NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Disciplinary Proceeding No. C9A020017
v.	:	Hearing Officer - JN
EMANUEL L. SARRIS (CRD #1363059),	:	**HEARING PANEL DECISION**
New Hope, PA,	:	March 17, 2003
Respondent.	:	

Respondent willfully failed to keep current his Form U-4, in violation of Rule 2110, and willfully failed to disclose material information on his Form U-4, in violation of Rule 2110. For sanctions, the Panel imposed a $10,000 fine, a one-year suspension, and a re-qualification requirement. Respondent was also assessed $1,650.35 in costs.

Appearances

For the Complainant: Thomas K. Kilkenny, Esq. and Rory C. Flynn, Esq.

For the Respondent: Keith Loveland, Esq.

Decision

I. Introduction and Background

On April 11, 2002, the Department of Enforcement filed a Complaint against Respondent Emanuel L. Sarris. The First Cause alleged that on several occasions, he willfully failed to keep current his Uniform Application for Securities Industry Registration or Transfer ("Form U-4") as to details involving state insurance regulatory proceedings. The Second Cause alleged that on two occasions, he willfully failed to state

material facts concerning such proceedings in his U-4. The Complaint charged that all of the above conduct violated Rule 2110.

A Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 9, conducted a hearing on September 18, 2002, in Philadelphia, Pennsylvania. The parties' Stipulation to various facts was admitted as JX-1. Enforcement introduced ten exhibits (CX-1, CX-2, CX-10–17), and Respondent introduced three exhibits (RX-1, RX-2, and RX-3). The parties filed post-hearing briefs. The last brief (Enforcement's Reply) was filed on December 24, 2002.

From January of 1994 until September of 2001, Respondent was registered as an Investment Company and Variable Contracts Products Representative – first with Securities America, Inc. and later with Washington Square Securities, Inc. (CX-1). Beginning in 1996 and continuing through 2001, he was a party to proceedings initiated by New Jersey and Pennsylvania state insurance regulators, which culminated in the revocation of his New Jersey insurance license and an eighteen-month voluntary surrender of his Pennsylvania license (JX-1, ¶¶ 4–6, 9, 12, 18). The instant disciplinary proceeding involves the timeliness and accuracy of Sarris' disclosures of these state proceedings on his Form U-4.

II. Failure to make prompt amendments

NASD By-Laws require that "every application for registration filed with the NASD staff shall be kept current at all times by supplementary amendments … [which] shall be filed with the NASD not later than 30 days after learning of the facts or circumstances giving rise to the amendment" (Article V, Section 2(c), NASD By-laws). The relevant U-4's contain a commitment, signed by Respondent, "to update this form by

causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported" (CX-16, pp. 14, 20, 48; CX-17, p. 9).

Question 23D on the Form U-4 asked whether "any state regulatory agency ... ever … revoked your registration or license or otherwise ... prevented you from associating with an investment-related business…?" (CX-16, p. 10). The phrase "investment-related" was italicized, and the disclosure questions began with a boldface direction to "refer to the explanation of terms section of Form U-4 instructions for explanations of italicized terms" (Id., at p. 9). The Form defined "investment-related" as "pertaining to securities, commodities, banking, insurance, or real estate…." (CX-17, p. 8; Tr. 104; emphasis added). Question 23G asked "[h]ave you ever been notified, in writing, that you are now the subject of any: (1) regulatory … proceeding that could result in a 'yes' answer to any part of … 23D…?" (CX-16, p. 51).

The Form makes it clear that these insurance regulatory proceedings needed to be reported promptly, and the record shows that Respondent was in serious violation of the timeliness requirement on at least five occasions.

On March 14, 1996, the New Jersey Department of Insurance issued an Order seeking to revoke Sarris' insurance license (JX-1, ¶ 4). On February 3, 1998, Respondent filed an amended U-4 which disclosed this New Jersey Order (Id., at ¶ 8). Second, on August 7, 1996, the Pennsylvania Insurance Commission issued an Order seeking to revoke his insurance license in that State, but Respondent also did not disclose that Order until the February 3, 1998 filing (Id., at ¶¶ 5, 8). Third, on July 8, 1997, the New Jersey Department issued a further order adding allegations to the charges against him; Sarris failed to disclose this order until he made the February 3, 1998 filing (Id., at ¶¶ 6, 8).

