

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 01-16 (CAF000013).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Disciplinary Proceeding
No. CAF000045

Hearing Officer—Andrew H. Perkins

Respondents.

ORDER REGARDING PRODUCTION OF DOCUMENTS

I. Introduction

Following the Pre-Hearing Conference on August 9, 2001, the Hearing Officer entered an Order dated August 13, 2001 (the “Order”), directing the Department of Enforcement to further supplement its declaration setting forth its compliance with NASD Code of Procedure Rule 9251. Specifically, the Order directed the Department to describe the steps it undertook to assure compliance with Rule 9251 and the principles governing disclosure set forth in the Hearing Officer’s Order dated May 17, 2001. The Order further directed that the supplemental declaration be sufficiently detailed and unambiguous so as to allay existing doubts that the Department is fully aware of the appropriate disclosure standards under Rule 9251 and Brady, and that it employed these

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standards in undertaking a search reasonably calculated to identify all disclosable material. Finally, the Order directed the Department to certify that it complied with its disclosure obligations.

On August 20, 2001, the Department filed its response to the Hearing Officer's Order. Rather than file a succinct statement outlining the information the Hearing Officer requested, the Department instead elected to file four lengthy declarations, two of which state that their purpose is to demonstrate that the Department filed the Complaint timely.¹ Those two declarations only obliquely address the issues identified in the Order, as they originally were filed on August 14, 2001, as exhibits to the Department's opposition to the Respondents' motion for summary disposition. The other two declarations were of Jaya B. Gokhalé and Rory C. Flynn.

On August 29, 2001, the Respondents filed further oppositions. The Respondents complain that the new declarations are lacking in five general areas. First, the Respondents want the Department to provide a chronology of its investigation so that they can identify and analyze the delays attributable to the Department. The Respondents assert that they are entitled to this material because it may be exculpatory under their laches defense. The Respondents further assert that the material is needed to refute the Department's claim that some of the delay in bringing this proceeding is attributable to the Respondents' actions. Second, the Respondents complain that the Department continues to employ an impermissibly narrow reading of Rule 9251. The Respondents contend that the Department should be required to search all of the District offices. In

¹ See Decl. of Kelsey C. Goodman and Decl. of Thomas B. Lawson attached as Exhibits 2 and 3 to the Department's Not. of Filing of Supplemental Declarations.

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particular, the Respondents claim that they are entitled to receive all documents relating to any customer complaints and questionnaires about the Term Trusts. Third, the Respondents contend that the Department has not provided all of the documents covered by Rule 9251(b)(2) and the doctrine enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the Respondents want all of the staff's customer interview notes and all material exculpatory evidence received by the Department after it filed the Complaint. Fourth, the Respondents complain that the Department has not provided all documents showing when the NASD first became aware of the misconduct complained of in the Complaint. In this regard, the Respondents specifically request that the Department be ordered to turn over all documents relating to the opening of the investigation and all internal memoranda regarding communications with other regulators. Finally, Respondent _____ renews his application that the Department provide copies of the staff's internal notes and other documents relating to the NASD's review of the external advertising submitted by _____ for the Term Trusts.

II. Discussion

A. Documents Reflecting the Chronology of the Investigation

On March 9, 2001, the Respondents moved to compel the production of the Department's internal documents that reflect the chronology of the Department's investigation of this case, to enable the Respondents "to establish when and why delays occurred in filing the Complaint." (Resp. of Resp't _____ to Supplemental Decl's of Dep't of Enforcement at 3 (hereafter "_____ Resp.")). The Respondents seek these documents to support their laches defense and to counter the Department's allegations that the Respondents caused some of the delay in the investigation. (*Id.*) Since

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the documents they seek are usually protected from disclosure by Rule 9251(b)(1), the Respondents are entitled to this material only if they contain “material exculpatory evidence” under Rule 9251(b)(2) and the *Brady* doctrine.

