

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JOSEPH ROGALA
(CRD No. 1051594)

2 S. 574 Danbury Drive
Glen Ellyn, IL 60137

Respondent.

Disciplinary Proceeding
No. C8A030089

Hearing Officer – DRP

PANEL DECISION

October 11, 2004

Respondent is barred from association with any member firm in any capacity for: (1) affixing a customer’s signature to a letter of instruction without authority, in violation of NASD Conduct Rule 2110, and (2) providing false and misleading documents to NASD, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. In light of the bars imposed, Respondent is not further sanctioned for creating and distributing sales literature without prior written approval from his firm, nor for using misleading sales literature that failed to identify the variable products offered and failed to disclose risks or other material facts, in violation of NASD Conduct Rules 2210 and 2110.

Appearances

For the Department of Enforcement: Kevin G. Kulling, Regional Counsel, Chicago, IL (Rory C. Flynn, Esq., Washington, DC, Of Counsel).

For the Respondent: Joseph Rogala, *pro se*.

DECISION

I. Procedural History

The Department of Enforcement filed a three-count Complaint on December 5, 2003. In the Complaint, Enforcement charges that Joseph Rogala (Rogala or Respondent) violated NASD Conduct Rule 2110 by affixing a customer’s signature to a letter without the customer’s

authority. Enforcement also charges that Rogala violated NASD Conduct Rules 2210 and 2110 by creating and distributing at least six illustrations of variable annuities that were misleading, predicted investment results and failed to identify clearly the variable product offered or disclose material facts. Enforcement further alleges that Rogala failed to obtain his firm's or NASD's approval prior to using these illustrations. Finally, Enforcement charges that Rogala violated NASD Procedural Rule 8210 and Conduct Rule 2110 by providing to NASD documents that he knew or should have known were false and misleading. Rogala filed an Answer on January 5, 2004, in which he denied the charges and requested a hearing. On April 19, 2004, a one-day hearing was held in Chicago, before a hearing panel composed of the Hearing Officer and two current members of District Committee 8.

At the hearing, Enforcement called two witnesses, Tom O'Grady and Todd Foster of NY Life Insurance Company, and offered seventeen exhibits, which were admitted in evidence. The Respondent offered no exhibits, but played a tape-recorded message for the Panel and testified on his own behalf.¹

II. Findings of Fact and Conclusions of Law

A. Respondent

Rogala was registered with NASD member NYLife Securities Inc. (NY Life) from July 5, 1999, until his registration was terminated on February 1, 2002. Since February 2002, Respondent has not been associated or registered with any NASD member. (CX-1.)

Rogala is subject to NASD jurisdiction pursuant to Art. V, Section 4 of NASD's By-Laws, because the Complaint, which was filed within two years of the termination of Respondent's registration with NY Life, charges him with misconduct that commenced while he

¹ References to the hearing transcript are noted as Tr. Enforcement's exhibits are cited as CX; Respondent did not offer any exhibits.

was registered, and with supplying misleading documents pursuant to NASD requests for information made during the two-year period following the termination.

From 1998 to 2002, Respondent worked in Downer's Grove, Illinois, as an agent for New York Life Insurance Company and as a registered representative for its wholly-owned subsidiary, NY Life. During the period relevant to the Complaint, Tom O'Grady was Respondent's manager for the insurance business, while Jon Jaramillo supervised Respondent's securities-related activities. (Tr. 31-32, 62-64; CX-1, CX-10.)

B. Customer BP

In May 2001, Respondent met with customer BP to discuss the purchase of a life insurance policy. According to Respondent, he asked BP to sign a policy illustration at the time he completed his application. Respondent told BP that to receive coverage while his application was pending, the customer had to pay the first month's premium, provide a voided blank check, and complete a form for automatic monthly withdrawals from his checking account (check-o-matic). BP was obtaining quotes from other insurance agents, but nevertheless gave the completed forms and a blank check to Respondent. BP believed that supplying a check and completed check-o-matic forms was a formality required by NY Life. He did not think money would be deducted from his checking account. (CX-3, CX-4, CX-6, CX-7, CX-8, CX-9.)

