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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT 2 Respondent.	Disciplinary Proceeding No. 2007007989901 Hearing Officer - MC **AMENDED HEARING PANEL DECISION**[1] **May 4, 2010**

The Department of Enforcement did not prove by a preponderance of the evidence that Respondent failed to maintain high standards of commercial honor and just and equitable principles of trade by taking control of an insurance policy, facilitating its sale with forged and falsified documents, and retaining the proceeds of the sale, in violation of Conduct Rule 2110. Accordingly, the Hearing Panel finds that Respondent did not violate Conduct Rule 2110, and dismisses the Complaint.

Appearances

Noel C. Downey, Senior Regional Counsel, and Michael J. Newman, Senior Regional Counsel, Woodbridge, NJ, for the Department of Enforcement.

Paula D. Shaffner, Esquire, Philadelphia, PA, for Respondent.

DECISION

I. Background and Procedural History

On February 10, 2009, the Department of Enforcement filed the Complaint in this disciplinary proceeding against Respondents David Steven Forman and Respondent 2 ("Respondent 2" or "Respondent"). Respondent Forman submitted an Offer of Settlement which

[1] This Decision is amended to correct the omission of a word in footnote number 106.

the National Adjudicatory Council accepted on November 9, 2009. This Hearing Panel Decision, therefore, applies only to the violations the Complaint alleges against Respondent 2.

The single Cause of Action alleges that from October 2004 through February 2005, Forman and Respondent 2 deceived the owner of a $5 million life insurance policy and "took control" of it using "forged and falsified documents," then sold the policy for almost $1 million, keeping the proceeds for themselves. Enforcement claims that Respondent, by participating in this course of conduct, failed to maintain high standards of commercial honor and just and equitable principles of trade, in violation of Conduct Rule 2110.[2]

The life insurance policy at issue insured the life of NS, the wife of KS, Forman's long-time customer. Most of the Complaint describes the alleged misconduct of Forman and AG, a business associate and friend of both Forman and Respondent 2. The few allegations directed against Respondent 2 specify that he, in concert with Forman: (i) kept information about the sale of the policy from KS; (ii) sent signature pages removed from insurance forms to be signed by KS and NS without disclosing the signatures were needed to facilitate the sale of the policy; and (iii) "falsified" a form authorizing the release of NS's medical records to an insurance company.[3] Respondent filed an Answer denying the allegations.

The hearing took place in Philadelphia, PA, on November 17 and 18, 2009.[4] The issue before the Hearing Panel was whether Respondent violated Conduct Rule 2110 by: (i) taking

[2] Complaint ¶ 1. As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. The applicable rules are available at www.finra.org/rules.

[3] Complaint ¶¶ 20-23.

[4] The Hearing Officer and two current members of the District 9 Committee comprised the Hearing Panel.

control of the policy; (ii) facilitating its sale with forged and falsified documents; and (iii) retaining the sale proceeds.

Enforcement did not prove these allegations by a preponderance of the evidence. The Hearing Panel bases the following findings of fact and conclusions of law on its evaluation of the credibility of the testimony of the witnesses, including Respondent, and its assessment of the exhibits received into evidence in the course of the hearing.[5]

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent first registered with FINRA as a General Securities Representative on December 19, 1984. On September 7, 2000, Respondent also became registered as a General Securities Principal.[6] He was registered in both capacities through Private Consulting Group, Inc. ("PCG"), a FINRA member firm with headquarters in Portland, Oregon, from February 7, 2003, to June 29, 2007.[7] Thus, he was registered through PCG during the period relevant to the Complaint, from October 2004 through February 2005.[8] During this time, Respondent operated his own insurance business, EMA Brokerage LLC, from office space he rented from Forman and AG in Cherry Hill, NJ.[9]

After leaving PCG, Respondent was registered through another FINRA member firm from June 20, 2008, through October 16, 2008. Respondent has not been associated with a

[5] References to the testimony at the hearing are designated as "Tr." followed by the page number; for example, a citation to page 35 of the transcript would appear as "Tr. p. 35." References to Enforcement's Exhibits are designated as "CX" followed by the exhibit number and, if necessary, the page number; for example, a citation to Enforcement Exhibit 2, page 14, would appear as "CX-2, p. 14." References to Respondent's Exhibits are designated as "R2-__." References to exhibits submitted by Respondent Forman prior to his settlement, and admitted into evidence upon motion of the parties, are designated as "DF-__."

[6] CX-2.

[7] *Id.*, p. 7; Tr. pp. 454, 508.

