

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

The Department of Enforcement,

Complainant,

vs.

Toni Valentino  
Boca Raton, Florida,

Respondent.

DECISION

Failure to Provide  
Information Proceeding

No. FPI010004

Dated: May 21, 2003

**Where respondent, who was a registered individual, refused to appear for on-the-record testimony, Hearing Panel found that respondent violated NASD Procedural Rule 8210. Held, Hearing Panel's findings and sanction of a bar affirmed.**

**Appearances**

For the Complainant Department of Enforcement: Samuel Israel, Esq, David R. Sonnenberg, Esq., NASD Department of Enforcement.

For the Respondent Toni Valentino: Martin P. Russo, Esq., Kurzman Eisenberg Corbin Lever & Goodman.

**Opinion**

Respondent Toni Valentino ("Valentino") appealed pursuant to NASD Procedural Rule 9543 a March 25, 2002 decision of an NASD Hearing Panel.<sup>1</sup> We affirm the Hearing Panel's

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<sup>1</sup> The Department of Enforcement served Valentino with a Notice of Intent to Suspend on October 26, 2001, under NASD Procedural Rule 9541(b), for her refusal to appear for on-the-record interviews scheduled for February 20 and October 25, 2001. On October 31, 2001, Valentino requested a hearing, which was held on December 19, 2001. The Hearing Panel

[Footnote continued on next page...]

finding that Valentino failed to appear for two on-the-record interviews. We also affirm the Hearing Panel's imposition of a bar and assess hearing and appeal costs on Valentino.

**I. Background**

Valentino worked as a sales assistant in the securities industry from 1989 until October 1996, when she became registered as a general securities representative with Gruntal & Co., L.L.C. ("Gruntal & Co."). Valentino was associated with Gruntal & Co. in that capacity until she terminated her association with the firm in August 1998. In May 2000, Valentino associated with another member firm as a general securities representative and remained associated with that firm until she terminated her association with the firm in October 2000.

**II. Facts**

NASD's Department of Enforcement conducted an investigation of possible fraudulent activities by D.L. Cromwell Investments, Inc. ("D.L. Cromwell") that involved the private placement and trading in the securities of Pallet Management Systems, Inc. ("Pallet"). During the course of its investigation, Enforcement identified Valentino as an individual who might have relevant information. Valentino's husband, who co-owned D.L. Cromwell and served as its president, was also under NASD investigation and had received notice from criminal authorities that he was the target of a federal grand jury investigation. During Valentino's association with Gruntal & Co., her brokerage customer purchased 185,000 units of Pallet from D.L. Cromwell and later sold 160,800 of the units back to D.L. Cromwell. Enforcement staff sought to interview Valentino with respect to these facts.

On November 30, 2000, Enforcement staff sent a written request to Valentino scheduling an on-the-record interview of her for January 4, 2001 at NASD's office located in Washington, D.C. By letter dated December 13, 2000, Enforcement advised Valentino's attorney that it had rescheduled Valentino's testimony from January 4 to January 24, 2001 to accommodate her schedule.

By letter dated January 12, 2001, Valentino's attorney advised Enforcement that he had just learned from Valentino that surgery that had been scheduled for her infant for January 3, 2001 had been rescheduled to January 16, 2001. Based on this change in surgery dates, Valentino's attorney requested that Enforcement move the location of Valentino's January 24, 2001 testimony from Washington, D.C. to Florida so that she would not need to travel from home for the interview. Alternatively, Valentino's attorney suggested that Valentino's testimony be rescheduled to some time in the middle of February 2001. Valentino's attorney subsequently

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issued its decision and imposed the sanction of a bar. Under NASD Procedural Rule 9543, a party sanctioned under the rule has the right to appeal to the NAC.

advised Enforcement by telephone that the child's surgery had been postponed from January 16 to March 2001. By letter dated January 19, 2001, Enforcement informed Valentino's attorney that the January 24, 2001 date for Valentino's testimony would remain unchanged, given that the surgery had been postponed to March 2001.

On January 22, 2001, Valentino's attorney sent Enforcement a letter informing staff that because Valentino's child was undergoing further testing, Valentino would not be prepared to provide testimony on January 24, 2001. Enforcement accommodated Valentino by advising Valentino's attorney by letter dated January 25, 2001 that Enforcement had rescheduled Valentino's testimony from January 24 to February 20, 2001. The January 25, 2001 letter also informed Valentino's attorney that Enforcement would not move the site of the testimony from Washington, D.C. to Florida.

