NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C9B040033
v.	:	
	:	**HEARING PANEL DECISION**
ROBERT M. RYERSON (CRD No. 1224662)	:	Hearing Officer - SW
Freehold, NJ,	:	
	:	Dated: January 24, 2005
Respondent.	:	

Respondent Ryerson is (i) suspended for two years, (ii) fined $230,000 (a $15,000 initial fine plus $215,000, the amount of his financial benefit), and (iii) required to requalify in all capacities, for violating NASD Conduct Rules 3040 and 2110 by participating in the sale of securities, without providing prior written notice to, and obtaining prior written approval from, his employer. Respondent is suspended for 15 business days and fined $5,000, for violating NASD Conduct Rule 2110 by sharing commissions with a non-NASD member. Respondent is suspended for one year and fined $10,000, for violating NASD Conduct 2110 and NASD Procedural Rule 8210 by failing to provide a timely on-the-record interview.

Appearances

Jonathan M. Prytherch, Esq., Regional Attorney, and David B. Klafter, Esq., Regional Counsel, Woodbridge, NJ, for the Department of Enforcement.

Robert M. Ryerson, pro se.

DECISION

I. Procedural Background

On April 22, 2004, the NASD Department of Enforcement ("Enforcement") filed a three-count Complaint against Respondent Robert M. Ryerson ("Respondent"). Count one of the Complaint alleges that Respondent, while associated with Prime Capital Services, Inc. ("Prime Capital"), engaged in private securities transactions totaling in

excess of $4 million, for $215,000 in compensation, without giving prior written notice to, or receiving prior written approval from, his employer. Count two of the Complaint alleges that Respondent paid $100,000 in commissions to XW Consulting, Inc. ("XW Consulting"), a non-NASD member firm, in connection with the sale of variable annuity contracts. Count three of the Complaint alleges that Respondent failed to appear for two on-the-record interviews and failed to provide a doctor's excuse to explain his inability to appear for future on-the-record interviews between 2002 and 2004.

With respect to count one of the Complaint, Respondent argued that he provided notice of the transactions to his employer, and argued that he received approval for the transactions from his employer. With respect to count two of the Complaint, Respondent initially argued that he paid the $100,000 commission to a registered representative of another NASD firm, but subsequently admitted that XW Consulting was not an NASD member. Finally, with respect to count three of the Complaint, Respondent admitted that he did not appear for the two on-the-record interviews, but he argued that he had a valid excuse for his non-appearance. Respondent admitted that he did not appear until 2004 for an on-the-record interview, but he argued that he never claimed that he was too ill to be interviewed, rather the NASD staff chose to wait until the end of 2003 to request another on-the-record interview in 2004.

The Hearing Panel, consisting of a current member of the District 9 Committee, a former member of the District 11 Committee, and a Hearing Officer, conducted a Hearing in Woodbridge, New Jersey, on October 13 and 14, 2004.[1]

[1] "Tr." refers to the transcript of the Hearing held on October 13 and 14, 2004; "CX" refers to Enforcement's exhibits; "RX" refers to Respondent's exhibits; and "Stip." refers to the Parties' September 14, 2004 Joint Stipulation of Facts.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Article V, Section 4 of the NASD's By-Laws provides for a two-year period of retained jurisdiction over an individual whose registration with an NASD member has been terminated, covering conduct that occurred prior to termination of registration and failure to provide information requested pursuant to Rule 8210 during the period of retained jurisdiction. On June 5, 2002, Respondent's registrations as general securities principal and general securities representative with Prime Capital were terminated. (CX-1, p. 7). Respondent is not currently registered or associated with any NASD member firm. (Stip. at ¶4).

Enforcement filed the three-count Complaint on April 22, 2004, within two years of the June 5, 2002 termination of Respondent's registrations with Prime Capital, and the Complaint alleges misconduct occurring before Respondent's registrations were terminated and failures to respond to requests for on-the-record interviews issued during the period of retained jurisdiction. Accordingly, the Hearing Panel finds that NASD has jurisdiction over Respondent.

B. Background and Variable Annuity Contracts

1. Respondent's Activities with Xu Wang

In 2000 and 2001, Respondent was an independent contractor working out of an office in Matawan, New Jersey, for Prime Capital, an NASD member firm based in Poughkeepsie, New York. (Tr. pp. 95, 233, 491; CX-57, p. 9). Respondent became registered with Prime Capital in 1993 as a general securities representative and became registered with Prime Capital in 1998 as a general securities principal. (CX-1, p. 7).

At all times relevant to the Complaint, Respondent was also president and owner of New Century Planning Associates, Inc. ("New Century"), a registered investment advisory and financial planning firm. (Tr. p. 198). Respondent conducted his securities business through Prime Capital, selling stocks, mutual funds, and variable annuities. (Tr. p. 188; CX-24). Respondent also sold insurance and fixed annuities. (Tr. pp. 170, 491; CX-24; CX-53, pp. 12-19).

