NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. FRANK PETER QUATTRONE (CRD #1312126), Los Altos Hills, CA, Respondent.	Disciplinary Proceeding No. CAF030008 Hearing Officer—Andrew H. Perkins **HEARING PANEL DECISION** January 16, 2004

Respondent failed to respond to a request for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Majority of Hearing Panel fined the Respondent $30,000 and suspended him in all capacities for one year. If he fails to comply fully and unconditionally with the request for information within one year, the Respondent is barred. The Hearing Officer dissented as to sanctions finding insufficient mitigation to warrant a sanction of less than an immediate bar.

Appearances:

For the Department of Enforcement: Rory C. Flynn, Leo F. Orenstein, David R. Sonnenberg, and Gary A. Carleton, NASD, Washington, DC.

For Frank Peter Quattrone: John W. Keker, Elliot R. Peters, and Ethan A. Balogh, KEKER & VAN NEST LLP, San Francisco, CA; Howard E. Heiss, Carl H. Loewenson, Jr., and Jonathan P. Bach, MORRISON & FOERSTER LLP, New York, NY; Kenneth G. Hausman, Barbara A. Winters, and Danial B. Asimow, HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN, San Francisco, CA.

DECISION

I. INTRODUCTION

The Department of Enforcement ("Department") brought this proceeding against Frank Peter Quattrone ("Quattrone" or the "Respondent") after he refused to testify at an on-the-record interview in February 2003. The Department charged Quattrone with violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Quattrone answered the Complaint and denied any wrongdoing. Quattrone asserted that he had cooperated fully with the Department's investigations until he was notified by the Attorney General's Office of the State of New York and by the United States Attorney's Office for the Southern District of New York that he was the target of related criminal investigations being conducted by both offices. Once he learned of those criminal investigations, Quattrone asserted that, under the Fifth Amendment of the United States Constitution, he could not be compelled to give testimony in any proceeding that might incriminate him in the ongoing criminal investigations. Quattrone asserted that forcing him to waive his constitutional right against self-incrimination violates NASD's statutory duty to provide him with a fair opportunity to defend himself. Accordingly, he requested that NASD delay his on-the-record interview until the criminal investigations ended. Quattrone further asserted that NASD lacked a legitimate regulatory purpose when it requested his testimony in February 2003.

The Department advised Quattrone that the Fifth Amendment did not apply to NASD disciplinary proceedings and refused his request to postpone the interview until the criminal proceedings ended. The Department then promptly filed the Complaint initiating this proceeding.

II. PROCEDURAL BACKGROUND

The Department filed the Complaint on March 6, 2003, and the First Amended Complaint on June 6, 2003. The Department eliminated a number of factual allegations in the First Amended Complaint, but charged Quattrone with the same violations. Quattrone timely answered both Complaints.

On April 17, 2003, the Department filed a Motion for Summary Disposition, and, on June 30, 2003, the Department filed a Superseding Motion for Summary Disposition ("Motion").[1] In support of the Motion, the Department filed a Memorandum of Points and Authorities, a Statement of Undisputed Facts, a Declaration of Nicole Bocra[2] ("Bocra Decl."), and 19 exhibits. On July 29, 2003, Quattrone filed his opposition to the Department's Motion, together with a Statement of Additional Undisputed Facts and the Declarations of Howard E. Heiss ("Heiss"), Kenneth G. Hausman, and Barbara A. Winters.

On October 28, 2003, the Hearing Panel granted the Department's Motion on the issue of liability and continued the proceeding for a hearing on the issue of sanctions only. The grounds for the Hearing Panel's ruling are discussed below.

The hearing was held on November 11 and 12, 2003, in San Francisco, CA, before a hearing panel composed of the Hearing Officer and two current members of NASD's District 1 Committee. The Department did not call any witnesses to testify at the hearing. The Respondent

[1] The Department withdrew the original Motion for Summary Disposition and accompanying papers.

[2] Nicole Bocra was an investigator with NASD's Department of Enforcement.

testified on his own behalf and called four additional witnesses.[3] The Parties also introduced 20 exhibits into evidence.[4]

III. FACTS

A. Quattrone's Background in the Securities Industry

Quattrone first became employed in the securities industry in June 1977 as a corporate financial analyst with Morgan Stanley & Co. in New York.[5] Between September 1979 and June 1981, he attended Stanford University where he earned a Masters in Business Administration. Quattrone then rejoined Morgan Stanley. Over the succeeding years, Quattrone began working with technology companies, ultimately becoming the head of Morgan Stanley's technology group. Quattrone left Morgan Stanley in 1996 to form DMG Technology Group, an investment banking business for Deutsche Bank Securities Inc.[6]

In early 1998, Credit Suisse First Boston Corporation ("CSFB" or the "Firm") recruited Quattrone to head its Global Technology Group ("Tech Group").[7] Quattrone joined CSFB in July 1998 and served as the Managing Director of the Tech Group until February 3, 2003, when CSFB announced that it was placing Quattrone on administrative leave "pending completion of an investigation" into whether he had acted improperly when he sent an e-mail, and permitted a

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[3] References to the hearing transcript are cited as "Tr.__"

[4] References to the Complainant's exhibits are cited as "C__," and references to the Respondent's exhibits are cited as "R__." The following 20 exhibits were admitted into evidence: R67, R70, R83, R87, R91, R111, R121, R123, R179, R181, C13, C5, C7, C8, C9, R500, R501, C12, C14, and R134. At the conclusion of the hearing, the Respondent submitted three proffers of evidence that the Hearing Officer had excluded. The proffered exhibits are attached to the record of this proceeding as "supplemental documents" in accordance with Procedural Rule 9267(b).

[5] Dept's Statement of Undisputed Facts ¶ 2; Tr. 168.

[6] Tr. 168.

[7] *Id.* at 232.

subordinate to send a similar e-mail, to some CSFB employees in December 2000 regarding document retention issues.[8]

Quattrone first registered as a General Securities Representative in October 1984 and as a General Securities Principal in August 1991.[9] On March 4, 2003, Quattrone resigned his position with CSFB.[10] He has not been registered with NASD or associated with an NASD member firm since March 4.[11]

Quattrone had not been the subject of a disciplinary charge or proceeding before this proceeding was filed on March 6, 2003.[12]

B. The Underlying Investigations

In 2002, the Department commenced two investigations that centered on the Tech Group's practices and policies.[13] The first focused on "spinning"—the practice of allocating initial public stock offerings to the personal brokerage accounts of corporate or venture-capital executives—so the shares can then be sold, or "spun," for quick profits—in a potential bid to get future business from the executives' companies (the "Spinning Investigation"). The second focused on conflicts of interest between research analysts and investment bankers that resulted in pressures on analysts to compromise the analysts' independence and objectivity (the "Analyst Investigation"). In addition, in connection with the investigations, the Department examined the

[8] Dept's Statement of Undisputed Facts ¶ 5; Bocra Decl. ¶ 7.