[8] CX-2, p. 7; Tr. p. 251.

[9] Tr. pp. 333, 444-445; CX-2, p. 5.

FINRA member firm since October 15, 2008.[10] Pursuant to Article V, Section 4 of FINRA's By-Laws, however, FINRA retains jurisdiction over Respondent for the purposes of this disciplinary proceeding because the Complaint alleges conduct that occurred while he was associated with a member firm, and because the Complaint was filed less than two years after the termination of his last association with a member firm.[11]

B. Respondent's Relationship with Forman and AG

Respondent met Forman and AG in 1993 and worked with them until 1997, when their career paths temporarily diverged.[12] Respondent worked primarily with independent insurance agents, assisting them in placing policies with insurance companies with which he did business.[13] In 2000, Respondent approached Forman and AG to re-establish their business relationship and to explore handling their insurance business for them.[14] Forman and AG rented office space to Respondent.[15]

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[10] CX-2.

[11] In his Pre-Hearing Submission, Respondent challenged FINRA's jurisdiction over the alleged conduct because it relates to the sale of an insurance policy, which he argued falls properly within the purview of insurance regulators, not FINRA. Respondent's Pre-Hearing Submission, pp. 4-5. Respondent cited no authority and presented no argument at the hearing to support his jurisdictional challenge. The Hearing Panel rejects the claim. The Complaint alleges violations of Conduct Rule 2110, an ethical rule that requires conduct reflecting "high standards of commercial honor and just and equitable principles of trade," and that is broad enough "to encompass any unethical business-related misconduct, regardless of whether it involves a security." *Dep't of Enforcement v. Saad,* No. 2006006705601, 2009 FINRA Discip. Lexis 29, at *11 (NAC Oct. 6, 2009), *citing Daniel D. Manoff,* Exch. Act Rel. No. 46708, 2002 SEC LEXIS 2684, *12 (Oct. 23, 2003) (registered person's use of a co-worker's credit card without authorization violated Rule 2110); *James A. Goetz,* 1998 SEC LEXIS 499, 53 S.E.C. 472 (Mar. 25, 1998) (registered person's misuse of firm's matching gift program to obtain private school tuition credit violated Rule 2110); *Dist. Bus. Conduct Comm. v. Bruun,* No. C3B960004, 1998 NASD Discip. LEXIS 23 (NAC Jan. 23, 1998) (registered person's submission of reimbursement requests for seminar expenses he did not incur violated Rule 2110); *Donald M. Bickerstaff,* 1995 SEC LEXIS 982, 52 S.E.C. 232 (Apr. 17, 1995) (forgery of customer's signature on insurance documents violated NASD conduct rules). As the facts below establish, the allegations of this Complaint arise from a business-related context within the ambit of Conduct Rule 2110.

[12] Tr. pp. 448-450.

[13] Tr. pp. 444-447.

[14] Tr. p. 450.

[15] Tr. pp. 450-451.

Forman was operating an office of PCG, which required a Registered Principal. Respondent agreed to serve in that capacity, and became Forman's supervisor for the limited number of securities-related transactions in which Forman engaged through PCG. Respondent received no compensation for doing so, but expected to receive insurance business referrals from Forman.[16] By 2004, Forman and AG relied increasingly upon Respondent to place their insurance products with companies with which he had developed relationships.[17]

C. The Life Insurance Policy

1. Customer KS

KS, now 82 years of age, is a successful businessman who resides with his wife, NS, in Winnetka, IL.[18] In the mid-1990's, KS retained Forman to assist him with estate planning matters.[19] At the time, Forman was registered with FINRA through member firm Mesirow Financial, Inc. ("Mesirow") as a General Securities Representative.[20] At Mesirow, where he provided comprehensive financial planning advice to clients, Forman worked with AG, a friend who was also registered as a General Securities Representative with FINRA through Mesirow.[21] Forman and AG together provided estate planning advice to KS.

2. KS Purchased the Life Insurance Policy

In December 2000, on the advice of Forman and AG, KS purchased a life insurance policy for tax purposes.[22] The policy provided coverage of $5 million on the life of NS. The

[16] Tr. pp. 454-455.

[17] Tr. pp. 457-458.

[18] Tr. p. 92.

[19] Tr. pp. 93-94.

[20] Tr. pp. 93-94; CX-1, pp. 9-10; CX-46, pp. 9-10.

[21] During the period relevant to the Complaint, however, AG was not registered with FINRA and therefore was not subject to FINRA's jurisdiction. Tr. pp. 250, 252-253; CX-3.

