NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT Complainant, v. LANCE DAHMER (CRD No. 1615284) Wadsworth, IL Respondent.	Disciplinary Proceeding No. C8A030086 Hearing Officer – AWH **Hearing Panel Decision** February 17, 2005

Registered representative failed to disclose outside business activities, in violation of NASD Conduct Rules 3030 and 2110. Respondent suspended from associating with any member firm in any capacity for 60 days, fined $5,000, ordered to requalify by examination, and assessed costs.

Appearances:

Kevin G. Kulling, Esq., and Richard March, Esq. for the Department of Enforcement

Steven M. Malina, Esq., and Hallie A Diethelm, Esq., for Lance Dahmer

DECISION

Introduction

On November 14, 2003, the Department of Enforcement ("Enforcement") issued the Complaint in this matter against Lance Dahmer ("Dahmer" or "Respondent"), alleging that he failed to disclose outside business activities, in violation of NASD Conduct Rules 3030 and 2110. Respondent filed an Answer to the Complaint on January 8, 2004, generally denying the alleged misconduct, and requested a hearing. A hearing was held on October 5, 2004, in Chicago, Illinois, before a hearing panel composed of the Hearing Officer and two current members of the District 8 Committee. The Respondent

filed his post-hearing submission on November 16, 2004, and Enforcement filed its post-hearing submission on November 17, 2004.

Findings of Fact[1]

The Respondent

Lance Dahmer first entered the securities industry at the end of 1986 when he became associated with American Express Financial Advisors ("AEFA"). He was registered as a General Securities Representative through AEFA[2] from March 1987 through August 2001. CX-1 at 2. He is currently registered in the same capacity with another NASD member firm, and, accordingly, is subject to NASD's jurisdiction for purposes of this proceeding. CX-1 at 2; Tr. 66.

From 1988 on, Dahmer concentrated his business activity on clients who were retired or were within five years of retirement. He began his focus on retirement and estate planning when a senior AEFA representative shared roughly 200 of his 2,000 retirement-age clients with Dahmer. Tr. 104-05.

Dahmer's Outside Business Activities

1. Sales of Non-AEFA Products

Dahmer began to sell non-AEFA products early in his career with AEFA. In November 1989, Thomas Moser, Dahmer's Division Manager at the time, referred his neighbors, CT and VT, to Dahmer as clients. Tr. 121-22. Moser and Dahmer went together to Mr. and Mrs. T's home to discuss financial planning. After gathering information, Dahmer prepared a plan that included both survivorship and term life

[1] References to Enforcement's exhibits are designated as CX__; Respondent's exhibits, as RX__; and the transcript of the hearing, as Tr. __.

[2] Prior to 1995, AEFA was known as IDS Financial Services. Tr. 28. Hereafter, both will be collectively referred to as "AEFA."

insurance policies, products that were potentially appropriate to their needs. Tr. 122-26. Shortly thereafter, Moser and Dahmer returned to present the plan in person to Mr. and Mrs. T. The plan included a survivorship life insurance policy, a product that AEFA did not offer at the time, and a term life insurance policy, a product that AEFA did offer at that time. Nevertheless, the term policy contained in the plan offered by Dahmer was a Jackson National Life policy that charged a premium which was a little more than half of a similar AEFA policy. Moser was aware of the sale of the Jackson National Life policy and the survivorship life insurance policy, but he never mentioned to Dahmer the need to complete any outside business activity documentation before or after effecting the sale of those outside products. Tr. 125-28. Except for Moser's knowledge of the sales of the two non-AEFA products to CT and VT, Dahmer effected them without providing any other type of notice to AEFA. Tr. 126-27.

Similarly, in the late summer of 1990, Moser and Dahmer both met with HW, a potential client. They discussed a proposal for both an AEFA universal life policy and a Jackson National Life Ultimate 7 whole life product. Tr. 129-132. Moser again did not mention any need to provide AEFA with outside sales activity documentation or to receive written approval for the sale from AEFA. Tr. 132.

Over the course of his employment by AEFA, in addition to selling AEFA products, Dahmer entered into agent's contracts to sell insurance products for CNA, American Equity Insurance, American Life and Casualty Insurance Company,[3] Jackson National Life, and United States General Life Company ("USG"). CX-16; Tr. 82-83. Dahmer sold his clients the products that he believed were best suited for their needs, goals, and objectives, regardless of whether the product was offered by AEFA or one of

[3] American Life and Casualty Insurance Company is currently known as Conseco. Tr. 75.

the other companies for which he acted as agent. Tr. 110-11, 139-40, 142. As a result, over a twelve year period from June 1989 to June 2001, Dahmer sold non-AEFA fixed annuities, equity index annuities, and life insurance policies to at least 56 customers (most of whom were AEFA customers), totaling more than $7 million, and for which he received $1,578,630 in compensation. CX-2; Tr. 72-76.