[9] Dept's Statement of Undisputed Facts ¶¶ 3–4.

[10] *Id.* ¶ 6.

[11] Tr. 168–69.

[12] *Id.* at 174.

[13] Dept's Statement of Undisputed Facts ¶ 1.

Tech Group's organizational structure and the adequacy of its supervisory systems and practices.[14]

In connection with these two investigations, the Department questioned a number of CSFB employees, including Quattrone. The Department questioned Quattrone for two days in October 2002.[15] Quattrone cooperated fully and timely with all of the Department's requests for information in 2002.

By letter dated January 16, 2003, following a meeting with Quattrone's counsel that day, the Department advised Quattrone that it had made a preliminary determination to recommend a disciplinary proceeding against him for violations of certain NASD rules and, if he wished, he could submit a "Wells" Submission no later than February 6.[16] While the Department's letter does not specify the contemplated charges, from the Wells Submission Quattrone submitted on February 13,[17] the Hearing Panel notes that the contemplated charges involved spinning and supervisory issues.

On February 3, 2003, before Quattrone made his Wells Submission, CSFB issued a press release under the headline, "CSFB Places Frank Quattrone on Administrative Leave Pending Completion of Investigation."[18] CSFB announced that it took this action

> based on new information learned on Friday, January 31 … [that] raised questions about [his] response to an inquiry last week by the Firm about whether he was aware of pending investigations in 2000 when he sent an e-mail to employees

[14] *Id.* ¶ 7.

[15] *Id.* ¶ 9. The transcripts of his on-the-record interviews are Exhibits R67 (Oct. 1, 2002) and R70 (Oct. 3, 2002).

[16] R83.

[17] R111. The Department granted Quattrone an extension of time from February 6 to February 13. (Bocra Decl. ¶ 6.) Quattrone supplemented his Wells Submission on February 26, which is Exhibit R121.

[18] C5.

> regarding document retention issues … [and] about whether [he] acted appropriately in December 2000 when he sent that e-mail and permitted a subordinate to send a similar e-mail to employees.[19]

The press release further stated that CSFB had "notified the appropriate government and regulatory authorities about the new information."[20]

CSFB's release on February 3, 2003, in which CSFB referred to newly learned information about Quattrone's December 2000 e-mail, triggered immediate governmental and regulatory action.[21] Quattrone's attorneys testified that on the morning of February 3 they received a telephone call from a representative of the New York Attorney General's Office and another in the afternoon from Steve Peikin, an Assistant United States Attorney in the U.S. Attorney's Office for the Southern District of New York.[22] Each official notified Quattrone's counsel that his office was opening a criminal investigation into possible improper document destruction at CSFB. Peikin further advised that his office was going to launch a grand jury investigation and that he was about to issue a grand jury subpoena for Quattrone's testimony on February 12, 2003.[23] Then, later in the afternoon, Quattrone's attorneys received a letter from Bocra by facsimile, which, pursuant to NASD Procedural Rule 8210, requested that Quattrone appear on February 12, 2003, for an on-the-record interview (the "Rule 8210 Request").[24]

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[19] *Id.*

[20] *Id.*

[21] Quattrone's attorneys testified that other news articles ran the morning of February 3 indicating that Quattrone may face criminal charges for document destruction. (Tr. 40, 93; Heiss Decl. in Supp. of Quattrone's Opp'n to Dept's Mot. for Summ. Disposition ¶ 4.)

[22] Tr. 40, 93–95.

[23] *Id.*

[24] R87 (Letter from Bocra to Howard E. Heiss, Esq. of February 3, 2003.).

C. The Rule 8210 Request

The Rule 8210 Request stated that the Department required Quattrone's "further testimony" in an on-the-record interview in connection with NASD file number EAF 020016, the Analyst Investigation. The request made no mention of the document destruction issue, although the Department contends that this was the real subject matter of its further inquiry.[25]

Upon receipt of the Rule 8210 Request, Quattrone's attorneys telephoned Bocra on February 5, 2003, to request a continuance because, among other reasons, they needed time to prepare the Wells Submission that was due shortly.[26] Bocra agreed to extend the date to February 28.[27] Heiss also asked Bocra what the subject matter of the testimony would be. Bocra told Heiss that the subject matter would relate to what had been reported in the press regarding possible document destruction at CSFB and the circumstances surrounding CSFB's decision to place Quattrone on administrative leave.[28]

During this period, Quattrone also was seriously ill. From December 2002 to April 2003, he suffered from mycoplasma pneumoniae, a form of pneumonia often much more severe than viral pneumonia.[29] Between February 11 and 21, 2003, despite intensive medication, Quattrone's condition worsened. On February 21, 2003, Quattrone's treating pulmonologist advised him that it would be very deleterious to his health and recovery for him to travel to Washington, DC and to

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[25] Dept's Statement of Undisputed Facts ¶ 20. The Department contends that it used the Analyst Investigation file number on the Rule 8210 Request as a "matter of expediency." The Department never opened a separate investigation file for the document destruction issue. The Spinning Investigation had been assigned file number EAF 020043.

[26] Tr. 97–98.

[27] C9 (Letter from Bocra to Heiss of February 7, 2003.).

[28] Tr. 96.

[29] R501 (Decl. of Andrew B. Newman, MD, dated Nov. 10, 2003.)

be subject to continuous questioning. His doctor further advised that this type of activity could lead to permanent lung damage.[30]

On February 24, 2003, Heiss telephoned Barry Goldsmith ("Goldsmith"), the Department's head, to request a further extension of Quattrone's on-the-record interview "in light of the continuing dual criminal prosecutions that were being conducted by the U.S. Attorney's Office in Manhattan and by the New York Attorney General's Office."[31] Goldsmith told Heiss that an adjournment was unlikely, but he would consult with other members of his staff. Heiss also had a larger discussion with Goldsmith, trying to persuade him that, because of the circumstances in which Quattrone found himself, it was unfair to require him to give testimony on the exact same subject that was the subject of the two criminal investigations. Goldsmith disagreed. He told Heiss that other people have been in the same or similar circumstances. For example, Goldsmith referred to four individuals at CSFB who had been the subject of an investigation in 2000 and who were sanctioned as a result of their not giving testimony at the same time that they were the subjects of criminal investigations being conducted by the U.S. Attorney's Office in Manhattan. Goldsmith said "he didn't think there was any basis for distinguishing Mr. Quattrone or making an exception for Mr. Quattrone."[32] Heiss also advised Goldsmith of Quattrone's pulmonary condition, which would restrict his travel. Goldsmith said the Department would be sensitive to those concerns and, if need be, Quattrone's testimony could be taken in San Francisco.[33]

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[30] *Id.*

[31] Tr. 100.