[22] Tr. pp. 94-96, 161-162; CX-4.

nominal owner of the policy was the NS Descendants Insurance Trust (the "trust"), of which KS was the sole trustee. The beneficiaries of the trust were the children of KS and NS.[23]

Respondent played no role in KS's purchase of the policy,[24] and had nothing to do with KS's subsequent consideration of whether to allow the policy to lapse or to sell the policy, as discussed in further detail below.[25] In fact, KS and Respondent did not know each other, and they had never met or spoken prior to the hearing in this matter. Their only contact was when Respondent sent "one or two" documents for KS to sign in connection with the sale of the life insurance policy.[26]

3. KS Decided to Stop Paying Premiums

Maintaining the life insurance policy was costly to KS, with annual premiums in excess of $250,000.[27] In 2002, when federal tax law changes significantly reduced his potential estate tax liability, KS decided to stop paying the premiums.[28]

KS informed Forman of his decision.[29] KS understood that if he did not pay the premiums, the insurance company would deduct their cost from the cash value of the policy until it was depleted, and then the policy would lapse unless KS made additional premium payments.[30] KS testified that it was probably in 2003 that he made his final decision to allow the policy to lapse.[31]

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[23] CX-4; Tr. pp. 98, 161-162.

[24] Tr. pp. 160-161.

[25] Tr. p. 239.

[26] Tr. p. 95.

[27] CX-4; Tr. p. 121.

[28] Tr. p. 97.

[29] Tr. pp. 99-100, 164.

[30] Tr. pp. 165, 177.

[31] Tr. p. 166.

4. Forman and AG Advised KS to Maintain and Then Sell the Policy

According to KS, Forman disagreed and advised KS that he should continue to make the payments required to maintain the policy, and try to sell it.[32] KS agreed to let Forman attempt to sell the policy.[33] KS testified that he recalled having no further discussions with Forman or AG about the policy,[34] although at one point he may have asked them for an update on the status of the sales effort.[35]

In 2004, Forman sent KS a flurry of documents that KS assumed were related to the possible sale of the policy.[36] KS testified that he was "not really" interested in the details of the sales effort because he did not think the policy was valuable.[37] KS claimed that Forman "never got back" to him about the policy after sending him the documents.[38]

On September 27, 2004, the insurance company issued a "Grace Period Notice," informing KS that unless he paid a partial premium in the amount of $54,650 by October 28, 2004, the policy would expire. KS testified that he did not know if he actually read it, because at the time he was "firmly convinced" that he did not need the policy and thus the notice "wasn't of any consequence" to him.[39]

In late 2004, Forman and AG met with KS in Chicago. KS testified that they did not discuss selling NS's life insurance policy at the meeting.[40] An e-mail to KS from AG dated October 26, 2004, however, implies that Forman and AG intended to discuss the subject at the

[32] Tr. p. 168.

[33] Tr. p. 169-170.

[34] Tr. p. 171.

[35] Tr. p. 170.

[36] Tr. p. 171.

[37] Tr. p. 169.

[38] Tr. p. 170.

[39] Tr. pp. 98-100; CX-5.

[40] Tr. p. 103.

meeting. The e-mail "strongly" suggested that KS pay the premium to maintain the policy's coverage "at least" until after meeting with Forman and AG. The e-mail stated that there were potential buyers for the policy and that if KS did not wish to pay any more premiums, Forman and AG would "like to take over the coverage and … pay the premiums."[41] KS testified that he "assume[d]" he received this e-mail, but he does not know if he read it because he "probably" had already heard "of all of these things" from Forman.[42] By then, KS reiterated emphatically, he knew he did not want the policy, did not need the policy, and had told Forman and AG to sell the policy, although he did not understand what selling the policy entailed.[43]

5. Forman and AG Paid the Premium to Avoid Policy Lapse

Ann Giampetro was the office manager and notary public employed by Forman and AG from 1998 until September 2005.[44] Giampetro testified that in October 2004, when KS was no longer interested in maintaining NS's life insurance policy, she overheard AG offer to purchase the policy from KS for $50,000.[45]

At AG's direction, on October 27, 2004, one day prior to the policy's expiration date, Giampetro sent a premium check to the insurance company in the amount of $21,100.[46] The check, signed by AG, was drawn on the account of Forman's company, Voorhees Insurance Services Inc. ("Voorhees").[47] On November 2, 2004, AG issued a stop payment order that

[41] CX-6.

[42] Tr. p. 102.

[43] Tr. p. 103.