On October 25, 2000, Respondent met Mr. Xu Wang, an investment company and variable contracts products representative with Metropolitan Life Insurance Company and MetLife Insurance, Inc. ("MetLife"); they were introduced by a former colleague of Respondent. (Tr. p. 473; CX-31, p. 2; CX-26, p. 1). Mr. Wang told Respondent that he had New Jersey clients, and he discussed with Respondent the possibility of jointly servicing New Jersey clients. (Tr. p. 468; CX-57, p. 19). Mr. Wang was not registered in New Jersey and, as a captive MetLife representative, he was limited in the products that he could offer his clients. (Tr. pp. 505-507; CX-57, p. 45).

From October 2000 through December 2000, Respondent and Mr. Wang discussed various types of securities that Respondent could offer through Prime Capital, as well as negotiated the compensation arrangements for Mr. Wang's referral of clients to Respondent. (Tr. p. 468; CX-25; CX-26; CX-57, p. 22). In e-mails sent to Mr. Wang during the period, Respondent represented that he was awaiting approval of the compensation arrangements from Prime Capital's compliance department. (CX-25; CX-26, p. 5).

In December 2000, Mr. Wang discussed with Respondent potential business transactions with Dr. BM. (Tr. pp. 468-469). In December 2000, Respondent met Dr. BM, who explained that he wanted to invest in Kemper Destinations variable annuity

contracts because they contained specific financial features that presented arbitrage opportunities. (Tr. pp. 469-470, 474; CX-57, p. 22). On behalf of a large hedge fund, Dr. BM, as the co-trustee of various newly created trusts, had millions of dollars to invest in variable annuity contracts. (Tr. p. 245; CX-11). Respondent confirmed that the Kemper Destinations variable annuity contract was a Prime Capital approved product, and he advised Dr. BM that there were variable annuity contracts issued by other insurance companies that contained financial features similar to the Kemper Destinations variable annuity. (Tr. pp. 471, 474; CX-57, p. 26).

On December 9, 2000, Dr. BM executed two Kemper Destinations variable annuity contracts on behalf of trusts created for customers YL and JM.[2] (CX-28, pp. 1-2, 5-6). On December 20, 2000, Mr. Wang and Respondent finalized written agreements to share the commissions on the YL and JM annuity contracts. (CX-27).

A Kemper Destinations variable annuity for customer JM in the amount of $1 million was issued on December 21, 2000, and shortly thereafter an additional $3 million was added to the annuity contract. (CX-28, p. 3). A Kemper Destinations annuity for customer YL in the amount of $1,000 was issued on December 21, 2000, and shortly thereafter an additional $999,000 was added to the annuity contract. (CX-28, p. 7).

On December 28, 2000, Respondent executed the commission-sharing agreements with Mr. Wang regarding the annuity contracts for customers YL and JM. (CX-27). Although Respondent briefly discussed commission-sharing arrangements with Ms. Southard, Prime Capital's compliance officer, and assumed that he had received oral approval of the arrangements from Prime Capital, Prime Capital's written supervisory

[2] Respondent never dealt with the annuitants of the trusts; Respondent's only contact was with Dr. BM. (RX-10, pp. 49, 57-58).

procedures explicitly required registered representatives to obtain written approval prior to sharing commissions. (Tr. pp. 500-501; CX-55, p. 8). Respondent did not request and did not obtain written approval from Prime Capital for his arrangements with Mr. Wang. (Tr. p. 505).

After receiving payment on the YL and JM annuity contracts from Prime Capital, on January 23, 2001, Respondent wrote a $100,000 check payable to XW Consulting for the referral of the $5 million in variable annuity sales generated via Dr. BM. (CX-29; CX-28, pp. 4, 7). XW Consulting was never registered with NASD, the SEC, any State, or any other self-regulatory organization. (Tr. p. 87; CX-30).

Mr. Ryan and Ms. Southard did not recall any specific conversation regarding Mr. Wang or Dr. BM. (Tr. pp. 148, 297-298). However, Mr. Ryan and Ms. Southard were certain that they were not advised of and were not provided with copies of Respondent's commission sharing agreements with Mr. Wang or with a copy of the $100,000 check payable to XW Consulting that Respondent delivered to Mr. Wang. (Tr. pp. 167-169).

The Hearing Panel finds that although Respondent may have generally talked about Mr. Wang's proposal to share commissions with Mr. Ryan and Ms. Southard, he did not provide Prime Capital with specific details of the transactions or copies of the agreements as required by Prime Capital's written supervisory procedures.

Subsequently, Dr. BM executed a number of additional annuity contracts and placed them through Respondent, including additional contracts for YL and JM as well as contracts for other individuals. (CX-24). Between January 9, 2001 and April 1, 2001, Respondent caused to be processed annuity contracts totaling an additional $4.03 million for customer JM and annuity contracts totaling $9.01 million for a trust for customer JN, another trust created by Dr. BM. (CX-24, pp. 2, 7-12, 15). Because of the unique funding

pattern of the contracts, i.e., original investment of the minimum amount followed shortly thereafter by an investment of the maximum amount, Mr. Ryan testified that Prime Capital reviewed the annuity contracts with counsel and determined that the business was legitimate. (Tr. p. 350).

Despite the terms of the agreements with Mr. Wang, there was no evidence that Respondent paid Mr. Wang any additional compensation after January 2001 for the additional annuity contracts that Dr. BM placed through Prime Capital.