On or about August 23, 2001, BP phoned NY Life to request that no further deductions be made from his checking account. Respondent was not aware of BP's call, but on or about August 26, 2001, he observed that the commission he had earned from this policy no longer appeared on his account ledger. Respondent questioned O'Grady about the removal of his \$3660 commission,² phoning him each day that week. Respondent left a daily message in which he

² When a NY Life customer uses check-o-matic to pay his or her insurance premium, the commission credited to the agent's ledger is computed as an annual amount. (Tr. 33-34.)

threatened to resign and “take the rest of the staff with him” if O’Grady did not reinstate the commission by the end of the week. (Tr. 57, 65, 116, 140-141; CX-4, CX-17.)

O’Grady was out of the office during this period but thought Respondent’s messages were “strange.” He consulted Todd Foster, director of operations for the Chicago area, about Respondent’s request and re-played one of his messages. Foster said he would determine whether Respondent’s commission could be reinstated if BP provided a letter stating that he wanted check-o-matic restored. (Tr. 30-31, 42, 57, 66.)

When O’Grady returned to the office the following week, he noticed that Respondent’s commission had been restored. On or about September 4, 2001, Foster also saw that Respondent’s commission had been reinstated and contacted O’Grady, who had no explanation for it. Foster then phoned the firm’s service center in Atlanta and learned that the commission was restored after Respondent provided a letter from BP. Foster asked for and received a copy of the letter, dated August 28, 2001. The letter instructed NY Life to place BP’s policy on “bank draft” and stated that a copy of BP’s original check to NY Life was enclosed. Foster found the letter “suspicious,” because Respondent had said that BP was in Costa Rica and unable to send such a letter. He kept a copy of the letter for his files. (Tr. 39-41, 66-67; CX-2, CX-16.)

By letter dated November 27, 2001, BP complained that his directive to stop deductions from his checking account had been reversed without his consent. The firm investigated and learned that BP had not signed the August 28, 2001 letter requesting bank drafts to resume, or the policy illustration. As a result, Respondent was discharged. (CX-1, CX-4, CX-5.)

During the course of NASD’s investigation of this matter, Respondent admitted that he prepared the August 28, 2001 letter and photocopied BP’s signature from another document. Respondent claimed he was instructed to do so by O’Grady and Foster. He contended that BP

was fully aware of what he had done and had agreed to continue making payments via check-omatic. At the hearing, Respondent made the same admission regarding the letter but again contended that O'Grady and Foster told him to prepare it in this fashion.³ O'Grady and Foster denied telling Respondent to create the letter and further denied instructing him to sign for BP or to photocopy BP's signature from another document. Both Foster and O'Grady testified that the firm's policies and procedures prohibited employees from signing documents for a customer or photocopying a customer's signature.⁴ (Tr. 43-44, 68-70, 118-119, 148-150, 158-160; CX-9, CX-11, CX-16.)

C. Illustrations of Variable Annuities

Respondent testified that when soliciting some customers to purchase variable annuities, he provided illustrations projecting potential rates of return, ranging from 3% or 4% to 15% or 16%. He conceded that NY Life did not have software to prepare illustrations for variable annuities but claimed the firm had approved software from Vorton technology, which he used to prepare these illustrations.⁵ Respondent contended that O'Grady or another NY Life employee had loaded Vorton onto his computer and claimed that several other agents in the office were also using it for this purpose. Though he did not request or obtain prior written approval from a principal of the firm to use these illustrations, he did not think that was problematic because "so many people were using [Vorton]" and O'Grady was aware of it. (Tr. 120-124, 137, 169-176.)

³ In contrast, Respondent stated in his Answer that he never saw the signature on the August 28, 2001 letter and accused O'Grady and Foster of having affixed BP's signature to the letter. (Answer ¶ 5.)

⁴ Respondent testified that he had BP sign the policy illustration when he completed the application for life insurance in May 2001, which Respondent then dated July 9, 2001. BP informed NY Life that he had not seen or signed that document. (Tr. 162-165; CX-3, CX-5.)

⁵ Examples of illustrations Respondent used were attached to the Complaint as Exhibit A but were not introduced as hearing exhibits.

Respondent admitted that the illustrations he used did not describe or identify the variable product or disclose information regarding costs or investment risk. He testified that he provided that type of information to customers when he delivered the policy. (Tr. 177-180.)