[44] Tr. pp. 244, 333-334, 381, 382.

[45] Tr. pp. 342-343.

[46] Tr. pp. 342, 393; CX-7. Forman and AG had informed KS that he needed to pay $54,650 to prevent the policy from lapsing; this was, however, a quarterly premium. The $21,100 was for a monthly premium, payment of which would temporarily prevent the policy from lapsing. Tr. p. 263.

[47] Tr. p. 338.

rendered the check worthless. Nonetheless, sending the check prevented the lapse of the policy.[48]

6. Respondent "Shopped" the Life Insurance Policy

Respondent first learned about KS and the life insurance policy from Forman and AG in October 2004. They told Respondent that KS no longer wished to pay premiums on the life insurance policy, that it was about to lapse, and that they had offered to sell the policy for KS. Forman and AG asked Respondent, because of his insurance company contacts, to find a buyer for the policy.[49] Although Respondent had no previous experience with this type of transaction, called a life settlement, he approached firms he knew to explore whether they would be interested in purchasing the policy.[50] He did this for Forman and AG, whom he viewed as his clients, not KS, whom he considered to be their client.[51]

Respondent testified that he believed Forman and AG were in the process of acquiring ownership of the policy,[52] although he did not learn until later how much Forman and AG had offered to pay KS.[53] Respondent testified that he believed Forman and AG were communicating with KS directly and that they had met with KS about the policy.[54]

On November 8, 2004, Respondent notified AG by e-mail that he had found a firm interested in buying the life insurance policy.[55] When Respondent learned that a second firm was interested as well, he informed Forman and AG, and advised them that they needed to

[48] Tr. p. 271. Respondent testified that he was not informed about the stop-payment order on the premium check. Tr. 515. There is no evidence to the contrary.

[49] Tr. pp. 348-349.

[50] Tr. p. 458-459.

[51] Tr. pp. 525-527.

[52] Tr. p. 560.

[53] Tr. p. 561.

[54] Tr. p. 601.

[55] CX-9.

provide him with NS's medical records for at least the previous five years.[56] Forman and AG continued to handle communications with KS.[57]

That same day, November 8, 2004, AG sent a second check drawn on the Voorhees account to the life insurance company, replacing the previously issued partial-premium check on which he had stopped payment, to ensure that the policy would not yet expire.[58]

KS was unaware of the issuance of these checks.[59]

7. Forman and AG Transferred Ownership of the Policy with a Forged Document

During this time, in November 2004, Giampetro prepared a change of ownership form for KS to transfer ownership of the life insurance policy to Voorhees.[60] Before Giampetro was able to send it to KS, AG asked her to forge KS's name on the form. When she refused, Giampetro testified that AG angrily took the form from her.[61]

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[56] Tr. p. 461.

[57] AG did copy Respondent on at least one e-mail to KS, listing the names of NS's doctors, which was information Respondent needed for the two firms. DF-29; Tr. p. 473.

[58] CX-10.

[59] Tr. 107. KS also testified that he did not see, or, if he saw, he did not pay any attention to, an e-mail dated November 9, 2004, from Forman, informing KS that a particular company had indicated an interest in purchasing the policy, and asking KS to call Forman to arrange to provide the necessary signatures. The e-mail is CX-11. Tr. p. 108. KS testified that he was unaware that anyone had expressed interest in buying the policy. Tr. p. 181.

[60] Tr. p. 345-346.

[61] Giampetro testified that after this incident, her relationship with Forman and AG deteriorated and they terminated her employment in September 2005. Tr. p. 353. After her termination, Giampetro wrote a letter and sent it anonymously to KS's children. The letter, CX-37, accused Forman and AG of conspiring illegally to dupe KS into transferring the insurance policy to them, after which they sold it for nearly $900,000. Tr. pp. 353-360. In the letter, Giampetro did not refer to Respondent by name, and did not accuse him of being a co-conspirator; her only reference to him was that "Forman had enlisted the help of a general agent and friend to shop insurance carriers that would purchase the policy." Tr. pp. 360-361. Giampetro's anonymous letter was the first notice to KS of how much money Forman and AG sold the policy for; it led to the filing of a suit by KS against Forman and AG. Tr. pp. 139-142. Respondent was not included in the suit, or the subsequent settlement, Tr. pp. 218-219, pursuant to which Forman and AG paid KS approximately $500,000. Tr. p. 149; DF-66. Forman's and AG's transfer and sale of the policy was also the subject of an investigation by the United States Attorney, District of New Jersey, in which Respondent was informed by letter that he was a witness, not a target. MR-38.

