudulent account statement to a 68 year-old widow, who needed assistance in understanding her account. Mangan's falsification of records is the antithesis of a registered representative's upholding high standards of commercial honor. Based on these particular circumstances, we

that District No. 10 staff made proper service of their requests was uncontested, and we find that proper service was made.

apportion \$100,000 of the total fine of \$120,000 to this cause. We also impose a bar based on this cause.⁶

Failing to abide by an NASD Regulation request for information is a serious violation. In re John A. Malach, 51 S.E.C. 618, 621 (1993). Here, Mangan's disregard of his obligation to provide information to District No. 10 directly undermined NASD Regulation's ability to carry out its responsibility as a self-regulatory organization to prevent fraudulent and manipulative acts and practices. We find no mitigation based on Mangan's claim that he acted pursuant to advice of counsel because Mangan had the sole responsibility to give his testimony to NASD Regulation and he chose not to. We apportion \$20,000 of Mangan's total fine to cause two.⁷

Accordingly, we order that Mangan be censured, barred from associating with any member firm in any capacity, fined \$120,000, and assessed \$2,753.50 in DBCC costs and \$750 in appeal costs. The bar is effective immediately upon service of this decision.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

⁶ We have not considered any misconduct by Mangan that does not relate to the allegations in the complaint. Specifically, we do not consider whether Mangan effected unauthorized transactions in DB's account or whether he improperly conditioned a transfer of DB's account on a release of liability.

⁷ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

July 29, 1998

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Philip S. Raible, Esq.
Mintz & Gold
New York, New York

Re: Complaint No. C10960162: Douglas John Mangan

Dear Mr. Raible:

Enclosed herewith is the Decision of the National Adjudicatory Council in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the Commission within thirty days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. ("NASD Regulation") Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to NASD Regulation by similar means.

Your application must identify the NASD Regulation case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASD Regulation. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange
Commission
450 Fifth Street, NW, Stop 6-9
Washington, DC 20549

The address of NASD Regulation is:
Office of General Counsel
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley

Enclosure

cc: Stephen Brennan, Esq.