

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9A030017
	:	
v.	:	Hearing Officer – DMF
	:	
ERIC J. LAUCIUS	:	HEARING PANEL DECISION
(CRD #2898681)	:	GRANTING MOTION FOR
Huntington Valley, PA	:	SUMMARY DISPOSITION
	:	
	:	October 1, 2003
Respondent.	:	

Respondent is barred from associating with any member firm in any capacity for refusing to answer questions during an on-the-record interview, in violation of Rules 8210 and 2110.

Appearances

Thomas M. Huber, Esq., Philadelphia, PA, (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for Complainant.

Richard L. Scheff, Esq., and Steven Pachman, Esq., Philadelphia, PA, for Respondent.

DECISION

1. Procedural History

The Department of Enforcement filed a Complaint on May 30, 2003, charging that respondent Eric J. Laucius violated Rules 8210 and 2110 by refusing to answer questions posed by NASD staff during an on-the-record interview (OTR). Laucius filed an Answer contesting the charge. Enforcement then filed a motion for summary disposition, pursuant to Rule 9264, which Laucius opposed. For the reasons set forth below, the Hearing Panel, finding no genuine issue as to the material facts, grants the

motion, holds that Laucius violated Rules 8210 and 2110, and bars him from associating with any NASD member in any capacity.

2. Facts

There was no dispute as to the material facts.¹ Laucius was associated with Penn Financial Group, Inc. (PFG), a former NASD member, as a General Securities Principal from November 15, 1999 to March 20, 2003. He is not currently registered or associated with any NASD member, but NASD retains jurisdiction for purposes of this proceeding, pursuant to Art. V, Sec. 4 of NASD's By-Laws. PFG was an NASD member from about November 15, 1999 to May 9, 2003. Laucius was PFG's president and majority owner from the time PFG became an NASD member through at least March 10, 2003.

MK was once a customer of PFG and at times relevant to the Complaint worked in the building in which PFG's offices were located. He was never registered with PFG in any capacity.

In October 2001, customer MB opened an account at PFG in the name of a corporation he owned, and in April 2002, he opened a joint account at PFG with his wife, LB. Laucius was identified on the account applications and on PFG's account statements as the representative for these accounts. In December 2002, NASD received a customer complaint on its website from MB. The complaint referred to both Laucius and MK as PFG "reps," and asserted that "our brokers" had failed to return funds and had "engaged in dishonest and unethical practice"

¹ The Panel's findings are based upon the statement of undisputed facts, the declaration of Eric J. Bickhardt, and the exhibits to that declaration, filed by Enforcement, as well as Laucius' response to Enforcement's statement of undisputed facts, including Exhibit A to that response, and Laucius' memorandum in opposition to Enforcement's motion, including Exhibits A-C to the memorandum.

Based on this complaint, NASD's Philadelphia District Office opened an investigation to determine whether Laucius or PFG had engaged in conduct that violated NASD rules or the securities laws or regulations. In January 2003, in the course of the investigation, NASD staff received a letter from an attorney on behalf of MB enclosing documents and alleging that MB's PFG accounts "have been looted of more than \$650,000."

In March 2003, in connection with the investigation, NASD staff requested Laucius, pursuant to Rule 8210, to appear in NASD's Philadelphia office on April 17, 2003, to testify under oath at an OTR. Laucius appeared for the OTR with counsel on the scheduled date, and NASD staff took his testimony, under oath.

During the OTR, on advice of counsel, Laucius refused to answer approximately 33 questions, claiming a privilege against self-incrimination under the Fifth Amendment to the United States Constitution. Laucius also told NASD staff that he would refuse to answer any questions posed by NASD staff in certain subject areas. The staff advised him that refusing to answer, even if based on asserted Fifth Amendment rights, could lead to disciplinary action by NASD; nevertheless, Laucius persisted in his refusal to answer.

Among other things, Laucius refused to testify about the circumstances under which approximately \$100,000 was wired out of one of MB's accounts; refused to state whether he knew who controlled the entity to which the funds were wired; and refused to answer whether he had contacted MB or LB to confirm that they had authorized the transfer. Laucius later testified that MK authorized the transfer, but refused to explain how MK was able to send a wire transfer request to PFG's clearing firm, or to answer

whether MK had his (Laucius') user name and password to PFG's computers, which would have allowed MK to send such a request.

Laucius also refused to answer whether there had been occasions when MK told him not to follow a customer's instructions. With regard to another wire transfer from one of MB's accounts, he refused to identify the persons who controlled the entity to which the funds were wired, and refused to answer whether, in his review of PFG's account activity, he noted the wire transfer. After testifying that MK was responsible for a transfer of more than \$100,000 from one of MB's accounts, he refused to answer whether he had ever received authorization from MB and LB for MK to undertake activity in the account. He also refused to divulge who was directing trading in MB's accounts, or whether he (Laucius) had received commissions based on that trading. He would not answer questions pertaining to businesses that MK may have been operating out of PFG's offices.