Shortly thereafter, Forman sent the insurance company another change of ownership form transferring ownership of the life insurance policy from the trust to Voorhees.[62] Although this change of ownership form appeared to have been signed by KS, he had not seen it, did not sign it, and testified that his signature was a forgery.[63] The parties stipulated that the signature on the form was a forgery.[64] There is, however, no evidence as to the identity of the forger. There is also no evidence that Respondent ever saw the change of ownership form or that he had anything to do with the forgery of KS's signature; in fact, all of the handwriting on the form, other than the forged signature, is AG's.[65]

KS claimed that he was unaware of the transfer of ownership of the policy.[66]

8. Respondent Sold the Policy on Behalf of Forman and AG

In order to sell the policy, Respondent obtained from Forman and AG the necessary authorization from NS to compile NS's medical history.[67] He sent NS's records to the two firms that had indicated an interest in purchasing the policy. Shortly thereafter, the firms began to bid against each other for the policy. Respondent kept Forman and AG informed of the bidding, which began at $350,000.[68] On December 28, 2004, one of the firms conveyed to Respondent an

[62] The form is dated November 9, 2004. CX-12.

[63] Tr. pp. 108-109.

[64] The parties stipulated to the proffered testimony of a forensic document examiner who analyzed known exemplars of KS's signature, compared them to the signature on the change of ownership form, and concluded that the signature on the form was not that of KS. Tr. pp. 628-629; CX-43. Giampetro testified that this form, with the forged signature of KS, was not the same form that AG presented to her on which he asked her to forge KS's name. Tr. pp. 380-381.

[65] CX-45, pp. 39-40.

[66] Tr. p. 113; CX-14.

[67] Tr. p. 462.

[68] Tr. pp. 462-464.

offer to purchase the policy for $930,000.[69] On January 3, 2005, Forman accepted the offer on behalf of Voorhees.[70]

Once the offer was accepted, Respondent handled the closing. The purchasing firm sent Respondent voluminous closing documentation to be reviewed and signed by various persons, including KS and NS.[71] Respondent reviewed the documents with Forman and AG and noted the signatures that were required.[72]

Because Forman traveled frequently and was often out of the office, he authorized Respondent to contact KS directly on his behalf to obtain needed documents.[73] Consequently, Respondent collected the signature pages of a number of documents that KS and NS needed to sign. On January 5, 2005, Respondent sent the signature pages to KS by facsimile with a cover memo, marked "urgent" and "Re: Required Signatures." Never having met KS, Respondent identified himself in the memo as the person who handled Forman's insurance business and explained that Forman had asked him to send the documents. Respondent requested that KS sign the forms as "Designee" and that NS sign the forms as the "Insured."[74]

Respondent did not indicate on the facsimile cover sheet that the documents related to the sale of the insurance policy by Voorhees, did not identify the nature of the documents, and did not include any pages other than the signature pages.[75] Some of the omitted pages identified the nature of the documents he was asking KS and NS to sign. For example, the omitted first page of a two-page disclosure statement included an acknowledgment that the signer had read the life

[69] CX-20.

[70] Tr. p. 467; CX-21.

[71] Tr. pp. 468-469.

[72] Tr. p. 469.

[73] Tr. p. 483.

[74] CX-22.

[75] Tr. pp. 533-534; CX-22.

insurance policy purchase agreement, consented to its terms, and agreed to appoint the buyer of the policy as NS's attorney-in-fact empowered to execute medical releases.[76] Enforcement argues these facts are conclusive evidence of Respondent's knowing participation in a scheme with Forman and AG to deceive KS and NS because he concealed the sale of the policy from them.[77] The Hearing Panel disagrees.

The Hearing Panel found credible Respondent's testimony that by sending KS only signature pages, rather than the entire documents, he was following his routine practice to "hasten the process" and avoid any delay in completing the transaction. He relied on Forman and AG to explain the process to their client, KS.[78] In addition, the Hearing Panel notes that the signature pages Respondent sent to KS contained text with a number of specific references to the sale of the life insurance policy. For example, on the signature page of the two-page disclosure statement, requiring the signatures of both KS and NS, there are two references to "the Buyer" and the purchase of "the Policy from the Seller, Voorhees Insurance Services, Inc."[79] Two of the signature pages Respondent sent are form letters, to be signed by NS, stating that the insured is "proceeding with a life settlement transaction" and naming the firm purchasing the policy.[80] Two other pages are imprinted with the name of the firm purchasing the policy prominently displayed at the top.[81] These references undermine Enforcement's argument that Respondent was concealing the sale of the policy from KS.

