

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.49248 / February 13, 2004

Admin. Proc. File No. 3-11164

In the Matter of the Application of

MARK H. LOVE
c/o Judah Best, Esq.
Debevoise & Plimpton
555 Thirteenth Street, NW
Washington, D.C. 20004

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

NATIONAL SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Failure to Provide Written Notice to Member Firm
Employer of Private Securities Transaction

Conduct Inconsistent with Just and Equitable Principles
of Trade

Former registered representative of member firm of national securities association participated in private securities transactions without providing prior written notice to his member firm employer and, as a result, engaged in conduct inconsistent with just and equitable principles of trade. Held, association disciplinary action sustained.

APPEARANCES:

Judah Best, of Debevoise & Plimpton, for Mark H. Love.

Marc Menchel, Patrice Gliniecki, Alan B. Lawhead, and James S. Wrona, for NASD.

Appeal filed: June 20, 2003

Last brief received: September 25, 2003

I.

Mark H. Love, a registered representative formerly associated with PaineWebber Inc. ("PaineWebber" or "the Firm"), a member firm of NASD, seeks review of NASD disciplinary action. In May 2003, NASD found that Love had participated in private securities transactions while employed at PaineWebber without giving PaineWebber prior written notice of such transactions. NASD found that this conduct violated NASD Conduct Rule 3040 1/ and, as a result, was inconsistent with just and equitable principles of trade in violation of NASD Conduct Rule 2110 2/, and imposed on Love a \$25,000 fine and a suspension of 30 business days in all capacities. 3/ We base our findings on an independent review of the record.

II.

Love has worked in the securities industry since 1984. From 1988 to 1995, Love worked as a registered representative in the Tucson, Arizona, office of PaineWebber.

In 1994, three sets of Love's customers (two married couples and a father and son) expressed to Love a need for greater returns than Love believed he was able to provide them through PaineWebber, as well as a desire to invest in initial public offerings ("IPOs"). A fellow PaineWebber representative and Love's personal friend, Thomas Zirbel, had introduced Love to Bryan Foster. Foster operated an entity called Summit West Partners ("Summit West"), which invested in IPOs. Love provided his customers with a basic explanation of Summit West's investment strategy and explained to them that Summit West could provide them with greater access to IPOs than the customers could obtain in their accounts with the Firm. He also provided the customers with Foster's contact information.

Zirbel had told Love that Foster was a personal friend of Zirbel and that Zirbel was considering leaving PaineWebber to work

1/ Rule 3040 requires a registered representative of an NASD member firm to provide prior written notice to the member firm before participating in any manner in a private securities transaction.

2/ Rule 2110 directs registered representatives of NASD member firms to conduct their business in accordance with just and equitable principles of trade.

3/ NASD also assessed costs of \$1,879.52.

with Foster. Love told his customers these things when he gave them Foster's contact information. Love also told one of his customers, at the time he referred the customer to Foster, that he personally was interested in making an investment in Summit West. Love assisted the customers in transferring funds from their PaineWebber managed accounts to make the investments in Summit West. In the case of one set of Love's customers, this involved liquidating the entirety of their PaineWebber account. Love did not provide written notice to PaineWebber either that these withdrawals were effected to allow the customers to invest in Summit West or that Love had introduced the customers to Foster. After making their investments in Summit West, Love's customers occasionally had difficulty withdrawing funds invested with Summit West and asked Love to contact Foster directly to try to resolve the issues. Love called Foster on these occasions.

Summit West ultimately failed as a business entity in 1996, and Love's customers lost most of their investments. Certain of the customers filed arbitration claims against Love and PaineWebber, and PaineWebber settled those claims in September 1997. PaineWebber itself then filed an arbitration claim against Love, and Love settled that claim.

NASD began its investigation in 1997. NASD filed a complaint against Love in January 2001. After a hearing, an NASD panel found that Love had violated Rules 3040 and 2110 and imposed a ninety-day suspension, a \$25,000 fine, and \$1,879.52 in costs on Love. Love appealed the hearing panel decision to the National Adjudicatory Council of NASD (the "NAC"). The NAC affirmed the hearing panel's findings of violations, but reduced Love's suspension from ninety days to thirty business days. This appeal followed.

III.

Rule 3040 prohibits a registered representative associated with an NASD member firm from participating in any manner in a private securities transaction without providing prior written notice of the transaction to the member firm. Love accepts that the transactions in question meet the NASD definition of "private securities transactions," defined under Rule 3040 as "any securities transaction[s] outside the regular course or scope of an associated person's employment with a member." Love also acknowledges that he did not provide written notice to PaineWebber of his customers' investments in Summit West.

