

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT

Respondent.

Disciplinary Proceeding
No. 2012033128703

Hearing Officer - DRS

**ORDER GRANTING MOTION TO LIMIT DISSEMINATION AND USE OF
PERSONAL CONFIDENTIAL INFORMATION**

A. Background

On June 16, 2014, the Department of Enforcement moved for an order limiting the dissemination and use of personal, confidential information ("PCI")¹ contained in Enforcement's investigative files that will be produced to Respondent in accordance with FINRA Rule 9251 or produced by any party either pre-hearing or as a potential exhibit at or for the hearing. The motion seeks an order requiring, among other things,² that Respondent, "[w]ithin 60 days of the

¹ PCI is defined as the name of an individual, coupled with any of the following: social security number; tax identification number; date of birth; driver's license number, state of issuance, or expiration date; cellular telephone number; fax telephone number; electronic mail address; the identity of any bank account, including name of bank or account number; any description of assets (and value of assets) owned by an individual; the identity of any securities brokerage account, including name of the brokerage firm or account number; the investment history, investment objectives, or other financial information regarding the individual appearing in securities brokerage account forms and correspondence (including account statements and confirmations) between the brokerage account and the individual; specific investments made by the individual; any and all information relating to credit or debit cards held by individuals; or compensation information including salary, bonus, or commission arrangements with employers. Additionally, in its motion, Enforcement requested that the 2011 federal income tax return of [JM and EM], in its entirety, be included in the definition of PCI. Respondent did not oppose this request. Therefore, for the purposes of this order, PCI will be construed as including that tax return.

² The motion also requested that the Hearing Officer: (1) limit Respondent's "use of PCI contained in the investigative files produced by Enforcement to use in this litigation;" (2) order Respondent "not to disseminate PCI to anyone that is not a party to the case or assisting in the defense of the Respondent to this litigation;" and (3) order

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conclusion of the litigation in this matter (including any and all appeals) . . . either return all copies of the PCI to Enforcement for destruction, or certify that he has destroyed the PCI produced from the investigative file or other parties.” The motion represented that except with respect to this return or destroy provision, the parties had agreed to all other terms of a PCI protective order.

On June 23, 2014, Respondent filed his response opposing the inclusion of the return or destroy provision. In his response, Respondent argued that this provision is unnecessary; not authorized under FINRA Rule 9146(k), which governs protective orders limiting or prohibiting the dissemination of confidential information;³ would cause his attorney to violate record retention requirements contained in applicable state ethics rules; and is contrary to admonitions by insurance companies that attorneys not agree to such provisions. Enforcement filed its reply to the response on July 9, 2014.

As discussed below, after reviewing the motion, response and reply, the Hearing Officer finds that good cause exists for granting the motion, including the request for a return or destroy requirement.

Enforcement to “maintain its investigative files in accordance with its standard procedures that provide for the protection of PCI.”

³ Enforcement did not seek a protective order pursuant to Rule 9146. Instead, it invoked the authority of Rule 9251(b)(1)(D), which authorizes the Hearing Officer to grant “leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.” In its motion, however, Enforcement is not seeking to withhold a Document or category of Documents from production. Therefore, Rule 9251(b)(1)(D) is inapplicable to the issues presently before the Hearing Officer.

B. Discussion

Orders limiting the use and dissemination of PCI are frequently issued in FINRA disciplinary proceedings. Here, the parties agree that such an order is appropriate and have further agreed to all the terms, except one, of a proposed order. The issue raised by the instant motion is whether that order should include a return and destroy requirement. Enforcement states that it seeks this requirement because FINRA is committed to safeguarding PCI and the requirement would provide “a belt-and-suspenders assurance that the PCI remains confidential,” protecting against even inadvertent disclosure. Respondent’s arguments against inclusion of a return or destroy provision are not persuasive, and the Hearing Officer rejects them.

First, given the importance of safeguarding PCI, the Hearing Officer finds that a return or destroy requirement is not superfluous, as Respondent contends. Rather, it provides a useful, added measure of protection and is a common feature in FINRA disciplinary orders limiting the use and dissemination of PCI⁴ and other confidential information.⁵

Second, the Hearing Officer has the authority to include such a provision in a PCI order. Hearing Officers are granted broad authority under FINRA Rule 9235(a) “to do all things necessary and appropriate to discharge his or her duties,” including, but not limited to “resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions, subject to any limitation set forth elsewhere in the Code.” While FINRA Rule 9146(k) does not specifically authorize the inclusion of a return and destroy provision in a protective order, it does not prohibit the Hearing Officer from doing so.⁶

⁴ See, e.g., OHO Order 10-01 (200500224102) (Apr. 26, 2010) at 2–3.