Fourth, on April 16, 1999, the Pennsylvania Commission issued an Order seeking revocation of his insurance license for failing to disclose inter alia that New Jersey had revoked his license on August 31, 1998 (Id., at ¶ 12). On April 26, 2000, Sarris filed a U-4 amendment which disclosed this Pennsylvania order (Id., at ¶ 17). Fifth, Respondent settled with Pennsylvania by surrendering his license for two and one-half years, but never filed a U-4 amendment reflecting such action (Id., at ¶¶ 18, 19).

In short, he did not report the first New Jersey order until nearly two years after the event. The first Pennsylvania order was reported more than eighteen months after it issued. The second New Jersey order was reported nearly eight months after the fact. Sarris did not report the second Pennsylvania order until more than one year after it entered, and he never reported the Pennsylvania settlement, which involved an eighteen-month surrender of his license.

Whether measured by the By-Laws' thirty days[1] or the U-4s' "timely basis," the Panel finds that Respondent fell far short of the mark. "The burden of updating a Form U-4 rests with the registered representative" and a failure to carry that burden violates Rule 2110. Department of Enforcement v. Daniel Richard Howard, 2000 NASD Discip. LEXIS 16 at *31 (NAC November 16, 2000), aff'd, 2002 SEC LEXIS 1909 (SEC July 26, 2002). The Panel concludes that Sarris' untimely reporting, detailed above, violated Rule 2110.

[1] The thirty-day requirement became effective in July of 1996 (JX-1, ¶ 3). One of the events in issue (an order of the New Jersey Department of Insurance) occurred before that effective date, during a time when the By-Law required that the amendment be made "promptly" (Id.).

III. Failure to Disclose

On December 23, 1999, Sarris filed a Form U-4, applying for registration as a representative of Washington Square Securities (CX-16, pp. 4–20). This filing failed to disclose either the New Jersey revocation decision or the April 16, 1999 Pennsylvania order seeking revocation of his license for failing to disclose the New Jersey action to the Pennsylvania Commission (JX-1, ¶ 14).

As shown above, the Form required disclosures as to state regulatory proceedings involving "investment-related" matters, a term explicitly defined in the Form as including "insurance." Sarris was thus plainly required to disclose the New Jersey revocation of his insurance license and the Pennsylvania Order seeking revocation of his license in that State. He failed to do so, and such failures constitute violations of Rule 2110 (see IM-1000-1).

IV. Respondent's Defenses

Respondent's principal argument is that he relied on the advice of counsel (Brief, pp. 1, 6-8). This contention rests on a declaration by Mr. Burton H. Finkelstein, a securities practitioner, who had several conversations with Respondent during 1996 or 1997 in which "I expressed my longstanding view that the United States Supreme Court in the National Life case in the 1950's had held that the sale of fixed life insurance was not a security for SEC purposes" (RX-1). As the parties stipulated, Respondent "spoke on one or more occasions with [Mr. Finkelstein] who informed Emanuel L. Sarris that fixed life insurance is not a security" (JX-1, ¶ 7).

"If reliance on the advice of counsel is asserted as a substantive defense, the party asserting the defense must: 1) make a complete disclosure to the attorney of the intended

action; 2) request the attorney's advice as to the legality of the action; 3) receive counsel's advice that the conduct would be legal; and 4) rely in good faith on that advice."[2] Applying those standards to the facts of this case, the Panel concludes that Respondent failed to establish the defense.