[32] *Id.* at 100–01.

[33] *Id.* at 104.

On February 25, 2003, Department counsel confirmed that they would not adjourn Quattrone's on-the-record interview, but they would agree to take his testimony in San Francisco rather than Washington, DC.[34] Heiss followed up with a letter the next day to Goldsmith confirming that Quattrone declined to testify due to the two pending criminal investigations.[35]

On February 27, 2003, David Sonnenberg, Esq. ("Sonnenberg") wrote to Heiss that the Department intended to recommend that a disciplinary action be authorized against Quattrone "based on his refusal to appear for testimony on February 28, 2003, and by conditioning this refusal on the completion of the pending criminal investigations."[36] Sonnenberg explained that there were three reasons why the Department could not agree to the further adjournment Quattrone requested. First, he stated that taking Quattrone's testimony "on matters directly relating to representations he makes in his Wells submissions of February 13 and 26, 2003, as well as with respect to crucial issues regarding document destruction and possible obstruction of justice, is of the utmost importance."[37] This is the first time the Department indicated that it desired to question Quattrone about his Wells Submissions relating to the Spinning Investigation.[38] Second, Sonnenberg pointed out that the investigation could involve others, some of whom are no longer in the industry. Accordingly, time was important because NASD would eventually loose jurisdiction over those individuals who have left the industry. Finally, Sonnenberg

[34] *Id.* at 105.

[35] R123 (Letter from Heiss to Goldsmith of February 26, 2003.).

[36] C12. The letter was hand delivered to Heiss at a meeting concerning Quattrone's Wells Submission.

[37] *Id.* at 1.

[38] The Department explained that it desired to question Quattrone about the Wells Submission because of its unusual factual detail. Although the Department had limited Quattrone to 35 pages, he had attached 148 pages of additional material.

pointed out that the Department had already been flexible in rescheduling his testimony.[39] Ultimately, Sonnenberg asserted that it would not be in the public interest to permit an open-ended extension that was contingent on the completion of two separate criminal investigations.[40]

Quattrone relied upon his attorneys' advice in declining to testify.[41] They insisted that Quattrone not testify in order to preserve his Fifth Amendment right against compelled testimony.[42] His attorneys further advised Quattrone that the Department likely would bring charges against him if he declined to testify.[43] Quattrone understood fully that the Department took the position that his obligation to testify was unconditional.

Upon receipt of Heiss's letter of February 26, 2003, the Department canceled Quattrone's on-the-record interview.[44] Quattrone has never supplied the testimony the Department requested.

D. Quattrone's Proffers of Cooperation

Quattrone was scheduled to appear for his testimony on Friday, February 28, 2003. The following Monday, the Wall Street Journal ran an article stating that Quattrone may be barred for his failure to appear for his on-the-record interview.[45] Three days later, the Department filed two detailed Complaints against Quattrone—one charging him with spinning and supervisory

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[39] C12, at 1–2.

[40] *Id.* at 2.

[41] Tr. 179–80, 196–97.

[42] Dept's Statement of Undisputed Facts ¶ 26. Quattrone's attorneys further advised Quattrone that, if he testified, the Department might share that testimony with the criminal prosecutors. (Tr. 198.)

[43] Tr. 201.

[44] Quattrone was willing to appear at the scheduled on-the-record interview and assert his claim under the Fifth Amendment as the Department questioned him. The Department had requested, however, that the Department be spared the cost of traveling to San Francisco if Quattrone was going to decline to testify. (Tr. 105; Dept's Statement of Undisputed Facts ¶ 30.)

[45] R134.

violations, the second charging him with failing to respond to the Rule 8210 Request. Shortly thereafter, Heiss sent the Department a letter stating that Quattrone's attorneys believed that the criminal investigations could be brought to a quick resolution. In the meantime, they offered to provide information "in a reasonable manner that would accommodate [the Department's] interests."[46] As an example, Quattrone's attorneys suggested that Quattrone could make a "factual proffer [to the Department] relating to the subjects of the investigation following specific interrogatories fashioned by [the Department]."[47] Quattrone's attorneys had reason to believe that this might satisfy the Department's needs because they understood that it had accepted a similar offer from at least one of the other four CSFB brokers that Goldsmith had referenced when he declined Quattrone's request for a delay of his on-the-record interview. Quattrone's attorneys also invited the Department to propose "other reasonable alternatives" to the on-the-record interview.[48] Quattrone made these offers as a stopgap while he attempted to resolve the criminal investigations. He repeatedly made clear his intention to testify as soon as the criminal investigations ended, which he believed would be soon.

The Department flatly rejected Quattrone's offer of cooperation. By letter dated March 12, 2003, the Department advised Quattrone that his offer of a factual proffer was inadequate.[49] The Department saw no value in exploring alternatives to his sworn testimony, nor did the Department determine if Quattrone could answer questions about some subjects, such as the Wells Submission or the Spinning allegations, without implicating his Fifth Amendment concerns.

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[46] R179.

[47] *Id.*

[48] *Id.*; Tr. 111–12.

[49] R181.

Indeed, none of the reasons the Department gave for rejecting Quattrone's offer of cooperation addressed why the Department was not interested in obtaining information from Quattrone in another manner while he attempted to resolve the criminal investigations. The Department set forth the following reasons for rejecting Quattrone's offer of cooperation. First, the Department stressed that, as an associated person, Quattrone was required to give NASD his full cooperation in an investigation. The Department stated that it should not have had to file a formal disciplinary action to obtain his cooperation and pointed out that he is not permitted to impose conditions on his cooperation. Second, the Department pointed out that its investigation centered on Quattrone. For that reason, the Department considered it important to obtain his direct testimony, not the representations of his attorneys. The Department also noted that it wanted to question him about some of the representations and facts in his Wells submission. Next, the Department stated that a proffer does not provide for the free flow of questions and answers. Finally, the Department asserted that it considered it to be essential that it obtain evidence in a form that it can use at a hearing, whether against Quattrone or others. The Department expressed its doubts that a proffer of facts would be admissible at a hearing against others.