On February 12, 2001, Valentino's attorney sent Enforcement a letter acknowledging staff's authority to designate the location where interviews will be conducted, but stated that his client had concluded that her "maternal obligations" to her infant child "far outweigh[ed] [her obligations under] NASD Procedural Rule 8210(1)." After Valentino failed to appear for the February 20, 2001 interview, Enforcement notified Valentino's attorney by letter dated February 20, 2001 that Valentino was in violation of Procedural Rule 8210 because she had failed to appear for her on-the-record interview. The letter further stated that if Valentino wanted staff to consider rescheduling her interview to a Florida location, she had to provide Enforcement with a list of five dates between March 12 and April 6, 2001 on which she would be available for testimony in Florida.

On May 9, 2001, after Valentino and her attorney failed to respond to Enforcement's February 20, 2001 letter, Enforcement sent Valentino a letter, with a copy to her attorney, directing her to appear for an on-the-record interview on June 28, 2001 at NASD's office located in Boca Raton, Florida. By letter dated June 18, 2001, Valentino's attorney stated that although he previously had confirmed with Enforcement that June 28, 2001 was an "appropriate" date for Enforcement's interview of Valentino, he now realized that he had a conflicting appointment with the SEC on that date.

In a letter dated July 6, 2001, Enforcement advised Valentino's attorney that it had postponed Valentino's June 28, 2001 interview because of his unavailability. The letter further advised Valentino's attorney to select three dates from 15 suggested alternative dates in July and August 2001 and to give staff the selected dates by July 13, 2001. The deadline passed without a response from Valentino or her attorney.

By letter dated July 16, 2001 to Valentino, which was copied to Enforcement, Valentino's attorney advised Valentino that he had been named in a criminal complaint in the Eastern District of New York and that, therefore, he would not have the time necessary to devote to her case. By letter dated July 17, 2001, the attorney who represented Valentino's husband informed Enforcement that Valentino was in the process of seeking new counsel, and that she would instruct her new counsel to contact Enforcement staff. The attorney also represented that

Valentino would be unavailable to testify during the first two weeks of August 2001 because she would be out of town.

On August 13, 2001, Enforcement sent Valentino a letter advising her that she had failed to respond to its July 6, 2001 letter to her attorney (a copy of which had been sent to Valentino) that instructed Valentino to notify Enforcement about her available dates. Enforcement further advised Valentino in its August 13, 2001 letter that staff had rescheduled Valentino's on-the-record interview for August 28, 2001, in Washington, D.C. in accordance with the terms set forth in its July 6, 2001 letter.

By letter dated August 24, 2001, Valentino's new attorney informed Enforcement staff that he had been retained to represent Valentino. The attorney asked that Valentino's August 28, 2001 testimony be postponed because he would be on vacation on the date of the scheduled interview. He also asked NASD to allow him some time to learn the facts of the case before requiring him to discuss the issue of Valentino's on-the-record interview with Enforcement staff.

In a letter dated October 11, 2001, Enforcement reminded Valentino's attorney that staff had asked him in a telephone conversation on August 24, 2001 to provide a list of dates on which Valentino would be available for testimony in its offices in Washington, D.C. The October 11, 2001 letter noted that Valentino's attorney had contacted staff by telephone on September 21, 2001, and had advised staff that Valentino preferred not to travel to Washington, D.C. for her on-the-record interview as a result of the events of September 11, 2001. The staff's October 11, 2001 letter also reminded Valentino's attorney that on October 9, 2001 staff had informed him that it would not move the location of Valentino's testimony and that it had given him a list of five days in October 2001 on which Enforcement would be available to conduct Valentino's on-the-record review. Enforcement's October 11, 2001 letter further advised Valentino's attorney that, because staff had not received a response as to which of the five dates that Valentino preferred, staff had scheduled her on-the-record interview for October 25, 2001, at its offices in Washington, D.C.

By letter dated October 12, 2001, Valentino's attorney advised Enforcement that Valentino would not attend the October 25, 2001 interview because NASD was unwilling to hold the interview in a location other than Washington, D.C. The letter further advised Enforcement that Valentino was unwilling to fly to Washington, D.C. to attend the interview following the events of September 11, 2001. Valentino's attorney also noted that it was difficult for Valentino to leave Florida because she was the primary caregiver to her two young children.

On October 18, 2001, Enforcement sent Valentino a letter, with a copy to her attorney, advising Valentino that staff had relocated her on-the-record interview to its offices in Boca Raton, Florida in order to accommodate her needs, and that the date of the interview would remain October 25, 2001. In a letter dated October 22, 2001, Valentino's attorney informed Enforcement that Valentino would not appear for the scheduled interview on October 25, 2001 in Boca Raton, Florida. Valentino's attorney advised Enforcement that Valentino would not testify because an "appeal" was pending in the United States Court of Appeals for the Second Circuit that, according to Valentino's attorney, had a "direct bearing on Ms. Valentino's decision whether

to testify." Valentino's attorney requested that NASD adjourn Valentino's on-the-record interview until after the Second Circuit ruled on the appeal.