⁵ See, e.g., OHO Order 05-33 (CAF040058) (Oct. 11, 2005) at 5; OHO Order 03-01 (CAF020041) (Jan. 6, 2003) at 4.

⁶ By contrast, FINRA Rule 9146(k)(2) contains limitations on the adjudicator’s authority to include certain provisions, not relevant here, in a protective order.

Third, Respondent failed to demonstrate that the requested return or destroy provision would cause his counsel to violate applicable state ethics rules.⁷ In his response to the motion, Respondent's counsel represents that she is licensed to practice law in Colorado and Texas, is bound by their ethics rules, and would violate those rules if she were required to comply with the return or destroy provision.

Relying upon Rule 1.16A of Colorado's Rules of Professional Conduct, Respondent asserts that a lawyer must retain client files for ten years following the termination of the representation, thereby prohibiting a lawyer from complying with a return or destroy obligation such as that sought by Enforcement. The Colorado rule upon which Respondent relies, however, does not support this assertion. The ten year retention provision, Rule 1.16A(b), permits a lawyer, after ten years, to destroy a client's files without notice to the client as long as "there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer had not agreed to the contrary." This provision does not mandate file retention if the file is returned to the client, the client authorizes destruction of the file, or the lawyer gives notice of intent to destroy the file, as addressed in subpart (a) of Rule 1.16A.

Rule 1.16A(a)(1) states that a lawyer in private practice need not retain a client's files on a matter if, either, "the lawyer delivers the file to the client," or "the client authorizes destruction of the file in writing, signed by the client" as long as "there are no pending or threatened legal proceedings known to the lawyer that relate to the matter."

⁷ Respondent assumes, but failed to demonstrate, that a return or destroy requirement is inappropriate if it contravenes defense counsel's ethical obligations. (Neither party addressed this threshold issue in their papers). This assumption, however, is open to question. Adopting Respondent's position would make the appropriateness of a return or destroy requirement dependent upon whether Respondent is represented by counsel and the ethical rules applicable to that particular attorney, rather than upon whether the requirement is a useful safeguard against the improper use and dissemination of PCI. Regardless, the Hearing Officer need not decide this issue in light of his finding, above, that Respondent failed to show that his lawyer will violate state ethics laws if the Hearing Officer imposes a return or destroy requirement on Respondent.

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Also, under Rule 1.16A(a)(2), the lawyer need not retain the files if he “has given written notice to the client of [his] intention to destroy the file on or after a date stated in the notice . . . and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.”

A return or destroy provision in this case would simply require Respondent to obtain the documents containing PCI from counsel and destroy or return them to Enforcement, or direct his attorney to do so. Alternatively, counsel could provide notice to Respondent of an intention to destroy the documents. Respondent has not shown that these approaches contravene the Colorado Rules of Professional Conduct.

Similarly, Respondent has not cited any authority demonstrating that a return or destroy requirement violates the Texas Disciplinary Rules of Professional Conduct. Respondent argues that Rule 1.14(a) “leaves no room for the destruction of client files prior to five years after termination of the representation.” But this provision does not state that the lawyer must retain all property for five years following the termination of the representation. Instead, the Rule requires that lawyers keep and preserve “complete records” of “account funds and other property . . . for a period of five years after termination of the representation.” In other words, the Rule states that the lawyer must retain records of property, not the property itself.⁸

⁸ *See also* Rule 1.15(d), which addresses the post-termination disposition of client papers and property and requires a lawyer to “take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled.” Rather than requiring retention of papers relating to the client, the rule permits retention “to the extent permitted by other law only if such retention will not prejudice the client in the subject matter of the representation.” Additionally, the Supreme Court of Texas Professional Ethics Committee for the State Bar of Texas Opinion Number 570 (May 2006) (“Texas Opinion 570”) concluded that “generally, the documents in a lawyer’s file that are property to which the client is entitled must be transferred to the client upon request unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.” Respondent has not shown that his counsel is permitted by law to retain the documents containing PCI or that she could retain them without prejudicing his interests.