Dahmer put his clients' interests ahead of his own, often earning lower commissions on non-AEFA products than he would have been paid for selling the client an equivalent AEFA product.[4] Tr. 141-42; CX-11. Dahmer disclosed fully to his clients the identity of the company whose product he was selling, and the features, benefits, and fees associated with those products. Tr. 143-44, 187.[5] Dahmer never represented that AEFA somehow endorsed his sales of non-AEFA products or that it approved any of the non-AEFA products. Tr. 55-56, 143-44, 187. Finally, none of Dahmer's customers was harmed by his sales practices. To the contrary, his clients benefited from his actions by paying lower premiums, and he earned their trust and respect. Tr. 127-28, 184.

2. Extent of Disclosures to AEFA

In 1990, Dahmer received prior approval to sell, and he sold a non-AEFA corporate health insurance plan to a customer. Tr. 41, 46, 50, 96-97. In 1991, Dahmer received prior approval to sell, and he sold a non-AEFA survivorship life insurance plan to a customer. Tr. 96-97. However, it was not until1997 that AEFA required representatives to disclose outside business activities on a corporate form. From that time

[4] For example, when Dahmer sold a Jackson National Life term life insurance policy to Mr. and Mrs. T, he received a commission of $946. Had he sold the similar AEFA policy to them, he would have received approximately $1,600. Tr. 127.

[5] The Hearing Panel notes that there were ten customers who would have given similar testimony to customer MK who testified at the hearing that he knew the products Dahmer sold him were not AEFA products, and he did not believe AEFA sponsored the products. Tr. 191-92.

forward, Dahmer disclosed on that form renewals of the non-AEFA corporate health insurance plan that he sold in 1990, and the non-AEFA survivorship life insurance plan that he sold in 1991. CX-6-10.

From 1997 to 2001 when Dahmer disclosed on the "Outside Activities Disclosure Form" the renewals of the corporate health insurance plan and the survivorship life plan, he did so because the clients who bought them had initially expressed an interest in a variable universal life policy or other policies that might be considered to be securities. As it turned out, the two clients ultimately purchased insurance products that were not securities. Dahmer was aware that he had to disclose to AEFA outside securities sales, and, accordingly, in the process of soliciting those clients, he sought permission from Moser to participate in such sales. Tr. 96-98, 105-06.

Dahmer never received AEFA's Client Relations Guide or compliance manual, which explained the firm's policy on outside business activities.[6] Tr. 94, 107, 174-75. Nor did he receive any formal or informal instruction regarding the AEFA policy specifically, or NASD Conduct Rule 3030 generally.[7] Tr. 95-96.

The AEFA "Outside Activities Disclosure Form" explicitly required disclosure of outside activities, including the authorized sale of outside insurance products. CX-6-10; Tr. 39-49. Nonetheless, except for the two renewals noted previously, Dahmer did not disclose on any of the forms, or during his annual compliance reviews, his contracts with the non-AEFA insurance companies, nor did he disclose sales of any insurance products

[6] The Hearing Panel credits Dahmer's testimony on this matter, and not the testimony of branch manager Geoffrey Wharton. Dahmer's testimony was candid and consistent. Moreover, there is no evidence of a signed verification form to demonstrate that he ever received such a manual. Tr. 176. On the other hand, AEFA put Wharton's supervision of Dahmer at issue during its investigation of the matter, and the Hearing Panel finds Wharton's recollection of the events to be consistent with his own self-interest.

[7] There is no evidence that documents the subject matter of any training that was given to AEFA representatives regarding particular NASD Rules.

on behalf of those companies. CX-6-10; Tr. 39-49, 84-85. Rather than carefully reading the Form, he merely "glanced over" it when he filled it out, assuming that only outside securities business needed to be reported. Tr. 85-89. He wrote in a July 11, 2001, memorandum to the AEFA Compliance Department: "I want to stress the point that all sales [of undisclosed non-proprietary products] were for either fixed, guaranteed annuity products, or equity index annuities with principal guarantees. No security sales or variable annuities are involved." Tr. 110-11; CX-13.

