

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BRAD LOUIS ZIGLER
(CRD No. 1263008),

Respondent.

Disciplinary Proceeding
No. C01030030

Hearing Officer—Andrew H. Perkins

HEARING PANEL DECISION

March 31, 2004

Respondent barred for failing to appear for an on-the-record interview, in violation of Procedural Rule 8210 and Conduct Rule 2110.

Appearances

David A. Watson, Regional Counsel, San Francisco, CA (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC, Of Counsel) for the Department of Enforcement.

Brad Louis Zigler appeared on his own behalf.

DECISION

I. INTRODUCTION

The Department of Enforcement (the “Department”) filed a Complaint on October 1, 2003, against Brad Louis Zigler (“Zigler” or “Respondent”) charging that he failed to appear for two on-the-record interviews requested by NASD staff, in violation of NASD Procedural Rule 8210 and NASD

Conduct Rule 2110. Zigler filed an Answer admitting all of the factual allegations in the Complaint and requesting that this matter be adjudicated on the basis of written submissions.

On December 1, 2003, the Hearing Officer held an Initial Pre-Hearing Conference at which the Respondent confirmed his desire to waive his right to a hearing. Accordingly, the Hearing Officer established a schedule for the Parties to submit additional evidence. On December 31, 2003, the Department filed a Memorandum of Points and Authorities, the Declaration of Anna Jones, a Supervisor of Examiners in NASD's San Francisco office, and seven exhibits.¹ The Respondent filed his Response to Complainant's Memorandum of Points and Authorities on February 2, 2004.

For the reasons set forth below, the Hearing Panel finds that the Respondent violated Procedural Rule 8210 and NASD Conduct Rule 2110.

II. FINDINGS OF FACT

Zigler began his career in the securities industry in 1984 with B.L. Zigler & Co.² Over the ensuing 20 years, he worked at a number of NASD member firms. Most recently, he was associated with Barclays Global Investors Services ("Barclays") in San Francisco. On October 26, 2001, Barclays filed a Uniform Termination Notice for Securities Industry Registration–Form U-5, which indicated that Barclays permitted Zigler to resign after it learned that he had participated in Internet communications regarding securities products in violation of the firm's written policies and procedures.³ Zigler has not

¹ The Declaration of Anna Jones is referred to as "Jones Decl.," and the exhibits are referred to as "C-."

² C-1, at 3.

³ *Id.* at 6.

worked in the securities industry since he left Barclays, and his registrations as a General Securities Representative and a General Securities Principal terminated effective October 26, 2001.⁴

Because of the Form U-5 Barclays filed on Zigler's behalf, NASD staff began an investigation into the circumstances surrounding his resignation.⁵ In addition, NASD's Advertising Regulation Department had opened an investigation into Zigler's activities involving 115 postings made on Morningstar's Internet web site.⁶

In the course of its investigation, NASD staff attempted to secure Zigler's on-the-record testimony concerning the nature and extent of his involvement with the Internet postings. On August 29, 2002, NASD staff sent Zigler a letter pursuant to NASD Procedural Rule 8210 requesting that he appear in NASD's San Francisco office on September 18, 2002, for an on-the-record interview.⁷ The letter advised Zigler to inform NASD staff of another date in September if he could not appear on the scheduled date. On September 6, 2002, NASD staff received a reply letter in which Zigler stated that "[a]n appearance at the district office requires a 120-mile round trip,⁸ impinging on [his] work schedule."⁹ In the alternative, Zigler offered to testify by telephone.¹⁰

⁴ *Id.*; Jones Decl. ¶ 3.

⁵ Jones Decl. ¶ 4.

⁶ *Id.* ¶¶ 4-5.

⁷ *Id.* ¶ 11; C-2, at 1.

⁸ Zigler resides in Santa Rosa, CA, which is located approximately 60 miles north of San Francisco.

⁹ C-3.

¹⁰ *Id.*

On September 9, 2002, NASD staff advised Zigler by letter that it had denied his request to have his testimony taken by telephone.¹¹ In addition, NASD staff reiterated its request that he appear as previously scheduled on September 18, 2002, at NASD's San Francisco office.