In Laucius' memorandum in opposition to Enforcement's motion, his attorneys represent that MK was the target of a federal criminal investigation, and, that sometime in 2002, after the Federal Bureau of Investigation raided PFG's offices and seized records, computers and other materials, "the FBI advised Mr. Laucius that he was [also] a 'subject' of its criminal investigation." Further, Laucius' memorandum asserts:

[I]t was in December 2002 that Mr. Laucius began to receive inquiries from [MB and LB] to cash out their [PFG] accounts (totaling more than \$400,000) – accounts ... that were controlled by [MK]. [MB and LB] and Mr. Laucius soon learned that the majority of these accounts, including the account balances themselves, were "created" by [MK] ... and that [MK] had been holding himself out as "[PFG]" without Mr. Laucius' knowledge or authorization. Mr. Laucius also learned around this time that [MK] had been creating fictitious account statements on [PFG] stationary.

Laucius' memorandum represents that the FBI's investigation culminated in an indictment of MK, an undated and unsigned copy of which is attached to the memorandum. The indictment charges that MK devised a scheme to defraud MB and LB by holding himself out as an authorized representative of PFG and accepting investments from MB and LB on the pretense that the money would be placed in PFG accounts serviced by PFG's clearing firm. It alleges that MK provided false account statements to MB and LB, while MK received the true statements from the clearing firm, and that MK illegally diverted funds belonging to MB and LB to his own purposes. Laucius says that he cooperated in the criminal investigation leading to the indictment, and that he has been subpoenaed by the government to testify at trial as a witness against MK.

3. Discussion

Rule 9264 provides that either Enforcement or a respondent may move for summary disposition, and that the Hearing Panel may grant such a motion if there is no dispute as to any material fact and the moving party is entitled to summary disposition as a matter of law. After considering the parties' submissions, the Panel concludes that the material facts in this case are not in dispute, and that Enforcement is entitled to summary disposition on both liability and sanctions.

Rule 8210 provides that NASD staff "shall have the right to ... require a ... person subject to [NASD's] jurisdiction to provide information orally ... with respect to any matter involved in [an] investigation"² The rule further provides, "No member or person shall fail to provide information or testimony ... pursuant to this Rule." The

² Even though Laucius was no longer associated with PFG at the time of the OTR, he was still subject to NASD jurisdiction for purposes of Rule 8210, pursuant to Art. V, §4 of the NASD By-Laws. See Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *6-7 (Aug. 11, 2003).

National Adjudicatory Council (NAC) recently reiterated the “well established [principle] that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD’s ability to carry out its regulatory mandate.” Department of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003).

There is no dispute that Laucius refused to respond to questions posed to him during his OTR. Furthermore, it is clear that the questions were directly relevant to NASD staff’s investigation, focusing on possible rule violations by Laucius that may have led to serious customer injury. By refusing to answer, Laucius impeded NASD staff’s ability to pursue the investigation, and thereby undermined NASD’s ability to carry out its regulatory mandate.

Laucius argues that his refusal to answer should be excused because he was exercising his rights against self-incrimination under the Fifth Amendment. The NAC, however, has recently reaffirmed that the Fifth Amendment is “not a valid reason not to comply with an NASD request for information. Numerous courts have held that NASD is a private entity, and the Fifth Amendment does not apply to NASD investigations and proceedings.” Department of Enforcement v. Steinhart, No. FPI020002, 2003 NASD Discip. LEXIS 23, at *9 (Aug. 11, 2003) (citing D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161-163 (2d. Cir. 2002)).

Laucius attempts to distinguish Cromwell on the ground that it concerned NASD’s authority to require the plaintiffs to provide OTRs, rather than NASD’s authority to discipline them for refusing to answer questions. The distinction is unpersuasive. In Cromwell, the plaintiffs argued that NASD should be enjoined because,

if they refused to answer questions during their OTRs based on their Fifth Amendment rights, they would be subject to disciplinary action. In refusing to grant the injunction, the court held that NASD, as a private entity, was not required to recognize Fifth Amendment rights in conducting its investigations, implicitly recognizing NASD's right to impose disciplinary sanctions on the plaintiffs if they refused to answer questions on that ground. In any event, the distinction urged by Laucius is foreclosed by the NAC's holding in Steinhart, in which disciplinary sanctions were imposed.

Laucius also argues that Cromwell and the other decisions holding that the Fifth Amendment does not apply to NASD investigations are wrong. In support, he relies on cases involving the termination of public employees for claiming Fifth Amendment rights, but those cases are not on point, because NASD is not a governmental entity and Laucius is not a public employee. Laucius also relies on Spevack v. Klein, 385 U.S. 511 (1967), where the Supreme Court held that the New York courts could not disbar an attorney for claiming his Fifth Amendment rights, but courts are plainly governmental entities; NASD is not. The decisions directly on point are clear and unanimous – NASD is not a governmental entity and therefore is not bound by the Fifth Amendment.