O'Grady testified that NY Life provides a software package to agents with all approved software. Vorton technology is not included in the package, nor did O'Grady authorize Respondent or anyone else to use it. Furthermore, variable annuities were securities; thus Jaramillo, the registered principal, handled those matters. (Tr. 73-75.)

D. False and Misleading Documents

During the course of NASD's investigation, Respondent provided several letters that were purportedly signed by O'Grady. A letter on NY Life letterhead dated July 7th 2001, reads exactly as follows:

I am writing this letter on behalf of Joe Rogala Lutf:s request. We have a new marketing tool in the Greater Chicago Office called Vorton technology. I have advised my agents this is an approved tool to show people various returns on all variable annuity prospects. Since we cannot provide an illustration such as on life products and fixed annuities. I have all my agents using this, including [JY, FR] & others. This has been installed on New York Life:s community computers in the training room & all agents can access this. Joe has shown his concern of this, since he has been an agent for over 25 years & he wants to be assured that our compliance department & Susan Blood has approved this. If you have any questions please contact me at [omitted].

It was addressed "To Whom It May Concern," and was signed "Sincerely, Thomas J. O'Grady, Sales Manager." (Tr. 181; CX-12.)

Respondent first claimed that O'Grady wrote the letter at his request, due to his concern about Vorton technology. He maintained that he became concerned when a compliance person was contacting his customers in July 2001, after he had provided them with illustrations on variable annuities using Vorton. Respondent testified that O'Grady wrote the letter and left a

copy of it in his office, but he never saw the original. Respondent later testified that he typed the letter and asked O’Grady to sign it but did not witness his signature. (Tr. 181-183, 185, 187-189.)

Another letter on NY Life letterhead, dated September 28th 2001, and addressed to Respondent, reads exactly as follows:

I am writing this letter in regards to you wanting to resign from New York Life Insurance Company. I as your manager, take full responsibility for the unethical things that go around in the Greater Chicago Office... I promise you that if you do not resign, if there are any problems with any of you cases personally. This letter will exonerate you from any Insurance investigation... I hope this enough information to keep you satisfied that I am doing the bast I can.

This letter was also signed “Sincerely, Thomas J. O’Grady, Sales Manager.” Respondent provided it to NASD staff during the course of the investigation. He first testified that he believed that O’Grady had written this letter but could not remember the circumstances that prompted him to draft it. Respondent later testified that he could have written it himself.⁶ Respondent wanted O’Grady to admit that he knew about unethical business practices in the office. As with the earlier letter, Respondent testified that he never received the original. (Tr. 195-199, 203-206; CX-13.)

Respondent provided two other letters to NASD during the investigation. Each letter was on NY Life letterhead, addressed to Respondent, and signed “Sincerely, Thomas J. O’Grady, Sales Manager.” Respondent did not recall whether he drafted these letters for O’Grady but testified that he had not received the original letters. (Tr. 206-209; CX-14, CX-15.)

O’Grady testified that he did not write or sign any of the four letters and that the information contained in the letters was inaccurate. He pointed out that his signature on each

⁶ In his Answer, Respondent stated that he wrote the September 28th letter. (Answer ¶ 9.)

letter was identical, including the same areas of discoloration. The font for the signature line was identical in all four letters, but did not always match the font in the body of the letter, nor were the margins aligned properly. O’Grady believes that a photocopy of his signature was affixed to each letter. (Tr. 75-76, 78-81, 83-85.)

E. Discussion

The charges considered by the Hearing Panel were whether Respondent: (1) affixed a customer’s signature to a letter of instruction without authority, in violation of NASD Conduct Rule 2110, (2) created and distributed illustrations regarding variable annuities that violated various provisions of NASD Conduct Rule 2210, and (3) provided false and misleading documents to NASD, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

1. Affixing a customer’s signature without authority

NASD Conduct Rule 2110 states that members “shall observe high standards of commercial honor and just and equitable principles of trade.” Rule 115 extends this requirement to persons associated with members. The ethical and legal obligations set forth in Rule 2110 are not limited to the sale of securities but encompass a wide variety of unethical business-related conduct.⁷ Affixing a customer’s signature on a document without the customer’s knowledge and consent is unethical conduct that falls under the purview of Rule 2110.⁸

Though BP did not testify at the hearing, circumstantial evidence supports the charge that Respondent affixed BP’s signature to the August 28, 2001 letter without the customer’s consent.

