BEFORE THE BOARD OF GOVERNORS

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of Market Regulation Committee, Complainant, vs. Jerome E. Rosen Miami, FL, Respondent.	DECISION Complaint No. CMS970027 Dated: June 1, 2000

Where market maker repeatedly telephoned another market maker in response to that market maker's quotation activity, held that market maker engaged in harassment in violation of Conduct Rule 2110, as alleged in the complaint. MRC sanctions reduced to a censure, $32,000 fine, 10-day suspension, and costs.

Jerome E. Rosen ("Rosen") has appealed, pursuant to NASD Procedural Rule 9310, a November 30, 1998 decision of the Market Regulation Committee ("MRC") in which the MRC found that Rosen, a market maker, violated NASD Conduct Rule 2110 by making anti-competitive, harassing telephone calls to another market maker, to influence improperly that market maker's legitimate competitive activities. After a review of the entire record, the National Adjudicatory Council ("NAC") of NASD Regulation, Inc. ("NASD Regulation") considered this matter pursuant to Rule 9349(a).

On March 30, 2000, the NASD, Inc. Board ("Board") called this matter for review pursuant to NASD Procedural Rule 9351(a). We find that there was sufficient evidence to support the findings that Rosen's conduct was anti-competitive and violated Conduct Rule 2110. We order that Rosen be fined $32,000, suspended in all capacities for 10 days, and assessed $1,700.50 in MRC hearing costs.

Discussion

On August 4, 1997, the MRC issued a four-cause complaint alleging that Rosen [1] engaged in: "Anti-Competitive Harassment of Another Market Maker" (cause one), and refusing to deal with another market maker (causes two and three), all in violation of Conduct Rule 2110.[2] On November 30, 1998, the MRC issued a decision in which it found that Rosen engaged in anti-competitive harassment as alleged in cause one of the complaint by telephoning a fellow market maker and harassing him with respect to his quotations in the stock of Quigley Corporation ("Quigley"). The MRC also found that Rosen had backed away from a firm quote under cause three. The MRC imposed the following sanctions: censure; six-month suspension in all capacities; $62,000 fine ($60,000 for anti-competitive harassment and $2,000 for backing away); and $1,700.50 in hearing costs.

Rosen appealed the MRC decision to the National Adjudicatory Council, but the only issue that Rosen addressed in his motions and briefs on appeal is the admissibility of tape recordings of several telephone conversations between Rosen and John J. Fiero ("Fiero") that Fiero recorded (the "Recordings") and sent to the NASD.

At the MRC hearing, Rosen objected to admission of the Recordings, arguing that they were unreliable. The MRC rejected this argument, admitted the Recordings into evidence, and relied heavily upon them in finding that Rosen violated Conduct Rule 2110. At the hearing before a subcommittee of the National Adjudicatory Council ("Subcommittee"), Rosen argued not only that the Recordings were unreliable, but also that Florida law prohibited their use as evidence because Rosen did not consent to being recorded. For reasons set forth below, we affirm the MRC's finding that the Recordings were admissible into evidence, and we also find that Florida law does not prohibit their use as evidence in this disciplinary proceeding.

Rosen initiated each of the conversations in issue, and Fiero began recording the conversation when the telephone rang. Fiero taped the conversations onto videocassette using a device that he activated at his discretion. After recording numerous conversations, Fiero manually transferred selected conversations from the original videocassette recordings onto audiocassettes by placing a microphone near the videocassette speaker, and then playing the videocassette while simultaneously activating a separate audio recorder. Since the date and

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[1] Rosen entered the securities industry in 1973 and, excluding four months in 1986 and six months in 1994, he has, since then, been continuously associated with member firms as a general securities representative. At all times relevant to the complaint and currently, Rosen was associated as a securities trader at J. Alexander, where he was a market maker in the stock of, among others, Quigley Corporation.

[2] The complaint also contained a cause of action against Rosen's employer, J. Alexander Securities, Inc. ("J. Alexander"). J. Alexander settled this allegation prior to the MRC hearing.

time of each conversation was visually displayed on the videocassette, Fiero had to read those dates manually into the recording microphone before playing the substance of each conversation into the audio recorder. In all but one instance, Fiero transferred the entire substance of the selected conversations onto the audiocassette and sent it to the NASD.[3] The NASD received the audiocassette, investigated, and later filed the complaint in this action.