[76] CX-29; Tr. pp. 542-543.

[77] Tr. pp. 645-646, 651.

[78] Tr. p. 484.

[79] CX-22, p. 2; CX-29, p. 2. CX-22 is comprised of the cover memo and the set of signature pages Respondent sent KS.

[80] CX-22, pp. 5-6.

[81] CX-22, pp. 7-8.

Furthermore, Respondent explained that, when dealing with his own clients, he routinely sends only the signature pages, with instructions to sign and return them. He later provides the clients a copy of the whole document. Respondent testified that his practice was consistent with common practice in the insurance industry.[82] No evidence contradicted him. In this instance, because his client was Voorhees, Respondent sent the complete, signed documents to Forman and AG, expecting that they would provide the documents in their entirety to KS.[83]

9. Respondent Attested to Witnessing NS's Signature When He Did Not

One of the signature pages Respondent sent to KS on January 5, 2005, was part of a medical records release.[84] NS signed it, and the date of January 10, 2005, appears next to her signature. By signing, NS gave the buyer of the policy access to her past, current, and future medical records. Because Respondent had already collected and sent the buyer all of NS's medical records that were required for the transaction, the purpose of this release was to authorize access to NS's medical records in the future.[85] NS signed it as the insured; Forman subsequently signed it as owner of the policy.

Respondent signed the form in two places. He signed the medical release form as a witness to Forman's signature and also as a witness to NS's signature. Respondent was present and observed Forman sign, but was not present to observe NS sign. Respondent testified that although the form was needed for the closing, he was unsure if it was necessary to witness NS's signature. Nevertheless, he admitted that he should not have signed the form as a witness to NS's signature.[86] Respondent characterized signing the witness line for NS as a "lapse in

[82] Tr. pp. 543-544; 566-567, 570.

[83] Tr. pp. 531-535.

[84] Tr. p. 545.

[85] Tr. pp. 474-475, 552.

[86] Tr. p. 546.

judgment."[87] He signed for convenience,[88] to complete the document for the closing.[89] Even so, Respondent testified that he had felt comfortable that NS's signature was genuine.[90]

10. Respondent Was Paid a Commission

As noted above, Forman and AG sold the policy for $930,000. The purchase price included a commission, determined by the buyer, in the amount of $65,000, sent in a separate check payable to Respondent through his company, EMA Brokerage LLC,[91] as well as a reimbursement to Voorhees for an additional premium paid while the transaction was pending completion.[92] Respondent retained half of the commission, $32,500, and paid the other half to Voorhees. According to Respondent, it was common for him to split a commission, or share an "override,"[93] and he did so in other cases when he sold policies on the secondary market for Forman and AG.[94]

Forman and AG received the proceeds of the sale of the policy in the amount of $877,450.[95] They paid KS and the trust nothing. They shared none of these proceeds with Respondent.

D. Legal Standard and Burden of Proof

The Complaint charges Respondent with violating Conduct Rule 2110's requirement that every "member, in the conduct of his business, shall observe high standards of commercial honor

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[87] Tr. pp. 585-586.

[88] Tr. pp. 554-555.

[89] Tr. pp. 545-546.

[90] Tr. p. 548. It is undisputed that NS's signature on CX-30 is genuine. Tr. p. 325.

[91] CX-36, p. 3.

[92] Tr. pp. 470-471. The premium paid by Voorhees was $12,450. CX-23.

[93] Respondent testified he did so because he believed Forman and AG could have sold the policy without his assistance. Tr. pp. 562-563.

[94] Tr. p. 564.

[95] CX-36.

and just and equitable principles of trade." A Rule 2110 violation is committed if a respondent's misconduct (i) occurs in the course of his business, and (ii) violates just and equitable principles of trade.[96]

The Rule imposes ethical standards as well as legal obligations. The Rule may be violated when a member engages in misconduct in the course of securities business. It may also be violated when a member engages in unethical conduct that is not securities-related,[97] but reflects on the person's "ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money."[98]

In order to impose liability upon Respondent, the Hearing Panel must find that Enforcement met its burden of proving by a preponderance of the evidence that Respondent violated Conduct Rule 2110 by: (i) taking "control" of the life insurance policy; (ii) facilitating its sale "with forged and falsified documents;" and (iii) retaining "the sale proceeds."