Additionally, Respondent cited no other authority demonstrating that the return or destroy requirement at issue here would cause his counsel to violate applicable state ethics law.⁹ Indeed, federal courts in both Colorado¹⁰ and Texas¹¹ have entered orders containing provisions requiring counsel for the parties to return all confidential information provided subject to the protective order immediately upon the termination of the litigation.

Finally, Respondent's unsupported argument that insurance malpractice carriers advise against attorneys entering into such provisions is not determinative of the issues before the Hearing Officer. Irrespective of whether insurance companies prefer that their insureds not agree to a return or destroy provision, the question is whether this provision is warranted in this case. As discussed above, the Hearing Officer finds that it is appropriate, given Enforcement's undisputed representation that the investigative files contain PCI, coupled with the importance of protecting against the risk of even the inadvertent dissemination of PCI.

⁹ Respondent cites Texas Opinion 570 for the proposition that "other property" of a client includes, among other things, "documents obtained from third parties and the opposing party." The definition of "other property," however, is not at issue on the present motion. Additionally, the question presented in this ethics opinion was: "Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer refuse a former client's request to disclose or turn over the lawyer's notes made in the course of and in furtherance of his representation of the client?" The opinion does not address whether complying with a return or destroy requirement violates the Texas Disciplinary Rules of Professional Conduct.

¹⁰ See, e.g., *Dine Citizens Against Ruining Our Environment v. Klein*, 2009 U.S. Dist. LEXIS 130123, at *9 (D. Colo. Aug. 3, 2009); *Paysinger v. Res-Care, Inc.*, 2007 U.S. Dist. LEXIS 35518, at *7 (D. Colo. May 15, 2007); *Faughn v. Am. Nat'l Prop. & Cas. Co.*, 2006 U.S. Dist. LEXIS 80115, at *7-8 (D. Colo. Nov. 1, 2006); and *Smith v. Bruderman*, 2006 U.S. Dist. LEXIS 21015, at *8 (D. Colo. Apr. 7, 2006) where the court issued orders containing document return provisions pursuant to stipulations entered into by Colorado counsel. By contrast, in other instances, courts have entered stipulated orders permitting counsel to retain confidential documents subject to a protective order following the termination of the litigation. See *Klein Frank, P.C. v. Girards*, 2012 U.S. Dist. LEXIS 163350, *7 (D. Colo. Nov. 15, 2012); *Null v. Nat'l Ass'n of Certified Home Inspectors*, 2012 U.S. Dist. LEXIS 150357, *6-7 (D. Colo. Oct. 18, 2012). But these orders do not provide the rationale for permitting counsel to retain the documents.

¹¹ See *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, 2009 U.S. Dist. LEXIS 15901, *21 (N.D. Tex. Feb. 23, 2009) (ordering, in a case in which the parties were represented by Texas counsel, that at the conclusion of the litigation, all confidential information produced or disclosed in the action be returned or shredded within 30 days of a request by the party who made the disclosure thereof).

C. Order

Accordingly, for good cause shown, the motion is **GRANTED**, with certain modifications to the language proposed by Enforcement, and the Hearing Officer orders as follows:

1. Respondent shall limit the use of PCI contained in the investigative files produced by Enforcement to use in this litigation (including any appeal).
2. Respondent shall not disseminate PCI to anyone that is not a party to the case or assisting in the defense of Respondent in this litigation (including any appeal). As a precondition to an individual receiving PCI, Respondent shall advise the recipient of the existence of PCI and that its use is limited by the terms of this Order.
3. Not later than 60 days after the conclusion of this disciplinary proceeding (including any and all appeals), Respondent shall either return any PCI to Enforcement for destruction, or will certify that he has destroyed the PCI produced from the investigative file or other parties.¹²
4. Enforcement shall maintain its investigative files in accordance with its standard procedures that provide for the protection of PCI.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Date: July 16, 2014

¹² This provision, however, shall not preclude Respondent's present counsel of record (i.e. counsel as of the date of this order) from retaining any documents subject to this order if, within 60 days of the conclusion of this disciplinary proceeding (including any and all appeals), she becomes aware of any pending or threatened legal proceedings relating to this matter. Any documents retained by Respondent's present counsel shall continue to be subject to all other provisions in this order governing the limitation and use of PCI.