NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
Complainant,	:	Failure to Provide Information Proceeding
v.	:	No. FPI010004
TONI VALENTINO (CRD #1926553),	:	Hearing Officer - JN
Boca Raton, FL,	:	**HEARING PANEL DECISION**
Respondent.	:	March 25, 2002

Respondent found liable for refusing to appear for investigative testimony, pursuant to requests issued under Rule 8210. For these violations, Respondent was barred from associating with any NASD member in any capacity and assessed a total of $1,759.07 in costs.

Appearances

For the Complainant: Samuel L. Israel, Esq. and David R. Sonnenberg, Esq.

For the Respondent: Adam D. Mitzner, Esq.

DECISION

I. Introduction

On January 25, 2001, NASD Regulation staff, acting pursuant to Rule 8210, requested that Respondent, formerly a registered representative of Gruntal & Co., appear for an on-the-record interview to be held on February 20, 2001. She did not appear for that interview. On October 11 and 18, 2001, the staff, again acting under Rule 8210,

requested her appearance for an on-the-record interview to be held on October 25, 2001. She did not appear for that interview.

By letter dated October 26, 2001, NASD Regulation, issued a Notice of Intent to Suspend the Respondent for her failures to appear. On November 5, 2001, she made a timely request for a hearing, pursuant to Rule 9542. A Panel, consisting of an NASD Regulation Hearing Officer and two current members of the Association's District 10 Committee, held a hearing in New York City on December 19, 2001. The parties there introduced forty-three Joint Exhibits (cited in this Decision with the prefix "JX"). The Complainant introduced one exhibit (CX-1). The Respondent testified and also introduced one exhibit (RX-1).

A. Jurisdiction

Pursuant to Rule 8210(a)(1), the NASD Regulation staff has "the right to require a…person subject to the Association's jurisdiction to provide information orally…with respect to any matter involved in [an] investigation." Respondent was a registered representative, whose registration terminated in October of 2000 (JX-1, ¶ 2). Article V, Section 4 of the NASD By-Laws creates a two-year period of retained jurisdiction over formerly registered persons, covering conduct which began before the association terminated and failures to respond to NASD requests for information issued during that two-year period. The pertinent staff requests were issued in January and October of 2001, well within two years of her termination. At all relevant times, Respondent was thus a "person subject to the Association's jurisdiction" and required to respond to requests made pursuant to Rule 8210.

B. The Investigation and Respondent's Refusals to Appear

The NASD Regulation staff was investigating "possible fraudulent activities, in violation of the federal securities laws and NASD Conduct Rules," involving trading by D.L. Cromwell Investments, Inc. in units issued by Pallet Management Systems (CX-1). Respondent (whose husband was co-owner of Cromwell) was a registered representative with Gruntal & Co. One of her corporate customers, Rothschilds Capital Holdings, Inc., ("RCH") purchased 185,000 units from Cromwell and later sold 160,800 of them back to that firm (CX-1). The staff sought to interview Ms. Valentino, believing that she was "likely to have information relevant to the Investigation" (Id.).

NASD Regulation staff sought twice to take Ms. Valentino's investigative testimony, pursuant to Rule 8210. It is undisputed that each request was properly served on her and that she refused to appear on both occasions (JX-1, ¶¶ 11-14).

The first request, dated January 25, 2001, directed Valentino to appear on February 20, 2001 at NASD Regulation's Washington, DC office for questioning concerning Cromwell and trading in the Pallet securities (JX-11). Respondent lives in Boca Raton, Florida. Her then attorney replied that:

> [m]y client has concluded that her maternal obligations to her infant child far outweigh NASD Procedural Rule 8210(1). My client and I have never understood why Staff was unwilling, given the health problems my client's child faces, to travel to Florida for this interview. Should the Staff wish to rethink its position, I will be happy to arrange suitable time in Florida. Failing that alternative, my client will not appear on February 20, 2001, as per the Staff's insistence and scheduling (JX-13).

Ms. Valentino's status as a mother of small children was argued as a mitigating factor (Tr. 41-42), but was not again invoked as a defense to her refusal to appear.

The staff issued its second request October 11, 2001, requiring that Ms. Valentino report for questioning on October 25, 2001 at NASD Regulation's Washington, DC office (JX-23). Her new attorney (who also represents her in this proceeding) replied (JX-24):

> I write to respond to your October 11 letter. In light of the fact that the NASD is unwilling to hold Ms. Valentino's on-the-record interview any place other than in Washington, D.C., she will not attend the October 25 on-the-record interview scheduled by the NASD.
>
> As we discussed, in light of recent events at the World Trade Center and the Pentagon, Ms. Valentino is unwilling to fly at this time. In addition, Ms. Valentino is the primary care giver to her two young children and it is very difficult for her to leave the Florida area where she lives.

