

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL FRANCIS O'NEILL
(CRD No. 352958),

Respondent.

Disciplinary Proceeding
No. E102003130804

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

September 13, 2006

Respondent is barred from associating with any NASD member in any capacity for paying commissions to an unregistered person, in violation of Conduct Rule 2110.

Appearances

Michael J. Newman and David B. Klafter, Woodbridge, NJ, (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, and Mark P. Dauer, New Orleans, LA, Of Counsel) for the Department of Enforcement.

Victor A. Deutch, Deutch & Associates LLC, Woodbridge, NJ, for Michael Francis O'Neill.

DECISION

I. INTRODUCTION

The Department of Enforcement (“Enforcement”) charged Michael Francis O’Neill (“O’Neill” or the “Respondent”) with paying brokerage commissions to Savas Z. Alkoc (“Alkoc”), an unregistered individual, pursuant to a commission-sharing arrangement, in violation of NASD Conduct Rule 2110.

Enforcement filed the Complaint on October 11, 2005, and the Respondent filed his Answer and Affirmative Defenses on November 4, 2005. The Respondent denied the charge and alleged that he employed Alkoc to assist with “reporting and other documentation.”¹ The Respondent further alleged that he needed assistance because he suffers from Charcot-Marie-Tooth disease (“CMT”), a progressive hereditary disorder that causes nerve damage (neuropathy) to the peripheral nerves. In the Respondent’s case, the disease impairs his muscle control in his hands and feet.

The hearing was held at NASD’s offices in Woodbridge, New Jersey, on April 18, 2006. The Hearing Panel included the Hearing Officer, a current member of NASD’s District 9 Committee, and a current member of NASD’s District 11 Committee. Enforcement presented two witnesses, including O’Neill, and offered 23 exhibits in evidence.² With the exception of Exhibit C 20, the Hearing Officer admitted the offered exhibits.³ O’Neill offered six exhibits, which the Hearing Officer also admitted.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent O’Neill

O’Neill has worked in the securities for approximately 35 years at more than 20 broker-dealers. At the time relevant to this proceeding, February to September 2002, he was registered with Financial Consultant Group, LLC (“FCG”) as a General Securities Representative.⁴ O’Neill operated as an independent broker.⁵ He rented two offices from FCG in Wall, New Jersey.

¹ Ans. at 3 (Affirmative Defenses ¶ 4).

² The hearing transcript is cited as “Tr.,” followed by the page number. Enforcement’s exhibits are labeled with the letter “C”; O’Neill’s are labeled with the letter “R.”

³ For convenience, the excerpts of Exhibit C 23, which is the on-the-record interview of KJG, have been reprinted and designated Exhibit C 24.

⁴ According to the Central Registration Depository System (“CRD”), the Respondent was registered with Financial Consultant Group from January 2002 until October 2002. *See* C 1 at 5.

⁵ Tr. 112.

O'Neill used one office and Alkoc used the other.⁶ He received a 90% payout on the commissions he generated, and he paid all of his own expenses.⁷

At the time of the hearing, O'Neill was registered with J.P. Turner & Company, L.L.C., an NASD member firm with its main office in Atlanta, GA.

B. O'Neill's Relationship with Alkoc

Alkoc entered the securities industry as an Investment Company and Variable Contract Products Representative with Equitable Life Insurance Society of the United States in February 1990. Between October 1998 and November 1999, Alkoc was registered with Summit Financial Services Group, Inc. ("Summit") as an independent broker.⁸ Summit terminated Alkoc for misappropriation of customer funds, and, in April 2002, NASD barred him from associating with any member firm in any capacity.⁹

About the time NASD barred Alkoc from the securities industry, he and O'Neill entered into a commission-sharing arrangement whereby Alkoc referred potential brokerage clients to O'Neill.¹⁰ Alkoc and O'Neill characterized their arrangement as a partnership.¹¹ In fact, O'Neill testified that most of the commissions he earned at FCG came from Alkoc's referrals.¹² In addition, Alkoc performed a variety of administrative services for O'Neill, such as completing new account forms and performing research.¹³ In return, O'Neill split his commissions with

⁶ C 5 at 9 (Tr. 30, O'Neill On-the-Record Interview).

⁷ *Id.* at 6 (Tr. 24, O'Neill On-the-Record Interview).

⁸ *Id.* at 9 (Tr. 35, O'Neill On-the-Record Interview).

⁹ C 3.

¹⁰ Tr. 144; C 5 at 7-8 (Tr. 27-28, O'Neill On-the-Record Interview).

¹¹ Tr. 25, 27-28.