2. Respondent's Activities with Peter Passalacqua

Dr. BM told Respondent that he did not want to invest the funds that he controlled solely through one broker-dealer, but he wanted to diversify the investments through a number of broker-dealers. (Tr. pp. 471-472, 485).

In early January 2001, Respondent introduced Dr. BM to Peter Passalacqua, a general securities representative with The Investment Center and owner and president of a registered investment firm. (Tr. p. 195). Effective January 1, 2001, Respondent and Mr. Passalacqua executed an employment agreement whereby Respondent's company, New Century, was employed by Mr. Passalacqua's registered investment company, ostensibly to provide investment recommendations, securities research, and investment advice. (CX-3). However, the employment agreement was designed to provide a mechanism for Mr. Passalacqua to pay Respondent 90% of any commissions generated by Dr. BM's transactions executed through Mr. Passalacqua at The Investment Center. (Tr. p. 201). The employment agreement provided for a salary of $200,000 and bonuses to be determined. (CX-3, pp. 3-4). Previously, in 1999, Respondent had met and become a friend and mentor to Mr. Passalacqua. (Tr. p. 197). In June 2000, Respondent and Mr.

Passalacqua began seriously discussing merging their businesses.[3] (Tr. pp. 197, 466).

In late December 2000 or early January 2001, Respondent spoke with Mr. Ryan regarding Mr. Passalacqua joining Prime Capital and the possibility of sharing commissions with him. (Tr. pp. 476-477). Mr. Ryan referred Respondent to Ms. Einsman, the chief operating officer of Prime Capital, who referred him to Ms. Southard. (Id.). Respondent spoke with Ms. Southard, who indicated that (i) Prime Capital had previously approved shared commission transactions, and (ii) Prime Capital had a specific form developed for such transactions. (Tr. p. 477).

On January 15, 2001, Respondent completed a Prime Capital compliance questionnaire. (CX-4). Respondent certified on the 2001 questionnaire that he had not received compensation from any third party. (Id.).

In January 2001, Respondent confirmed with Mr. Passalacqua that The Investment Center's product line included the Kemper Destinations variable annuity contracts. (Tr. p. 493). In January 2001, Dr. BM executed four Kemper Destinations variable annuity contract applications placed through Mr. Passalacqua for customers DB, FM, JF, and EG.[4] (CX-6; CX-7; CX-8; CX-9). The Kemper Destinations annuity contracts for customers DB and FM were issued on January 28, 2001. (CX-6, p. 5; CX-9, p. 5). The Kemper Destinations annuity contract for customer EG was issued on February 8, 2001, and the Kemper Destinations annuity contract for customer JF was issued on February 9, 2001. (CX-7, p. 5; CX-8, p. 5).

[3] Both Respondent and Mr. Passalacqua viewed the referral of Dr. BM as an additional incentive for Mr. Passalacqua to join Prime Capital. (Tr. p. 200).

[4] The variable annuity application that was placed through Mr. Passalacqua and The Investment Center for customer JF was signed by Dr. BM in Respondent's Matawan office. (CX-7, p. 3).

Subsequently, Respondent had Mr. Passalacqua confirm that The Investment Center's product line included: (i) the ManuLife "Venture" Annuity; (ii) the Alliance "Alterity" Annuity; (iii) the Golden American "Premium Plus" Annuity; (iv) the Kemper "Destinations" Annuity; and (v) the PFL Life (which became Transamerica) "Extra" Annuity. (Tr. pp. 493, 540; CX-57, pp. 108, 112; RX-2).

Ms. Einsman and Ms. Southard had a series of conversations with Respondent to understand the business being provided by Dr. BM. (Tr. p. 349). There were also a number of discussions between Respondent, Mr. Ryan, Ms. Einsman, and Ms. Southard between December 2000 and March 2001 regarding sharing commissions with Mr. Passalacqua and Mr. Passalacqua joining Prime Capital. (Tr. pp. 150-151, 482- 484; CX-57, p. 111). Ms. Einsman remembers Respondent inquiring whether "the firm had a policy with regard to commission sharing with another firm." (Tr. p. 299). Ms. Southard remembers Respondent approaching her to discuss doing "some joint business with [Mr.] Passalacqua." (Tr. p. 143). Upon the instructions of Ms. Southard, Respondent drafted a written request, which was delivered to Prime Capital on March 17, 2001. (Tr. pp. 147-148, 503-504; RX-2).

Respondent's written request referenced splitting commissions with Mr. Passalacqua of The Investment Group with respect to the following products: (i) the ManuLife "Venture" Annuity; (ii) the Alliance "Alterity" Annuity; (iii) the Golden American "Premium Plus" Annuity; (iv) the Kemper "Destinations" Annuity; and (v) the PFL Life "Extra" Annuity. (RX-2). The annuity contracts listed in the request were products approved by Prime Capital. (CX-57, p. 113).

Respondent's written request failed to detail Respondent's participation in the proposed transactions, failed to mention the referral of Dr. BM to The Investment Center,

and most importantly failed to mention the four Kemper Destinations annuity transactions that had been placed through The Investment Center in January 2001 as a result of Respondent's referral of Dr. BM to Mr. Passalacqua. (RX-2).

