

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES BARRICK  
(CRD No. 1088520),

3410 Egbert Road  
Martinsville, IN 46151,

Respondent.

Disciplinary Proceeding  
No. C8A030034

Hearing Officer—Andrew H. Perkins

**HEARING PANEL DECISION**

April 26, 2004

**Respondent engaged in outside business activity without providing member firm with prompt written notice, in violation of Conduct Rules 3030 and 2110, and failed to appear and testify, in violation of Procedural Rule 8210 and Conduct Rule 2110. Respondent barred for each violation. In addition, Respondent is fined \$33,820 for his violation of Rule 3030, which shall be due and payable if and when he re-enters the securities industry.**

**Appearances**

Kevin G. Kulling, Senior Regional Counsel, Chicago, IL (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel) for the Department of Enforcement.

James Barrick appeared on his own behalf.

## **DECISION**

### **I. INTRODUCTION**

The Department of Enforcement (the “Department”) filed a Complaint on May 6, 2003, against James Barrick (“Barrick” or “Respondent”) charging that he (1) engaged in outside business activities without providing his employing NASD member firm with prompt written notice of his activities, in violation of NASD Conduct Rules 3030 and 2110; and (2) failed to respond to NASD staff requests for information, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Barrick filed an Answer denying the charges and requested a hearing, which was held in Indianapolis, IN, on January 16, 2004, before a Hearing Panel composed of the Hearing Officer and two members of the District 4 Committee.<sup>1</sup>

### **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Barrick was registered with NASD member 1717 Capital Management Company (“1717 Capital”) as a Series 6 Investment Company and Variable Contracts Products Representative and as a Series 22 Direct Participation Program Representative from February 1993 until September 1999.<sup>2</sup> Thereafter, he was registered with another NASD member firm in the same capacities from November 1999 until April 2002; he has not been registered since April 2002.<sup>3</sup>

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<sup>1</sup> The hearing transcript is cited “Tr.,” and the Department’s exhibits are cited as “CX.” The Respondent did not offer any exhibits.

<sup>2</sup> Tr. 102; C1, at 3. Barrick first registered with NASD in 1982.

<sup>3</sup> Even though Barrick is not currently registered, NASD has jurisdiction to bring this proceeding pursuant to Article V, Section 4 of NASD’s By-Laws because the charges relate to his conduct while registered with 1717 Capital and the Department filed the Complaint within two years after his registration terminated.

## A. Outside Business Activities

In 1998 and 1999, Barrick was associated with 1717 Capital as a “personal producing general agent.”<sup>4</sup> Under this arrangement, Barrick operated out of his own premises as Diversified Financial Services and reported to KP, a regional vice president with 1717 Capital.<sup>5</sup> At the same location, Barrick also provided tax preparation and automobile repair services.<sup>6</sup>

In May 1998, B.J., a former business associate and employee of Standard Life of Indiana, approached Barrick about selling viatical settlement contracts. Barrick was not familiar with viaticals, but they sounded like a good investment for his clients on a fixed income because of the prevailing low interest rates at the time.<sup>7</sup> B.J. assured Barrick that viatical settlement contracts were not securities and that he therefore could sell them without jeopardizing his securities license.<sup>8</sup>

Between May 1998 and October 1999, Barrick sold 26 viatical contracts issued by four companies.<sup>9</sup> From these sales, Barrick earned commissions of at least \$33,820.<sup>10</sup>

The Department alleges in the First Cause of Complaint that Barrick failed to give 1717 Capital written notice that he was selling viatical settlement contracts on a commission basis, as he was required

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<sup>4</sup> Tr. 28

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.* at 102–03.

<sup>7</sup> *Id.* at 153.

<sup>8</sup> *Id.* at 113–14.

<sup>9</sup> C4, at 4–5 (Viatical Settlement Report prepared by Barrick dated November 27, 2001).