¹² Tr. 136. Exhibit C 10 at 3 is a list of the 34 customers Alkoc referred to O'Neill at FCG. Alkoc referred approximately 109 accounts to O'Neill before they ended their relationship in November 2004. Tr. 34.

¹³ C 5 at 8 (Tr. 29, O'Neill On-the-Record Interview), Tr. 141.

Alkoc.¹⁴ They also split their office expenses equally.¹⁵ In total, between December 2002 and November 2004, O'Neill paid Alkoc approximately \$333,000.¹⁶

The Panel found that O'Neill and Alkoc formed their partnership for their mutual benefit. O'Neill testified that he had given up his book of business in order to be a strategist for his former firm. Thus, when O'Neill joined FCG, he had no accounts of his own.¹⁷ Accordingly, he was dependent upon Alkoc to develop new accounts. Alkoc, on the other hand, was successful at developing business, but he had lost his securities license. Accordingly, to continue to benefit from his book of business, he needed someone to act as the broker of record. In other words, O'Neill and Alkoc were mutually dependent on each other. Indeed, Alkoc testified at his on-the-record interview that he formed the partnership with O'Neill because he had been barred from the securities industry.¹⁸

The Panel rejected O'Neill's contention that he paid Alkoc for administrative services only. Aside from O'Neill's candid testimony to the contrary at his on-the-record interview in October 2003, O'Neill's claim is belied by the sheer size of the commission payments he made to Alkoc. The payments far outstripped the reasonable value of the administrative assistance O'Neill claimed was the basis for the payments. In addition, the equal division of commissions and expenses reflect the reality that O'Neill and Alkoc functioned as a team, providing brokerage services to their customers. Under their agreement, Alkoc did far more than simply refer his former customers to O'Neill. Both O'Neill and Alkoc admitted in their on-the-record

¹⁴ Tr. 17, 22; C 5 at 6, 10 (Tr. 24, 40, O'Neill On-the-Record Interview). O'Neill testified in his on-the-record interview that their sharing arrangement did not involve a fixed percentage, but it was generally about 50%. C 5 at 11 (Tr. 42-44, O'Neill On-the-Record Interview).

¹⁵ Tr. 26.

¹⁶ C 21.

¹⁷ Tr. 135.

¹⁸ Tr. 25-26.

interviews that Alkoc participated in customer meetings during which investment recommendations were made.

Furthermore, the Panel rejected O'Neill's claim that he believed it was permissible to split commissions with Alkoc under the facts and circumstances of this case. O'Neill learned in the second quarter of 2002 that Alkoc had been barred from associating with any broker-dealer in any capacity.¹⁹ Nonetheless, O'Neill permitted Alkoc to engage in the securities business at FCG's office. The Panel found O'Neill's claim that he believed Alkoc could function in such a capacity as an unregistered independent contractor to be unconvincing. O'Neill had been registered as a securities professional for more than 35 years. In the Panel's view, he clearly knew or should have known that it was improper to share brokerage commissions with an unregistered person.

In conclusion, the Panel found that O'Neill conducted his securities business jointly with Alkoc, an unregistered person, and that O'Neill knowingly violated NASD's registration requirements by compensating Alkoc for soliciting customers, in violation of Conduct Rule 2110.²⁰ A member, or a person associated with a member, may not make payments of "finders" or referral fees to unregistered third parties who introduce or refer prospective brokerage customers to the firm.²¹ "Persons who introduce or refer prospective customers and receive commissions for such activities are engaged in a securities business for the member in the form of solicitation, which is the first step in the consummation of a securities transaction and is clearly a part of the conduct of a securities business."²² Moreover, Alkoc did far more than refer

¹⁹ C 5 at 12 (Tr. 45, O'Neill On-the-Record Interview).

²⁰ See *District Bus. Conduct Comm. V. Kunz*, 1999 NASD Discip. LEXIS 20, at 63-64 (July 7, 1999).

²¹ *District Bus. Conduct Comm. v. Hanmi Sec., Inc.*, 1996 NASD Discip. LEXIS 2, at *16 (May 9, 1996) (quoting Notice to Members 89-3).

²² *Department of Enforcement v. Galas*, No. C8A980097, 2000 NASD Discip. LEXIS 42, at *26-27 (O.H.O. July 28, 2000) (citing *District Bus. Conduct Comm. v. Hanmi Sec., Inc.*, 1996 NASD Discip. LEXIS 2, at *16 (May 9, 1996) (quoting Notice to Members 89-3, 1989 NASD LEXIS 3, at *2 (Jan. 1989))).

customers to O'Neill. Alkoc filled out new account forms and met with customers to describe the services O'Neill offered.²³ Without question, Alkoc was required to be registered to engage in this activity.²⁴

III. SANCTIONS

The NASD Sanction Guidelines ("Guidelines") for registration violations recommend a fine of \$2,500 to \$50,000, plus the amount of any financial gain, and a suspension in all capacities for up to six months.²⁵ In egregious cases, a longer suspension or a bar may be appropriate.²⁶ The Panel concluded that this Guideline was the one most closely analogous to the conduct charged in this case.

