

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of

District Business Conduct Committee
for District No. 1,

Complainant,
vs.

Ashton N. Gowadia
Newport Beach, CA,

Respondent.

DECISION

Complaint No. C01950010

District No. 1

Dated: November 5, 1997

Ashton N. Gowadia ("Gowadia") has appealed, pursuant to NASD Procedural Rule 9310, a January 27, 1997 decision of the District Business Conduct Committee for District No. 1 ("DBCC"). We find that Gowadia violated Article III, Section 1 of the NASD Rules of Fair Practice (now known and subsequently referred to as "Conduct Rule 2110"), and Article IV, Section 5 of the NASD Rules of Fair Practice (now known and subsequently referred to as "Procedural Rule 8210"), by failing to respond timely to requests for information from the Association. Accordingly, we order that Gowadia be censured; fined \$10,000; suspended for one year from association as a securities representative; required to requalify as a general securities representative following completion of the suspension; and assessed \$827.90 in costs.

Factual Background

Gowadia entered the securities industry in May 1990. He was employed by Shearson Lehman Hutton, Inc., Shearson Lehman Brothers, Inc., and Smith Barney, Inc. (collectively "Smith Barney") until July 1993. Gowadia then worked for Dean Witter Reynolds, Inc. for several weeks in August and September of 1993. From November 1993 to April 1994, Gowadia was employed by Global Strategies Group, Inc. ("Global"), and from May to June 28, 1994, he was employed with Reynolds Kendrick Stratton, Inc. ("Reynolds"). At all relevant times, Gowadia was registered as a general

securities representative, and listed his address in the Central Registration Depository as _____, San Francisco, California ____ ("CRD Address"). Although Gowadia is no longer employed in the industry, he remains subject to the jurisdiction of NASD Regulation, Inc. ("NASD Regulation") and has expressed a desire to rejoin the industry.

The investigation and complaint in this case were triggered by three separate filings of Uniform Termination Notices For Securities Industry Registration ("Forms U-5") pertaining to Gowadia. Global filed the first Form U-5 on May 24, 1994, reporting that Gowadia had been permitted to resign from the firm on April 22, 1994. Reynolds filed a Form U-5 on August 4, 1994, reflecting that Gowadia had been permitted to resign from that firm on June 28, 1994. On October 26, 1994, NASD Regulation received an amended Form U-5 from Smith Barney, reporting problems with one of Gowadia's accounts at that firm.

As a result of these Form U-5 filings, the staff of NASD Regulation sent Gowadia five separate requests for information. Each request informed Gowadia that: (1) the request for information was made pursuant to Procedural Rule 8210; (2) he remained subject to the jurisdiction of NASD Regulation; (3) he had a continuing obligation to notify NASD Regulation's San Francisco office of any change in his address; and (4) his failure to provide the requested information could be found to be a violation of NASD Regulation's rules. Gowadia did not respond to these requests for information.

The Five Requests For Information. On June 7, 1994, Compliance Examiner Greg Siemons ("Siemons") sent a request for information via first-class mail to Gowadia at Reynolds' San Francisco and Beverly Hills offices. The request informed Gowadia that NASD Regulation was investigating: (1) allegations that Gowadia failed to follow Global's firm procedures regarding customer complaints, and (2) a complaint by customer MR that Gowadia had engaged in unauthorized transactions and had failed to execute sell orders in MR's account. Gowadia did not respond to this request for information.

On October 14, 1994, Senior Compliance Examiner Paul Hammon ("Hammon") sent a second request to Gowadia at Gowadia's CRD Address. Hammon informed Gowadia that the investigation of his termination by Global included not only MR's allegations, but also allegations that Gowadia had made unsuitable recommendations to customers RB, JK and AK. This request, sent by regular mail, was not returned to NASD Regulation. Gowadia did not respond to this request either.

On November 1, 1994, Hammon sent a third request for information to Gowadia at his CRD Address. Hammon noted that the NASD was investigating Gowadia's termination from Reynolds because Reynolds' Form U-5 reported that 14 of 19 new accounts that Gowadia had opened there had failed to pay for trades of Celltech Media, Inc. stock, resulting in losses to Reynolds of \$236,612.99. This third request, sent via certified mail, was returned with the notation "Moved-Left No Address." Gowadia did not respond to this request.