1. Respondent Did Not Take Control of the Policy

The Hearing Panel finds that Enforcement did not prove by a preponderance of the evidence that Respondent took "control" of the policy. The evidence clearly established that KS was Forman's and AG's client, not Respondent's. KS never spoke to Respondent. There is no evidence that Respondent had a role in Forman's and AG's acquisition of the policy. Forman and AG, not Respondent, paid the premiums to prevent the policy's lapse. They, not Respondent, sent the forged authorization to transfer ownership of the policy, which allowed Voorhees to acquire it. Forman and AG, not Respondent, decided whose bid to accept. They,

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[96] *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, *18 (NAC June 2, 2000).

[97] *Id.*, *16 ("Conduct Rule 2110 is not limited to securities-related conduct; instead it covers all unethical business-related conduct.").

[98] *Id.*, *35 (*quoting James A. Goetz*, Exch. Act Rel. No. 39796, 1998 SEC LEXIS 499, *11 (Mar. 25, 1998)).

not Respondent, exercised control of the policy. Respondent, on their behalf, simply sought and found a buyer.

2. Respondent Did Not Facilitate the Sale of the Policy with False and Forged Documents

Enforcement also failed to establish by a preponderance of the evidence that Respondent facilitated the sale of the policy by means of false and forged documents.

Enforcement presented no evidence that Respondent had anything to do with the forgery of KS's name on the change of ownership form, or played any role in the change of ownership of the policy. The Hearing Panel finds, based upon the evidence, that when Respondent became involved with shopping the policy, he reasonably believed, as he was told by Forman and AG, that KS no longer wanted the policy and that Forman and AG either had acquired ownership of the policy or were in the process of doing so.[99]

It is undisputed that Respondent signed the medical release form and thereby represented that he had witnessed NS sign the form. Enforcement argues that by his signature, Respondent rendered the release a false or forged document and that he then used the false document in a scheme with Forman and AG to deceive KS, in violation of Conduct Rule 2110.

The Hearing Panel finds that the evidence does not support this argument. NS's signature on the medical records release is authentic. NS testified that she signed it. The document contains no forged signature. Enforcement presented no evidence that Respondent's signature as a "witness" affected the validity of the authorization given by NS for the release of her medical records. In addition, by the time Respondent signed his name to the form, the prospective purchaser already possessed NS's medical records. Enforcement provided no testimony or authority for the proposition that NS's signature had to be witnessed in order for the

[99] Indeed, KS testified repeatedly that he had decided he would pay no more premiums and made his decision known to Forman.

medical release form to be valid. Enforcement presented no evidence and cited no authority that the purchasing company would have declined to purchase the policy if the witness line had not been signed.

3. Respondent Did Not Violate Conduct Rule 2110 by Signing the Release

Alternatively, Enforcement argues that the Hearing Panel should find Respondent liable for violating Conduct Rule 2110 solely for the act of signing the medical release form as a witness, even if the evidence fails to prove that he conspired with Forman and AG to take control of the policy and facilitate its sale with false and forged documents, in order to obtain the proceeds.[100] Respondent strenuously disagrees.[101]

In this case, to hold Respondent liable simply for signing the medical release form would require the Hearing Panel to find that: (i) Respondent's signature on the medical information

[100] Enforcement raised this theory of liability it its summation at the close of the hearing in response to questions from the Hearing Panel. Tr. pp. 653-654. Up to that point, the theory of Enforcement's case was that Respondent was a co-conspirator of Forman and AG, that the "conspiracy with Forman and [AG] would not have been possible, would not have been successful" without Respondent, Tr. p. 52, and that Respondent's liability stemmed from his "being part of this team, this conspiracy." Tr. p. 68.