Love disputes, however, that his involvement in the transactions amounts to "participation" under Rule 3040. Love emphasizes that he took no fee and received no other form of

compensation. The text of Rule 3040, however, makes it clear that the requirement to provide the member firm employer with written notice of the transaction does not arise only when the representative receives compensation. In fact, subparts (b), (c), and (d) of Rule 3040 specify, respectively, that the required written notice must state whether the representative may or will receive compensation for his or her participation in the transaction, that the representative must receive written authorization from the member firm to engage in the transaction if receiving compensation therefor, and that the firm may apply specific conditions to the representative's participation, even if the representative is not receiving compensation. 4/

Love also argues that, because no reported decision has found a violation of Rule 3040 on facts such as those presented here, Love's conduct does not amount to a violation. The Rule, however, requires written notice to the member firm employer when the representative participates "in any manner" in the transaction. 5/ We have emphasized previously that this language should be read broadly. 6/ Here, Love's conduct establishes his participation in the Summit West transactions.

Love's clients came to him with specific investment goals and asked Love to help them accomplish those goals. None of Love's customers knew of Foster or Summit West before Love mentioned them

4/ Love acknowledges that receipt of compensation is not a required element of a Rule 3040 violation, but nevertheless cites our decision in Keith L. Mohn, Securities Exchange Act Rel. No. 42144 (Nov. 16, 1999), 71 SEC Docket 198, to support his argument that Love's conduct does not amount to "participation" in his clients' transactions for purposes of Rule 3040. Love contends that it is "significant" that, in Mohn, the representative was found to have violated Rule 3040 with respect to transactions for which he received compensation and not for transactions for which he received no compensation. Our decision in Mohn simply points out that NASD did not allege violations with respect to the non-compensated transactions. Id. at 200 n.5. The Mohn decision says nothing about whether the transactions might have amounted to a violation if such an allegation had been made.

5/ See, e.g., Terry Don Wamsqanz, 48 S.E.C. 257, 258 (1985).

6/ See generally Ronald J. Gogul and Christopher E. Peta, 52 S.E.C. 307, 310 (1995); Stephen J. Gluckman, Exchange Act Rel. No. 41628 (July 20, 1999), 70 SEC Docket 418, 423.

to the customers, and, without Love's introduction, his customers would not have made the investments. 7/ Love went further than merely passing along a telephone number. He effectively vouched for Foster, telling the customers that Foster was a close friend of Zirbel and that Zirbel, whom Love knew well from their prior work together, was considering going to work for Foster. In addition, Love told at least one customer of his own interest in investing with Foster during the initial conversation in which the customer's potential investment with Foster was discussed. He also facilitated the transfers of funds from the customers' PaineWebber accounts to Summit West to make the investments. When the customers had difficulty withdrawing funds from Summit West, Love interceded with Foster on their behalf.

The policy reasons behind Rule 3040 mandate that the Rule be interpreted broadly to include conduct such as Love's. Rule 3040 serves not only to protect investors, but also to permit securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions. 8/ Love's involvement in his customers' Summit West transactions was, in many respects, analogous to his involvement in any investments the customers made through PaineWebber, in that he made specific recommendations, vouched for the validity of the investments, and facilitated to some degree the transaction process. If the investments had been made through PaineWebber, however, PaineWebber would have had the ability to exercise its supervision to protect its customers. 9/ The notice provisions thus serve the interests of both the member firm employer and the investing public, to which the member firm is obligated. In Gilbert M. Hair, we emphasized this important policy basis for Rule 3040 in sustaining a finding of violation of Rule 3040 in a "selling away" case in which the customers were apparently satisfied with their investments. 10/ While we wish to emphasize that a broker who

7/ See Mohn, 71 SEC Docket at 203 (citing the fact that clients did not know about investments prior to representative's introduction as a factor in finding that representative participated in the transactions for purposes of Rule 3040).

8/ Gilbert M. Hair and Vladimir Chorny, 51 S.E.C. 374, 378 (1993).

9/ See NASD Rule 2310 (1996).

10/ Id. These policy bases apply in determining whether a violation of Rule 3040 occurred, regardless of arguments, such as those made by Love, about the motivation of the representative in

(continued...)

does nothing more than refer a customer to another investment opportunity should not ordinarily run afoul of Rule 3040, where, as here, the broker becomes involved in a customer's investment choice through a specific recommendation and by facilitating the mechanics of transactions, we believe that such participation fits within the broad range of behavior prohibited by Rule 3040.