Finkelstein's statement that life insurance was not a security falls far short of advice that Sarris need not report his state insurance regulatory difficulties on the Form U-4. One thing had no necessary connection to the other. The relevant questions on the Form asked broadly about "investment-related" matters, and were not limited by the concept of "securities." Moreover, the record does not clearly show that Respondent asked Finkelstein about the U-4. Sarris said that he read some "investment-related" questions to the attorney, but acknowledged that "I don't remember if they were on a NASD form or an insurance company form or a variable life form" (Tr. 103). In any event, Mr. Finkelstein's declaration does not reflect the asserted nondisclosure "advice." The Panel concludes that Respondent's decision to treat "investment-related" as somehow excluding insurance – contrary to the plain language of the Form's definition – rested on his own interest in silence, and not Finkelstein's opinion about what was or was not a "security."[3]

[2] Dep't of Enforcement v. Michael F. Flannigan, 2001 NASD Discip. LEXIS 36 at *20 (NAC June 4, 2001), aff'd, 2003 SEC LEXIS 40 (January 8, 2003).

[3] A portion of the Finkelstein statement contained the declarant's opinion that Respondent believed that he did not have to report the state regulatory matters because life insurance was not a security (see RX-1, last paragraph; Tr. 62-64). That portion made no reference to any conversation, action, or specific event, but consisted solely of an unexplained belief. Mr. Finkelstein did not participate in the hearing, either in person or by telephone. Without cross-examination, there was no way for the Panel to understand how Mr. Finkelstein could claim to know what was in Respondent's mind, and there was no way to evaluate the declarant's opinion. In these circumstances, the Panel agreed with Enforcement that the opinion should be excluded as entitled to no weight (Id.).

In the alternative, Respondent argues that he should not be held liable for the U-4 violations because he relied on other people (his ex-wife, employees at his insurance agency, employees of the relevant securities firms) to handle the details. This contention has no merit. It is settled that a registrant "cannot evade responsibility for the accuracy of the Forms U-4 … by attempts to shift responsibility" to others. Dep't of Enforcement v. Marlowe Robert Walker, III, 2000 NASD Discip. LEXIS 2 at * 22 (NAC April 20, 2000).

In any event, there is evidence of Respondent's personal involvement in the misconduct. For example, his letters to Securities America, Inc. and then to Washington Square Securities, Inc. discussed the New Jersey proceedings, but remained silent about the Pennsylvania show cause order (CX-10, p. 2; RX-2). Indeed, his silence in the Washington Square letter – which stated only that Pennsylvania had renewed his license, while knowing of the New Jersey proceedings – (CX-10, p. 2) – conveyed the misleading impression that he had no Pennsylvania licensing problems. These letters were from Sarris, not someone else; the Washington Squire letter was in his writing (Tr. 98). Respondent cannot blame anyone but himself.

V. "Willfulness"

The Complaint alleges that Sarris' failures to update the U-4 and his omissions on the December 23, 1999 filing were "willful." A finding of willfulness, though not an element of the offenses under Rule 2110, may have serious collateral consequences. See Article III, Section 4(f) of the NASD By-Laws, creating a disqualification for a person who "has willfully made or caused to be made in any [Form U-4] any statement which was at the time, and in light of the circumstances under which it was made, false or

misleading with respect to any material fact or has omitted to state in any such [form] any material fact which is required to be stated therein."

"Willfulness" is described in In re Christopher LaPorte, Exchange Act Rel. No. 39171, 1997 SEC LEXIS 2058 at *8 (September 30, 1997) and Arthur Lipper Corp. v. S.E.C., 547 F.2d 171, 180 (2d Cir. 1976). This element requires proof that "the respondent knew or should have known under the particular facts and circumstances that his conduct was improper" (LaPorte). The term "willfully" requires "proof that [Respondent] acted intentionally in the sense that he was aware of what he was doing ... '[W]illfully' in this context means intentionally committing the act. There is no requirement that the actor also be aware that he is violating one of the Rules or Acts" (Lipper). Measured by those principles, the Panel finds that Sarris' conduct was willful.

He was named as a respondent in state proceedings, which threatened his valuable life insurance licenses. There is no claim that he did not know of or somehow had forgotten about these orders. Indeed, he acknowledged the career importance of the first New Jersey show cause order (Tr. 128). The state proceedings themselves alleged omissions, misstatements, and untimely disclosures to state regulators (JX-1, ¶¶ 6, 12). In these circumstances, the Panel believes that Sarris must have known not only of the pendency of the state proceedings, but also of the significance of full and prompt disclosure.