The state criminal investigation did end quickly; the federal did not. Quattrone was indicted and stood trial in the federal court for the Southern District of New York. In October 2003, the presiding judge declared a mistrial after the jury was unable to reach a verdict. Quattrone is scheduled to be retried in early 2004.

On October 24, 2003, when it appeared that a mistrial was a possibility, Quattrone's attorneys again offered to meet with the Department to discuss Quattrone's requested testimony.[50] There is no evidence that the Department ever responded to this offer.

IV. CONCLUSIONS OF LAW

A. Motion for Summary Disposition

1. Legal Standard for Summary Disposition

NASD Procedural Rule 9264 states that a Hearing Panel may grant a motion for summary disposition if there is no genuine issue with regard to any material fact, and the party that files the motion is entitled to summary disposition as a matter of law. In cases involving motions for summary disposition, NASD looks to federal law for guidance.[51]

Under Federal Rule of Civil Procedure 56, after which NASD Rule 9264 is patterned,[52] the moving party bears the burden of demonstrating the absence of a genuine issue of material fact.[53] The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[54] Once the moving party has demonstrated that there is no genuine issue of material fact, the burden shifts to the nonmoving party to show otherwise.[55]

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[50] R500 (Letter from Carl H. Loewenson, Jr. to Rory C. Flynn of October 24, 2003.).

[51] *See, e.g., Department of Enforcement v. U.S. Rica Financial, Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (N.A.C. Sept. 9, 2003).

[52] *See generally* NASD Notice to Members 00-56 (Aug. 10, 2000).

[53] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[54] *Department of Enforcement v. Coniglione*, No. C10000140, 2001 NASD Discip. LEXIS 29, at *6 (N.A.C. May 14, 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[55] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986); *Department of Enforcement v. Levitov*, No. CAF980025, 1999 NASD Discip. LEXIS 30, at *11 (N.A.C. Nov. 1, 1999).

"The nonmoving party may not depend solely on denials contained in the pleadings, but must submit specific facts [that create a triable issue]."[56] In so doing, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts."[57]

B. Quattrone's Refusal to Testify

There is no dispute as to the material facts. Quattrone forthrightly admits that he received the Department's requests that he testify at an on-the-record interview, yet he refused to comply so long as he was subject to criminal prosecution on related charges. Nevertheless, Quattrone contended in his Opposition to the Department's Motion for Summary Disposition that NASD cannot sanction him for his refusal to testify because: (1) the Department did not issue the Rule 8210 Request for a legitimate investigative purpose, as required by Procedural Rule 8210; (2) this disciplinary proceeding is barred because it seeks to penalize him for invoking his constitutional right against compelled testimony, in violation of the Fifth Amendment; and (3) this disciplinary proceeding is barred because sanctioning him for asserting his Fifth Amendment right against compelled testimony violates NASD's statutory duties under Sections 15A(b)(8) and (h)(1) of the Exchange Act.[58]

The Hearing Panel considered and rejected each of the Respondent's affirmative defenses. For the following reasons, the Hearing Panel found that the Department had complied with Procedural Rule 8210 and Sections 15A(b)(8) and (h)(1) of the Exchange Act, and that the Fifth Amendment does not apply to NASD investigations or proceedings.

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[56] *Samuel v. Tidewater Marine Servs.*, 943 F. Supp. 644, 646 (E.D. La. 1996).

[57] *Matsushita*, 475 U.S. at 586.

[58] 15 U.S.C. §§ 78o-3(b)(8) & (h)(1).

C. Quattrone's Claim of Improper Purpose

As an individual registered with NASD, Quattrone agreed to abide by its Conduct Rules, which are unequivocal with respect to the obligation to cooperate fully with NASD's requests for information.[59] Quattrone does not argue otherwise. Rather, he assails the Department's motive in issuing the Rule 8210 Request, asserting that the Department issued the Rule 8210 Request in bad faith, with the ulterior motive to "prejudice public opinion and impede Mr. Quattrone's ability to defend himself" against the charges in the Spinning Case.[60] In Quattrone's view, this proceeding is nothing more than an attempt by the Department to score a "quick, high-profile victory," which conduct "stands in stark contrast to [his own] repeated demonstration[s] of good faith."[61]Accordingly, Quattrone contends he cannot be found to have violated Procedural Rule 8210 because the Department did not issue the Rule 8210 Request for a "genuine investigative purpose."[62]

The Hearing Panel rejected Quattrone's arguments. The undisputed evidence shows that the Department properly issued the Rule 8210 Request in connection with an authorized investigation. Although there is considerable debate over the request's scope, there is no question that each topic the Department eventually enumerated was a proper subject of investigation by NASD. Moreover, while the Department did not open a new file to investigate the allegations of document destruction at CSFB, the Department had two open investigations at the time it sent the Rule 8210 Request–the Spinning Investigation and the Analyst Investigation. The Department

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[59] *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994).

[60] Quattrone's Opp'n to Mot. for Summ. Disposition at 12.

[61] *Id.* at 14.

[62] *Id.* at 10.

therefore had the right under Procedural Rule 8210 to request additional information from Quattrone on "any matter involved in [those] investigation[s]."[63] The Hearing Panel finds that Quattrone's conduct in December 2000, involving possible criminal obstruction of the federal grand jury, was sufficiently "involved with" the Spinning and Analyst Investigations to permit the Department to issue the Rule 8210 Request. At the very least, such alleged misconduct involves serious questions about the manner in which Quattrone supervised the Tech Group, a subject that the Department was examining in connection with the open investigations.

Furthermore, Quattrone cannot defend his noncompliance by questioning whether the Department needed the information.[64] Nor can Quattrone question the information's relevance or materiality to the Department's investigation.[65] In short, Quattrone "cannot raise the purpose of the information requests as part of [his] substantive defense."[66] Accordingly, the Hearing Panel found Quattrone's challenge to the purpose of the Rule 8210 Request unavailing.

D. Quattrone's Fifth Amendment Claim

Next, Quattrone asks that this case be dismissed because imposing a sanction under the present circumstances would penalize him for invoking his constitutional right against compelled testimony, in violation of the Fifth Amendment.[67] This is not a novel argument. Indeed, NASD,

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[63] Procedural Rule 8210(a)(1).