Counsel's reply did not invoke any privileges on Respondent's behalf.

On October 18, 2001, the NASD Staff amended its request and directed that she appear for the October 25, 2001 interview at a specific location in Boca Raton, Florida (JX-25). On October 22, 2001, her counsel stated that she would not appear and requested that the NASD postpone the interview until the United States Court of Appeals for the Second Circuit ruled on an appeal which "has direct bearing on Ms. Valentino's decision whether to testify" (JX-26). (As discussed later in this Decision, the District Court had rejected invocations of the Fifth Amendment by her husband and others in resisting Rule 8210 requests, and the Second Circuit later affirmed that decision). Meanwhile, the staff declined to adjourn the requested interview to await the outcome of the appeal (JX-27), and on October 26, 2001, NASD Regulation issued its Notice of Intent to Suspend the Respondent for her refusals to appear for interviews requested pursuant to Rule 8210 (JX-28).

II. Respondent's Defenses

A. The "State Actor" Contention

In D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248 (S.D.N.Y. 2001), aff'd, 2002 U.S. App. LEXIS 1689 (2d Cir. Feb. 1, 2002),[1] a United States District Court declined to enjoin NASD Regulation from questioning certain of Cromwell's registered representatives, including Ms. Valentino's husband, a co-owner of the firm. The court rejected the contention that NASD Regulation was acting as an agent of federal prosecutors and thus could not, under the Fifth Amendment, compel the witnesses to give evidence against themselves under threat of NASD sanction.[2]

Respondent argues that NASD Regulation was similarly acting as a state agent in seeking to question her and was, therefore, constitutionally prohibited from sanctioning her for exercising her Fifth Amendment rights (Pre-Hearing Memorandum, pp. 8-13; Tr. 105-108). This contention lacks merit.

The argument that NASD Regulation is an agent of the government in seeking to question her rests on precisely the same facts which were before the court in Cromwell (See Pre-Hearing Memorandum, pp. 10-11) where the judge rejected the contention, concluding that NASD Regulation "was not an instrumentality of the government in seeking these Rule 8210 interviews" (JX-36, p. 15). As noted, the Second Circuit affirmed this conclusion.

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[1] The Complaint and the District Court opinion appear in the record as JX-35 and JX-36, respectively. The District Court's opinion is also reported as D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248 (S.D.N.Y. 2001), 2001 U.S. Dist. LEXIS 1912 (S.D.N.Y. Feb. 26, 2001)

[2] As the District Court explained, absent the "state actor" theory, NASD is a private association and the Fifth Amendment does not apply to its Rule 8210 demands (132 F. Supp. 2d at 252, citations omitted).

B. The Cromwell Appeal

As noted, Respondent's counsel advised that his client would not appear for the October 25, 2001 Florida interview, and requested that the staff adjourn that session until the Second Circuit ruled on an appeal from the District Court's Cromwell decision (JX-26). It is well settled that firms and associated persons cannot place conditions on their responses to Rule 8210 requests.[3] Valentino's refusal to appear until the appellate court decided the case flatly violated that principle. Enforcement's Rule 8210 right to request information from firms or associated persons does not turn on collateral litigation, and the Department properly declined to postpone the interview until the Second Circuit ruled. In any event, the argument that the Hearing Panel should await the results of the Cromwell appeal (Pre-Hearing Memorandum, pp. 13-15; Tr. 108-111) is mooted by the Second Circuit's affirmance.

C. The Spousal Privilege

In a memorandum filed shortly before the hearing, Respondent's counsel argued for the first time that Ms. Valentino's refusals were justified by the "adverse spousal testimony privilege," which protects one spouse from testifying against the other (Pre-Hearing Memorandum, pp. 6-8). The Panel concludes that even if the NASD were to recognize such a privilege in Rule 8210 interviews – an issue on which the Panel expresses no view – it was not properly invoked here.