⁷ See *Daniel J. Alderman*, Exchange Act Release No. 35,997, 1995 SEC LEXIS 1823, at *7 (July 20, 1995), *aff’d*, 104 F.3d 285 (9th Cir. 1997).

⁸ See *Donald M. Bickerstaff*, Exchange Act Release No. 35,607, 1995 SEC LEXIS 982 (Apr. 17, 1995). See also *Dist. Bus. Conduct Comm. v. Peters*, No. C02960024, 1998 NASD Discip. LEXIS 42, at *4-5 (NAC Nov. 13, 1998); *Dep’t of Enforcement v. Brinton*, No. C04990005, 1999 NASD Discip. LEXIS 36, at *1, *8 (NAC Dec. 14, 1999).

BP's complaint letter to NY Life in November 2001, in which he states that automatic deductions from his checking account had taken place without his authority, supports this conclusion.⁹ Furthermore, Respondent admitted he prepared the August 28, 2001 letter and photocopied BP's signature from another document, actions that would not have been necessary had the customer actually given his consent.¹⁰

The Panel notes that Respondent was greatly agitated when he lost his commission from BP's policy, threatening to resign if it were not reinstated. He thus had ample incentive to submit a forged letter in order to countermand BP's directive to stop check-o-matic deductions, and thereby have his commission reinstated. In light of his conflicting explanations and admission that he affixed the customer's signature to this letter, the Panel did not find the Respondent to be a credible witness. Moreover, the forgery here is consistent with other forgeries alleged in this proceeding. The Hearing Panel finds that Respondent affixed a customer's signature to a letter of instruction without authority, in violation of NASD Conduct Rule 2110, as charged in the first cause of the Complaint.

2. Communications with the public

NASD Conduct Rule 2210 governs member communications with the public.¹¹ The rule defines sales literature as "written or electronic communication ... distributed or made generally

⁹ It is well established that in NASD proceedings "hearsay statements may be admitted in evidence and, in an appropriate case, may form the basis for findings of fact." *Charles D. Tom*, Exchange Act Release No.31081, 1992 SEC LEXIS 2000 at *7 (Aug. 24, 1992).

¹⁰ Respondent gave conflicting explanations regarding the letter. In his Answer, Respondent stated that he never saw the signature on the letter and accused O'Grady and Foster of having affixed BP's signature. At the hearing, Respondent admitted preparing the letter and photocopying BP's signature from another letter. He then charged that O'Grady and Foster had instructed him to do so. O'Grady and Foster denied telling Respondent to create the letter and further denied instructing him to sign for BP or to photocopy BP's signature from another document. Foster admitted he told Respondent that his commission could be reinstated if he obtained a letter from BP, but testified that Respondent said BP was out of the country and unable to provide such a document. The Panel had no reason to question the veracity of O'Grady or Foster.

¹¹ Respondent was charged with violating provisions of Rule 2210 that existed prior to November 3, 2003, when the rule was amended. Accordingly, the Panel considered, and the Decision references, only the former provisions.

available to customers or the public” which does not constitute an “advertisement.”¹² Under Rule 2210(b), each item of sales literature must be approved by signature or initial of a registered principal of the member in advance of use or filing with NASD for approval.

Respondent admitted he presented illustrations regarding variable annuities to potential customers to solicit their business and when delivering policies. These illustrations meet the definition of sales literature and, thus, required written approval of a NY Life principal prior to distribution. Respondent suggested that O’Grady had indirectly approved the illustrations, claiming O’Grady was aware that Rogala and other employees were creating them. Even if that were true, there is no evidence that Respondent obtained *written* approval for the illustrations, as required. Thus, the Hearing Panel finds that Respondent violated NASD Conduct Rule 2210(b).¹³

In general, Rule 2210(d) requires that sales literature “ ‘disclose in a balanced way the risks and rewards for the touted investment.’ ”¹⁴ When sales literature sets forth points attractive to investors, it also must explain any contingent or speculative factors and provide a sound basis for evaluating a potential investment.¹⁵ Rule 2210(d)(1)(B) prohibits exaggerated, unwarranted, or misleading statements or claims.¹⁶ Moreover, communications may not omit any material that could cause communications to be misleading.