On November 17, 1994, Hammon sent a fourth request to Gowadia at the CRD Address, seeking information about a customer complaint reported on Smith Barney's amended Form U-5. Customer SK complained that Gowadia misrepresented a closed-end bond fund, resulting in losses exceeding \$10,000. The fourth request, sent via certified mail to the CRD Address, enclosed and incorporated the three previous requests. It was returned marked "Moved-Left No Address." Gowadia did not respond.

On November 28, 1994, Hammon made a fifth request to Gowadia at the CRD Address, enclosing and incorporating the four previous requests. It was sent via certified mail and was returned marked "Moved-Left No Address." Gowadia failed to respond.

The DBCC's Default Decision Was Issued And Remanded. On March 30, 1995, the DBCC issued a Notice of Complaint against Gowadia and mailed it to his CRD Address via certified mail. On April 26, 1995, the DBCC issued a Second Notice of Complaint and sent it to Gowadia's CRD Address, also via certified mail. Both Notices were returned marked "Moved - Left No Address." Gowadia did not answer the complaint. On April 18, 1996, the DBCC issued a default decision pursuant to Procedural Rule 9216 (formerly Article II, Section 3 of the Code of Procedure), in which Gowadia was censured, fined \$20,000, and barred from associating in any capacity with any member of the Association.

On May 7, 1996, Gowadia wrote to the Office of General Counsel of NASD Regulation seeking an appeal and asking to have the decision remanded. Gowadia raised four defenses: (1) that he had never received the requests for information; (2) that the case stemmed from a mis-communication between NASD Regulation's Los Angeles and San Francisco offices; (3) that Gowadia had responded to the customer complaints to Global and had assumed that Global forwarded his responses to NASD Regulation; and (4) that he did not commit the violations underlying the requests for information. On July 1, 1996, the National Business Conduct Committee ("NBCC") informed Gowadia that it had remanded the case to NASD Regulation's District No. 1 office in San Francisco.

Gowadia Did Not Receive The Requests For Information. The first request, dated June 7, 1994, was sent via first-class mail to Gowadia at Reynolds' San Francisco office and was not returned to NASD Regulation. Gowadia's uncontested testimony was that he did not receive the request because he was working in Reynolds' southern California offices at that time. According to Gowadia, during the relevant period Reynolds' offices were in disarray and were about to close. In fact, the firm filed its Uniform Request for Broker-Dealer Withdrawal ("Form BDW") on July 29, 1994, and several of its employees were severely sanctioned by NASD Regulation.

In addition to work-related difficulties, Gowadia was experiencing personal problems as well. Gowadia testified that his fiancee had left him; that his business had failed; that he had lost all of his money; and that he was on the brink of either having a nervous breakdown or committing suicide. Gowadia's father, recognizing his son's troubled condition, flew to San Francisco, paid the landlord at

Gowadia's CRD Address to release Gowadia from his lease obligations, and sent Gowadia to Germany to stay with relatives. Although Gowadia knew that NASD Regulation was seeking information from him, he testified that this was the last thing on his mind.

Gowadia did not change his CRD Address when he left California and therefore did not receive Hammon's four requests for information. Gowadia returned to California at Christmas of 1994, stayed until June 1995, returned to Germany until the Fall of 1995, and then returned to California again. Gowadia did not maintain a regular address during this period and did not update his CRD Address.

The Alleged Miscommunication Between NASD Regulation's Offices. Gowadia argued that this case arose from a miscommunication between Larry Lippold ("Lippold") in NASD Regulation's Los Angeles office and Hammon in the San Francisco office. In 1993, Lippold investigated a customer complaint against Gowadia stemming from his employment at Smith Barney in Los Angeles ("Smith Barney Investigation"). Gowadia met Lippold during the course of that investigation, which resulted in no action against Gowadia. Gowadia moved to San Francisco in November 1993. In late 1994, Lippold began investigating another customer complaint against Gowadia that resulted from his employment at Dean Witter in Los Angeles in August and September of 1993 ("Dean Witter Investigation").