<sup>10</sup> C8, at 2.

to do under NASD Conduct Rule 3030<sup>11</sup> and 1717 Capital's written procedures. The current Compliance Manager at 1717 Capital testified that the Firm had no record of ever having received such written notice and had no record of ever granting Barrick permission to sell viatical settlement contracts.<sup>12</sup> She further testified that 1717 Capital prohibited the sale of viatical settlement contracts, which prohibition was set forth in its Compliance Manual.<sup>13</sup>

At the hearing, Barrick hinged his defense on two incongruent positions. First, Barrick claimed that sometime in early 1998 he told his supervisor that he intended to sell viatical settlement contracts, which oral notice satisfied his obligation to 1717 Capital.<sup>14</sup> Barrick contended that he was not obligated to do more because he did not need 1717 Capital's permission to engage in such outside business activities.<sup>15</sup> Second, Barrick claimed that he gave 1717 Capital written notice sometime before he started selling viatical settlement contracts. As proof of his contention, Barrick produced an unsigned copy of a letter dated February 6, 1998, that he claimed he sent to 1717 Capital.<sup>16</sup> For the reasons discussed below, the Hearing Panel finds that neither defense has any merit.

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<sup>11</sup> NASD Conduct Rule 3030 provides in relevant part:

No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member. Such notice shall be in the form required by the member.

<sup>12</sup> Tr. 41, 64. At the time, 1717 Capital required its associated persons to obtain written authorization to engage in outside business activities. (Tr. 39.)

<sup>13</sup> Tr. 32; C14, at 15–16.

<sup>14</sup> Tr. 135; C3, at 2; C5, at 5–6.

<sup>15</sup> *Id.* at 120; C3, at 2.

<sup>16</sup> C6, at 4.

Barrick's first line of defense that he spoke to his supervisor about his intention to sell viatical settlement contracts is not relevant for a finding of a violation of NASD Conduct Rule 3030 because the rule requires "prompt written, not oral, notification."<sup>17</sup> There is no exception for verbal statements to supervisors. In addition, Barrick's belief that the viatical settlement contracts were not securities is irrelevant because NASD Conduct Rule 3030 requires disclosure of all outside business activity, not just securities-related activity.<sup>18</sup>

Moreover, Barrick's reliance on oral notification is undercut by two factors, which indicate that he knew written notification was required and that he needed 1717 Capital's permission before he could sell viatical settlement contracts. First, according to Barrick's account, when he first mentioned selling viatical settlement contracts to his supervisor she immediately told him that she was not sure he could sell them.<sup>19</sup> His supervisor told him that she would get back to him; but, before she did, Barrick began selling viatical settlement contracts.<sup>20</sup> After speaking to his supervisor again, Barrick received a letter from 1717 Capital advising that it would not allow him to sell viaticals.<sup>21</sup> Nevertheless, he continued. Second, Barrick had a history of disclosing his other outside business activities in writing, and

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<sup>17</sup> District Bus. Conduct Comm. v. Miguel Angel Cruz, No. C8A930048, 1997 NASD Discip. LEXIS 62, at \*95 (N.B.C.C. Oct. 31, 1997).

<sup>18</sup> *Id.* at \*96.

<sup>19</sup> C3, at 2.

<sup>20</sup> C5, at 5.

<sup>21</sup> *Id.*

he requested an outside business activity form when he first spoke to his supervisor about his intent to start selling viatical settlement contracts.<sup>22</sup>

Barrick's second line of defense is that he sent his supervisor a letter dated February 6, 1998, in follow-up to their telephone conversation concerning his interest in selling viatical settlement contracts during which call his supervisor had told Barrick that she did not think that 1717 Capital would permit him to proceed. In the letter, Barrick states that he did not want to wait until his annual review to formally disclose his intent to sell viatical settlement contracts. He also indicated that he considered his intended activities to be outside of 1717 Capital's control. He wrote: "As you know my position is that Viatical Settlements are an outside activity and NOT under the 'control' of [1717 Capital] or any other regulatory agency any more than fixed annuities would be."<sup>23</sup> In closing, he stated he would search for another broker-dealer if 1717 Capital did not want him to sell viatical settlement contracts.