Believing that Prime Capital had given him oral approval and would give him written approval to share commissions on the five types of annuity contracts with Mr. Passalacqua, on March 15, 2001, Respondent directed Mr. Passalacqua to deliver to him two checks totaling $215,000 as compensation for referring Dr. BM and the subsequent opening of accounts for the trusts of customers FM, DB, JF, and EG. (Tr. pp. 209-210, 503, 536). The $215,000 represented 90% of the commissions earned by Mr. Passalacqua on the annuity contracts for customers FM, DB, JF, and EG. The $200,000 and the $15,000 checks were labeled salary and bonus, respectively, in conformity with the January 1, 2001 employment agreement. (RX-4; RX-5). Respondent deposited the checks dated March 15, 2001 and April 15, 2001 into his account in late April 2001. (RX-4; RX-5; RX-6).

On March 21, 2001, in response to Respondent's request, Ms. Southard sent Respondent, via facsimile, a copy of a proposed agreement for splitting of commissions between Prime Capital and The Investment Center. (CX-15). The agreement was executed by Ms. Southard on behalf of Prime Capital. (Tr. p. 184; CX-15). The facsimile cover sheet indicated that the agreement was subject to the approval of The Investment Center. (CX-15, p. 1). Although Ms. Southard had no specific recollection of sending the executed original agreement to The Investment Center, she did remember discussing the commission sharing arrangement with Mr. Quillen, senior vice president of The Investment Center. (Tr. p. 179).

Mr. Quillen discussed the proposed commission sharing arrangement with Ralph DeVito, the president of The Investment Center. (Tr. p. 389). Based on the proposed 90/10 split set forth in the agreement, with only 10% of the commission going to The Investment Center, Mr. DeVito instructed Mr. Quillen to reject the agreement. (Tr. pp. 390, 399-400; CX-21, p. 2). In March 2001, Mr. Quillen advised Ms. Southard and Mr. Passalacqua of Mr. DeVito's decision to reject the proposed commission sharing arrangement. (Tr. pp. 160-161, 390).

Ms. Southard advised Respondent orally that The Investment Center had rejected the commission sharing agreement.[5] (Tr. p. 162). Respondent was aware that The Investment Center continued to process variable annuity contracts for Dr. BM. (Tr. p. 426; CX-57, p. 84). As of May 2001, The Investment Center processed variable annuity contracts for more than 24 additional accounts placed through Mr. Passalacqua by Dr. BM. (Tr. pp. 207-208; CX-11).

There was no evidence presented that, after being advised that The Investment Center rejected the commission sharing arrangement, Respondent received any additional compensation from Mr. Passalacqua for the more than 24 additional accounts placed by Dr. BM through Mr. Passalacqua.[6]

[5] Prime Capital failed to provide Respondent with a written response to his request as required by NASD Conduct Rule 3040.

[6] On July 6, 2001, Transamerica Life Insurance Company wrote The Investment Center advising the firm that certain annuity contracts issued by Transamerica would be frozen pending an investigation. (CX-59, pp. 1-2). On December 7, 2001, Dr. BM's co-trustees wrote The Investment Center stating that Dr. BM was not permitted to act on behalf of the trusts, which had invested in the variable annuity contracts. (CX-59, pp. 3-4). The Investment Center conducted an investigation, and upon learning of the $215,000 paid by Mr. Passalacqua to Respondent for the referral of the Dr. BM trusts, terminated Mr. Passalacqua's employment, effective December 19, 2001. (Tr. p. 213; CX-2, p. 7).

C. Count One: Respondent's Activities Violated NASD Conduct Rule 3040

NASD Conduct Rule 3040 provides that prior to participating in any securities transactions outside the regular scope of an associated person's employment with a member, the associated person shall provide written notice to the member, describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction.

Pursuant to NASD Conduct Rule 3040, "Selling Compensation" includes "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security. . ." If selling compensation will be paid, the firm must approve or disapprove the associated person's participation in the transaction in writing, and if the firm approves participation, "the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member."

The reach of NASD Conduct Rule 3040 is very broad, encompassing the activities of "an associated person who not only makes a sale but who participates in any manner in the transaction." The NAC has held that an associated person who introduces clients to an investment and later receives a finder's or referral fee participated in the transaction for purposes of NASD Conduct Rule 3040.[7]

Respondent admitted that he: (i) referred Dr. BM to Mr. Passalacqua in January 2001; (ii) expected and received compensation in connection with securities sales, i.e., sales of variable annuity contracts, placed through Mr. Passalacqua in January 2001; and (iii) did not provide prior written notice of these transactions to this employer. (Tr. p.

[7] Gilbert M. Hair 51 S.E.C. 374, 378 (1993); Charles A. Roth, 50 S.E.C. 1147, 1150 (1992).

526). Respondent argued that the annuity contracts were Prime Capital approved products and therefore were not outside the scope of his employment. However, the four annuity contracts were sold through Mr. Passalacqua and The Investment Center, not Prime Capital, and Prime Capital confirmed that the contracts were not recorded on its books and records.

Accordingly, the sales were outside the scope of Respondent's employment with Prime Capital. Consequently, there can be no dispute that Respondent's actions violated NASD Conduct Rule 3040. NASD has held that a violation of NASD Conduct Rule 3040 is also a violation of NASD Conduct Rule 2110's requirement to observe just and equitable principles of trade.[8]

Respondent testified that he had no clear understanding of NASD Conduct Rule 3040.[9] He vaguely believed that the rule involved a prohibition on selling products in direct competition with the products of his employer. However, as a matter of law, Respondent is presumed to know and understand the NASD Rules. Carter v. SEC, 726 F.2d, 472, 474 (9th Cir. 1983).