Lippold learned that Hammon was investigating complaints filed by Gowadia's customers in San Francisco, so in late-1994 he called Hammon to ensure that their investigations did not overlap. Hammon's investigation focused on the Forms U-5 filed by Global and Reynolds, since that alleged misconduct had occurred in San Francisco. Lippold continued the Dean Witter Investigation and mailed requests for information to Gowadia's CRD Address. Lippold's Dean Witter Investigation was closed in July 1995, in part because the DBCC for District No. 1 had filed the complaint in this case.

In December 1994, Gowadia filed an arbitration claim against Dean Witter in NASD Regulation's Los Angeles office ("Dean Witter Arbitration"). Gowadia was represented by Henry Hauer ("Hauer") in the Dean Witter Arbitration. Lippold was not aware, at that time, that Gowadia had filed the Dean Witter Arbitration.

Gowadia was in California from December of 1994 until May of 1995. Gowadia called Lippold in May to determine whether Lippold was still seeking information from him. Gowadia claims that during this conversation he told Lippold to contact Hauer with any further questions about the Dean Witter Investigation because Gowadia was often out of the country. Lippold testified that, contrary to Gowadia's testimony, Gowadia specifically instructed Lippold not to contact Hauer about the Dean Witter Investigation because Gowadia wanted to avoid paying Hauer additional legal fees.¹ During this

¹ Gowadia argued that since Hauer was working on a contingency fee arrangement, Lippold's version of this conversation was nonsensical. In fact, it seems more likely than not that Hauer's contingency arrangement was limited to the Dean Witter Arbitration where Gowadia stood to receive a

conversation, Gowadia told Lippold that Gowadia's new address was _____, Irvine, California ____ ("Irvine Address").² On May 24, 1995, Lippold sent Gowadia a letter regarding the JK/AK customer complaint at the Irvine Address. Gowadia received that letter and, in a letter to Lippold dated November 7, 1995, noted his exception to its wording.³

Also during the last week of May 1995, Gowadia called NASD Regulation's San Francisco office and spoke with Hammon. When Hammon told Gowadia that Gowadia was the subject of the complaint in this case, Gowadia said that he had been out of the country. Gowadia told Hammon to mail the complaint to him at the Irvine address. Gowadia did not inform Hammon that Gowadia was leaving the country again or that Gowadia had hired an attorney to handle his disciplinary matters. On June 2, 1995, Hammon mailed the complaint and the five requests for information to Gowadia at the Irvine address. Gowadia then left the country again, without responding to either Hammon's or Lippold's correspondence.

When Gowadia returned to California in the Fall of 1995, he called Lippold but not Hammon. Lippold claimed that he told Gowadia that the Dean Witter Investigation was closed but that Gowadia should contact Hammon because Gowadia was about to be barred for failing to respond to Hammon's requests for information. Gowadia denied that Lippold told him this. Gowadia then sent Lippold the November 7, 1995 letter. In this letter, Gowadia asserted that Lippold and he must have miscommunicated about the Dean Witter Investigation, because Gowadia had told Lippold that Hauer would handle Gowadia's matters during Gowadia's trips outside the country.

Gowadia Responded To The Underlying Customer Complaints. Although Gowadia never responded to Hammon's requests for information, he apparently did respond to a number of the customer complaints that triggered those requests. Gowadia produced several documents from Global's files, subpoenaed in connection with the Dean Witter Arbitration, that explained why MR's and the JK/AKs' complaints lacked merit. He also produced an affidavit of JK, dated October 8, 1993, in

monetary payment from which a contingency fee could be taken, as opposed to a disciplinary dispute which could only result in Gowadia's making a payment. Hauer's affidavit does not clearly answer this question.

² It is unclear why Gowadia would tell Lippold to forward all further inquiries to Hauer, while simultaneously giving Lippold a new mailing address.