Despite the importance of this letter, Barrick did not mention it in his first two written responses to NASD staff. Not until March 2002, when he was asked to appear for an on-the-record interview, did Barrick assert that he sent 1717 Capital written notice of his intent to sell viatical settlement contracts.<sup>24</sup> In his email dated March 26, 2002, he explained that he had not produced or mentioned the letter earlier because he had purged all of his files from his computer.<sup>25</sup> According to Barrick, he had not remembered the letter until his wife reminded him about a box of almost 400 diskettes that he had set

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<sup>22</sup> *Id.*

<sup>23</sup> C6, at 4.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.*

aside for the trash.<sup>26</sup> Barrick claims he uncovered the copy by searching through those diskettes.<sup>27</sup>

Barrick could not say for certain, however, that he ever sent the letter, and, as stated above, the Compliance Manager from 1717 Capital testified that she conducted a thorough search of the files and found no evidence of such a letter.

The Hearing Panel finds that the preponderance of the evidence supports the conclusion that Barrick did not send 1717 Capital written notice of his intent to sell viatical settlement contracts. First, the Hearing Panel finds the Compliance Manager's testimony to be reliable and truthful. Second, the Hearing Panel finds it significant that 1717 Capital had a written policy prohibiting sales of viatical settlement contracts. Therefore, if it had received the letter, it is unlikely the Firm would have ignored Barrick's contention that the Firm lacked the authority to control the sales of such products. Finally, Barrick produced no evidence corroborating his claim that he sent the letter.

In addition, the Hearing Panel notes that Barrick did not disclose his sales of viatical settlement contracts on his annual disclosure form dated December 16, 1998.<sup>28</sup> The inspection report indicates that Barrick represented that he had not sold any product other than those approved in writing by 1717 Capital. This certification was false. Barrick knew that viatical settlement contracts were not an approved product. His apparent game plan was to continue as long as he could in defiance of his Firm's written procedures, and, if 1717 Capital uncovered his activity and insisted that he stop, he would then

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<sup>26</sup> *Id.*; Tr. 125.

<sup>27</sup> Tr. 125.

<sup>28</sup> Ex. C2.

leave for another broker-dealer that permitted this activity. In other words, Barrick elected to operate outside of 1717 Capital's supervision, the very activity Conduct Rule 3030 is designed to prohibit.

Accordingly, considering all of the evidence, the Hearing Panel finds that Barrick violated NASD Conduct Rules 3030 and 2110 by selling viatical settlement contracts for compensation without providing 1717 Capital with prompt written notice of his activities.

**B. Failure to Appear for an On-The-Record Interview**

In August 2001, NASD opened an investigation into Barrick's sales of viatical settlement contracts. The investigation was prompted by 1717 Capital's disclosure of a customer's lawsuit involving her purchase of one or more such contracts through Barrick.<sup>29</sup>

Throughout the course of the investigation, NASD staff sent Barrick a series of requests for information pursuant to NASD Procedural Rule 8210,<sup>30</sup> which he partially answered.<sup>31</sup> Unable to obtain all of the requested information in writing, NASD determined that it would require Barrick to appear at an on-the-record interview. On March 13, 2002, NASD staff sent him the first request that he appear and testify.<sup>32</sup> Barrick responded by email and requested a continuance.<sup>33</sup> Barrick also enclosed for the first time the letter dated February 6, 1998, that he claimed he sent to his supervisor notifying 1717

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<sup>29</sup> Tr. 67; C3, at 1.

<sup>30</sup> Procedural Rule 8210 requires persons subject to NASD's jurisdiction to provide information and to testify if requested with respect to an investigation, complaint, examination or proceeding authorized by NASD.

