BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. David B. Tysk Eden Prairie, MN, Respondent.	DECISION Complaint No. 2010022977801r Dated: March 11, 2019

Respondent altered notes of customer communications and produced misleading evidence in arbitration. Held, findings and sanctions reaffirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Danielle I. Schanz, Esq., David Monachino, Esq., Gino Ercolino, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Brian L. Rubin, Esq., Lee A. Peifer, Esq., Eversheds Sutherland (US) LLP

Decision

I. Background

This matter is before us on remand from the Securities and Exchange Commission ("Commission"). In a May 16, 2016 decision, the National Adjudicatory Council ("NAC") found that David B. Tysk altered his computer notes concerning customer-related information after the customer complained to his firm and that Tysk failed to disclose to the firm or the customer that he had done so for several months, in violation of NASD Rule 2110 and FINRA Rule 2010.[1] The NAC also found that Tysk concealed his altered notes and deliberately submitted discovery responses that were misleading in an arbitration proceeding, in violation of FINRA Code of Arbitration Procedure for Customer Disputes ("Arbitration Code") IM-12000 and FINRA Rule 2010. For his violations, the NAC suspended Tysk for one year and fined him $50,000. *See Dep't of Enforcement v. Tysk*, Complaint No. 2010022977801, 2016 FINRA Discip. LEXIS 36 (FINRA NAC May 16, 2016).

[1] We apply the NASD and FINRA rules in effect at the time of the underlying misconduct.

Tysk appealed the NAC's decision to the Commission, and the Commission remanded the case to FINRA for further clarification of the findings. The amended complaint, dated July 24, 2013, alleged four causes of action against Tysk and Ameriprise, two of which remain at issue in this case.[2] Under the first cause of action, the Commission asked the NAC to explain whether Tysk violated his firm's policies by altering his notes, and, if so, which policies were violated and how Tysk's conduct violated NASD Rule 2110 and FINRA Rule 2010. *See David B. Tysk*, Exchange Act Release No. 80135, 2017 SEC LEXIS 645, at *8-9 (Mar. 1, 2017).

Under the second cause of action, the Commission requested FINRA to clarify further why Tysk's conduct was inconsistent with just and equitable principles of trade, including whether his IM-12000 violation of the Arbitration Code rests on his failure to satisfy the discovery requirements under FINRA Rule 12506(b)(1). *Id.* at *10. The Commission further asked the NAC to address Tysk's reliance-on-counsel argument with particular regard to the alleged discovery violations he committed during the arbitration proceeding. *Id.* at *11.

We have reconsidered the matter based on the full record and the briefs that the parties submitted during this remand. As explained below, we find that Tysk violated his firm's policies and FINRA's rules. Additionally, we determine that the sanctions we originally imposed on Tysk remain appropriate.

II. Facts

The pertinent facts are largely restated from our previous decision. Tysk entered the securities industry in 1987. He was associated with Ameriprise Financial Services, Inc. ("Ameriprise") as a general securities representative for his entire registered career. During the relevant period, Tysk had approximately 200 clients and sold traditional investment products, including mutual funds, stocks, and bonds. Sales in variable annuity products accounted for roughly three percent of Tysk's book of business. On March 17, 2017, Tysk voluntarily ceased his employment at Ameriprise. Currently, Tysk is not associated with a FINRA member firm.

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[2] The amended complaint also alleged that Ameriprise violated FINRA rules by failing to immediately notify the customer and his attorneys that Tysk altered the copy of ACT! Notes previously produced in discovery, and failing to produce a relevant exception report until the eve of the scheduled arbitration hearing (causes three and four). For its misconduct, the Extended Hearing Panel ("Hearing Panel") censured Ameriprise, fined it $100,000, and imposed hearing costs for which it was jointly and severally liable. Ameriprise did not appeal the Hearing Panel's decision, and the NAC did not call it for review. Thus, the Hearing Panel's decision, dated October 13, 2014, constitutes FINRA's final disciplinary action against Ameriprise.

A. The ACT! Notes Program

When he joined Ameriprise, Tysk purchased and installed an off-the-shelf computer program called ACT! Notes by Sage to keep track of customer contact information and to manage his accounts at Ameriprise. ACT! Notes is designed to record events as they occur and provide reminders of tasks and future events.

Tysk used ACT! Notes to maintain customer contact information, records of meetings, and notes. Upon entering new information, ACT! Notes included certain defaults. For example, when entering a new note for a contact, the program would automatically populate the date that the new entry was made. For changes to an existing note entry, the program would also automatically record the date the change was made as the "edited on" date. A user could, however, bypass the default prompts and manually change the date of a new entry by deleting the default date and entering a previous date to make it appear as if the entry was made in the past.