The MRC played the Recordings at its hearing and, over Rosen's counsel's objection, admitted them into evidence. Rosen and Fiero both testified at the MRC hearing. Fiero testified that the voices on the Recordings were his and Rosen's; that he added the date and time of the conversations but did not otherwise edit the original contents of the conversations; and that he disposed of the videocassette after transferring the selected conversations. Although Rosen testified and discussed the contents of the Recordings, he never disputed that the conversations occurred or alleged that the substance of the conversations had been altered. Rosen's counsel stipulated that Rosen's voice was on the Recordings. The MRC found that the Recordings were sufficiently trustworthy and highly probative, and it therefore admitted them into evidence.

Rosen concedes that NASD proceedings are not governed by the Federal Rules of Evidence, and that hearing panels have great latitude to admit evidence and testimony that might be excluded before other tribunals. In re Monroe Parker Securities, Inc., Exchange Act Rel. No. 39057 (Sept. 11, 1997); In re Rita H. Malm, 52 S.E.C. 64 (1994) ("self-regulatory organization proceedings are "informal" when compared to "formal" proceedings in federal and state courts where rules of evidence and procedure apply"). Although the Commission has in the past stated that any evidence that can conceivably throw light upon the controversy at hand should normally be admitted, In re Jesse Rosenblum, 47 S.E.C. 1065, 1072 (1984); In re Charles P. Lawrence, 43 S.E.C. 607, 612 (1967), the NASD has sought to ensure that any evidence offered is reliable and probative. In re Gary L. Greenberg, Exchange Act Rel. No. 28076 (1990).

The Recordings appear sufficiently reliable and are highly probative to the case at hand. Naturally, we would prefer original and complete recordings over the edited duplications that we have here. There is, however, substantial corroborating evidence to support the authenticity of the Recordings. In this case, each participant in the recorded conversations verified that his voice was on the recording, and each testified about the Recordings without disputing their contents. Rosen's counsel speculated that the Recordings may have been altered by Fiero or while in the NASD's possession. The record contains no evidence to support this conjecture

[3] There is no evidence concerning the substance of any conversations that Fiero did not transfer onto the audiocassette.

and much to contradict it, including Rosen's own testimony. Based upon our independent review of the record, we affirm the MRC's finding that the Recordings are trustworthy and probative and should be admitted.[4]

On appeal, Rosen's new counsel claimed, in an argument not raised below, that Florida's Security of Communications Act, Fla. Stat. Ann. Section 934 (West 1998) (the "Act"), prohibits us from using the Recordings because Rosen did not consent to being recorded. The Act makes it unlawful to intercept any wire, oral, or electronic communication through any electrical, mechanical or other device without the consent of both parties. Id. at 934.03 and 934.10. The Act establishes criminal penalties for violators and civil relief for victims of unlawful recording.

There are several reasons to reject this argument. First, Rosen's prior counsel waived it by failing to raise it before the MRC. Second, the Act, by its own language, does not apply to NASD proceedings; it applies only to tribunals of the State of Florida. The Act prohibits the use of illegally intercepted communications in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, ***or other authority of the state, or political subdivision thereof*** . . . " Id. at 934.06 (emphasis added).

Third, the Recordings fall within the "business extension" exception to the Act. Under the business extension exception, a mechanical recording device is excluded from coverage if: (1) the communication is intercepted by equipment furnished by a provider of wire or electronic communications services in the ordinary course of business; and (2) the call is intercepted in the ordinary course of business. Id. at 934.02(4)(a). In Royal Health Care Services v. Jefferson-Pilot Life Ins. Co., 924 F. 2d 215, 217 (11th Cir. 1991), the U.S. Court of Appeals for the Eleventh Circuit, applying Florida law, held that the business extension exception applies when a tape recorder is attached to a business phone and is used in the ordinary course of business. The Royal Health Care court found that when a tape recorder is attached to a telephone, the telephone, and not the recorder, intercepts the communication. Id. On that basis, the court denied relief to a Florida resident whose conversation with a North Carolina insurance company was recorded without his consent.