[101] At the hearing, Respondent argued that to hold him liable for violating Conduct Rule 2110 for the witness signature alone would be a violation of due process because the Complaint charges him as a conspirator with Forman and AG, and the Hearing Panel must decide the case on the basis of the charges which he "prepared to come here to contest." Tr. p. 656. It is well-settled that the Hearing Panel could not properly hold Respondent liable for a violation not alleged in the Complaint, or apply a standard that was not fairly litigated at the hearing. *Leonard John Ialeggio*, Exch. Act Rel. No. 37910, 1996 SEC LEXIS 3057 (Oct. 31, 1996); *James L. Owsley*, Exch. Act Rel. No. 32491, 1993 SEC LEXIS 1525, *9-*10 (June 18, 1993) ("Basic due process requires that a respondent be given notice of the offenses with which he is charged."); *Dep't of Enforcement v. Keith Howard Medeck*, No. E9B2003033701, 2009 FINRA Discip. LEXIS 7 (NAC July 30, 2009); *Dep't of Enforcement v. Paul Bryan Zenke*, No. 2006004377701, 2009 FINRA Discip. LEXIS 37, *10-*13 (NAC Dec. 14, 2009) (dismissing complaint when liability was found based on misconduct not alleged); *D.E. Wine Investments, Inc.*, Exch. Act Rel. No. 43929, 2001 SEC LEXIS 222, *1220-*1221 (Feb. 6, 2001) ("We will not now apply a standard that was neither initially charged nor fairly litigated at the hearing."). In this case, however, even though the Complaint does not expressly allege that Respondent violated Conduct Rule 2110 solely because he signed as a witness to NS's signature on the medical release form, the Complaint put Respondent sufficiently on notice that this signature was an important element of his alleged misconduct. Indeed, Respondent's Pre-Hearing Submission contains an extensive, well-supported defense that his signature was not fraudulent, did not create a falsified record, and did not violate Conduct Rule 2110. Respondent's Pre-Hearing Submission, pp. 6-9. It is clear, therefore, that Respondent understood and was prepared to defend against the alternative theory of liability argued by Enforcement. *See Wanda P. Sears*, Exch. Act Rel. No. 58075, 2008 SEC LEXIS 1521, *11 (July 1, 2008), *sanctions modified on remand, Dep't of Enforcement v. Wanda P. Sears*, No. C07050042 (July 23, 2009), *appeal filed*, SEC Admin. Proc. No. 3-12881 (Aug. 6, 2009).

release form was required;[102] (ii) by signing, Respondent intentionally rendered the form a false document;[103] and (iii) Respondent facilitated the sale of the policy by representing the falsified form as if it were properly completed.[104]

As noted above, however, Enforcement did not prove that the sale of the policy was dependent upon or facilitated by Respondent's signature on the form. Furthermore, Enforcement did not prove that Respondent falsified the release. In general, "a finding of falsification requires a showing that a document is 'materially false' and designed to create a 'false impression.'"[105] The evidence does not establish that Respondent materially falsified the release or that he intended to create a false impression by attesting to a signature he believed, correctly, to be genuine.

The Hearing Panel finds credible Respondent's testimony that he believed that NS's signature was genuine, and that he signed as a witness to expedite the transaction, not to perpetrate a deception.[106] Thus, Respondent did not "facilitate" the sale by representing a falsified form to be something other than what it was. Although the evidence shows that Respondent had a business relationship with Forman and AG, and a friendship with AG, Enforcement did not prove by a preponderance of the evidence that Respondent was involved in, or privy to, Forman's and AG's transfer of ownership of the insurance policy from the trust to Voorhees, allegedly without KS's knowledge. The Hearing Panel finds forthright and credits Respondent's testimony that he did not conspire with Forman and AG to take control of the

[102] Complaint ¶ 22.

[103] *Id.*, ¶ 23.

[104] *Id.*, ¶ 25.

[105] *Dist. Bus. Conduct Comm. v. Wagner*, No. C07940061, 1995 NASD Discip. LEXIS 39, *8-*9 (NBCC Oct. 27, 1995).

[106] By this finding, the Hearing Panel does not suggest that it approves of Respondent's action, for which he expressed regret and contrition, of signing the medical release form as if he had witnessed the execution of a signature, when he had not.

insurance policy, facilitate its sale by means of falsified documents, or retain the proceeds of the sale.

4. Respondent Did Not Retain the Proceeds of the Policy

Finally, the Complaint alleges that Respondent, after engaging in a course of misconduct with Forman and AG, wrongfully retained the proceeds of the sale of the insurance policy. The Hearing Panel finds that Enforcement failed to prove this allegation. The proceeds of the sale, in the amount of $877,450, went to Voorhees,[107] and thereby to Forman and AG. The buyer paid Respondent, by separate check, a commission of $65,000, for having brought the buyer and seller together.[108] On the basis of this evidence, the Hearing Panel concludes that Respondent did not, with Forman and AG, "retain" proceeds of the sale of the life insurance policy.

III. Conclusion

The Hearing Panel finds, therefore, that Enforcement failed to prove the allegations against Respondent by a preponderance of the evidence. The Hearing Panel therefore concludes that Respondent did not violate Conduct Rule 2110.

IV. Order

For the reasons set forth above, the Hearing Panel dismisses the Complaint against Respondent.[109]

HEARING PANEL.

_____

By: Matthew Campbell
Hearing Officer

[107] CX-36, p. 2.

[108] CX-36, p. 3.

[109] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

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