Laucius also argues that Enforcement “has not shown that Mr. Laucius’ ‘failure’ has impacted the NASD’s investigation negatively.” Laucius notes that he appeared and answered questions on a number of topics over a period of several hours. He urges that his answers should assist NASD in its investigation, and suggests that he “is not the only available source of information to the NASD in its attempt to explore any wrongdoing here,” contending that NASD staff could collect additional information from “former employees of [PFG], representatives of [PFG’s clearing firm], or [MB and LB]

themselves.” Furthermore, Laucius says that, even though he refused to answer questions during his OTR, he “expressed a willingness to assist the NASD further through an off-the-record proffer,” which, he asserts, is “a tool used by prosecutors.”

The simple answer to this argument, however, is that it misapprehends the respective obligations of Laucius and the staff. When Laucius elected to become associated with an NASD member, he agreed to be bound by NASD’s rules, including Rule 8210, which imposes an unqualified affirmative obligation on members and associated persons to cooperate in NASD investigations: “No member or person shall fail to provide information or testimony ... pursuant to this Rule.” See Joseph G. Chiulli, Exch. Act Rel. No. 42359, 2000 SEC LEXIS 112, at *18 (Jan. 28, 2000). In light of this obligation, “It is ... well settled that respondents cannot impose conditions on their response to NASD’s inquiries.” Department of Enforcement v. Valentino, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (May 21, 2003).

Therefore, NASD staff was not required to look elsewhere for the information needed to determine whether Laucius violated NASD rules, or to accept an off-the-record proffer of information that, because it was off the record, could not be used in disciplinary proceedings against Laucius or others. Laucius was required to answer the questions posed by the staff, on the record; he refused to do that.

The Hearing Panel, therefore, finds on the basis of the undisputed facts that Laucius violated Rule 8210, as charged. Furthermore, by violating Rule 8210, he also violated Rule 2110.

4. Sanctions

The NASD Sanction Guidelines provide, “If the individual did not respond in any manner, a bar should be standard.” NASD Sanction Guidelines at 39 (2001 ed.). A refusal to answer questions on Fifth Amendment grounds is equivalent to a non-response, for sanctions purposes, and, even if based on the advice of counsel, may justify a bar. Steinhart, 2003 NASD Discip. LEXIS 23, at *10-12.

Laucius seeks to distinguish Steinhart on several grounds. First, he points out that, unlike Steinhart, he appeared for his OTR and answered many questions, in an attempt “to assist the NASD as best he could under the circumstances.” Second, he states that, the criminal investigation now having concluded, he recently offered to respond to the questions that he refused to answer during his OTR – an offer that Enforcement apparently has rejected. Although the NAC held that such an offer by Steinhart was not mitigating, Laucius points out that, unlike Steinhart, he is still subject to NASD jurisdiction; therefore, he urges, his responses should still satisfy NASD’s investigative needs.

Laucius, however, had an obligation to answer all of the staff’s questions fully and promptly. He was not free to set conditions, or to pick and choose which questions to answer, based on his own interests. The questions that he refused to answer went to the heart of the staff’s investigation of Laucius’ conduct, and he was required to answer them at the OTR. His expressed willingness to answer the questions now, months later, is not significantly mitigating. “NASD ... should not have to bring disciplinary proceedings to obtain responses to requests for information.” Steinhart, 2003 NASD Discip. LEXIS 23, at *13. Although at present Laucius remains subject to NASD

jurisdiction, if the Hearing Panel were to allow him to provide answers now to questions he should have answered months ago, it would reward him for his delaying tactic and could impose unwarranted pressure on the staff to conclude its investigation before NASD loses jurisdiction.³ Moreover, other relevant evidence may have been lost or destroyed during the intervening period. Therefore, the Hearing Panel finds no mitigating circumstances that would warrant a sanction less than a bar for Laucius' violation.

5. Conclusion

Respondent Eric J. Laucius is barred from associating with any NASD member in any capacity for refusing to respond to questions posed by NASD staff during an on-the-record interview, in violation of NASD Rules 8210 and 2110. The bar shall become effective immediately if this decision becomes the final NASD disciplinary action in this matter.⁴

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to:

Eric J. Laucius (via overnight and first class mail)
Richard L. Scheff, Esq. (via facsimile and first class mail)
Steven Pachman, Esq. (via facsimile and first class mail)
David Newman, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

³ Laucius has not been registered with any NASD member since March 2003. Pursuant to Art. V, §4 of NASD's By-Laws, NASD retains jurisdiction to file a complaint against Laucius for two years after his registration terminated, based on his conduct while registered. Therefore, a delay of several months in providing critical information could have a significant impact on NASD's ability to file charges timely.

⁴ 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.