10/ (...continued)
participating in the transactions in question.

Love's argument that his admonitions to his customers that they should carry out their own background research and due diligence on Foster and Summit West indicate that he did not participate in the transactions is similarly without merit. In Stephen J. Gluckman, we held that the "responsibility to give notice under Rule 3040 does not hinge on whether the investors also independently discussed and negotiated the transactions with [the sponsor]." 11/

Love argues that the application of Rule 3040 to prohibit Love's acts would render the Rule unconstitutional as void for vagueness. In this connection, Love contends that his referral of his customers to Foster is protected free speech and that the Rule does not sufficiently identify what type of conduct it prohibits. 12/ We are unpersuaded by Love's vagueness argument.

With respect to Love's First Amendment vagueness arguments, even if NASD were deemed to be a state actor, 13/ commercial speech, such as Love's referral of his customers to Summit West, receives a lesser degree of constitutional protection than do other forms of speech, and the restrictions on speech imposed by Rule 3040 are within the constitutional parameters set forth under applicable precedent. 14/ As for Love's contention that

11/ Gluckman, 70 SEC Docket at 425.

12/ Love argues that he "... do[es] not believe participation as spelled out in Conduct Rule 3040 was meant to prohibit Love's acts, which are protected free speech, but if Rule 3040 was meant to apply, then that Rule is unconstitutional as void for vagueness when applied here." Love's argument emphasizes the limitation the Rule places on speech. However, because constitutional vagueness analysis typically sounds in Due Process concerns, we analyze Love's arguments both in terms of its First Amendment and Due Process implications.

13/ We have held that NASD proceedings are not state actions and thus not subject to constitutional requirements. Martin Lee Eng, Exchange Act Rel. No. 44224 (Apr. 26, 2001), 74 SEC Docket 1194A, 1194D (First Amendment not applicable to NASD). See also Desiderio v. Nat'l Ass'n of Securities Dealers, Inc., 191 F.3d 198, 206-07 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001) (NASD is not a state actor, and constitutional requirements generally do not apply to it).

14/ See Eng, 74 SEC Docket at 1194D. See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S.

(continued...)

Rule 3040 is void for vagueness on Due Process grounds, in Charles A. Roth, 15/ we expressly held that the predecessor to NASD Rule 3040, which was substantially identical to Rule 3040, was not impermissibly vague so as to render it unfair. We concluded that the Rule gives fair guidance to firms, their associated persons, and NASD decision makers with respect to the type of activities that are subject to its restrictions.

Accordingly, we find, as did NASD, that Love violated Rule 3040. NASD's determination that Love violated NASD Rule 2110 is in accord with our long-standing and judicially recognized policy that a violation of another NASD rule or regulation, including Rule 3040, constitutes a violation of Rule 2110. 16/ We accordingly conclude further that Love violated Rule 2110.

IV.

Love claims that NASD delayed in filing its complaint against him and, in doing so, rendered the proceedings unfair. The Exchange Act requires that self-regulatory organizations, such as NASD, provide a fair procedure for the disciplining of associated persons of member firms. 17/ Two Commission decisions in recent years, on which Love relies, have addressed the effect that a delay by a self-regulatory organization ("SRO") in the filing of a complaint against a representative may have on the overall fairness of proceedings against the representative. 18/ These decisions, however, do not establish bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings. In fact, in William D. Hirsh, we affirmed the consistently-held principle that no statute of limitations applies

14/ (...continued)
557, 562-63 (1980) ("the Constitution [...] accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

15/ 50 S.E.C. 1147, 1150 n.10 (1992).

16/ See, e.g., Gluckman, 70 SEC Docket at 428.

17/ 15 U.S.C. § 78o-3(b) (8).

18/ Jeffrey Ainley Hayden, Exchange Act Rel. No. 42772 (May 11, 2000), 72 SEC Docket 1125; William D. Hirsh, Exchange Act Rel. No. 43691 (Dec. 8, 2000), 73 SEC Docket 3597.

to disciplinary actions of SROs. 19/ For this reason, a comparison of the length of the time lags at issue in Jeffrey Ainley Hayden and Hirsh against the corresponding periods in this matter does not, in itself, resolve the fairness question here. 20/ Both Love and NASD devote considerable portions of their briefs to identifying and analyzing the periods referred to in Hayden (initial misconduct and last misconduct to filing of complaint, notice to SRO of misconduct to filing of complaint, initiation of investigation to filing of complaint). However, in assessing overall fairness, as we are charged with doing under the Exchange Act, we have never employed a mechanical test and decline the invitation to endorse a de facto statute of limitations using the time frames presented by the facts

19/ Hirsh, 73 SEC Docket at 3605; see also Gluckman, 70 SEC Docket at 431.