3. AEFA's Knowledge of Dahmer's Outside Activities

In 2001, Dahmer's recommendation to a client to switch an annuity, even though the client would incur a surrender charge, prompted an investigation by an AEFA client service organization. Tr. 50-51. As a result, Dahmer's branch manager since 1997, Geoffrey Wharton, was asked to prepare a written summary of his supervision of Dahmer and Dahmer's alleged violation of AEFA's outside activities policy. Tr. 51-52. Wharton did so in an August 23, 2001, letter to AEFA's Field Compliance Director. CX-11. The letter was written one week after Dahmer resigned from AEFA. Tr. 146. That letter acknowledges Wharton's general knowledge of Dahmer's outside sales activities. The letter notes that in an interview with Dahmer in 1998, Wharton and Dahmer discussed Dahmer's "propensity to sell non-proprietary products." In that discussion, Wharton told Dahmer that, because those products were paid at a lower percentage than proprietary products, Dahmer's income was lower than the previous year and his sales-to-redemption ratio was "adversely affected by non-proprietary sales." CX-11. The letter also notes that Dahmer's annuity sales with AEFA "remained between 15% - 20% of his product mix."

The letter also asserts that Wharton conducted a close review of selected transactions, client files, and mail logs. Wharton had access to any and all of Dahmer's files to conduct his annual compliance review. Tr. 58, 133. Although Wharton typically reviewed Dahmer's top 10 to 15 client files, Dahmer never knew in advance which files would be reviewed. Tr. 134. Dahmer kept documentation on his activities with all of his clients, regardless of whether they involved AEFA products. Tr. 76-79, 133-34. Dahmer did not conceal any client files or specific information contained in those files, nor was he ever cited for not properly maintaining client files. Tr. 58. In his files for his top 10 to 15 clients, Dahmer included copies of annual statements or applications for non-AEFA products that he sold to those customers. Tr. 135-36, 171-72. Moreover, for clients with more than $50,000 of assets, Dahmer created a portfolio asset allocation chart and list that included outside sales of non-AEFA products and the identity of the company from which those products were purchased. Tr. 77-78; RX-6. As a result, more than 80% of his clients' files contained those worksheets. Tr. 134. Although Dahmer admits that he did not volunteer information to Wharton about outside sales activities, Wharton admitted seeing the portfolio percentage allocation worksheets during his inspections, but he never discussed with Dahmer a need for further documentation, disclosure, or authorization. Tr. 59-60, 136-39.

4. Dahmer's Resignation from AEFA

As he had planned for some time, on August 16, 2001, Dahmer resigned from AEFA. On August 17, 2001, AEFA filed a Form U-5, terminating his registration, and describing his departure as "voluntary." Tr. 147-48; CX-1 at 3. Eleven days later, on August 28, 2001, AEFA sued Dahmer to enjoin him from contacting any of his AEFA

clients. Tr. 148-49; RX-4. Dahmer eventually settled the lawsuit, paying more than $100,000 to be able to continue service to his clients, and he agreed to indemnify AEFA for any damages awarded against it should any of those clients who purchased non-proprietary products bring a lawsuit or claim against AEFA. Tr. 154-55.

Discussion

Conduct Rule 3030 provides that no person registered with a member "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member . . . in the form required by the member." The purpose of Conduct Rule 3030 is to provide member firms with prompt notice of outside business activities so that the member's objections, if any, to such activities can be raised at a meaningful time and the member can exercise appropriate supervision as necessary under applicable law. *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exchange Act Release No. 26,178, 1988 SEC LEXIS 2032 (Oct. 13, 1988). Rule 3030 requires disclosure of all outside business activity, not just securities-related activity. *Dist. Bus. Conduct Comm. v. Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (NBCC Oct. 31, 1997).

Dahmer does not dispute that from 1989 to 2001 he engaged in outside business activities without giving AEFA prompt written notice, and that such conduct violates NASD Conduct Rule 3030.[8] Respondent's Brief at 1; Respondent's Proposed Findings of Fact at ¶ 9; Tr. 74-75, 105-06. Moser had actual knowledge of Dahmer's outside

[8] A violation of another NASD rule constitutes a violation of Conduct Rule 2110. *Steven J. Gluckman*, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

activities. Wharton not only knew that Dahmer had made significant sales of non-AEFA products, but he also had access to the portfolio allocation worksheets identifying outside companies whose products Dahmer sold. Nevertheless, AEFA's Outside Activities Disclosure Form was unambiguous in its requirement that the sale of outside insurance products be disclosed in writing. Moreover, Conduct Rule 3030 is explicit in its requirement that a representative give prompt written notice to the member of outside business activity, in the form required by the member. Therefore, regardless of whether Moser knew of the outside insurance sales, or whether Wharton failed to inquire as to the specific circumstances of the sales by Dahmer of non-AEFA products, their knowledge of his outside business activities does not satisfy the requirement of Rule 3030 that the firm receive prompt written notice.

The purpose of the Rule is to give the firm a meaningful opportunity to review the representative's activity and determine the extent, if any, to which it should supervise his involvement. As a registered representative, Dahmer is charged with having knowledge of the Rules and the responsibility of complying with them. A registered representative is responsible for his actions and cannot shift that responsibility to the firm or his supervisor. *See DBCC v. Holland*, No. C3A960014. 1997 NASD Discip. LEXIS 63 (NBCC Nov. 18, 1997).