The Hearing Panel finds that Respondent violated NASD Conduct Rules 3040 and 2110 in connection with his participation in the Dr. BM securities transactions placed through Mr. Passalacqua.

[8] Chris Dinh Hartley, Exchange Act Release No. 50021, 2004 SEC LEXIS 1507 at *9-10 (July 16, 2004).

[9] Contrary to Respondent's argument that the phrase "has received" in NASD Conduct Rule 3040 indicates that there may be circumstances pursuant to which prior approval is not required. The Hearing Panel finds that the phrase "has received" indicates that in those circumstances where approval is being sought, prior violative compensation must be disclosed.

D. Count Two: Respondent's Activities Violated NASD Conduct Rule 2110

Respondent admits that he: (i) wrote a check for $100,000 payable to XW Consulting in connection with the sale of the two variable annuities; and (ii) did not know at the time whether XW Consulting was an NASD member.

NASD has consistently taken the position in published interpretations that it is improper for an NASD member or a person associated with an NASD member to make payments of finder's or referral fees to third parties who introduce or refer prospective broker customers to a firm, unless the recipient of the fee is registered with NASD.[10]

Persons who introduce or refer prospective customers and receive compensation for such activities are engaged in solicitation, the first step in the consummation of a securities transaction, and, accordingly, such persons are engaged in the securities business and are subject to the NASD qualification and registration requirements.[11] Therefore, it is a violation of NASD Conduct Rule 2110's requirement to observe high standards of commercial honor and just and equitable principles of trade for registered representatives to subvert these requirements by sharing commissions generated by securities transactions with non-registered persons.[12]

Respondent argued that he discussed the matter with the compliance department and would have expected the compliance staff to apprise him of all regulatory concerns. As discussed above, however, Respondent is required and presumed to know and understand his obligations as a registered representative. Accordingly, the Hearing Panel

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[10] See Frequently Asked Questions-Registration, Question R13 at Hhttp://www.nasd.com/stellent/idcplg?IdcServiceH=SS_GET_PAGE&ssDocName=NASDW_011102&ssSourceNodeId=1108.

[11] Notice to Members, 97-11 (March 1997).

[12] District Bus. Conduct Comm. v. Prince, No. C05930027, 1994 NASD Discip. LEXIS 18 (NBCC July 28, 1994) (Prince violated Article III, Section 1, the predecessor of NASD Conduct Rule 2110, by allowing his production number to be used by a non-registered person, and paying off-book compensation to that non-registered person).

finds that Respondent violated NASD Conduct Rule 2110 when he split the commissions that he earned on the YL and JM annuity sales with XW Consulting, a non-NASD member.

E. Respondent Violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210

1. Respondent Failed to Provide an On-the-Record Interview in a Timely Manner

The NASD staff began an investigation into this matter after receiving a Form U-5 in December 2001 indicating that Mr. Passalacqua had been permitted to resign for unauthorized commission splitting with a registered representative at another firm. (Tr. pp. 30-33; CX-2, p. 9). After learning that Respondent was the registered representative mentioned in the Form U-5, on February 8, 2002, Jack Litsky, an NASD examiner, sent a Rule 8210 letter to Respondent requesting his presence at an NASD on-the-record interview on February 21, 2002. (Tr. pp. 30, 98; CX-32).

Respondent retained Michael Shannon as counsel to represent him. (CX-32, p. 2; CX-57, p. 144). Because of Mr. Shannon's schedule, Mr. Shannon requested that the on-the-record interview be rescheduled. (Tr. pp. 98-99). Mr. Litsky granted Mr. Shannon's request and rescheduled the on-the-record interview to March 4, 2002. (CX-34, p. 1). Subsequently, Mr. Shannon requested a second extension because of his litigation schedule, which Mr. Litsky also granted. (CX-33). On March 8, 2002, Mr. Shannon withdrew as counsel for Respondent because Mr. Shannon's schedule did not permit him to timely meet the NASD staff's time requirements. (Tr. p. 101; CX-34, pp. 3-4).

In light of Mr. Shannon's withdrawal and based on Mr. Shannon's recommendation, Respondent immediately approached Ms. Niosi to represent him. (Tr.

p. 508). Ms. Niosi requested a postponement of the scheduled on-the-record interview because of her prior travel plans, which Mr. Litsky granted. (Tr. p. 106; CX-35).

On April 4, 2002, Mr. Litsky issued a Rule 8210 request to Respondent directing him to appear for an on-the-record interview on April 16, 2002. (Tr. p. 106; CX-36). On April 10, 2002, Ms. Niosi told Respondent that she had a family emergency and would take care of rescheduling the on-the-record interview. (Tr. pp. 508, 511). Ms. Niosi sent to Mr. Litsky a facsimile cover sheet, via regular mail, indicating that she had a family emergency, the details of which an NASD staff attorney knew, and that she would contact Mr. Litsky on the afternoon of April 16, 2002 to reschedule the interview. (CX-38). Mr. Litsky did not receive the cover sheet until the morning of April 16, 2002 and opened the record to receive evidence that Respondent had not appeared for his scheduled interview. (Tr. p. 112; CX-39).