³ Lippold's May 24, 1995 letter is not part of the record because Lippold was unable to locate his Dean Witter Investigation file. Yet, Lippold must have sent it and Gowadia must have received it because Gowadia noted his exception to it in his November 7 letter to Lippold. Moreover, Lippold must have sent the May 24 letter to the Irvine address. If Lippold had sent the May 24 letter to Gowadia's San Francisco CRD Address, Gowadia would not have received it, just as he did not receive the four requests for information that Hammon sent there.

which she expressed her trust in Gowadia and her satisfaction with his service. On July 16 and 17, 1996, Gowadia sent the DBCC and NASD Regulation Office of General Counsel several letters explaining that: (1) Reynolds had misled him and cheated his customers; (2) RB's complaint lacked merit; and (3) SK's complaint also lacked merit. Gowadia claimed that he had given much of this information to Global and had assumed that Global forwarded it to the NASD.

Discussion

Gowadia's appeal raises two intertwined issues: (1) whether Gowadia received proper notice of the requests for information; and (2) whether Gowadia violated Procedural Rule 8210 and Conduct Rule 2110 by failing timely to respond to those requests for information. After a thorough review of the record and for the reasons discussed below, we find that Gowadia did receive proper notice of the requests and that he did violate Procedural Rule 8210 and Conduct Rule 2110 by failing to respond timely.

Gowadia received sufficient notice of the requests for information. Hammon properly mailed four requests for information to Gowadia's CRD Address. Procedural Rule 9134 provides 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." A registered person has "a continuing duty to notify the Association . . . of his current address and to receive and read mail sent to him." In re John G. DeGolyer, 46 S.E.C. 324, 327 (1976). See also In re Zester Herbert Hatfield, 48 S.E.C. 958, 961 (1988). When Gowadia decided to leave the country in June of 1994, he was obligated to change his CRD Address. He failed to do so.⁴

Gowadia remained subject to this duty despite terminating his association with Reynolds in June of 1994. In re William T. Banning, 50 S.E.C. 415 (1990) (continuing duty to provide a current address applies to associated person who terminated association with member and later changed his address without notifying the Association). This is particularly applicable here because the four requests for information sent to Gowadia at his CRD Address related to customer complaints about conduct which occurred during Gowadia's association with member firms. See In re Reed Hatkoff, 51 S.E.C. 991 (1994). Any other rule would permit "an individual purposely to evade jurisdiction simply by moving without leaving a forwarding address." In re Alan Howard Gold, 51 S.E.C. 998, 1001 (1994) (applying NYSE rule).

The record also establishes that Gowadia had actual notice of the Association's requests for information no later than June of 1995, yet he failed to respond until after a default decision was entered

⁴ Moreover, Gowadia agreed in his Form U-4 to keep his address with the NASD current and to accept service of NASD documents at the address listed in the NASD's records. See In re Nazmi Hassaanieh, Exchange Act Rel. No. 35029 (November 30, 1994).

against him in April of 1996. Gowadia admits that he spoke with Hammon in early June and that Hammon informed him of the pending complaint. Gowadia gave Hammon a new address to which Hammon could mail the complaint and requests for information but then failed to monitor that address for incoming mail. It is inexplicable that Gowadia should tell Hammon this new address, leave the country without informing Hammon, and then fail to follow-up with Hammon during his absence or upon returning in the Fall.⁵

Having concluded that Gowadia received adequate notice of the requests for information and complaint, the next issue is whether Gowadia violated Procedural Rule 8210 and Conduct Rule 2110. Procedural Rule 8210 authorizes Association staff, 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); In re Michael David Borth, 51 S.E.C. 178 (1992).

There is no doubt that Gowadia failed to respond fully and promptly to Hammon's requests for information. Gowadia argued that he is not responsible for his failure to respond because: (1) he provided responses to Global and assumed that Global would pass those responses along to the Association; and (2) Lippold knew that Gowadia was represented by an attorney but failed to inform Hammon to send copies of the requests for information to Gowadia's attorney. We reject both of these arguments as a matter of law. The duty to respond to requests for information is an individual one and cannot be shifted to others. In Borth, the Securities and Exchange Commission ("SEC") rejected the respondent's argument that his failure to respond was excusable because he had relayed the complaint to his firm's attorney. 51 S.E.C. at 180. The SEC stated that the respondent's attempt to shift responsibility for complying with the request to the firm's attorney did not abrogate the respondent's personal duty to provide the requested information. See also In re John A. Malach, 51 S.E.C. 618 (1993) (respondent cannot shift duty to respond to former firm).