<sup>31</sup> Barrick stipulates that he received each of the requests. (Tr. 79–80.)

<sup>32</sup> C6, at 1.

<sup>33</sup> *Id.* at 3.



Capital of his intent to sell viatical settlement contracts.<sup>34</sup> NASD staff granted Barrick a continuance and directed that he pick a convenient date during the week of May 20, 2002.<sup>35</sup> The staff further advised Barrick that if he did not pick a date by April 11, 2002, the staff would select a date for him.<sup>36</sup> Barrick did not respond, so the staff sent him a letter dated May 15, 2002, setting his on-the-record interview for June 5, 2002.<sup>37</sup> This letter further advised Barrick that it was a final request and that his failure to comply may result in disciplinary action.

On May 20, 2002, Barrick sent NASD staff a letter by certified mail in response to the staff's letter of March 28, which granted his request for a continuance of the on-the-record interview to the week of May 20. In this response, Barrick stated: "Since I have not heard from you regarding my testimony date during the week of April 20, and you have not honored my request ... for a formal copy of the complaint against me I have enclosed all of [the] information that you requested that I bring to my testimony."<sup>38</sup> Barrick's letter made no mention of the staff's more recent letter dated May 15, 2002. Accordingly, NASD staff sent Barrick yet another request for his appearance.<sup>39</sup> This time, the staff set Barrick's on-the-record interview for June 20, 2002, at NASD's office in Chicago. Barrick did not appear at his scheduled on-the-record interview on June 20, 2002.<sup>40</sup>

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<sup>34</sup> *Id.* at 4.

<sup>35</sup> C7, at 1.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2.

<sup>38</sup> C8, at 1.

<sup>39</sup> C9, at 1.

<sup>40</sup> C10.

On July 19, 2002, Barrick wrote another letter to NASD staff regarding his requested appearance for an on-the-record interview.<sup>41</sup> In this letter, Barrick set forth his position regarding NASD's request for his testimony:

I had set aside the week of May 20 to testify. You notified me on May 19 that you changed the date to testify during the week of June 20. It would appear that you didn't want me to testify. However, I have nothing further that I could add in testimony about this matter. I have provided you with all the information you requested and any reasonable person would conclude that 1717 Capital Management had prior notice and your investigation, at that point, should have concluded. Please consider this letter as further response in lieu of my testimony.<sup>42</sup>

Based upon the undisputed evidence, the Hearing Panel finds that NASD staff gave Barrick ample notice of the scheduled interview dates and agreed to his request to reschedule the interview on one occasion. In addition, when it appeared that Barrick might not have received timely notice of the June 5 interview, the staff again continued his interview to give him an opportunity to appear and testify. Nevertheless, Barrick refused to appear for his testimony. Instead, he substituted his letter of July 19, 2002.

The Hearing Panel finds, under the circumstances here, that Barrick engaged in dilatory tactics to delay and ultimately evade questioning by NASD staff. He was not entitled to second-guess the

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<sup>41</sup> C11.

<sup>42</sup> *Id.*

staff's need for the information or to dictate the manner of his response.<sup>43</sup> Accordingly, the Hearing Panel concludes that Barrick violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.<sup>44</sup>

### **III. SANCTIONS**

#### **A. Outside Business Activities**

NASD Sanction Guidelines with respect to violations of NASD Conduct Rule 3030 recommend increasingly stiffer sanctions, depending upon the seriousness of the violation. When the outside business activities do not involve aggravating circumstances, the Guidelines provide for a fine of \$2,500 to \$50,000 and a suspension of up to 30 business days. When the outside business activities involve aggravating conduct, the Guidelines provide for a longer suspension of up to one year. Finally, in egregious cases, such as those involving a substantial volume or significant injury to customers of the individual's firm, the Guidelines provide for a bar.<sup>45</sup>

The Department argues that this is an egregious case because many customers were harmed and he intentionally violated the Firm's prohibition against selling viatical settlement contracts.<sup>46</sup>

The Hearing Panel agrees with the Department's assessment. Particularly troubling is Barrick's defiance of 1717 Capital's written procedures, which prohibited all of its associated persons from selling viatical settlement contracts. The purpose of Conduct Rule 3030 is to provide member firms with

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<sup>43</sup> See, e.g., *Department of Enforcement v. Dennis Sturm*, No. CAF000033, 2002 NASD Discip. LEXIS 2, at \*9 (N.A.C. Mar. 21, 2002).