On April 17, 2002, Mr. Litsky sent another Rule 8210 request to Respondent directing him to appear for an on-the-record interview on April 24, 2002. (CX-40). On April 23, 2002, one day before the interview, Ms. Niosi decided to withdraw from representing Respondent and alerted Mr. Litsky. (Tr. p. 512; CX-41). Ms. Niosi advised Respondent that she would not be able to represent him. (Id.). On April 23, 2002, Mr. Litksy sent a letter to Respondent, via facsimile transmission, acknowledging receipt of Ms. Niosi's resignation and warning Respondent that a failure to appear at the April 24, 2002 interview could result in disciplinary action against him. (CX-42). Respondent failed to appear for the April 24, 2002 on-the-record interview believing he should not appear to testify without counsel. (Tr. pp. 509-510; CX-43).

Approximately one week after Ms. Niosi resigned, Respondent hired Anthony Djinis to represent him. (CX-46). On May 2, 2002, Mr. Djinis wrote Mr. Litsky stating

that he was representing Respondent and indicating that he was willing to assist in any manner possible. (Id.). Between May 2002 and June 21, 2002, Respondent, through Mr. Djinis, provided documents to the NASD staff and had several conversations with Mr. Litsky. (Tr. p. 274; RX-12).

In a July 15, 2002 letter, Mr. Djinis indicated that Respondent was currently under a doctor's care. (CX-48). The NASD staff sent a Rule 8210 request letter to Respondent requesting information concerning his medical condition, including a request that he submit a doctor's opinion that he was unable to attend an on-the-record interview. (Tr. pp. 132-133; CX-49). Respondent provided medical records, including medical bills, but not a doctor's opinion that he was unable to appear for an interview. (Tr. pp. 264-265). Nevertheless, the NASD staff did not expressly renew their request that Respondent appear for an interview. (Tr. pp. 263-264).

Enforcement argued that the July 15, 2002 letter from Mr. Djinis set forth a condition on Respondent's willingness to attend an on-the-record interview. By implication, Enforcement argued that Respondent would have refused to honor another Rule 8210 request based on his medical condition. The Hearing Panel disagrees.

The July 15, 2002 letter did not explicitly state that Respondent would refuse to appear for an on-the-record interview, and neither Respondent nor his counsel intended to convey such a message. (Tr. pp. 284-285). Instead, Respondent's counsel suggested a format to proceed with the investigation, based, in part, on Mr. Litskey's prior actions.

Respondent was aware that the NASD staff had previously requested and remained interested in conducting an on-the-record interview. Yet, Respondent did not volunteer to be interviewed on any specific date. (Tr. pp. 275-276). On the other hand, the NASD staff did not renew its request for an interview pursuant to Rule 8210, until

December 15, 2003. (CX-54, pp. 1-2). On January 8, 2004, Respondent attended an on-the-record interview with the NASD staff; Enforcement did not allege that Respondent refused to respond to any of the staff's questions during the interview. (CX-57).

2. NASD Procedural Rule 8210

Under NASD Procedural Rule 8210, NASD may require any person subject to its jurisdiction to provide information regarding any matter under investigation. The obligation to respond is unqualified. Because NASD lacks subpoena power, Rule 8210 is the means by which NASD carries out its regulatory functions. It is a "key element in the NASD's efforts to police its members."[13] Failure to comply with Rule 8210 requests for information is a serious violation because it subverts the NASD's ability to perform its regulatory responsibilities.[14] A violation of NASD Procedural Rule 8210 is also a violation of NASD Conduct Rule 2110.[15]

The Hearing Panel finds that Respondent violated Rule 8210 when he failed to appear for his interview on April 24, 2002. Respondent's failure to appear on April 16, 2002 was reasonable based upon Ms. Niosi's advice that she would take care of obtaining an adjournment, but Respondent had no excuse for failing to appear on April 24, 2002. Although Respondent's desire to obtain counsel was understandable, there is no absolute right to counsel in NASD investigations. Thus, Respondent was required to appear as scheduled.

Respondent testified that had he known in April 2002 that he could appear and then request that the staff grant an adjournment to allow him to obtain counsel, he would

[13] See, e.g., Richard J. Rouse, 51 S.E.C. 581 1993 SEC LEXIS 1831, at *7 (1993).

[14] Id.

[15] See Department of Enforcement v. Baxter, C07990016, 2000 NASD Discip. LEXIS 3, at *21, *25 (Apr. 19, 2000).

have done so. (Tr. pp. 509-510; RX-19). Respondent further testified that he was unaware of such procedure because he relied upon counsel, instead of reviewing the Rule 8210 requests that he received. (Tr. pp. 509-510).

Having failed to appear, Respondent was under a continuing obligation to provide the requested interview, yet he did not volunteer to appear. By the same token, however, the NASD staff did not expressly renew its request for an interview until December 2003. When the staff did renew its request, Respondent appeared and provided the requested testimony. The Hearing Panel, therefore, finds that Respondent's violation is more properly characterized as a failure to provide information in a timely manner, rather than as a refusal to respond at all.