[64] *Michael David Borth*, 51 S.E.C. 178, 181 (1992).

[65] *Department of Enforcement v. Sturm*, No. CAF000033, 2001 NASD Discip. LEXIS 24, at *9 (N.A.C. June 27, 2001) (citation omitted).

[66] *Levitov*, 1999 NASD Discip. LEXIS 30, at *13–14.

[67] The Fifth Amendment privilege against self-incrimination, made applicable to the states by the Fourteenth Amendment, embodies the right to be free of self-incrimination compelled by the state. To establish a Fifth Amendment violation, a plaintiff must demonstrate "that in denying the plaintiff's constitutional rights, the defendant's conduct constituted state action." (*Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001)). That is because the Fifth Amendment restricts only governmental conduct, and will

the SEC, and the federal courts consistently have rejected this defense because self-regulatory organizations such as NASD are not government actors.[68] Quattrone argued, however, that none of the cases the Department relied upon takes into consideration two recent legal developments. First, Quattrone argues that NASD's position that it is a private body is contradicted by its own assertion of governmental immunity when it is sued. Second, Quattrone points to the Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), in which the Court held that the "pervasive entwinement" of state officials in the structure of a private corporation—in the absence of any offsetting factors—supported the conclusion that it was engaged in state action. Quattrone contends that *Brentwood* has effectively overruled the authority relied upon by the Department.[69]

For the reasons discussed below, the Hearing Panel found neither argument persuasive and concluded that Quattrone had violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.[70]

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constrain a private entity only insofar as its actions are found to be "fairly attributable" to the government. (*See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

[68] *See, e.g., D.L. Cromwell, Inc. v. NASD Reg., Inc.*, 132 F. Supp. 2d 248, 251-53 (S.D.N.Y. 2001), *aff'd*, 279 F.3d 155 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 580 (2002); *Vladislav Steven Zubkis*, 53 SEC 794, 797 & n.2 (1998) ("It is well established … that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government."); *Dan Adlai Druz*, 52 SEC 416, 429 (1995) (holding that Fifth Amendment privilege against self-incrimination does not apply to self-regulatory organizations such as the New York Stock Exchange). *Cf. Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1200–03 (9th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998) (the NASD's arbitration procedures are not subject to the restrictions on government action imposed by the due process clause of the Fifth Amendment**,** the Seventh Amendment, and the judicial forum clause of Article III of the U.S. Constitution because the NASD is not a government entity); *Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997) (the double-jeopardy clause of Fifth Amendment does not apply to NASD disciplinary proceedings because NASD is not a government agency).

[69] Quattrone's Opp'n to Mot. for Summ. Disposition at 15.

[70] NASD Rule 115 indicates that persons associated with a member shall have the same duties and obligations under NASD's Rules as members. Thus, the ethical standards imposed on members in Rule 2110 apply equally to persons associated with a member.

1. Absolute Immunity

Quattrone cites no case holding that NASD is a governmental entity. Rather, he contends that NASD should be judicially estopped from asserting its private status when it conducts disciplinary proceedings because it has successfully claimed absolute immunity in numerous cases when it has been sued for damages. More precisely, Quattrone contends that NASD has claimed, and federal courts have found, that NASD performs delegated governmental functions and acts in a quasi-governmental capacity when it carries out its regulatory duties under the Securities Exchange Act of 1934. In light of these claims and holdings, Quattrone argues that NASD should be subject to the same constitutional restrictions as the SEC.[71]

Quattrone's argument fundamentally misconceives the doctrine of absolute immunity.[72] The Supreme Court has developed a "functional approach" to analyze whether an official is entitled to absolute immunity.[73] Under this approach, the nature of the function performed is controlling, not the actor's identity.

In applying this analysis to private parties, such as NASD, courts have extended absolute immunity to persons who are functionally comparable to judges, prosecutors, witnesses, and other participants in the judicial process because they perform functions that share characteristics of the judicial process.[74] This analysis does not compel the conclusion that NASD must be considered a

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[71] Quattrone's Opp'n to Mot. for Summ. Disposition at 17–18.

[72] Quattrone also mistakenly states that NASD's assertion of absolute immunity is a recent development. In fact, Quattrone relies on a 1985 decision that granted NASD absolute immunity. (*See Austin Mun. Sec. v. NASD*, 757 F.2d 676 (5th Cir. 1985)).

[73] *See Butz v. Economou*, 438 U.S. 478, 514–15 (1978).

[74] *See Austin Mun. Sec.*, 757 F.2d at 690–91 (noting analogous decisions involving bar association disciplinary committees and arbitrators). *See also Shepard v. Irving*, 204 F. Supp. 2d 902 (E.D. Va. 2002) (granting absolute immunity to public university Honor Council members because they performed quasi-judicial functions); *Alessio v.*

state actor for purposes of application of the Fifth Amendment. Accordingly, the Hearing Panel concluded that Quattrone's argument that NASD should be estopped from asserting its private status is unpersuasive.

E. *Brentwood Academy*

Quattrone contends that the Supreme Court's decision in *Brentwood* reverses the line of cases holding that self-regulatory organizations are not state actors. But *Brentwood* is distinguished easily. In *Brentwood*, the Supreme Court held that a private interscholastic athletic regulatory body engaged in state action when it enforced a rule against a member school. There, the association primarily regulated public schools, and was an entity primarily composed of public school officials—state actors in their own right. The opinion stressed that these public officials acted in their official capacities "to provide an integral element of secondary public schooling," and that in substance the association set binding athletic standards for state schools.[75] The Court reasoned that this "pervasive entwinement" of public school officials in the structure of the association, and the fact that the association had historically regulated state high school athletics in lieu of the state Board of Education, supported its finding that the association's regulatory activity constituted state action. Neither of these factors is present in the circumstances of this case.

Here, unlike the association in *Brentwood*, NASD is a not-for-profit corporation. None of its directors is a government official or appointee, and none of NASD's operations is supported

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NYSE, 258 F.3d 93, 105 (2d Cir. 2001) (holding that NYSE enjoys absolute immunity in the performance of its "quasi-public adjudicatory duties").

[75] 531 U.S. at 299–300.

by public funds.[76] And, with respect to the particular activities Quattrone seeks to have classified as state action—namely NASD's disciplinary process—there is no direct governmental involvement.[77] The fact that NASD is heavily regulated by the SEC does not convert NASD's actions into those of the government.[78] In addition, "[t]he fact 'that a private entity performs a function which serves the public does not make its acts [governmental] action'."[79]

Accordingly, the Hearing Panel concluded that the *Brentwood* decision did not reverse controlling law holding that NASD is not a state actor.