In any event, the record does not support Gowadia's arguments. First, there is no evidence in the record that Gowadia responded to the requests for information regarding the customer complaints listed on Reynolds' or Smith Barney's Form U-5 filings. Second, although Gowadia provided Global with responses to customers' complaints, he did not and could not have provided that information to NASD Regulation in response to Hammon's requests for information, because Hammon issued those requests after Gowadia resigned from Global's employ. It was improper for Gowadia to assume that

⁵ Gowadia claimed that he never received Hammon's June 2 letter enclosing the complaint and requests for information. We find this claim not credible because he received Lippold's May 24 letter at the same address. Assuming, arguendo, that Gowadia did not receive Hammon's June 2 letter, he offered no explanation for his failure to notify Hammon that the letter never arrived.

responding to Global was sufficient. Third, there is no evidence in the record that Gowadia ever told Hammon that Gowadia had already provided Global with his responses.

There also was no evidence of a miscommunication between Lippold and Hammon. As a threshold matter, there would have been no room for miscommunication had Gowadia updated his CRD Address as required. The evidence shows that the alleged miscommunication -- Lippold's failure to tell Hammon about Gowadia's attorney -- did not arise until late in May 1995, when Gowadia allegedly first told Lippold to forward further inquiries to Hauer. This was almost one full year after Siemens sent Gowadia the first request for information and months after Gowadia resigned from Reynolds and left the country without updating his CRD Address. Gowadia could have cleared up this perceived confusion when he called Hammon in late May of 1995, but Gowadia admittedly failed to tell Hammon about Hauer and then failed to follow-up with Hammon when Hammon's June 2 letter vanished. Finally, it was unreasonable for Gowadia to assume that Hauer's participation in Gowadia's Dean Witter Arbitration would signal either Lippold or Hammon that Hauer would represent Gowadia in any NASD disciplinary proceedings, even those occurring in San Francisco.

Accordingly, we affirm the DBCC finding that Gowadia violated Procedural Rule 8210 as alleged in the complaint. We also find that Gowadia's conduct did not comport with high standards of commercial honor and, therefore, violated Conduct Rule 2110.

Sanctions

The NASD Sanction Guidelines ("Guidelines") recommend a fine of \$1,000 to \$20,000 and a bar when an individual has not responded in any manner to requests for information, or a suspension of six months to two years if mitigation exists.⁶ As described above, Procedural Rule 8210 is a vital investigatory tool for the NASD and Gowadia's failure to respond to the requests for information is a serious offense. Gowadia completely ignored his duty to maintain a current address in NASD records and therefore impeded the NASD's regulatory obligation to investigate allegations of misconduct and to protect the investing public.

While Gowadia did violate Procedural Rule 8210 as alleged in the complaint, we find that a bar is not appropriate in this case. Gowadia believed incorrectly that he had responded to the customer complaints lodged by Global's customers and presented documentation to that effect. Gowadia also claimed incorrectly that his attorney was handling his disciplinary matters during part of his absence from the country. Gowadia has taken steps, albeit post-complaint, to address the outstanding requests for information. Although these are not defenses to his conduct, we may consider them in fashioning a remedial sanction.

⁶ See Guidelines (1993 ed.) at 20 (Failure to Respond or Respond in a Timely Manner to the NASD).

We find that a censure, \$10,000 fine, and a one-year suspension from association in all capacities is an appropriate sanction in this case. In addition, we find Gowadia's knowledge of NASD Regulation rules and procedures to be woefully inadequate. To protect the investing public, we order that Gowadia requalify by examination upon completing his suspension.

Accordingly, we order that Gowadia be censured; fined \$10,000; suspended in all capacities for one year; required to requalify by examination as a general securities representative following completion of his suspension; and assessed \$827.90 in DBCC costs and \$750 in appeal costs.⁷ The suspension imposed herein will commence on a date to be set by the President of NASD Regulation, Inc.

On Behalf of the National Business Conduct Committee,

Joan C. Conley, Corporate Secretary

⁷ We note that these sanctions are consistent with the applicable NASD Sanction Guideline.

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 be summarily 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 be summarily revoked for non-payment.