¹² Rule 2210(a)(2). Materials that are published, or designed for use, in some form of public media qualify as advertisements. Rule 2210(a)(1).

¹³ Rule 2210(c) requires all sales literature pertaining to variable annuity contracts or variable life policies to be submitted to NASD within ten days of their anticipated first use. It would appear that Respondent failed to comply with this requirement, but the Panel declines to find a violation, as the record is silent regarding this issue.

¹⁴ *Robert L. Wallace*, Exchange Act Release No. 40,654, 1998 SEC LEXIS 2437, at *10 n. 8 (Nov. 10, 1998) (citing *Jay Michael Fertman*, Exchange Act Release No. 33,479, 1994 SEC LEXIS 149, at *17 (Jan. 14, 1994)).

¹⁵ *See Excel Financial, Inc.*, Exchange Act Release No. 39,296, 1997 SEC LEXIS 2292, at *16, *19 (Nov. 4, 1997); *see also* Rule 2210(d)(1)(A).

¹⁶ *See also Dep’t of Enforcement v. U.S. Rica Financial, Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *13 (NAC Sept. 9, 2003).

IM-2210-2 mandates clear identification of a variable product in a piece of sales literature. Rule 2210(d)(2)(N)¹⁷ permits the use of hypothetical illustrations of mathematical principles in advertising and sales literature, including the use of illustrations designed to show the “mechanics” of variable annuity contracts or variable life policies. However, predictions or projections of investment results in communications with the public are strictly prohibited.

The Panel notes that Enforcement failed to offer in evidence any illustrations used by Respondent in his solicitation of customers to purchase variable annuities. That omission would ordinarily be fatal to Enforcement’s case and result in dismissal of the charges contained in cause two of the Complaint. At the hearing, however, Respondent identified several variable annuity illustrations accompanying the Complaint as examples of illustrations he had created and used. More importantly, Respondent admitted that his illustrations disclosed no specific product information and contained no disclaimers about risks or costs. Based on Respondent’s concession that the illustrations contained no specific product information whatsoever, the Panel infers that the illustrations did not mention contingent or speculative factors associated with an actual investment.

The Panel finds it was inappropriate and misleading to present illustrations to customers without identifying the product to which they pertained or disclaimers about risks, costs or any other contingent or speculative factors associated with the proposed investment. It was also misleading to list hypothetical values ranging from 3-4% to 15-16% as Respondent admits. Though the Panel cannot definitively state that the illustrations contained specific predictions or projected results, it believes the implication was that if a client invests in a variable annuity, he will enjoy a rate of return similar to what was depicted in the illustration.

¹⁷ NASD Conduct Rule 2210(d)(2)(N) was modified and renumbered 2210(d)(1)(D), effective November 2003. As noted above, the modification occurred *after* the events that gave rise to the Complaint, and the new provision is, therefore, inapplicable here.

The Panel concludes that the illustrations were not based on principles of fair dealing and good faith, and failed to provide a sound basis for evaluating the facts associated with an investment in a variable annuity product. Based on Respondent's testimony, the Panel finds that the illustrations were seriously deficient -- they did not identify the variable product offered, gave rates of return that were potentially misleading, and failed to disclose material facts related to the investment. Accordingly, Respondent violated NASD Conduct Rules 2110,¹⁸ 2210(d) and IM-2210-2, as alleged in the second cause of the Complaint.¹⁹

3. Submission of false and misleading documents

"NASD members and associated persons must cooperate fully with NASD information requests so that it may perform its self-regulatory functions effectively."²⁰ Because NASD lacks subpoena power over its members, "a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate."²¹

Failing to respond truthfully to NASD requests for information, whether in writing or in oral testimony, constitutes a violation of Procedural Rule 8210 and Conduct Rule 2110.²² Providing misleading and inaccurate information to NASD, or omitting to provide information, is also conduct that is contrary to high standards of commercial honor and is inconsistent with

¹⁸ A violation of an SEC or NASD rule also constitutes a violation of Conduct Rule 2110's ethical obligation to observe high standards of commercial honor and just and equitable principles of trade. *See Steven J. Gluckman*, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, *22 (July 20, 1999) (citations omitted).