As discussed in a prior ruling on this issue,² *Brady* is not a discovery rule;³ it is a rule of fairness and minimum prosecutorial obligation.⁴ Under *Brady*, the defense is not entitled to evidence simply because it would assist them with their trial strategy.⁵ *Brady* also does not obligate the prosecution to turn over evidence that is already known to the defense.⁶

Applying these standards to this case, the Hearing Officer finds that the *Brady* doctrine, and hence Rule 9251(b)(2), does not obligate the Department to open its files to the Respondents so that they can second-guess every step of the investigation. Such an application of *Brady* would upset the disclosure scheme in Rule 9251 and could undermine the NASD’s ability to fulfill its self-regulatory obligations. Moreover, the Respondents are sufficiently aware of the chronology of the investigation to enable them to develop and present their laches defense. Accordingly, the Respondents’ motion to compel the production of the Department’s internal documents that reflect the chronology of the Department’s investigation of this case is denied.

² Order Den. Respondents’ Mot. to Compel the Produc. of Docs. and for a List of Withheld Docs. (May 17, 2001).

³ *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

⁴ See *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

⁵ See, e.g., *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir.), *cert. denied*, 459 U.S. 1174 (1983); see also, *United States v. Snell*, 899 F. Supp. 17, 20 (D. Mass. 1995) (“If courts were to define the *Brady* obligation too broadly—for example, as an affirmative obligation to search out all possible defenses, essentially to do the work for the defense as well as that of the prosecution—it could fundamentally undermine the adversary system.”).

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B. Scope of the Department's Search

The Respondents second complaint is that the Department has not conducted an entity-wide search for “sales practice examinations and audits,” including customer questionnaires regarding the Term Trusts.⁷ The Department states that it has not conducted such a search for the following reasons: (1) the investigation of the Term Trusts was conducted by the Department's Washington office, without the assistance of any other department or office (Flynn Decl. ¶ 5; Gokhalé Decl. ¶ 4); (2) all documents considered by the Department in connection with the investigation have been made available to the Respondents (Gokhalé Decl. ¶¶ 3-5); (3) all documents produced by NASD staff in connection with the investigation were reviewed and produced in accordance with Rule 9251 (Gokhalé Decl. ¶¶ 6-7); (4) the Department has tendered all customer complaints in its file to the Respondents, and to the extent there are others concerning the Term Trusts, there is no link between them and the investigation that led to the filing of the Complaint in this case (Gokhalé Decl. ¶ 13); and (5) none of the customer complaints received by the NASD before the investigation began in 1996 precipitated the investigation in this case (Flynn Decl. ¶ 6).⁸

⁶ See *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir.), cert. denied, 519 U.S. 868 (1996); see also *LeRoy*, 687 F.2d at 618.

⁷ _____ Resp. at 6.

⁸ The Department also opposes a further search for customer complaints on the grounds that such a search would be burdensome and unproductive. Neither of these is a legitimate excuse. Unlike discovery in federal court, Rule 9251 does not balance the burden of making relevant documents available to the defense with their relevance and usefulness. Absent a protective order, the burden to make covered documents available for inspection and copying is absolute. In any event, the Department cannot excuse itself from the obligation to search for documents on the grounds that it chose to store them in a manner that makes their retrieval burdensome and expensive. For these reasons, the Hearing Officer did not consider these grounds.

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Reading the declarations the Department submitted as a whole, the Hearing Officer concludes that it has complied with Rule 9251 and that a further search of the NASD's district offices is not warranted. The specific categories of documents the Respondents have identified were not "prepared or obtained . . . in connection with the investigation that led to the institution of [this proceeding.]" Thus, the Respondents' motion that the Department be ordered to conduct a further search for sales practice examinations and audits, including customer complaints and questionnaires regarding the Term Trusts, which pre-date the opening of the investigation in 1996 is denied.

C. Brady Material

The next category of documents the Respondents want produced is what loosely may be termed Brady material. This general request necessarily overlaps other of the Respondents' more specific requests. Thus, the following analysis applies to those documents not otherwise specifically addressed in this Order.