F. Quattrone's Fairness Claim

Finally, Quattrone argued that Sections 15A(b)(8) and (h)(1) of the Exchange Act, which require NASD to provide a fair disciplinary proceeding, compel NASD to permit respondents to assert the Fifth Amendment where they are subject to criminal investigation or prosecution on related charges. This argument has no merit. Nothing in the Exchange Act requires self-regulatory organizations to afford respondents the right against self-incrimination under the Fifth Amendment.[80]

V. SANCTIONS

In the usual case, absent mitigation, the NASD Sanction Guidelines ("Guidelines") for "Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests

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[76] *See Desiderio*, 191 F.3d at 206.

[77] Contrary to Quattrone's argument, the fact that NASD in some cases cooperates with governmental agencies in conducting investigations is of no consequence. (*See D.L. Cromwell*, 279 F.3d at 162–63.)

[78] *See Desiderio*, 191 F.3d at 206.

[79] *San Francisco Arts & Athletics. Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

[80] *See Druz*, 52 SEC at 429 (rejecting claim that the NYSE denied the respondent a fair opportunity to respond to the charges against him due to a pending criminal matter).

Made Pursuant To NASD Procedural Rule 8210" states that a bar should be standard where an individual did not respond in any manner.[81] The Department argues that this is such a case; therefore, it requests that the Hearing Panel impose the "standard" sanction and bar Quattrone from the securities industry.

Quattrone, on the other hand, argues that this is far from an ordinary case, and asks the Hearing Panel to consider a number of mitigating factors. In Quattrone's view, the real purpose underlying the Rule 8210 Request was the Department's gambit to force Quattrone into the untenable position of either sacrificing his Fifth Amendment rights or sacrificing his securities career. Knowing that Quattrone would have to assert the Fifth Amendment in response to the Rule 8210 Request, the Department would be positioned to quickly charge him under NASD Procedural Rule 8210 and seek his bar from the securities industry. Quattrone asks that the Hearing Panel consider this factor in assessing an appropriate sanction even if the Hearing Panel does not consider it a complete defense to the charge. In addition, Quattrone argues that a bar would be grossly disproportionate under the facts and circumstances of this case. Quattrone offers the following mitigating factors from the Guidelines: (1) he cooperated to the fullest extent possible under the circumstances; (2) he reasonably relied upon the advice of counsel; (3) he did not impede the Department's investigation; (4) he has no disciplinary history; (5) he did not engage in a pattern of misconduct; (6) he did not lull the Department into inactivity; (7) he did not

[81] NASD Sanction Guidelines 39 (2001 ed.).

provide false or misleading information; (8) he did not cause injury to others by refusing to testify; and (9) he did not receive financial gain as a result of his conduct.[82]

The Hearing Panel agrees with Quattrone's contention that this case presents significant mitigating factors; in the Hearing Panel's judgment, this is not a usual case. Accordingly, the Hearing Panel will impose a remedial sanction it believes appropriate under all of the facts and circumstances of this case.

The Hearing Panel begins its analysis by noting that the Guidelines require that each case be considered on its own facts. The Guidelines state that panelists "should consider case-specific factors in addition to those listed … in the [G]uidelines"[83] and "should impose sanctions tailored to address the misconduct involved in each particular case."[84] Moreover, the Guidelines make clear that panelists "must always exercise judgment and discretion"[85] to arrive at a sanction that is "necessary and appropriate to protect investors, other member firms and associated persons, and to promote the public interest."[86]

With these guiding principles in mind, the Hearing Panel finds that "[m]any of the considerations offered by [Quattrone], while unsuccessful as defenses to the violations, constitute substantial mitigation."[87]

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[82] Quattrone's Pre-Hearing Br. at 8–10. In addition, Quattrone argued that the Panel should take into consideration the Department's animus towards him, a factor not included in the Guidelines.

[83] Guidelines, Note to Principal Considerations, at 9.

[84] *Id.*, General Consideration No. 3, at 4.

[85] *Id.* at 5.

[86] Guidelines, Overview, at 1.

[87] *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993) (finding no violation of Art. III, Sec. 1 of the Rules of Fair Practice (now NASD Conduct Rule 2110) for failing to respond timely to a request for information considering the extraordinary facts of the case.) *Cf. Department of Enforcement v. Carney*, No. C8A000024, 2001 NASD Discip. LEXIS 21, at *37–38 (O.H.O. Feb. 2, 2001).

A. Unequal Treatment

According to the Department, the Hearing Panel has no choice but to impose the "standard" sanction and bar Quattrone from the securities industry. The Department argued that a bar is appropriate as the standard sanction because it "promotes the legitimate policy of both special and general deterrents."[88] The Department reasoned that equality of treatment of those in the industry is an important consideration:

> Every case sends a signal. This one included the message that we're asking to be sent, as a result of this case, is that membership in this association is a privilege and, with that privilege, come[s] responsibilities. If you're asked to testify in an NASD investigation, and you say no, you're out; and it doesn't matter who you are. It doesn't matter if you're Mr. Quattrone. It doesn't matter if you're other people in the street with, perhaps, less visibility.[89]

Contrary to this argument, the evidence shows that the Department did not treat Quattrone equally. Although the Department justified its refusal to grant Quattrone the deferral he requested on the ground that he should be treated no differently than his four co-workers at CSFB who also had asserted the Fifth Amendment and declined to testify, the Department in fact treated Quattrone far differently. The uncontradicted evidence established that the Department never formerly charged the other four CSFB brokers with refusing to cooperate. Rather, in each case, the Department acquiesced in the resulting delay, which in at least one case was as long as eight months. In three cases, the individuals testified once they were no longer subject to criminal

[88] Tr. 317.

[89] *Id.*

prosecution. In the fourth, however, the individual never testified. Nevertheless, each received the same sanctions—a $30,000 fine and a one-year suspension.[90]

The striking dissonance between the Department's treatment of Quattrone and his co-workers is significant because the Department pointed to those cases to explain its unwillingness to grant Quattrone an extension. Having made the other cases an issue, the Department made no attempt to explain why it treated Quattrone so differently. Rather, the Department rested its entire case on the proposition that individuals who fail to respond to an information request should always receive the "standard" sanction—a bar—which the Department concedes it did not seek for the other four who engaged in misconduct identical to Quattrone's. This disparate treatment undermines the Department's arguments that a bar must be imposed to send the appropriate message to the industry at large and that fairness demanded that Quattrone not receive special treatment.