¹⁹ There is insufficient evidence to support the charge that the illustrations contained investment predictions or projections in violation of Rule 2210(d)(2)(N), as alleged in ¶ 8(d) of the Complaint.

²⁰ *Robert A. Quiel*, Exchange Act Release No. 39,056, 1997 SEC LEXIS 1878, at *6 (Sept. 11, 1997) (other citations omitted).

²¹ *Michael D. Borth*, Exchange Act Release No. 31,602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

²² *Dist. Bus. Conduct Comm. v. Doshi*, No. C10960047, 1999 NASD Discip. LEXIS 6 (NAC Jan. 20, 1999).

just and equitable principals of trade.²³

In reviewing the documents at issue, the Panel immediately observed evidence of forgery. As O’Grady pointed out, his signature was absolutely identical on each letter. The font size of the typed signature line was also identical but did not match the font size used in the *body* of each letter. Moreover, margins of the document and of the signature block were visibly not aligned. The Panel also noted similarities in writing style between the letters purportedly authored by O’Grady and letters Respondent admits are his.²⁴ Moreover, Respondent’s conflicting testimony about the letters was simply not believable, and the fact that he could not produce any original letters further undermined his credibility.

Based upon the foregoing findings of fact, the Panel determines that Respondent provided false documentation to the staff. In so doing, he attempted to mislead NASD and obstruct its investigation. Accordingly, his misconduct violated NASD Procedural Rule 8210 and Conduct Rule 2110, as alleged in cause three of the Complaint.

III. Sanctions

In determining the appropriate sanctions for these violations, the Panel reviewed the Principal Considerations set forth in NASD’s Sanction Guidelines (“Guidelines”).²⁵ Specifically, the Panel notes that Respondent continues to deny his wrongdoing, despite all evidence to the contrary. Moreover, he engaged in a pattern of misconduct by repeatedly forging documents

²³ *Brian L. Gibbons*, Exchange Act Release No. 37,170, 1996 SEC LEXIS 1291, at *9-10 (May 8, 1996), *aff’d*, 112 F.3d 516 (9th Cir. 1997). *See also Dist. Bus. Conduct Comm. v. Pelaez*, No. C07960003, 1997 NASD Discip. LEXIS 34, at *10 (NBCC May 22, 1997) (finding that because respondents knew false documents had been submitted to NASD and they did not take any steps to advise NASD of this fact, they violated Section 1 of the NASD Rules of Fair Practice, precursor to Rule 2110).

²⁴ Most noticeable was the use of a colon when an apostrophe was the appropriate form of punctuation, and the use of an ampersand rather than the word “and.” *See e.g.*, CX-11 (Respondent’s Wells response) and CX-12 (letter Respondent claimed was O’Grady’s).

²⁵ NASD Sanction Guidelines, 8-9 (2004 ed.).

when he viewed it to be advantageous, with the intent to deceive his firm and NASD. Finally, at least one of Respondent's violations resulted in the potential for his monetary gain.

A. Affixing a Customer's Signature Without Authority

The Guidelines recommend a fine of \$5,000 to \$100,000 for forgery or falsification of records.²⁶ Additionally, the Guidelines recommend a suspension in any or all capacities for up to two years where mitigating factors exist, or a bar in egregious cases. In determining appropriate sanctions, the adjudicator is to consider the nature of the forged documents and "whether respondent had a good-faith, but mistaken belief of express or implied authority."

Respondent affixed BP's signature on a letter of intent without authority and submitted it in order to reinstate his commission on BP's account. BP had never even seen, let alone signed, the letter. In fact, the letter expressly contradicted BP's recent instruction to NY Life to take no further deductions from his account. Thus, Respondent could not have had a "good-faith, but mistaken belief" that the customer authorized him to draft and sign the letter. The Hearing Panel finds this act of forgery constitutes egregious misconduct for which Rogala should be barred from association with any NASD member firm in any capacity.²⁷

B. Communications with the Public

The Guidelines governing communications with the public recommend that failure to file warrants a fine ranging from \$1,000 to \$15,000 and a suspension of up to five business days.²⁸ The particular considerations applicable to establishing a fine for violations of this rule are: (1) whether the failure to file was inadvertent; (2) whether the communication with the public was circulated widely; and (3) whether the respondent failed to notify his supervisor of the

²⁶ *Id.* at 41.