By letter dated October 23, 2001, Enforcement informed Valentino's attorney that it would not adjourn Valentino's testimony pending the Second Circuit's ruling in the case of D.L. Cromwell v. NASD Regulation, Inc.,<sup>2</sup> and noted that Valentino was not a party to the case and that, contrary to Valentino's attorney's assertion, the case would not affect Valentino's testimony. Valentino did not appear for testimony on October 25, 2001.

On October 26, 2001, Enforcement served Valentino with a Notice of Intent to Suspend under NASD Procedural Rule 9541(b) for her refusal to appear for on-the-record interviews scheduled for February 20 and October 25, 2001. Valentino responded by requesting a hearing under NASD Procedural Rule 9542(a).

Valentino participated in a hearing, which was held on December 19, 2001 in Washington, D.C., and gave the following explanation for not appearing for her scheduled on-the-record interviews. With respect to the interview that was scheduled for February 20, 2001, Valentino testified that at the time of the scheduled interview she was dealing with her infant's recurrent ear infections and the prospect that her child was going to need surgery so that tubes could be inserted into the child's inner ears. Valentino further testified that it was later determined that surgery would not be necessary. With respect to the interview that was scheduled for October 25, 2001, Valentino testified that she did not want to fly to Washington, D.C. to attend the interview because of the continued warnings about possible terrorist attacks following the events of September 11, 2001. When questioned specifically, Valentino, also admitted that she had been reluctant to do anything that would jeopardize her husband.

### **III. Discussion**

Valentino does not dispute that she violated Procedural Rule 8210 by failing to appear for two on-the-record interviews with Enforcement staff. It is also not in dispute that Valentino received adequate notice of the requests for her on-the-record interviews. After carefully reviewing the record, we affirm the Hearing Panel's findings that Valentino failed to respond to Enforcement staff's requests for an on-the-record interview, in violation of Procedural Rule 8210.

The purpose of Procedural Rule 8210 is to allow NASD, in the course of its investigations, to obtain information from its members orally, in writing, or electronically "with respect to any matter involved in [an] investigation." See Procedural Rule 8210(a)(1). It is well established that because NASD lacks subpoena power over its members, a failure to provide

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<sup>2</sup> See D.L. Cromwell v. NASD Regulation, Inc., 132 F. Supp. 2d 248 (S.D.N.Y. 2001), aff'd, 279 F.3d 155 (2d Cir. 2002), cert. denied, 123 S.Ct. 580 (2002).

information fully and promptly undermines NASD's ability to carry out its regulatory mandate. Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table).

As an individual associated with a member firm, Valentino had a duty to cooperate fully and promptly with NASD requests for on-the-record interviews under Procedural Rule 8210.<sup>3</sup> The record establishes that instead of cooperating with NASD, over a one-year period Valentino continuously made excuses for not appearing for her scheduled on-the-record interviews, despite Enforcement's numerous accommodations to Valentino's schedule.

It is also well settled that respondents cannot impose conditions on their responses to NASD's inquiries. Sundra Escott-Russell, Exchange Act Rel. No. 43363, 2000 SEC LEXIS 2053 at \*11 (Sept. 27, 2000). Valentino violated that principle when she refused to appear for the October 25, 2001 interview while the D.L. Cromwell case was pending appeal. Moreover, Valentino was "not entitled as a matter of right" to postpone the dates set for her Procedural Rule 8210 testimony, regardless of the potential for criminal charges to be filed against her husband.<sup>4</sup> See, e.g., Department of Enforcement v. Levitov, Complaint No. CAF980025, 1999 NASD Discip. LEXIS 30 at \*12 (NAC Nov. 1, 1999).

Based on the uncontroverted evidence, we find that Valentino failed to respond to staff's requests for her to appear for on-the-record testimony on February 20, 2001 and October 25, 2001, in violation of Procedural Rule 8210.

#### **IV. Sanctions**

The NASD Sanction Guideline ("Guideline") for failure to respond provides that "if the individual did not respond in any manner, a bar should be standard."<sup>5</sup> The Guideline also recommends suspending the individual in any or all capacities for up to two years in cases where mitigation exists.

We affirm the Hearing Panel's imposition of a bar on Valentino for failing to appear for on-the-record interviews on February 20 and October 25, 2001. We find that there are no facts in mitigation to lower the standard sanction of a bar.<sup>6</sup> Valentino's disregard of her obligation to

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<sup>3</sup> See Brian L. Gibbons, 52 S.E.C. 791 (1996).