III. SANCTIONS

A. Private Securities Transactions

The Guidelines for Private Securities Transactions suggest fines ranging from $5,000 to $50,000, which the adjudicator may increase by the amount of respondent's financial benefit.[16] The Guidelines also suggest suspensions, ranging from 10 business days for sales activities involving sales of up to $100,000, to a 12 month suspension, or a bar, for sales activities involving sales in excess of $1,000,000, which suspensions the adjudicator may increase or decrease after considering other applicable aggravating or mitigating factors.[17] Arguing that the amount of the activity was egregious, Enforcement recommended that Respondent be barred.

[16] NASD Sanction Guidelines, pp. 17-18 (2004).

[17] Id.; see also Special NASD Notice to Members 03-65 (Oct. 2003). The Guidelines, as revised, recommend that adjudicators first assess the extent of the selling away, including the dollar amount of sales, the number of customers, and the length of time over which the selling away occurred. Following the assessment of the extent of the selling away, adjudicators are advised to consider the ten other factors listed in the Guideline, which include six of the general considerations listed in the introductory section of the Guidelines.

In arriving at specific sanctions, the Hearing Panel first considered the extent of the selling away, i.e., the dollar volume of sales, the number of customers, and the length of time. Respondent participated in transactions involving sales of $4 million in four transactions for one customer over a two-week period.

The revised Guidelines also list the following additional potentially aggravating or mitigating factors to be considered: (1) whether the product sold away has been found to involve a violation of applicable rules or laws; (2) whether the respondent had a proprietary or beneficial interest in, or was affiliated with, the issuer of the products; (3) whether the respondent attempted to create the impression that his or her employer sanctioned the activity; (4) whether the respondent's selling away activity resulted in injury to the investing public and, if so, the nature and extent of the injury; (5) whether the respondent sold away to customers of his or her employer; (6) whether the respondent provided his or her firm with verbal notice of the details of the proposed transactions and, if so, the firm's verbal or written response, if any; (7) whether the respondent sold away after being instructed by his or her firm not to sell or to discontinue selling the specific product involved; (8) whether the respondent participated in the sale by referring customers or selling the product directly to customers; and (9) whether the respondent recruited other registered individuals to sell the product.

A number of the potential aggravating factors were not present in this proceeding. For example, the Hearing Panel finds that: (1) the sale of variable annuity contracts sold did not involve a violation of federal or state securities laws, or federal, state or SRO rules; (2) Respondent did not have a proprietary or beneficial ownership interest in the issuers of the variable annuity contracts; (3) there was no injury to the investing public; (4) there was no evidence that Respondent continued to profit from the sale of the

variable annuity contracts placed through Mr. Passalacqua after being instructed not to do so; and (5) there was no evidence that Respondent created the impression that Prime Capital sanctioned his activity with The Investment Center.

Finally, contrary to Enforcement's argument, the Hearing Panel finds that Respondent did not deliberately attempt to conceal the variable annuity transactions from his employer. Enforcement argued that Respondent's March 17, 2001 request was a thinly disguised attempt to have Prime Capital ratify what he had already done. However, Respondent had already orally discussed the commission sharing arrangement with Prime Capital on several occasions and believed that it would be approved. In fact, Respondent expected the commission sharing arrangement to continue and grow.

Enforcement also argued that when Respondent failed to disclose the employment agreement with Mr. Passalacqua on his January 15, 2001 compliance questionnaire, he was attempting to hide the commission sharing arrangement from Prime Capital. The Hearing Panel disagrees. Although the employment agreement had an effective date of January 1, 2001, Respondent testified that it was actually executed later, after January 15, 2001. (Tr. pp. 496-497, 502). The Hearing Panel finds that the $200,000 proposed compensation figure set forth in the employment agreement was related to the commissions that Respondent earned on the DB, FM, JF, and EG annuity sales, which sales were executed after January 15, 2001.[18] In January 2001, Respondent had every expectation that Prime Capital would approve the commission sharing arrangement. Ms. Southard's forwarding to Respondent of an executed agreement with The Investment

[18] The variable annuity contract applications for customers DB and FM were executed on January 20, 2001. (CX-6; CX-9). The variable annuity contract applications for customers JF and EG were executed on January 27, 2001. (CX-7; CX-8).

Center vindicated his initial expectation. Therefore, he was not attempting to hide the arrangement.

In addition, the aggravating factors that did exist were mitigated somewhat by the circumstances surrounding the transactions. Although Respondent sold away to a customer of his employer, it is clear that Dr. BM affirmatively decided to parcel out his investment business to different broker-dealers. Although Respondent was responsible for another registered representative becoming involved in the variable annuity sales, the Hearing Panel finds that this factor is not materially aggravating because Mr. Passalacqua's participation did not violate NASD Conduct Rule 3040 since his participation was supervised by his employer, The Investment Center, a registered broker-dealer. Thus, the variable annuity sales received the oversight and supervision of a registered broker-dealer, which is one of the functions that Rule 3040 is designed to reinforce.

However, at the time Respondent completed the compliance questionnaire on January 15, 2001, Respondent had discussed the employment agreement with Mr. Passalacqua as a mechanism for obtaining referral fees and he anticipated receiving such referral fees. The Hearing Panel finds Respondent's failure to disclose on his compliance questionnaire that he anticipated executing such an employment agreement and his expectation to receive fees to be an aggravating factor.