The Hearing Panel cannot ignore Quattrone's unique prominence. For many, Quattrone has come to symbolize the excesses of the raging bull market of the 1990's. In their papers and arguments, both Parties refer to Quattrone's prominent role as an investment banker in the technology sector. With pride in his accomplishments, Quattrone points to his role in leading initial public offerings for more than 150 technology companies, many of which he claims became industry leaders.[91] For its part, the Department pointed to Quattrone's prominence, suggesting that he sought preferred treatment as a result. The Hearing Panel believes that Quattrone's unique status caused the Department to exhibit less flexibility in his case than it did with the others at

[90] *Id.* at 43. The Department settled each case through the process of an Acceptance, Waiver and Consent without bringing a formal disciplinary action.

CSFB who likewise asserted the Fifth Amendment and declined to testify while they were the subjects of criminal investigations. And while Quattrone was not entitled to identical, or even similar, treatment to that which his co-workers at CSFB received, the Department did not demonstrate "compelling reasons for insisting on expediency."[92] Moreover, the Hearing Panel found insufficient evidence to justify such disparate treatment.

B. Quattrone's Offers of Cooperation and the Department's Refusal to Delay his Testimony

Driven by their concerns relating to the criminal investigations, Quattrone's attorneys requested the Department to delay taking Quattrone's testimony until the investigations were resolved.[93] They also offered to cooperate in any other way that would not prejudice Quattrone's defense of the criminal charges. Nevertheless, the Department refused to delay the case and exhibited no interest in gathering information from Quattrone by alternative avenues. The Department offered no evidence to explain its intransigence. Under the circumstances, the Hearing Panel finds the Department's position unreasonably rigid.

Procedural Rule 8210 is a key tool in NASD's enforcement program for investigating potential wrongdoing. The purpose of Procedural Rule 8210 is to enable NASD to obtain needed information during the course of an investigation or proceeding.[94] And, because NASD lacks subpoena power over member firms and associated persons, any failure to fully and promptly

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[91] *See* Quattrone's Opp'n to Mot. for Summ. Disposition at 5.

[92] *Levitov*, 1999 NASD Discip. LEXIS 30, at *23 n.19.

[93] The Hearing Panel notes that Quattrone could have put the Department off by requesting an extension due to his illness. Quattrone testified, however, that his attorneys advised him not to use his illness as a delaying tactic. (Tr. 183.)

[94] *See, e.g., Department of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *11–12 (N.A.C. May 21, 2003).

comply with a request for information under Procedural Rule 8210 undermines NASD's ability to carry out its regulatory mandate.[95] Thus, failing to respond is considered a serious offense, as reflected in the Guidelines' suggestion that a bar should be standard, absent mitigation.

Where a member firm or associated person has a problem with responding to a request in a timely and complete manner, the SEC has stated that the respondent and the Department should resolve the problem "in the cooperative spirit and prompt manner contemplated by the Rules."[96] In limited instances, this means that the Department should grant extensions of time so that the individuals can respond,[97] although respondents may not dictate the terms of their responses.[98]

In *Department of Enforcement v. Levitov*, No. CAF980025, 1999 NASD Discip. LEXIS 30 (N.A.C. Nov. 1, 1999), the National Adjudicatory Council ("NAC") grappled with the tension created by these principles. There, the respondents argued, much as Quattrone has here, that the Department purposely chose to issue a request for information under Rule 8210 when the respondents were subject to criminal jeopardy for the same conduct the Department was investigating to force the respondents to make a Hobson's choice: refuse to testify and forfeit their careers, or testify and forfeit their Fifth Amendment rights in the criminal proceedings. Since respondents facing such a choice almost universally refuse to testify, the Department knew it would then be able to move swiftly and surely to bar the respondents from the securities

[95] *Id.* at *12 (citing *Brian L. Gibbons*, 52 S.E.C. 791, 794 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table)).

[96] *Rouse*, 51 S.E.C. at 584 n.9.

[97] *Id.* at 584.

[98] *See, e.g., Valentino*, 2003 NASD Discip. LEXIS 15, at *12.

industry.[99] In essence, the respondents in *Levitov* argued that the Department abused its power under Procedural Rule 8210 by issuing the requests in bad faith and for ulterior motives.[100]

Although the NAC concluded in *Levitov* that the Department had issued the requests for information in connection with its own investigation, the NAC found—under the unique circumstances before it—that the Department's refusals to grant adjournments "should be considered as mitigation with respect to sanctions."[101] The NAC found that this was particularly true because the Department had conceded that a brief delay would not have diminished the value of the testimony.[102] At the same time, the NAC restated the importance of compliance with Procedural Rule 8210 and made clear that by its ruling it did not intend to depart from the long line of NAC and SEC cases that state that respondents may not second-guess NASD's need for information and may not impose conditions on their responses.[103] Nevertheless, the Department's overly rigid stance mitigated the respondents' misconduct, "absent compelling reasons for insisting on expediency."[104]

Here, the Hearing Panel finds that the Department, as in *Levitov*, acted too rigidly and without a compelling reason for expediency. Several factors support these conclusions.

The Hearing Panel first notes that the Department did not dispute Keker's testimony that the U.S. Attorney's Office had granted Quattrone additional time to respond to the grand jury

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[99] *See Levitov*, 1999 NASD Discip. LEXIS 30, at *8.

[100] In *Levitov*, the respondents also contended that the Department issued the requests at the behest of the criminal prosecutors. The NAC found no evidence supporting this contention.

[101] *Levitov*, 1999 NASD Discip. LEXIS 30, at *13 n.12.

[102] *Id.* at *21–22.

[103] *Id.* at *23.

[104] *Id.* at *23 n.19.

subpoena on condition that Quattrone not testify before any other body in the meantime.[105] Although the U.S. Attorney's Office did not request NASD to suspend its investigation, these circumstances call into question the fairness of the Department's rigid stance. The Hearing Panel also notes that the Department's desire to question Quattrone about his Wells Submission arose after the Department had determined that it would not grant Quattrone additional time. While the Department may have wanted to further clarify Quattrone's contentions and assertions in his Wells Submission, there is no evidence that this was an urgent issue or that it was one of the considerations underlying the Department's decision to refuse Quattrone's request for a delay. Indeed, the Department filed the Spinning Complaint just four business days after Quattrone failed to testify.

