

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the matter of the Arbitration Between

Name of Claimant(s)

John Valentine

v.

NASD Arbitration
No. 94-00708

Name of Respondent(s)

Kidder, Peabody & Co., Inc., Ray Cyphers, Wes Clark,
and Len Gabrielson

REPRESENTATION

For Claimant: Alexander H. Singleton and Peter A. MacLaren, Esq.,
Law Offices of Alexander Singleton,
San Jose, California

For Respondents: William H. Phelps, Esq.,
Kidder, Peabody & Co., Inc.,
Los Angeles, California

CASE INFORMATION

Statement of Claim filed: February 25, 1994

Claimant's Submission Agreement signed: February 21, 1994

Joint Statement of Answer filed by Respondents: May 6, 1994

Respondent Kidder, Peabody & Co., Inc.'s Submission Agreement signed: May 6, 1994

Respondent Ray Cyphers' Submission Agreement signed: May 11, 1994

Respondent Wes Clark's Submission Agreement signed: May 10, 1994

Respondent Len Gabrielson's Submission Agreement signed: May 11, 1994

HEARING INFORMATION

Hearing Dates / Sessions: February 21, 1995/two sessions
February 22, 1995/two sessions
February 23, 1995/two sessions
February 24, 1995/two sessions
February 27, 1995/two sessions
February 28, 1995/two sessions

Hearing Location: San Francisco, California

CASE SUMMARY

John Leo Valentine ("Valentine") claims that Respondents engaged in unfair competition, false advertising, interference with prospective economic advantage, defamation, trade libel and misrepresentation, in publishing allegedly false, misleading and defamatory information about his termination from his employment with Respondent Kidder, Peabody & Co., Inc. Valentine does not contest his termination.

Respondents deny each of Valentine's allegations.

RELIEF REQUESTED

Claimant requested damages as a proximate result of unfair competition including lost income, harm to reputation, loss of client good will and emotional distress according to proof, plus an award of treble damages, punitive damages, interest, costs of arbitration and attorney's fees.

Respondents requested dismissal of all claims, and an award of costs of arbitration and attorney's fees.

FINDINGS

1. The Cyphers Letter is not privileged under Civil Code section 47(c).

Each of the claims outlined above raises a common issue: was the form letter which Ray Cyphers signed and Kidder sent to some of Valentine's clients (together with contemporaneous oral statements) privileged under Civil Code section 47(c), which states: "A privileged communication is one made... (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information."

"The lesson we deduce from these cases is that the scope of the privilege under section 47, subdivision 3 [now 47(c)] is not capable of precise or categorical definition, and that its application in a particular case depends upon an evaluation of the competing interests which defamation law and the privilege are designed to serve." Institute of Athletic Motivation v. University of Illinois (1980) 114 C.A. 3d 1, 11.

Kidder's expressed interest was to resolve "confusion regarding the reasons for John Valentine leaving Kidder." The ostensible interest of the client was to "understand the rationale for (Valentine) being terminated." We find that the Cyphers letter was not privileged for two reasons:

a.) It was sent to Valentine clients who had not asked about his leaving Kidder.

Initially, Ray Cyphers, Kidder's manager, instructed Kidder personnel to inform anyone asking about Valentine to reply that his departure was the result of a mutual decision reached after disagreements over internal policies at Kidder. (In fact, Valentine was discharged because he caused false and misleading financial information to be furnished to a loan broker concerning his personal accounts and the accounts of one of his clients. This was the culmination of a series of events which undermined Cyphers' confidence in Valentine.)

A form letter was then drafted by Cyphers and sent to any client of Valentine asking about the reasons for Valentine leaving Kidder. It was also sent to retiring GTE employees who Valentine had solicited for 401(k) roll overs, regardless of whether they made any inquiry.

b.) The Cyphers letter contained inappropriate language.

The Cyphers letter stated:

"First, let me say that our firm considers the termination of a broker a last resort decision. By way of example, I have only terminated one other broker in my fourteen years at Kidder, Peabody. Such a decision is never made in the heat of the moment, and in fact, requires serious and detailed consultation with members of the firm at the highest levels. Further, once decided, all governing agencies, i.e. New York Stock Exchange and the National Association of Securities Dealers, Inc. (NASD) are notified and a detailed description of the reason for it. I say all this to convey the extreme gravity of such an action.

John Valentine was terminated for his refusal to comply with various legal policies established internally and the external bodies to protect our clients and the firm. These policies were flagrantly and repeatedly ignored by Mr. Valentine over the two year period he was employed by Kidder, Peabody. As such, it was finally decided that in the interest of our clients such behavior could no longer be tolerated."

Rather than providing clarity and understanding, the ominous generalities of the Cyphers letter created doubt and dissonance. What kinds of "legal policies" did Valentine "flagrantly and repeatedly" ignore to earn the "death penalty" handed down only one other time over the past fourteen years at Kidder? Was Valentine's license in jeopardy because of the "detailed reasons" given to the regulatory authorities? The vice of the Cyphers letter is that it simply leaves far too much to the imagination of the reader to conjure up "a parade of horrors."

2. As a result of the Cyphers letter, Valentine was damaged.

Valentine was unable to take a significant number of clients with him following termination by Kidder. However, this was due primarily to his termination and not the Cyphers letter. The Cyphers letter had nothing to do with the loss of \$82 Million in institutional accounts. The only accounts affected were the GTE and other managed accounts, and no more than 15% of the loss in these accounts can be attributed to the Cyphers letter. Valentine was damaged in an amount described in the Award section, below.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the original remains on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent Kidder, Peabody & Co., Inc. is liable for and shall pay Claimant the sum of Seventy-Five Thousand Dollars (\$75,000.00).
2. All claims against Respondents Ray Cyphers, Wes Clark and Len Gabrielson are dismissed.
3. Claimant's request for punitive damages is denied.
4. The parties shall each bear their respective costs including attorney's fees.
5. Respondent Kidder, Peabody & Co., Inc. shall reimburse Claimant for forum fee expenses as set forth below.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following forum fees are assessed:

Twelve hearing sessions @ \$1,500/session	= \$ 18,000.00
Credit for Claimant's hearing deposit	= <u>1,500.00</u>
Total fees assessed	= \$ 16,500.00

1. Respondent Kidder, Peabody & Co., Inc. shall pay the NASD the sum of \$16,500.00 for forum fee costs and;
2. Respondent Kidder, Peabody & Co., Inc. shall reimburse the Claimant for the hearing deposit of \$1,500.00.

Fees listed in item 1 are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS

<u>Name</u>	<u>Public / Industry</u>
Bertram H. Shaughnessy	Public Arbitrator
John B. Marchant	Public Arbitrator
Donald S. Duerson	Industry Arbitrator

Concurring Arbitrators' Signatures

Bertram H. Shaughnessy

John B. Marchant
John B. Marchant

Donald S. Duerson

Date Served: 6-27-95