<sup>4</sup> As noted, during the period that Enforcement was seeking Valentino's on-the-record testimony, her husband had already been informed that he was the target of a criminal investigation by a federal grand jury.

<sup>5</sup> See Guidelines (2001 ed.) at 39 (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210).

<sup>6</sup> We note that this sanction is consistent with the applicable Guideline.

testify in response to Enforcement staff's repeated attempts to arrange an on-the-record interview directly undermined NASD's regulatory responsibilities and its efforts to investigate possible fraudulent activity by D.L. Cromwell.<sup>7</sup> District Bus. Conduct Comm. v. Chlowitz, Complaint No. C02980025, 1999 NASD Discip. LEXIS 31 (NAC Nov. 4, 1999).

Valentino argues that the Hearing Panel did not consider her reliance on counsel as a mitigating circumstance. The Guidelines list as a principal consideration whether the respondent has demonstrated reasonable reliance on competent legal advice.<sup>8</sup> Valentino has not shown that she reasonably relied on competent legal advice. Moreover, Valentino cannot shift to her attorneys or anyone else her responsibility to comply with NASD's requests. See Sundra Escott-Russell, Exchange Act Rel. No. 43363, 2000 SEC LEXIS 2053 at \* 11 (Sept. 27, 2000); Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994). Thus, we find no mitigation in Valentino's claim that she decided not to comply with Enforcement's requests for interviews on the basis of advice of counsel.

Valentino also argues that she did not understand the detrimental effect that her refusal to testify would have on her career in the securities industry. This argument is unavailing. As an individual registered with NASD, Valentino agreed "to abide by its [rules], which are unequivocal with respect to the obligation to cooperate with the NASD." Brian L. Gibbons, 52 S.E.C. 791, 794 n. 12 (quoting Michael David Borth, 51 S.E.C. 178, 180 (1992)). The duty to respond to requests for information under Procedural Rule 8210 is an individual one. Therefore, Valentino was solely responsible for complying with Enforcement's requests for testimony. Michael David Borth, supra, at 181.

The evidence establishes that Enforcement staff went to great lengths to accommodate Valentino's personal concerns by continuously changing the dates and locations of her testimony. Notwithstanding the extraordinary accommodations made by Enforcement, Valentino failed to provide the requested testimony.

Additionally, throughout this matter, Valentino offered an ever-shifting number of excuses for why she could not comply with Enforcement's Procedural Rule 8210 requests for testimony. Valentino originally claimed that she could not travel from her home in Florida to Washington, D.C. to be interviewed because of her child's "severe" medical condition. After Enforcement had changed the date of Valentino's testimony several times to accommodate her schedule and the schedule of her attorneys, Valentino's attorney advised Enforcement that Valentino would not fly to Washington to attend the interview that Enforcement had scheduled to take place on October 25, 2001 in Washington, D.C. Valentino's attorney cited the events of

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<sup>7</sup> The applicable Guideline lists as principal considerations in determining sanctions the nature of the information requested and whether the requested information was provided. Id.

<sup>8</sup> See Guidelines, Principal Consideration No. 7, at 9 (2001 ed.).

September 11, 2001 and the fact that Valentino was the primary caregiver to her two young children as reasons for Valentino's reluctance to leave Florida to attend the interview in Washington, D.C. Enforcement ultimately accommodated Valentino's desire not to travel and scheduled her interview to take place in Florida on October 25, 2001. Notwithstanding Enforcement's decision to change the location of the interview to accommodate Valentino's schedule, her attorney notified staff that she would not appear for the interview because the appellate court was considering an appeal in the D.L. Cromwell case that her attorney argued would have a direct effect on Valentino's decision about whether to testify.<sup>9</sup> There is no requirement, however, for NASD to postpone investigations or investigative interviews when there are pending criminal investigations or charges that may directly or indirectly affect the individual whose testimony NASD requests under Procedural Rule 8210. See Department of Enforcement v. Levitov, *supra*, at \*15.

Thus, based on the record evidence and the lack of any mitigating factors, we order that Valentino be barred from association with any NASD member firm in any capacity. We also assess hearing costs in the amount of \$1,759.07, appeal costs in the amount of \$1,000, and transcript costs for the appeal hearing in the amount of \$432.34. The bar will be effective as of the date of this decision.<sup>10</sup>

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney  
Senior Vice President and Corporate Secretary

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<sup>9</sup> We note that at the time that Valentino identified the D.L. Cromwell case as a reason for not testifying, the D.L. Cromwell appeal had been pending in the appellate court for more than half a year, yet Valentino had never before raised it as a basis for not complying with the Procedural Rule 8210 requests.

<sup>10</sup> We also have considered and reject without discussion all other arguments advanced by Valentino.