The privilege does not authorize outright refusals to appear for all questioning. On the contrary, the applicability of the spousal privilege must be examined in the context of

[3] In re Sundra Escott-Russell, Exchange Act Rel. No. 43363, 2000 SEC LEXIS 2053 at *11 and cases there cited (September 27, 2000).

specific questions. See United States v. Yerardi, 192 F.3d 14, 22 (1st Cir. 1999) ("[S]he is entitled to invoke the adverse spousal testimony privilege on a question-by-question basis"); United States v. Van Cauwenberghe, 827 F.2d 424, 431 (9th Cir. 1987), cert. denied, 484 U.S. 1042 (1988) ("[B]lanket assertions of the privilege are not favored"); In re Martenson, 779 F.2d 461, 463 (8th Cir. 1985) ("The privilege is not a general one. It must be asserted as to particular questions.") (quoting from In re Lochiatto, 497 F.2d 803, 805, fn. 3 (lst Cir. 1974)); see also In re Grand Jury Proceedings, 664 F.2d 423, 430 (5th Cir. 1982), cert. denied, Vannier v. United States, 455 U.S. 1000 (1982) (sustaining the privilege as to certain questions, while rejecting it as to those with an "objective nature").

The witness cannot, as Ms. Valentino did here, invoke the privilege by absenting herself from the proceeding. She has the burden of showing that the privilege applies. See Martenson, 779 F.2d at 463, finding that the witness "failed to demonstrate that her anticipated testimony would in fact be adverse to a protected interest of her spouse." As the Third Circuit said in In re Grand Jury, 111 F.3d 1083, 1086 (3rd Cir. 1997), "[t]he witness's argument that her spousal testimonial privilege protects the very act of testifying, regardless of whether the government could use the information to prosecute her husband, overlooks the significance of adversity in determining the scope of the privilege."

Since Ms. Valentino did not appear, she can only speculate that the questions would have concerned her husband, rather than her own activities or the activities of others. Although he is a co-owner of Cromwell, her husband is by no means the sole actor involved. As Respondent recognizes, "Mr. Beirne and others appear to be the focus of [Enforcement's] investigation" (Pre-Hearing Memorandum p. 1; emphasis added).

Indeed, three other Cromwell employees, Mr. Davidson – also a Cromwell owner – Mr. Thomes, and Mr. Greenwald, were also the subject of NASD requests for testimony and joined Beirne in the Cromwell complaint, seeking to enjoin the investigation (JX-35, pp. 1, 3-4).

The District Court opinion also mentions Cromwell brokers Nazareno and Plamenco, an unnamed "cooperating witness," and an entity named "Fiserv," which possessed Pallet trading data (JX-36, pp. 4, 6, 7, 8). Neither Davidson, Thomes, Greenwald, Nazareno, nor Plamenco was married to Respondent, and there is no suggestion on this record that Fiserv had any connection to her husband.

Some of Enforcement's questions for Ms. Valentino could thus have focused on the above persons or entities, and not necessarily on her husband. Indeed, the prosecutor stated that some of his questions would have been about other persons (Tr. 63):

> So what we're looking at is a very serious fraud case where clearly there may be liability on persons other than just respondent's husband. There could be liability on respondent. There could be liability on other persons besides her husband. None of that would be covered by the adverse spousal testimony privilege (Tr. 94).

Furthermore, Respondent was a legitimate source of inquiry concerning her own actions. As noted, she was a registered representative with Gruntal, where she had RCH as a customer. In that capacity, she may well have had personal knowledge of RCH's transactions in Pallet securities. She, not her husband, worked for Gruntal and she, not her husband, was the registered representative for the RCH transactions. Based upon these facts, the prosecutor argued that, "the Department and the staff determined that Ms. Valentino, not as a wife to [Mr. Beirne] but as a registered representative in the securities industry, had information that may be relevant to this investigation" (Tr. 80).

Ms. Valentino's reliance on the Fifth Amendment (Tr. 67-68) further undermines the contention that she was being forced to testify against her husband. That privilege rests on fear of self-incrimination, not the incrimination of someone else. Her invocation of it justifies the inference that Enforcement's questions not only would have been directed to her own actions but, indeed, would have produced self-incriminating answers.[4] Probing Respondent's own knowledge of transactions for which she functioned as the registered representative is not the equivalent of forcing Ms. Valentino to testify against her husband.

In these circumstances, there were sound reasons for application of the question-by-question rule in evaluating Respondent's claim that she was being asked to testify against her husband. Respondent has the burden of demonstrating "that her anticipated testimony would in fact be adverse to a protected interest of her spouse" (Martenson, supra). By refusing to appear for any questioning about any subject, Ms. Valentino has failed to carry that burden.

III. Sanctions

The NASD Sanction Guidelines (2001 ed.) state that "[i]f the individual did not respond in any manner, a bar should be standard" (at p. 39). If "mitigation exists," adjudicators may "consider suspending the individual...for up to two years" (Id.). Respondent argues that she has shown mitigation and should, therefore, receive less than a bar. The Panel has weighed Respondent's testimony, and is not persuaded to depart from the recommended "standard" sanction.