Both prongs of the business extension exception are met here. Fiero testified that he received Rosen's calls on one of the "trading lines" at his office, lines provided by a

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[4] By relying upon Fiero's and Rosen's testimony to corroborate the authenticity of the Recordings, the MRC implicitly determined that their testimony on this issue was credible. Rosen offers no evidence or argument sufficient to disturb that credibility determination. See In re Christopher J. Benz, Exchange Act Rel. No. 38440 (Mar. 26, 1997); In re Frank. J. Custable, 51 S.E.C. 643 (1993); In re Robert E. Gibbs, 51 S.E.C. 482 (1993).

telecommunications service provider. The record also establishes that Rosen's calls were strictly business-related and that Fiero recorded the conversations in the ordinary course of business. Rosen contends that Fiero's recording was outside the ordinary course of business because Fiero did not record every conversation that he received on his trading lines. This argument fails because Florida law does not require an individual to record every call for a recording to be in the ordinary course of his or her business. See State v. Nova, 361 So. 2d 411, 413 (Fla. 1978) (interception made for the benefit of the employer); Epps v. St. Mary's Hospital, Inc., 802 F. 2d 412, 416 (11th Cir. 1986) (recording related to employee relations). We conclude that Florida law did not prohibit Fiero from recording Rosen without Rosen's consent, and that the Recordings should be admitted into evidence.[5]

Rosen challenged the admissibility of the Recordings, but he did not challenge the MRC's findings of fact or findings of violation. The Recordings were the primary evidence supporting the MRC's findings. After reviewing the Recordings and the rest of the record de novo, we affirm the MRC's findings of fact. For the reasons set forth in the MRC decision, we affirm the MRC's findings of violation.

Sanctions

There is no sanctions guideline applicable to Rosen's violation of conduct Rule 2110. In the absence of such a guideline, we must formulate sanctions that are reasonably designed to prevent Rosen and others similarly situated from repeating this misconduct. In re Joseph Alderman, Exchange Act Rel. 35997 (July 20, 1995), aff'd 1997 WL 4757 (1997 9th Cir.); In re Paul Edward Van Dusen, 47 S.E.C. 668 (1981).

The NASD has a long-standing policy against harassment of market participants by other market participants, and it takes seriously its obligation to enforce this policy. Shortly after the events giving rise to this complaint (on January 15, 1997), the NASD codified this policy in Interpretive Material ("IM") 2110-5, noting that harassment and other anti-competitive activity "is fundamentally inconsistent with the obligations of member firms to their customers and is inimical to the public interest in fair and efficient securities markets." Even in the absence of IM-2110-5, Rule 2110 prohibited "conduct intended to influence a member to … refrain from legitimate market activity." Exchange Act Rel. No. 38715 (June 4, 1997).

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[5] Rosen's counsel submitted two motions prior to the Subcommittee hearing. Rosen filed a Motion to Adduce Additional Evidence in the form of an affidavit from Rosen denying that he consented to being recorded. The Subcommittee and the NAC denied that motion because Rosen failed to state good cause for not introducing the affidavit during the MRC hearing. We affirm that ruling. Rosen also filed a Motion to Dismiss the entire appeal based upon the lack of admissible evidence of the substantive violations. The Subcommittee delayed ruling on this motion until after the argument on the merits. We hereby deny Rosen's Motion to Dismiss for the reasons set forth in the "Discussion" section of this decision.

Rosen's misconduct was serious and it requires serious sanctions. Harassment of one market maker by another undermines the NASD's efforts to protect and promote legitimate, competitive market-making and the fair and efficient operation of the Nasdaq Stock Market. Although charged as a single violation, Rosen made repeated harassing calls, during which he cursed, berated, and yelled at another market participant. His conduct was wholly inappropriate and cannot be tolerated.

Rosen's prior disciplinary history is also a factor in formulating a remedial sanction. In 1992 Rosen settled NASD allegations that he, among others, charged fraudulently excessive mark-ups in connection with the sale of securities, for which he accepted a censure and a $5,000 fine. Rosen has had two other disciplinary events which occurred in 1985 and 1980. Unlike the MRC, we find the 1985 and 1980 violations too remote to weigh heavily in establishing a remedial sanction.

Considering all of the facts and circumstances, we conclude that imposing a censure, a 10-day suspension, and a $30,000 fine is a remedial sanction for cause one of the complaint. We believe that this sanction is commensurate with Rosen's misconduct, and that it will impress upon Rosen, and other market participants, that this conduct should not be repeated.

We also affirm the MRC's imposition of a $2,000 fine for backing away in connection with cause three of the complaint.

Accordingly, Rosen is censured, suspended for 10 days in all capacities, fined $32,000 and assessed MRC costs of $1,700.50.[6]

On Behalf of the NASD Board of Governors,

Joan C. Conley, Senior Vice-President
and Corporate Secretary

[6] We have 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.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will be summarily suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will be summarily revoked for non-payment.