Sanctions

For violations of Conduct Rules 2110 and 3030, the NASD Sanction Guidelines recommend a fine of $2,500 to $50,000, and, depending upon the extent of aggravating conduct, if any, a suspension for up to one year. NASD SANCTION GUIDELINES, at 16 (2004 ed.). In requesting that Dahmer be barred for his misconduct, Enforcement cites

the duration and extent of the outside activity, the fact that it involved customers of the firm, the possibility of customer harm, the prospect that Dahmer could have created the impression that AEFA approved the outside products, and the extent to which AEFA might have been misled by Dahmer's conduct. On the other hand, in asking for minimal sanctions, Dahmer cites his acceptance of responsibility for, and acknowledgment of, his misconduct; his cooperation in the investigation of it; his remorse; his strict compliance with Rule 3030 since July 2001; and the motivation he had to benefit his clients and not himself.

The Hearing Panel finds that this is not an egregious case, although there are some aggravating circumstances. In applying the Principal Considerations for Outside Business Activities to determine an appropriate sanction for Dahmer's misconduct, the Hearing Panel notes that the duration of the activity (12 years), number of customers involved (56), and the dollar volume of sales ($7 million) are substantial. Moreover, the outside activity involved customers of AEFA. However, customer testimony corroborates Dahmer's assertion that he made clear to his customers that the products they were buying were not approved by AEFA. In fact, many customers chose to buy products they were told AEFA did not offer, and other less costly products that were similar to those AEFA offered. As a result, Dahmer's customers benefited from Dahmer's outside activities; none was injured. His concern for his customers adversely affected his own financial interests.

Dahmer never attempted to mislead his supervisors about his outside activities or conceal them. Almost at the inception of Dahmer's employment at AEFA, Moser encouraged him to seek the most appropriate products for each client, regardless of the

provider, but he never advised Dahmer that he must seek prior approval from AEFA for such outside activity. AEFA compliance manuals did not specifically mention Conduct Rules 3030 and 3040, and Dahmer mistakenly confused outside business activity with selling away. It was not until 1997 that AEFA required outside business activity to be disclosed on an AEFA-provided form, and Dahmer reported the only two sales that were originally contemplated to involve securities. Moreover, Wharton was aware of the magnitude of Dahmer's sales of non-AEFA products, and the extent those sales adversely affected his income. Dahmer never refused a request for client files, and Wharton reviewed Dahmer's top 10 to 15 client files that contained documentation of outside sales. However, Wharton never questioned the lack of written notice to AEFA in those files, nor did he tell Dahmer to discontinue sales of non-AEFA products.

There is no evidence of financial injury to AEFA; in fact, Dahmer has indemnified the firm from any possible loss arising out of the sale of non-AEFA products, and he has compensated the firm for dropping any opposition to his continued service to customers who followed him after he left AEFA.

Because Dahmer had reasonable grounds to believe that AEFA knew about his outside sales activities, the Hearing Panel concludes that he did not willfully disregard the requirements of Conduct Rule 3030. *See Holland*, 1997 NASD Discip. LEXIS 63, at *17. At the hearing, Dahmer was contrite, and he credibly testified that he accepted responsibility for his conduct and acknowledged that it violated Conduct Rules 2110 and 3030. Although the duration and extent of the misconduct are significant, the Hearing Panel has considered his credibility, demeanor, and motive to benefit his customers at his own personal expense. In so doing, the Hearing Panel concludes that he should be able to

remain in the securities industry. However, to remediate the misconduct, the Hearing Panel will suspend him in all capacities for 60 days, fine him $5,000[9], require him to requalify by examination as a general securities representative, and assess costs against him in the total amount of $2,034.88, consisting of an administrative fee of $750 and a transcript fee of $1,284.88.

Conclusion

Lance Dahmer is suspended from associating in any capacity with a member firm for a period of 60 days, fined $5,000, ordered to requalify by examination as a general securities representative before resuming any activity as a general securities representative, and assessed costs in the total amount of $2,034.88, for engaging in outside business activities without providing his member firm with prompt written notice, in violation of Conduct Rules 3030 and 2110.

These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after the date this decision becomes the final disciplinary action of NASD, except that if this decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on April 18, 2005, and end at the close of business on June 16, 2005.

SO ORDERED.

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Alan W. Heifetz
Hearing Officer
For the Hearing Panel

[9] No customer was harmed by Dahmer's conduct. In fact, customers benefited since they received policies that they wanted from reputable insurers at competitive prices. Accordingly, the Hearing Panel will not order disgorgement of gains in addition to the fine.

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