The Hearing Panel also notes that the Department, in part, justified its need to proceed promptly with Quattrone's testimony because of the "new information" referenced in CSFB's press release of February 3, 2003, which announced that CSFB had placed Quattrone on administrative leave. However, the Hearing Panel could not evaluate the Department's claim because the Department did not present any evidence regarding the nature of the "new information." Indeed, the evidence fails to show that any new information had come to light regarding the alleged destruction of documents at CSFB since the Department questioned Quattrone about the issue in October 2002.

Finally, the Hearing Panel notes the Department's unexplained lack of interest in obtaining helpful information from Quattrone by other means. According to the Department, they had a number of areas of inquiry that were not the subject of the criminal investigations. Presumably,

[105] *See* Tr. 103.

these other lines of inquiry would not raise the same Fifth Amendment concerns as would questions about destruction of documents at CSFB, which was the subject of the criminal investigations. While Quattrone had no right to require the Department to proceed in a manner that suited him, the Department's demonstrated lack of interest in obtaining this information raises unanswered questions about whether the Department had singled out Quattrone for harsher treatment due to his prominence.

C. Reliance on Counsel

Reliance on the advice of counsel is not a defense to a failure to respond to a request for information issued pursuant to Procedural Rule 8210, but it may be considered in mitigation in extraordinary circumstances.[106] Here, Quattrone's attorneys testified candidly that they advised Quattrone not to testify because to do so would be too perilous.[107] Keker, Quattrone's lead attorney, explained his advice:

> Well, Mr. Quattrone found himself in an impossible position. There were two criminal investigations ongoing into the very subject matter on which the NASD requested his testimony. I have experience[] both as a prosecutor and a criminal defense lawyer and under those circumstances it is ill advised to permit your client to testify. There are a lot of things associated with the testimony that could prejudice a client in that position … [and] could result in indictments … [F]or example, if one were to give testimony very early in an investigation without the lawyers knowing all of the facts, a client could make an innocent mistake or statement that can be magnified by prosecutors beyond its significance and result in additional charges. In addition, there are tactical reasons. If an indictment were to result, and the case were to be tried … [y]ou would be basically giving the prosecutors an entire preview of your defense case, which is not to one's advantage if the case is going to be tried. In addition, you give the prosecutors a transcript that they can use and sometimes [in] unfair ways to cross examine your

[106] *See Department of Enforcement v. Steinhart*, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *9 n.1 (N.A.C. Aug. 11, 2003) (citing *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994)). *See also* Guidelines, Principal Consideration No. 7, at 9.

[107] Tr. 101–103.

> client.… And, in addition, it can affect the tactics that one follows at the trial because at that early stage you don't know whether or not your client at a criminal trial might take the stand and that is a very significant decision that has to be made at the time and in the context of the criminal case as it unfolds. If … a client were to testify at the NASD … the transcript of that testimony would be admissible at the criminal trial and that can force your hand one way or the other and compel testimony … that one might not otherwise give.… It is an awful dilemma.…[108]

Keker further stressed that Quattrone wished to testify in compliance with the Department's demand, but Keker likened the criminal proceedings to a cancer that had to be dealt with before all other problems.[109] All three law firms advising Quattrone concurred that it was too perilous to permit Quattrone to testify—particularly since NASD would provide the testimony to the criminal prosecutors.[110]

Quattrone's concerns about the criminal proceedings were genuine, and his attorneys' advice was reasonable under the circumstances of those proceedings. Had Quattrone testified, he would not have been able to keep the criminal prosecutors from using that testimony against him. Indeed, Quattrone's defense team argued that it would have been malpractice to have permitted Quattrone to testify—thereby forfeiting his Fifth Amendment rights in the criminal cases.

The Hearing Panel took into consideration the unique circumstances facing Quattrone when he requested the Department to allow him some additional time to resolve the criminal investigations. While Quattrone's reliance on his attorneys' advice does not excuse his noncompliance with the Rule 8210 Request, it does bear on his mental state. Quattrone understood from his attorneys that he was obligated to provide testimony to NASD, but he also

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[108] *Id.* at 102–03.

[109] *Id.* at 42.

[110] The Department does not deny that it was sharing information with the governmental authorities investigating Quattrone.

believed his attorneys' advice that he would be subject to grave and unpredictable consequences if he testified about the same matters that were under investigation by the criminal authorities. This genuine concern motivated Quattrone to decline to testify at the time NASD demanded. The Hearing Panel finds no evidence that Quattrone intended to impede NASD's investigation or lull the Department into inactivity. Thus, although his reliance on his attorneys' advice by itself would not constitute significant mitigation, the Hearing Panel did give it limited consideration in assessing the level of sanction needed to remediate his misconduct under the unique circumstances of this case.[111]

D. Conclusion

Taking into consideration all of the factors listed in the applicable Sanction Guidelines and the unique facts and circumstances of this case, the Hearing Panel concludes that a bar is not warranted at this time. The Hearing Panel determines that the appropriate remedial sanctions are a $30,000 fine and a one-year suspension in all capacities, which suspension shall convert to a bar if, at the end of one year, Quattrone has not fully and unconditionally provided NASD with his testimony.

VI. ORDER

For the foregoing reasons, Frank Peter Quattrone is fined $30,000 and suspended from associating with any member firm in any capacity for one year. If this Decision becomes the final action of NASD in this proceeding, Quattrone's suspension shall become effective at the opening of business on March 15, 2004, and end at the close of business on March 14, 2005, and the fine

[111] Absent the other mitigating factors the Hearing Panel found in this case, Quattrone's reliance on counsel would not have warranted a sanction of less than a bar.

shall be due and payable when and if Quattrone seeks to reenter the securities industry. Quattrone shall be barred if he has not fully and unconditionally complied with the Rule 8210 Request on or before March 14, 2005.

Quattrone also is ordered to pay costs in the total amount of $2,831.52, which include an administrative fee of $750 and hearing transcript costs of $2,081.52.[112]

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Andrew H. Perkins
Hearing Officer
For the Hearing Panel

DISSENT

Hearing Officer Perkins, dissenting, in part:

I respectfully dissent as to sanctions. Quattrone failed to demonstrate sufficient mitigation to warrant a sanction of less than an immediate bar.

Copies to:

Frank Peter Quattrone (by FedEx, next day delivery, and first-class mail)
John W. Keker, Esq. (by facsimile and first-class mail)
Howard E. Heiss, Esq. (by facsimile and first-class mail)
Kenneth G. Hausman, Esq. (by facsimile and first-class mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

[112] The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.