On September 16, 2002, Zigler wrote to NASD staff proposing an additional alternative to his appearance at NASD's office. Zigler stated that he was willing to provide sworn answers to interrogatories in addition to being available to testify by telephone.¹² Consistent with his letters, Zigler did not appear on September 18, 2002, for his on-the-record interview.¹³

NASD staff then wrote to Zigler on September 23, 2002, once again requesting that he appear at NASD's office for an on-the-record interview.¹⁴ NASD staff explained that his appearance was important to permit the staff to assess his demeanor and credibility. In addition, the staff noted that it wished to interrogate Zigler about a number of exhibits. The letter set October 7, 2002, for the on-the-record interview and advised Zigler that his failure to appear may result in disciplinary action taken against him.

On September 28, 2002, Zigler responded.¹⁵ He wrote that it was impossible for him to appear at NASD's San Francisco office "for the same reasons stated in [his] previous communications."¹⁶ Zigler concluded by stating that compelling him to appear as scheduled created an undue burden on his ability to defend himself. Zigler again requested that NASD staff

¹¹ C-4, at 1.

¹² C-5.

¹³ Jones Decl. ¶ 16.

¹⁴ C-6, at 1.

¹⁵ C-7.

¹⁶ *Id.* at 1.

accept his offer of either telephone testimony or sworn answers to written interrogatories.

Zigler did not appear on October 7, 2002, for his on-the-record interview.¹⁷

III. CONCLUSIONS OF LAW

NASD Procedural Rule 8210 requires persons subject to NASD's jurisdiction to provide information and to testify if requested with respect to, among other things, its investigations. Zigler remained subject to NASD's jurisdiction at the time he received the requests that he appear and testify. Article V, Section 4 of NASD's By-Laws gives NASD two years of continuing jurisdiction to request information from formerly registered persons. Each of the requests was sent within that period.

By not complying with the staff's requests, Zigler violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110. As the Securities and Exchange Commission ("SEC") recently held in *Toni Valentino*, Exchange Act Release No. 49,255, 2004 SEC LEXIS 330, at *11 (Feb. 13, 2004), "members and associated persons may not impose conditions, such as the location of an interview, under which they will respond to NASD requests for information."¹⁸ Zigler was not entitled to require NASD staff to proceed with the alternative methods he suggested simply for his personal convenience.

IV. SANCTIONS

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

¹⁷ Jones Decl. ¶ 20.

¹⁸ See also *Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998) (rejecting respondent's contention that he could not appear in downtown Los Angeles for an on-the-record interview because he had no accrued leave).

information.¹⁹ 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.²⁰

Zigler contends that he should not be sanctioned because the staff unreasonably required his personal appearance when less intrusive alternatives were available. In sum, Zigler argues that he did not “refuse” to cooperate with NASD’s investigation and that it would be inappropriate to sanction him in light of his “continued willingness to provide testimony.”²¹

Zigler misapprehends the seriousness of his violation. As the SEC has explained repeatedly, members and associated persons must cooperate fully with NASD requests for information because NASD lacks subpoena power. A failure to provide information fully and promptly undermines NASD’s ability to carry out its regulatory mandate.²² As discussed above, his willingness to cooperate on his own terms in no way mitigates his misconduct. Accordingly, the Hearing Panel concludes that a bar is the appropriate sanction.

V. ORDER

Brad Louis Zigler is barred from associating with any member firm in any capacity for his failure to appear for an on-the-record interview, in violation of NASD Procedural Rule 8210 and

¹⁹ NASD Sanction Guidelines 39 (2001 ed.).

²⁰ *Id.*

²¹ Response at 3.

²² *Valentino*, 2004 SEC LEXIS 330, at *12.

NASD Conduct Rule 2110.²³ The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

Copies to:

David A. Watson, Esq. (by first-class and electronic mail)
Brad Louis Zigler (by overnight courier and first-class mail)
Rory C. Flynn, Esq. (by first-class and electronic mail)

²³ 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.