

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LEROY AVERY
(CRD No. 2354752),

West Allis, WI,

Waukesha, WI,

Respondent.

Disciplinary Proceeding
No. C8A020032

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

February 5, 2003

Respondent is suspended from association with any member firm in any capacity for 90 days and ordered to disgorge commissions in the amount of \$28,559 for participating in private securities transactions and outside business activities, for compensation, without giving prior written notice to the NASD member firm with which he was associated, in violation of NASD Conduct Rules 2110, 3030, and 3040.

Appearances

Dale A. Glanzman, Regional Counsel, Chicago, IL (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel) for the Department of Enforcement.

Leroy Avery appeared on his own behalf.

DECISION

I. INTRODUCTION

The Department of Enforcement (the “Department”) charged Leroy Avery (“Avery”) with participating in the sale of viatical contracts for compensation without providing proper written notification to WMA Securities, Inc. (“WMA”), the NASD member firm with which he was associated. In the First Cause of Complaint, the Department charges that Avery sold viatical contracts to three WMA customers without providing prior written notification to, and obtaining prior written permission from, WMA. The Department alleges that these contracts were securities; hence, Avery’s activity violated NASD Conduct Rule 3040, which prohibits “selling away.” The Second Cause of Complaint alleges in the alternative that, if the foregoing contracts were not securities, Avery violated NASD Conduct Rule 3030, which prohibits an associated person from engaging in outside business activities for compensation unless the person has provided prompt written notice of the activities to the member firm with which the person is associated. The final cause alleges that Avery engaged in outside business activities in violation of NASD Conduct Rule 3030 by selling viatical contracts to four individuals, three of whom were WMA customers.¹

NASD has jurisdiction of this proceeding because Avery was registered with NASD when he participated in the sales of the viatical contracts and when the Department filed the Complaint.²

¹ See Stipulations (“Stip.”) ¶ 11, filed on November 25, 2002.

² Stip. ¶ 1. *Cf.* NASD By-Laws, Article V, Section 4 (NASD retains jurisdiction over a formerly registered person for two years following the termination of such person’s registration with NASD to file a complaint based upon conduct that commenced before the person’s registration terminated).

II. PROCEDURAL HISTORY

The Department filed the Complaint against Avery on May 28, 2002. Avery filed an Answer admitting the alleged violations and requesting a hearing, which was held in Chicago, IL, on December 5, 2002, before a Hearing Panel composed of the Hearing Officer and two members of the District 8 Committee. The Department introduced 11 exhibits into evidence and called three witnesses to testify, including Avery.³ Avery did not offer any additional evidence.

At the conclusion of Avery's testimony, the Department requested a recess to speak to Avery. Following the recess, the Parties reported that they had agreed on the following proposed sanctions: a 90-day suspension in all capacities and a fine in the amount of the commissions Avery earned selling the viatical contracts.⁴ The hearing panelists then met to consider the proposed sanctions, which they found were consistent with the NASD Sanction Guidelines for the charged offenses and appropriate under the facts and circumstances of this case. Accordingly, the Hearing Panel determined to adopt the Parties' proposed sanctions.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Avery testified that he began selling viatical contracts in 1997 because at the time he was looking for a safe fixed-income product for his clients.⁵ According to Avery, he responded to a mailer about fixed income insurance products. The insurance company representative invited Avery to attend a conference in Indianapolis at which the representative introduced Avery to

³ The hearing transcript is cited "Tr." The Department's exhibits are cited as "CX."

⁴ Tr. 35. At the Hearing, the Department represented that the total amount of commissions was \$29,539, whereas the actual total commissions was \$28,559. *See* Stip. ¶¶ 3–6, 10–13; Compl. Ex's A and B.

⁵ Tr. 20.

viatical contracts as an alternative “fixed annuity” product.⁶ The representative told Avery that he did not need a securities license to sell viatical contracts because they were not securities.⁷ Thus, in reliance upon the insurance representative’s advice, Avery concluded that he could offer viatical contracts to his clients without going through WMA.⁸

NASD commenced its investigation after Avery sought the State of Wisconsin’s assistance in getting further information about some of the viatical contracts he sold when his customers were not paid as expected.⁹ The State of Wisconsin advised Avery that it only was legal to sell viaticals to institutional customers in Wisconsin.¹⁰

A. Private Securities Transactions

Avery sold the following viatical contracts, each of which was a security, to the following persons without providing WMA written notice of his intent to participate in the transactions, as required by NASD Conduct Rule 3040:¹¹

1. On or about May 19, 1997, Avery sold a viatical contract in the amount of \$5,000 issued by The Lifeline Program to WMA customer G.L. Avery received a \$250 commission from this sale.
2. On or about September 30, 1997, Avery sold a viatical contract in the amount of \$19,101 issued by Beneficial Assistance, Inc. to WMA customer G.L. Avery received a \$764 commission from this sale.

⁶ *Id.* at 21-22.

⁷ *Id.* at 22; Stip. ¶ 2.

⁸ Tr. 26–28.

⁹ Stip. ¶ 16.

¹⁰ *Id.*

¹¹ *Id.* ¶¶ 3–8.