The Hearing Panel concluded that this was an egregious case and that a bar was the appropriate sanction. O'Neill intentionally violated NASD's registration requirements by entering into a partnership with an unregistered individual to conduct a securities business.²⁷ O'Neill knew that Alkoc had lost his securities license for misappropriating customer funds,²⁸ and O'Neill knew or should have known from his extensive background in the securities industry that he could not split commissions with Alkoc for customer referrals. This conduct standing alone would justify imposition of a bar. However, O'Neill's conduct was more egregious. O'Neill tried to avoid detection by claiming that he paid Alkoc only for administrative services necessitated by O'Neill's disease. However, the commission payments were not related in any way to the simple administrative services Alkoc performed, such as completing paperwork and

²³ Tr. 144.

²⁴ See Notice to Members 85-48, 1985 NASD LEXIS 400, at *2 (July 17, 1985).

²⁵ NASD Sanction Guidelines 48 (2006 ed.).

²⁶ *Id.*

²⁷ In addition, O'Neill's firm had a written policy prohibiting the sharing of commissions with unregistered persons, which O'Neill ignored. (Tr. 158.)

²⁸ See C 5 at 12 (Tr. 46, 56, O'Neill On-the-Record Interview); Tr. 145-46.

driving O’Neill to customer appointments on icy days. To the contrary, O’Neill and Alkoc based the payments on the value of the business Alkoc generated, and Alkoc participated in client conferences to explain and sell the investment services they offered. The fact that O’Neill was the designated broker did not alter the reality of the arrangement or the need for Alkoc to be licensed to share in the commissions they jointly generated.

Another aggravating factor the Panel took into consideration was O’Neill’s persistence in paying Alkoc for referrals even after NASD opened its investigation regarding the payments. At O’Neill’s on-the-record interview in October 2003, NASD staff questioned O’Neill about the propriety of his partnership with Alkoc. O’Neill expressed uncertainty about the arrangement, but he had not sought any advice to verify his conclusion that he could pay referral fees to an unregistered person.²⁹ O’Neill testified at the on-the-record interview that he would research the issue to determine if he should end his partnership with Alkoc. Nevertheless, O’Neill continued paying Alkoc for referrals for another year.³⁰ In the Panel’s view, this conduct reflects a willful violation of NASD’s registration rules. O’Neill put his economic interests first despite the fact that NASD staff had questioned the propriety of the payments. Such conduct requires that O’Neill be barred from the industry to achieve the remedial purposes of general and special deterrence. By this conduct, O’Neill demonstrated his unwillingness to conform to one of the most basic rules governing the securities industry—the requirement that securities professionals be registered.

Finally, the Panel took into consideration O’Neill’s deceptive conduct. O’Neill set up a shell corporation, MFO Advisors, Inc., to make the commission payments to Alkoc.³¹ O’Neill deposited the commission checks he received into the MFO Advisors bank account and then

²⁹ Tr. 66-67.

³⁰ Tr. 77.

³¹ C 5 at 9-10 (Tr. 35-37, O’Neill On-the-Record Interview).

issued a check to Alkoc for his split of the commissions. O'Neill admitted that he set up this arrangement because Alkoc did not have a securities license.³² In addition, the Panel noted that O'Neill sometimes indicated on the checks he paid Alkoc that the purpose of the payment was "consulting," not commissions.³³ In this manner, O'Neill attempted to conceal the true nature of the payments and his partnership with Alkoc.

In conclusion, the Panel found that O'Neill willfully violated NASD Conduct Rule 2110. Even when confronted with NASD's investigation, O'Neill continued making improper payments to Alkoc, who he knew had been barred from associating with a member firm in any capacity for serious misconduct. O'Neill's conduct reflects a conscious disregard of NASD's registration requirement and requires that he be barred from the securities industry.

IV. ORDER

For the reasons set forth above, O'Neill is barred from associating with any member firm in any capacity for paying commissions to an unregistered person, in violation of NASD Conduct Rule 2110.³⁴ The bar shall become effective immediately if this Hearing Panel Decision becomes NASD's final disciplinary action in this proceeding. In addition, O'Neill is ordered to pay costs in the amount of \$1,920.³⁵

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

³² C 5 at 12 (Tr. 45, O'Neill On-the-Record Interview).

³³ See C10; C 15.

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

³⁵ The costs are composed of an administrative fee of \$750 and transcript costs of \$1,170.

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