At the heart of the Respondents' complaints about the Department's treatment of Brady material is their skepticism that the Department has faithfully applied the proper standard of review. For example, the Respondents express incredulity at the Department's certification that none of the notes from the Department's interviews of 305 customers who purchased the Term Trusts contains a single exculpatory statement. (_____ Resp. at 9.) Without anything more than their suspicion, the Respondents argue that the Department has not fulfilled its obligations under *Brady* and Rule 9251(b)(2). The Respondents particularly complain that the Department's assertion that no Brady material is being withheld is too "conclusory and unsubstantiated." (*Id.* at 8.) Accordingly, the

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Hearing Officer will address each of the specified categories that are not otherwise addressed in this Order.⁹

1. Florida Comptroller Documents

The first such category of documents is the documents related to the investigation of customer complaints by the Florida Comptroller in 1995. The Declaration of Jaya B. Gokhalé states that the Department produced all of the “underlying documents,” excluding only the request and transmittal letters that may have been exchanged between the NASD and the Florida Comptroller’s office. If this is a correct reading of the declaration, the certification satisfies Rule 9251(b)(2) and *Brady*. However, because the declaration is ambiguous, the Department forthwith shall file a clarification indicating whether it withheld any documents other than the transmittal letters, and, if so, a further certification that such withheld documents do not contain any material exculpatory evidence. The Department also shall file a certification that none of the withheld transmittal letters contain material exculpatory evidence.

2. SEC Documents

The next category of documents is those documents “evidencing and relating to any contacts between NASD Regulation staff and the SEC regarding other term trusts sold by other broker-dealers, as well as ‘possibly the TCW/DW Term Trust.’” The Gokhalé Declaration does not address this category in reliance on the Order dated May 17, 2001, which held that *Brady* did not cover documents related to other products and other broker-dealers. By this, however, the Hearing Officer did not intend to relieve the

⁹ Originally, the Respondents identified 11 general categories of documents in their motion to compel production. Many of those requests were disposed of in the Hearing Officer’s Order dated May 17, 2001.

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Department from producing documents that are related to this proceeding. Consequently, the Department is ordered to produce all documents falling within Rule 9251(a) that contain material exculpatory evidence. Thus, if there are documents that were produced or received by Interested Association Staff in connection with the investigation that led to the filing of the Complaint in this proceeding, they should be reviewed for Brady material even if they relate, in whole or in part, to other products and broker-dealers. The search shall commence immediately. When the Department finishes, it shall file a certification confirming that it conducted a diligent search for any applicable documents and stating whether it located any Brady material.

3. Customer Related Documents

The next category the Respondents highlight is “documents relating to interviews, meetings, and discussions between NASD Regulation staff and customers of the Term Trust funds.” With respect to this category, the Department confirmed that the documents were reviewed for Brady material, and none was found. This certification meets the Department’s obligation under Rule 9251(b)(2) and *Brady*.¹⁰ Thus, the Respondents’ motion for the production of these documents is denied.

Finally, the Respondents complain that the Department failed to state affirmatively whether it conducted a review for Brady material obtained after it filed the Complaint. (_____ Resp. at 8, n.5.) The Department’s papers on this issue are vague. Consequently, the Department is ordered to review all documents produced or received by Interested Association Staff since the filing of the Complaint for Brady

¹⁰ *Cf., e.g., United States v. McVeigh*, 954 F. Supp. 1440, 1451 (D. Colo. 1997) (it is the government’s, not the court’s, responsibility to determine what is Brady material).

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material, which shall be produced promptly to the Respondents. The Department's obligations under Rule 9251 do not end with the filing of the Complaint. Basic notions of fundamental fairness dictate that the Respondents should be provided with material exculpatory evidence regardless of when it becomes known to the Department.

D. Advertising Documents

Respondent _____ filed a separate response, which focuses on the Respondents' request for documents from NASD Regulation's Advertising Department relating to the review of external sales literature for the Term Trusts. In essence, _____ reiterates his arguments that the staff's notes associated with the approval of _____ external advertising materials may contain material exculpatory evidence. The Hearing Officer must, however, deny this motion because Rule 9251 does not cover the documents. As the Hearing Officer ruled in the Order dated July 1, 2001, the advertising documents are not sufficiently related to the present disciplinary proceeding to require their production under Rule 9251(a)(1). The subject notes and other internal memoranda were not prepared or obtained in connection with the investigation that led to the filing of this proceeding. Hence they are not subject to disclosure under Rule 9251(b)(2), which is limited to those documents covered by Rules 9251(a)(1) and 9251(b)(1).

Furthermore, Rule 9251(a)(3) does not grant the Hearing Officer the discretion to order the Department to produce the requested documents, as it does not apply to those

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documents that may be withheld from production under Rule 9251(b)(1). Accordingly, the Respondents' request for the advertising documents is denied.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

October 4, 2001