3. On or about June 21, 1997, Avery sold a viatical contract in the amount of \$41,000 issued by Viatical Solutions, Inc. to WMA customer C.F. Avery received a \$2,870 commission from this sale.
4. On or about August 7, 1997, Avery sold a viatical contract in the amount of \$10,000 issued by Liberte Capital Group to WMA customer A.G. Avery received a \$500 commission from this sale.

B. Outside Business Activities

Avery sold the following viatical contracts to the following persons without providing WMA written notice of his intent to participate in the transactions, as required by NASD Conduct Rule 3030:¹²

1. Between March 25, 1997, and April 28, 1997, Avery sold at least one viatical contract in the amount of \$100,000 to WMA customer E.B. Avery received a \$7,000 commission from the sale or sales.
2. On or about January 6, 1998, Avery sold a viatical contract in the amount of \$136,000 issued by AMG, Inc. to W.R. Avery received a \$9,520 commission from this sale. W.R. was not a WMA customer.
3. On or about May 17, 1998, Avery sold a viatical contract in the amount of \$45,071 issued by ALI Funding, Inc. to WMA customer A.W. Avery received a \$3,155 commission from this sale.
4. On or about September 17, 1998, Avery sold a viatical contract in the amount of \$75,000 issued by Beneficial Assistance, Inc. to WMA customer J.W. Avery received a \$4,500 commission from this sale.

¹² *Id.* ¶¶ 10–15.

IV. SANCTIONS

The Parties proposed that Avery be suspended for 90 days from associating with any member firm in any capacity and that he be ordered to disgorge the commissions he earned from the sale of the viatical contracts in the sum of \$28,559.¹³ In determining whether to accept the Parties' proposed sanctions, the Hearing Panel first looked to the applicable NASD Sanction Guidelines ("Guidelines"). For violations of Rule 3040, "Selling Away (Private Securities Transactions)," the Guidelines recommend that a respondent be fined \$5,000 to \$50,000, plus the amount of any financial benefit the respondent earned, and suspended for up to one year. In egregious cases, the Guidelines suggest consideration of a longer suspension of up to two years, or a bar.¹⁴ For violations of Rule 3030, "Outside Business Activities," the Guidelines recommend that a respondent be fined \$2,500 to \$50,000, plus the amount of any financial benefit the respondent earned, and suspended for up to one year. In egregious cases, including those involving sales of financial products, the Guidelines suggest consideration of a longer suspension of up to two years, or a bar.¹⁵ The proposed sanctions fall within the Guidelines.

The Hearing Panel then reviewed the specific considerations listed in the Guidelines for each violation, noting the following two mitigating factors: (1) Avery did not have a proprietary or beneficial interest in the firms that issued the viatical contracts; and (2) there is no evidence that he attempted to create the impression that WMA sanctioned his activities. On the other hand, the Hearing Panel noted the following aggravating factors: (1) Avery made most of the sales to WMA

¹³ The Hearing Panel has modified the amount of the fine to match the actual amount of the commissions Avery earned. The Department did not request an additional fine due to Avery's financial condition. (Tr. 37.)

¹⁴ NASD Sanction Guidelines 19 (2001 ed.).

¹⁵ Guidelines 18.

customers; (2) Avery did not provide oral notice of his activities to WMA; and (3) the outside business activities involved financial products.

The Hearing Panel also consulted the general considerations listed in the Guidelines that are applicable to all violations.¹⁶ In this regard, the Hearing Panel noted the following: (1) Avery did not have a prior disciplinary history (the absence of such a history is not mitigating, but the existence of such a history would be aggravating), (2) Avery admitted his misconduct; and (3) Avery made no attempt to conceal his activities. The Hearing Panel also considered Avery's demeanor at the hearing and concluded that Avery testified truthfully regarding the reason he started selling viatical contracts. Avery relied on the insurance representative's assurances that the viatical contracts were not securities and that he therefore could sell them without WMA's permission. There is no evidence that Avery intentionally violated NASD Conduct Rules 3030 and 3040.

V. ORDER

Therefore, having considered all the evidence,¹⁷ the Hearing Panel orders as follows:

(1) Leroy Avery is suspended for 90 days from associating with any member firm in any capacity. If this Decision becomes the final disciplinary action of NASD, the suspension shall commence with the opening of business on April 14, 2003, and end at the close of business on July 14, 2003.

(2) Leroy Avery is fined \$28,559, which amount represents disgorgement of the commissions he earned from the sales of the viatical contracts. This fine shall become due and

¹⁶ Guidelines 9–10.

¹⁷ The Hearing Panel has 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.

payable upon the earlier of the following events: (1) when Avery re-enters the securities industry by associating with an NASD member firm following expiration of the foregoing suspension; or (2) when Avery files any request for permission to re-enter the securities industry following a statutory disqualification arising from this or any other event or proceeding.

(3) Leroy Avery is ordered to pay the costs of this proceeding in the total amount of \$1,109.26.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

Dale A. Glanzman, Esq. (by first-class and electronic mail)
Leroy Avery (by overnight courier and first-class mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)