[4] See District Bus. Conduct Committee v. Douglas John Mangan, 1998 NASD Discip. LEXIS at * 12 (July 29, 1998) as to the inference which may be drawn from reliance on the Fifth Amendment.

First, her misconduct has great significance in a meaningful system of self-regulation. "It is well settled that, in order for the NASD to perform its self-regulatory functions effectively, NASD members and associated persons must cooperate fully with NASD requests for information." In re Joseph G. Chiulli, Exchange Act Rel. No. 42359, 2000 SEC LEXIS 112 at *16 (Jan. 28, 2000). As there explained, "[t]he NASD lacks subpoena power and [respondent] substantially undermined the NASD's ability to carry out its regulatory responsibilities by failing to provide the documents when the NASD requested them" (Id. at *19). For the Association "to carry out its regulatory functions, it must have the full and prompt cooperation of persons associated with members when requests are made." In re Michael David Borth, 51 S.E.C. 178, 180 (1992).

Ms. Valentino's refusals to appear, despite the staff's attempts to accommodate her concerning the date and place for the interviews, were especially aggravated. For example, she refused to appear in Boca Raton, Florida (where she lives), even though her attorneys had asked Enforcement to change the site of the interview to that city. She invoked various reasons for refusing to appear. Her concerns began with maternal obligations, changed to fear of flying after September 11, 2001, and later turned to self-incrimination. Finally – on the eve of the hearing – she claimed the spousal privilege. This series of excuses, strung out over a ten-month period, falls far short of the "full and prompt cooperation" required of associated persons.

The staff was here investigating "possible fraudulent activities, in violation of federal securities laws and NASD Conduct Rules" (CX-1, ¶ 2). Respondent, the registered representative involved in some of the transactions, may well have had personal

knowledge of wrongdoing. Her baseless refusals even to appear for an interview frustrated a potentially important regulatory inquiry.

Respondent's counsel stressed his client's difficult choice between her professional obligations and her husband, and urged that she be allowed to remain in the securities industry because she might someday find it necessary to support her family (Tr. 112-116). The Panel is not persuaded by the "choice" argument.

The Panel notes that Ms. Valentino, not her husband, was the registered representative on some of the transactions under investigation and that she has invoked the Fifth Amendment. In these circumstances, her refusals may well have been dictated as much by self-preservation as by notions of spousal protection.

Moreover, personal difficulty or family considerations have not been treated as mitigating other forms of misconduct, and the Panel sees no reason for any different result here. See In re Daniel Turov, Exchange Act Rel. No. 31649, 1992 SEC LEXIS 3332, at *12 (Dec. 23, 1993) ("personal family and health problems…cannot excuse his egregious professional misconduct."); In re John R. Brick, Exchange Act Rel. No. 11763, 1975 SEC LEXIS 522, at *30 (Oct. 24, 1975) (that conduct stemmed from "a sense of family obligations" was not mitigating); see also District Bus. Conduct Comm. v. Buonocore, 1997 NASD Discip. LEXIS 32, at *11 (Apr. 29, 1997) (alcoholism and other unspecified personal difficulties did not mitigate refusal to respond under Rule 8210).

Every registered representative has (and acknowledges in his or her Form U-4) an obligation to comply with the Association's rules. One of those provisions is Rule 8210, which "provides a means, in the absence of subpoena power, for the NASD to obtain from

its members information necessary to conduct investigations. It is a key element in the NASD's effort to police its members." In re Richard J. Rouse, Exchange Act Rel. No. 32658, 1993 SEC LEXIS 1831, at *7 (July 19, 1993). Respondent, who was advised by experienced counsel at every step, made knowing and persistent decisions not to comply with requests made under Rule 8210. In the Panel's view, such conduct amounts to a decision to remove herself from the securities industry.

As noted, the Sanction Guidelines recommend a bar as "standard" where, as here, a respondent fails to respond in any manner. The Panel finds no reason why that standard recommendation should not apply in this case.

IV. Conclusion

For failing to respond to requests for information in violation of Rule 8210, Respondent Toni Valentino is barred from association with any NASD member firm in any capacity. The bar shall become effective on the date this Decision becomes the final disciplinary action of the Association.

In addition, a total of $1,759.07 in costs ($1009.07 for the transcript of the December 19, 2001 hearing and a standard $750.00 administrative fee) will be imposed on Respondent.[5]

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: Washington, DC
March 25, 2002

Copies to: Toni Valentino (via overnight delivery and first class mail)
Adam D. Mitzner, Esq. (via overnight delivery and first class mail)
Samuel L. Israel, Esq. (via electronic and first class mail)
David R. Sonnenberg, Esq. (via electronic and first class mail)

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