Yet, as shown above, on at least five occasions, covering a period which stretched from 1996 to 2001, Sarris repeatedly ignored the requirement that he promptly amend his U-4 to update his records as to these proceedings. In April of 1997, with show cause proceedings pending against him in New Jersey and Pennsylvania, he advised his

firm only about the former (RX-2) and remained silent about the proceedings in Pennsylvania, where his insurance agency was located (CX-12, p. 1). Two years later, he again failed to tell his firm that Pennsylvania was seeking to revoke his license for various nondisclosures (JX-1, ¶ 14). His handwritten note to the firm mentioned the New Jersey revocation, but again said nothing about the on-going Pennsylvania inquiry (CX-10, p. 2).

That note was also misleading, stating "[y]ou should also be aware that, following notification about the status of the New Jersey proceedings, the Pennsylvania Department renewed Mr. Sarris['] resident license for another two-year period" (Id.).[4] The intimation that the Pennsylvania Department had somehow blessed him is inconsistent with the pending show cause order alleging further nondisclosures. In February of 1998, when Sarris decided belatedly to disclose these proceedings, he did so by having his lawyer send the filing directly to NASD in Rockville, Maryland (CX-17, p. 2), thereby by-passing his firm altogether. Finally, after eventually settling the Pennsylvania proceedings (with a $25,000 fine and surrender of his license for two and one-half years), he told his new firm nothing about the outcome (JX-1, ¶ 19).

Perhaps any one of the instances might be forgiven. But, there are too many for the actions to be excused as inadvertent or careless. In the Panel's view, their repeated and continued nature creates a pattern which can only reflect deliberate misconduct.

Respondent argues that his failures were not willful because "investment-related" was a difficult concept which forces the industry to "grapple with the very

[4] Given this document, the Panel is willing to accept the inference that the firm inadvertently lost the materials pertaining to the New Jersey revocation (RX-3; JX-1, ¶ 13) and that Respondent's omission of this action on the December 23, 1999 U-4 was, therefore, not willful.

definition" (Respondent's Brief, pp. 10-11). This contention has no merit. Sarris' task was simple. All he had to decide was whether insurance was "investment-related," and the Form answered that question for him. Its definitional section (which was explicitly referred to in the questions) states that investment-related means: "pertaining to securities, commodities, banking, insurance or real estate…" (e.g. CX-17, pp. 2, 8; emphasis added). Even a casual reader of the Form would see that he or she had to disclose the relevant state insurance regulatory orders. Respondent should have known that his conduct was improper.[5]

VI. Sanctions

A Form U-4 is fundamental to the business and integrity of the securities industry. It is "used by all the self-regulatory organizations, including the NASD, state regulators, and broker-dealers to monitor and determine the fitness of securities professionals,"[6] and "serves as a vital screening device for hiring firms and the NASD against individuals with 'suspect history.'"[7] "The candor and forthrightness of applicants is critical to the effectiveness of this screening process."[8] Thus, in IM-1000-1, the NASD has warned applicants that:

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[5] Enforcement argued that the Sarbanes-Oxley Act effectively disqualified Respondent even without a finding of willfulness (Brief, p. 25). He urged that the new statute did not have that impact (Brief, pp. 15-16). The Panel finds willfulness here and sees no need to address the Act.

[6] In re Rosario R. Ruggiero, Exchange Act Release No. 37,070, 1996 SEC LEXIS 990, at *8-9 (Apr. 5, 1996).

[7] District Bus. Conduct Comm. v. Prewitt, No. C07970022, 1998 NASD Discip. LEXIS 37, at *8 (NAC Aug. 17, 1998). See also, e.g., In re Thomas R. Alton, Exchange Act Release No. 36,058, 1995 SEC LEXIS 1975, at *4 (Aug. 4, 1995).

[8] Alton, 1995 SEC LEXIS 1975, at *4. See also, e.g., District Bus. Conduct Comm. v. Perez, No. C10950077, 1996 NASD Discip. LEXIS 51, at *7 (Nov. 12, 1996) ("Full and accurate disclosures on a Form U-4 are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision.").