It is also an aggravating factor that Respondent failed to state in his written request for approval of the commission sharing arrangement the fact that he had already participated in four transactions. Further, after the commission sharing arrangement was

rejected, Respondent made no effort to disclose that he had already received funds under the arrangement, and he made no effort to return the funds.[19]

Based on all the factors discussed above, and noting that Respondent had been a registered principal for four years prior to the transactions, the Hearing Panel finds that Respondent's misconduct was egregious and warrants a serious sanction, but not a bar. The Hearing Panel suspends Respondent for two years in all capacities, requires him to requalify in all capacities, and fines him $230,000 (a $15,000 initial fine plus $215,000, the amount of his financial benefit).

B. Paying Commissions to an Unregistered Entity

There is not a specific sanction guideline for paying commissions to an unregistered entity. Enforcement recommended that a fifteen business-day suspension and fine in the amount of $5,000 was an appropriate sanction for the misconduct, citing the sanction imposed on another registered representative who paid a commission to Dr. BM regarding variable annuity sales.[20] The Hearing Panel also notes that Mr. Passalacqua received a $7,500 fine and a 10-day suspension for paying $215,000 in commissions to New Century, Respondent's non-NASD member advisory company. (Tr. p. 196; RX-21).

The Hearing Panel, having considered the various general considerations set forth in the Guidelines,[21] agrees that the sanctions proposed by Enforcement are appropriate

[19] The proposed agreement that Prime Capital approved, subject to the approval of The Investment Center, provided for the commissions to be split by the insurance company between the two broker-dealers, which commissions the broker-dealers would subsequently pay to Respondent and Mr. Passalacqua; the agreement did not provide for the registered representatives to split the commissions among themselves.

[20] See Michael Berardi, AWC No. C9B030079 found in Notices to Members 04-01. (RX-20).

[21] Guidelines, at 8-9.

under all the circumstances, and fines Respondent $5,000 and suspends him for 15 business days.

C. Failure to Provide an On-the-Record Interview in a Timely Manner

With respect to the Rule 8210 violations, the Sanction Guidelines recommend fines ranging from $2,500 to $25,000 and suspensions for up to two years for failures to provide information in a timely manner.[22] The principal considerations in assessing this sanction are: (1) the nature of the information requested; and (2) whether the requested information has been provided and, if so, the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response.[23]

Enforcement suggested a bar arguing that Respondent's failure to appear until 2004, and only after that staff had exerted the regulatory pressure of requesting a Wells Submission, were serious aggravating factors.

The Hearing Panel finds that Respondent's failure to appear at the April 24, 2002 on-the-record interview was unreasonable, in light of the April 23, 2002 letter by the NASD staff.

However, the Hearing Panel notes that Respondent failed to appear only after his counsel withdrew at the last minute, that he promptly obtained new counsel, and that Respondent and his new counsel cooperated in the staff's investigation by providing information requested by the staff. The Hearing Panel does not find that Respondent

[22] Guidelines, at 37.

[23] Id.

intentionally engaged in dilatory tactics designed to evade questioning by NASD.[24] Respondent and his counsel did not volunteer that Respondent would appear for an interview, but neither did the staff expressly renew its request for an interview until December 2003, and, at that point, Respondent appeared and provided the requested interview. Under these circumstances, the Hearing Panel concluded that substantial sanctions were appropriate, but not a bar. Instead, the Hearing Panel determined that a one-year suspension in all capacities, and a $10,000 fine are appropriate sanctions for Respondent's failure to provide a timely on-the-record interview in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

CONCLUSION

Respondent Robert M. Ryerson violated NASD Conduct Rules 3040 and 2110 by participating in the sale of securities, without providing prior written notice to, and obtaining prior written approval from, his employer, for which Respondent is: (i) suspended for two years in all capacities; (ii) fined $230,000 ($15,000 plus $215,000, the amount of his financial benefit); and (iii) required to requalify in all capacities.

Respondent also violated NASD Conduct Rule 2110 by sharing commissions with a non-NASD member, for which he is fined $5,000 and suspended for 15 business days in all capacities.

Respondent violated NASD Conduct 2110 and NASD Procedural Rule 8210 by failing to provide an on-the-record interview in a timely manner, for which he is suspended for one year in all capacities and fined $10,000.

[24] Toni Valentino, Exchange Act Rel. No. 49255 (Feb. 13, 2004) (Having been found to have engaged in dilatory tactics to evade questioning by NASD, Respondent was barred for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110).

The Hearing Panel also orders Respondent to pay the $4,178.26 costs of the Hearing, which include an administrative fee of $750 and Hearing transcript costs of $3,428.26. Respondent's fines and costs shall become due and payable upon his re-entry into the securities industry. The suspensions are to run concurrently. If this decision becomes NASD's final disciplinary action in this matter, Respondent's suspensions shall begin on March 21, 2005 and the last suspension shall conclude on March 20, 2007.[25]

SO ORDERED.

HEARING PANEL

By:_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
January 24, 2005

Copies to:
Robert M. Ryerson (via Federal Express and first class mail)
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[25] The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.