20/ The record indicates that NASD filed its complaint against Love approximately seven years after Love initially referred one of his customers to Foster, approximately six-and-one-half years after the last of Love's customers made an initial investment in Summit West, approximately four years after the date that NASD learned of Love's potential participation in the transactions, and approximately three-and-one-half years after NASD commenced its investigation of Love.

Love argues that NASD violated its own rules and rendered the proceedings against Love unfair by accepting the affidavit of Paula S. Weisz, a Supervisor of Examiners in NASD's Denver office. The affidavit was attached to NASD's brief filed with the NAC in Love's review proceeding, and states that NASD first learned of Love's potential involvement in the Summit West investments in May 1997. In fact, prior to the submission of the affidavit, Weisz had testified before the hearing panel that NASD first learned of Love's connection to Summit West in spring 1997, an immaterial difference in time from the date in the affidavit for purposes of our fairness analysis. Love challenges the veracity of the Weisz affidavit by arguing that NASD must have known about Love's connection to Foster and Summit West in 1996, at the time of Foster's conviction on wire fraud charges. Love's assumption is purely speculative and lacks any evidentiary support whatsoever. In addition, as discussed herein, it is unlikely that our decision would have differed, even if we accepted Love's speculative date for NASD notice of Love's involvement in the transactions. The admission of the Weisz affidavit did not prejudice Love in a manner that rendered the proceedings unfair.

in Hayden as limits defining the border of fairness in SRO proceedings.

Rather, we determine the fairness of this proceeding, as we did the proceeding in Hayden, on the entirety of the record before us. 21/ Here, that consideration leaves us convinced that these proceedings were fair. We are unable to find, as a factual matter, that Love's ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him. Love argues that he was prejudiced by the time lag because one of his former customers died between the commencement of the investigation and the filing of the complaint and because another customer was not contacted due to the fact that he was suffering from the effects of old age. 22/ In fact, NASD based its decision on facts that Love did not dispute. Therefore, the testimony of these individuals ultimately was not material. Love also claims that he was prejudiced by the dimming of his own memory of the events in question over the time between commencement of the investigation and the filing of the complaint against him, but Love's testimony in an investigative interview at the beginning of the investigation in 1997 did not differ in any material respect from his testimony before the NASD hearing panel.

V.

Love also argues that his attorney before the hearing panel had a conflict of interest because the attorney had also represented Foster during criminal proceedings against Foster in connection with Summit West and had not disclosed that representation to Love prior to, or during, the NASD proceedings against Love. Love argues that, as a result, the attorney's representation of Love rendered the NASD proceedings unfair and a sham. Love contends that his hearing attorney failed to represent him effectively before the hearing

21/ Although we stated in Hayden that we were unable to find, as a factual matter, that the respondent's ability to mount an adequate defense had been prejudiced by the delay in his proceedings, the record in this case clearly establishes that Love suffered no prejudice.

22/ Love also argues that the types of questions asked by the NASD staff in its interview of the now-deceased former customer and its questionnaire completed by another of Love's former customers were unfair and merited dismissal of the charges against Love. The NASD decision makes clear that it did not rely on the testimony of these two witnesses in making its findings against Love. We agree that facts undisputed by Love establish the violation of Rule 3040.

panel in various ways. Love's claim most directly related to the attorney's representation of both Love and Foster is that the attorney failed to call Foster as a witness before the hearing panel after stating at one point that Foster was "the backbone of the whole deal."

There is no constitutional or statutory right to representation by counsel in administrative proceedings, such as the NASD proceedings against Love. 23/ Love correctly points out that the decisions cited by NASD to support this principle did not arise in the context of an alleged conflict of interest on the part of counsel, but involved situations in which respondents acted pro se and then challenged the proceedings on the ground that they were not represented before NASD. However, the general principle that respondents in NASD administrative proceedings do not have the right to counsel nonetheless applies here.