<sup>44</sup> See, e.g., Toni Valentino, Exchange Act Release No. 49,255, 2004 SEC LEXIS 330, at \*15–16 (Feb. 13, 2004).

<sup>45</sup> NASD Notices to Members 03–65, 2003 NASD LEXIS 75, at \* 8 (Oct. 28, 2003).

<sup>46</sup> Tr. 171–72. The Department referenced the superseded version of the Guidelines pertaining to outside business activities.

an opportunity to raise any objections to such activities at a meaningful time and to exercise appropriate supervision as necessary under applicable law.<sup>47</sup> 1717 Capital had determined that it did not want to take the risk associated with sales of viatical settlement contracts, and it appropriately sent all of its registered representatives several compliance bulletins explaining its position. Despite the unambiguous prohibition in the compliance bulletins and his supervisor's comment that she did not believe the Firm would approve his sale of viatical settlement contracts Barrick nevertheless proceeded. He concluded that 1717 Capital had no right to stop him from selling the product and that he would continue selling viatical settlement contracts until he located another firm that would allow this activity.

The Department recommends that Barrick be suspended in all capacities for two years and fined \$33,820, the amount of the commissions he earned on the prohibited sales. The Hearing Panel finds that a suspension would not adequately address the misconduct at issue. Accordingly, the Hearing Panel will bar Barrick and fine him \$33,820 for his violation of NASD Conduct Rule 3030.

**B. Failure to Appear for On-The-Record-Interview**

NASD Sanction Guidelines with respect to NASD Procedural Rule 8210 provide that a bar should be the standard sanction when an individual fails to respond in any manner to requests for

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<sup>47</sup> *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exchange Act Release No 26,178, 1988 SEC LEXIS 2032 (Oct. 13 1988).

information.<sup>48</sup> The Guidelines further provide that, in cases where mitigation exists, a suspension in any or all capacities for up to two years should be considered as an appropriate sanction.<sup>49</sup>

In this case, Barrick did not explain his refusal to appear for his scheduled on-the-record interview. His correspondence with the staff, however, shows that he believed that NASD was harassing him, so he did not need to respond further. In his view, he could supply some of the requested information by letter and refuse to comply with the staff's request that he appear for questioning. In sum, no mitigation exists in this case. Accordingly, the Hearing Panel finds that the standard sanction of a bar is warranted.

#### **IV. ORDER**

Therefore, having considered all the evidence,<sup>50</sup> James Barrick is barred from associating with any member firm in any capacity and fined \$33,820 for engaging in outside business activity without providing his member firm prompt written notice of his activity, in violation of Conduct Rules 3030 and 2110. In addition, Barrick is barred for his failure to appear for an on-the-record interview, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD. The fine shall be due and payable if and when Barrick re-enters the securities industry.

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<sup>48</sup> NASD Sanction Guidelines 39 (2001 ed.).

<sup>49</sup> *Id.*

<sup>50</sup> 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.

In addition, Barrick shall pay costs in the amount of \$1,699, including an administrative fee of \$750 and hearing transcript costs of \$949.

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Andrew H. Perkins  
Hearing Officer  
For the Hearing Panel

Copies to:

Kevin G. Kulling, Esq. (by first-class and electronic mail)  
James Barrick (by overnight courier and first-class mail)  
Rory C. Flynn, Esq. (by first-class and electronic mail)