> [t]he filing with the Association of information with respect to … registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action.

The Form also requires applicants to amend their answers "whenever changes occur to answers previously reported."[9] This is far more than a mere technical violation: "[a] material misrepresentation on a Form U-4 is a serious offense."[10]

The Panel concludes that the present case involves several aggravating circumstances. The misconduct involved five failures to update and two omissions, and it extended over a five-year period. That there were some disclosures, stretched out over time, is not persuasive. A meaningful system of self-regulation demands more than piece-meal revelations which surface if, as, and when the registrant so chooses. Moreover, when Respondent in 1998, finally disclosed the 1996 show cause orders to Securities America, Inc., he did so through counsel who sent the mailing directly to NASD, a course which would circumvent the firm and prevent it from learning the facts.

In addition, the subject matter of the untimely and incomplete disclosures was especially serious. New Jersey and Pennsylvania insurance regulators were examining allegations of deceptive sales practices, withholding of material information, and failing to disclose various items (JX-1). Such matters are obviously relevant to employment in the securities industry. Indeed, in March of 2000, after learning of the Pennsylvania show cause order, which alleged Respondent's untimely and incomplete disclosures,

[9] See, e.g., CX-17, p 9.

[10] Alton, 1995 SEC LEXIS 1975, at *4.

Securities America, Inc. "permitted" him to resign. Respondent should have reported all of these matters promptly and fully and thus enabled the U-4 properly to perform its vital "screening" function.

As to mitigating circumstances, the Panel cannot find good faith reliance on the advice of counsel. As noted, Mr. Finkelstein never furnished the "advice" supposedly relied upon. He did not tell Sarris not to disclose these matters on a Form U-4. In the Panel's view, there is no reasonable connection between Finkelstein's advice that life insurance is not a "security" and Respondent's asserted belief that the state proceedings were not "investment-related." This is especially so considering the fact that the phrase "investment-related" was defined in the Form as expressly including "insurance." Mr. Sarris, with many years of success in the insurance industry and over ten years experience as an NASD registrant, could not reasonably have believed that the Form meant something other than what it said.

At best, the record reflects years of gross indifference to the U-4's demands. This pattern of untimely and incomplete disclosure demands serious sanctions. For U-4 violations, the NASD Sanction Guidelines recommend fines of $2,500 to $50,000 and suspensions of up to thirty business days (p. 77). The Guidelines also state that "egregious misconduct" may require sanctions "above or otherwise outside of a recommended range (Id., at p. 5). For the reasons set out above, the Panel concludes that this principle applies here.

Each party urges the imposition of a unitary sanction covering all of the misconduct.[11] The Panel agrees, noting that Respondent's extended pattern involves the

[11] Complainant's Brief, p. 26; Respondent's Brief, p. 15.

same underlying state regulatory proceedings and that the existence of multiple violations may (as here) be treated an aggravating factor (Guidelines, supra, at p. 6).

The Panel accepts Enforcement's recommendation that Respondent be fined $10,000 and suspended for one year. In addition, to impress upon Sarris the importance of compliance with regulatory requirements, the Hearing Panel will order the Respondent to re-qualify by examination before he re-enters the securities industry in any capacity.

VII. Conclusion

Emmanuel L. Sarris is suspended for one year from association with any NASD member firm in any capacity, fined $10,000, and ordered to re-qualify by examination before he re-enters the securities industry in any capacity.[12]

The foregoing sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD, except that if this Decision becomes the final disciplinary action of NASD, the Respondent's suspension shall become effective with the opening of business on May 5, 2003 and end at the close of business on May 4, 2004.

Sarris also is ordered to pay costs in the total amount of $1,650.35 which include an administrative fee of $750 and hearing transcript costs of $900.35.

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
March 17, 2003

[12] The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

Copies to: Emanuel L. Sarris (via overnight delivery and first class mail)
Keith Loveland, Esq. (via facsimile and first class mail)
Thomas K. Kilkenny, Esq. (via electronic and first class mail)
Rory C. Flynn, Esq. (via electronic and first class mail)