Love correctly argues that the fairness analysis of this question is not limited to determining whether effective assistance of counsel is constitutionally or statutorily required. However, the decisions that Love cites in arguing that his hearing attorney's alleged conflict of interest rendered the NASD proceedings unfair involve situations in which an attorney conflict or the appearance of a conflict created the potential that the overall integrity and fairness of the proceedings would be undermined. 24/ In Scattered Corporation and Clarke T. Blizzard, counsel represented or proposed to represent two participants with differing roles in the same proceedings. In Scattered, we found that the fairness of a disciplinary action of The Chicago Stock Exchange, Inc. was impaired by the fact that an outside law firm was hired by the exchange and handled aspects of both the adjudicatory function and the prosecutorial role of the exchange in the same case. In Blizzard, we ordered that counsel for a respondent be disqualified from representing the respondent before an administrative law judge, where counsel proposed to represent simultaneously the respondent and several individuals whom the Division of Enforcement intended to call as witnesses in their case against the respondent. We emphasized the difficulties that

23/ SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984). See also Sundra Escott-Russell, Exchange Act Rel. No. 43363 (Sept. 27, 2000), 73 SEC Docket 1265, 1270; Sheen Fin. Res., Inc., 52 S.E.C. 185, 192 (1995).

24/ Scattered Corp., 53 S.E.C. 948 (1998); Clarke T. Blizzard and Rudolph Abel, Investment Advisers Act Rel. No. IA-2032 (Apr. 24, 2002), 77 SEC Docket 1505.

almost certainly would arise in this type of situation because, among other things, of the attorney's obligation to maintain the confidentiality of information learned in the representation of one client, while simultaneously representing another client with adverse interests in the same proceedings. 25/ In each of these cases, the role of counsel in advising participants performing different functions in the same proceedings created the potential for harm to the apparent fairness and integrity of the proceedings.

Here, we do not find that the alleged conflict in the hearing attorney's representation of both Love and Foster created any potential of harm to the fairness of Love's NASD hearing. Unlike the situations in Scattered and Blizzard, this is not an instance of counsel representing participants performing different functions in the same proceedings. The hearing attorney's representation of Foster was in connection with criminal proceedings altogether different from Love's NASD proceedings. Foster was not directly involved in the NASD proceedings against Love, and, in fact, the record indicates that the criminal proceedings against Foster had already been finally adjudicated by the time of Love's hearing. The criminal proceedings against Foster on wire fraud charges were, at most, indirectly related to the administrative proceedings, based on a violation of NASD Rule 3040, brought by NASD against Love. 26/ We do not find that the hearing attorney's past representation of Foster in criminal and other proceedings related to Summit West undermined the appearance of fairness and integrity in the NASD proceedings against Love. 27/

VI.

Finally, Love argues that the sanctions imposed by NASD should be set aside because they are "unnecessary, excessive, and

25/ Blizzard, 77 SEC Docket at 1508.

26/ As noted above, NASD found that Love had violated Rule 3040 based on facts that were undisputed by Love.

27/ In accordance with this finding, Love's Motion for Leave to Adduce Additional Evidence, filed with the Commission on December 11, 2003, is denied. Love's Motion sought to include in the record additional evidence establishing the extent to which Love's hearing attorney had previously represented Foster in Colorado criminal proceedings. Our analysis accepts that the hearing attorney had previously represented Foster, but we make no finding as to whether this dual representation constituted a conflict of interest under Colorado law.

oppressive." Section 19(e)(2) of the Exchange Act requires us to set aside any sanction imposed by a SRO if the sanction is excessive or oppressive, or imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. 28/ We do not find that the sanctions against Love are excessive or oppressive.

The NASD Sanction Guidelines for violations of Rule 3040 provide that fines ranging from \$5,000 to \$50,000, and a suspension ranging from ten days to a bar, depending on the severity of the violation, may be imposed on a representative found to have violated Rule 3040. Love's thirty-day suspension falls on the low end of the range of potential suspensions under the Guidelines, and his fine falls at the mid-range. In fact, in reducing Love's suspension from ninety days, as recommended by the hearing panel, to thirty business days, the NAC recognized that Love's participation in his customers' Summit West transactions was not as great as that found in some other violations of Rule 3040. The purposes of Rule 3040 include the protection of both the investing public and the member firm with which the representative is affiliated, and both Love's customers

28/ 15 U.S.C. § 78s(e)(2). Love does not argue that the sanctions against him constitute an unfair burden on competition, and we do not consider that they do.

and PaineWebber suffered harm as a result of Love's violation of Rule 3040. Under these and the other circumstances on this record, we do not believe that the sanctions imposed by NASD are excessive, oppressive, or unnecessary.

An appropriate order will issue. 29/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, ATKINS and CAMPOS); Commissioner GOLDSCHMID not participating.

Jonathan G. Katz
Secretary

29/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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NASD

ORDER SUSTAINING DISCIPLINARY PROCEEDINGS OF REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Mark
H. Love be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz
Secretary