²⁷ Fines are generally not imposed in forgery cases where the Respondent has been barred. Guidelines at 12.

²⁸ *Id.* at 85.

communication with the public. The Hearing Panel notes that Respondent's misconduct was not inadvertent; there is no evidence to indicate whether the illustrations were widely circulated; and he neglected to notify or seek written permission from his supervisor before using the illustrations.

The relevant guidelines for violations of the use of misleading communications with the public provide for a fine of between \$10,000 and \$100,000 and a suspension of up to two years where the respondent's conduct is intentional or reckless.²⁹ There is insufficient evidence to establish that Respondent intended to mislead public customers in preparing and distributing the illustrations, but the Hearing Panel finds that he acted recklessly in turning a blind eye to the requirements of NASD rules and his professional responsibilities. Respondent sought to absolve himself of all responsibility for the misleading and deficient illustrations he utilized by claiming that O'Grady acquiesced to their preparation and use and then forging a letter to that effect from O'Grady.

Accordingly, the Hearing Panel concludes that, for violating various provisions of NASD Rule 2210, significant sanctions would be appropriate under the facts and circumstances of this case. However, in light of the bars imposed, the Hearing Panel will not impose a sanction for these violations. A suspension would be redundant,³⁰ and a monetary fine would serve no additional remedial purpose.³¹

C. Submission of False and Misleading Documents

The Sanction Guideline for failing to respond truthfully to a request for information made pursuant to NASD Procedural Rule 8210 provides for a fine of \$25,000 to \$50,000 and, if the

²⁹ *Id.* at 86-87.

³⁰ *Dep't of Enforcement v. Hodde*, No. C10010005, 2002 NASD Discip. LEXIS 4, at *17 (NAC Mar. 27, 2002).

³¹ *See, e.g., Dep't of Enforcement v. Castle Securities Corp.*, No. C3A010036, 2004 NASD Discip. LEXIS 1, at *36-37 (NAC Feb. 19, 2004).

individual did not respond in any manner, a bar should be standard. Where mitigation exists, the Guidelines recommend a suspension of up to two years.³²

Forgery is wholly inconsistent with NASD's requirement that registered individuals maintain high standards of ethical conduct and observe just and equitable principles of fair trade. Respondent intentionally obstructed NASD's investigation by submitting documents he had forged in an effort to conceal his forged customer letter and his advertising violations. The Panel considers this highly aggravating and notes that even when confronted with the false documents at the hearing, Respondent continued to deny his misconduct.

The Panel finds Rogala's conduct egregious, warranting the severest of sanctions to protect the investing public and deter similar misconduct by others. Accordingly, the Panel imposes a separate bar for this misconduct.³³

IV. Conclusion

Respondent Joseph Rogala violated NASD Conduct Rule 2110 by affixing a customer's signature to a letter of instruction without authority, and violated NASD Conduct Rule 2110 and Procedural Rule 8210 by providing false and misleading documents to NASD. For these violations, Respondent is permanently barred from association with any member firm in any capacity. Respondent is not further sanctioned for creating and distributing misleading sales literature or failing to obtain prior written approval from his firm for sales literature, in violation of NASD Conduct Rules 2210 and 2110.³⁴ Finally, Respondent shall pay costs in the amount of \$2,359.74, which includes an administrative fee of \$750 and transcript costs of \$1,609.74.

³² Guidelines at 37.

³³ Fines are generally not imposed in cases where a respondent has been barred for violating Rule 8210. *Id.* at 12.

³⁴ The Hearing Panel has considered all of the arguments of the parties. They are sustained or rejected to the extent they are in accord or inconsistent with the views expressed herein.

The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer
For the Hearing Panel

Dated: October 11, 2004
Washington, DC

Copies to: Joseph Rogala (*via facsimile and overnight mail*)
Kevin G. Kulling, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)