B. Tysk's Relationship with Customer GR

In March 2005, GR signed an Ameriprise client service agreement and became Tysk's customer. GR's first investment with Tysk was for $750,000, invested primarily in mutual funds. After achieving a 24 percent rate of return on his initial investment, GR invested an additional $250,000 in June 2006, and ultimately transferred his $20 million fixed income portfolio to Ameriprise with Tysk as his financial advisor. At this point, as Tysk testified, GR became "by far my biggest and most important client."[3]

In December 2006, Tysk recommended that GR purchase $2 million of Ameriprise variable annuities. Based on Tysk's recommendation, GR invested $1 million in variable annuities on December 14, 2006. GR then purchased another $1 million in variable annuities on July 11, 2007, which triggered an internal exception report at the firm due to GR's total investment amount in variable annuities and his age. In response to the exception report and the firm's request for additional information, Tysk, in an email dated August 16, 2007, stated that his recommendation was suitable given GR's high net worth, his available cash on hand, the annuity's deferred tax and other features, and that GR would not need the money during his lifetime—it would instead pass on to his heirs. Tysk's supervisor and registered principal of the firm, BS, reviewed GR's annuity transactions and determined that the investment was suitable.

Around October 2007, after the market regressed, GR became dissatisfied with the performance of his investment portfolio and the corresponding fees he incurred. Tysk met with GR in January 2008, and again in February 2008, along with GR's business partner, to discuss GR's concerns with his investments. Tysk testified that, approximately one month later, GR's

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[3] GR eventually had eight accounts opened at Ameriprise with approximately $30 million of total investments.

business partner sent him an email, informing Tysk that GR was moving his accounts elsewhere. According to Tysk, GR then proceeded to transfer his Ameriprise accounts to another firm, with the exception of his variable annuity investments.

C. GR Complains to Ameriprise

On April 2, 2008, GR sent a demand letter to Ameriprise complaining about Tysk's recommendations of his annuity investments and requesting that Ameriprise close his accounts, waive any surrender charges, and return his invested funds. In his letter, GR raised several suitability concerns. GR stated that he did not need to insure any of his assets for his heirs. He further stated, "I'm currently 78-years old. I do not know how it could possibly be in my best interest to have my money in an investment with a ten-year surrender charge." He was concerned that he would pay federal tax on his assets at the ordinary income rate instead of the lower capital gains tax rate. He was disappointed to learn that his annuity investments did not include a step-up in basis for his heirs, and thus they would have to pay higher taxes upon his death. He expressed concern that he was paying for a death benefit that he did not need. The letter ended with GR, stating that he would "prefer to work with Ameriprise directly, and not involve the NASD, SEC or Minnesota Attorney General."

In response to GR's demand letter, Ameriprise commenced an internal investigation on or about April 21, 2008. LZ, a firm compliance and investigations department analyst, opened a case and sent BS an email with an attached "Information Request for this investigation," a memorandum to BS dated April 21, 2008, providing him with inquiry instructions, and a copy of GR's letter. Tysk received a copy of GR's demand letter, along with the firm's request for information, and provided the firm his written response on or around April 25, 2008. The firm interviewed Tysk, GR, and GR's business partner. Sometime thereafter, the firm received supporting documentation of Tysk's recommendations to GR, including his file notes and other customer records. By letter dated July 7, 2008, Ameriprise concluded its investigation and denied GR's demand to reverse the annuity purchases and waive the surrender charges, stating that "we are unable to substantiate your allegations of lack of disclosure and suitability."

D. Tysk Altered His ACT! Notes During the Firm's Investigation

From May 13 through May 27, 2008, after Tysk received GR's complaint and provided his written response to the firm, and before the firm provided its response to GR, Tysk accessed the ACT! Notes program on his computer and made substantial alterations to his contact notes on GR that went undisclosed for over a year.

Tysk added 54 new entries—with several of them containing substantial details about GR's investment strategy—and supplemented 13 pre-existing note entries by adding more event details.[4] Tysk also overrode the ACT! Notes default prompts that would automatically populate

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[4] The parties stipulated to Tysk's supplementation of 10 of the 13 pre-existing notes on GR dated May 15, May 26, August 14, September 20, and December 14, 2006; and January 11, March 6, April 3, July 31, and October 31, 2007.

the current date, and instead manually backdated his new entries to make it appear as if his notes were entered contemporaneously with the past event. In some cases, Tysk's altered notes provided extensive details about events and conversations with GR that occurred up to three years prior, including new entries that supported the investment recommendations at issue. For example, Tysk's ACT! Notes as of May 27, 2008, included a new note entry that Tysk backdated to January 9, 2006. More than two years later, and after receiving GR's complaint, Tysk wrote:

> Got the check to add on the account and confirmed that we are going ahead with my suggestions on buying the suggested funds. We are going to sell Am Cent Ultra due to the disappointment and buy Putnam Vista and Fidelity New Insights. Frankly, he did not care much about my suggestions he said that the account was doing well and whatever changes could improve already good performance would be icing on the cake. DBT

Additional examples of the backdated notes included the following:

At or around May 2008, Tysk manually backdated a note entry to "May 15, 2006" and wrote:

> [GR] added another $250,000 to the account and wants to invest it more aggressively . . . His other assets are conservative. I reconfirmed that this money being invested aggressively was okay. I did not want to pay the price if the markets dropped . . . I made sure we reviewed the PMT for the first year with the account he was very, very happy.

At or around May 2008, Tysk manually backdated a note entry to "December 14, 2006" and wrote:

> We met and reviewed the account and our recent changes. He is very pleased with the pace of changes and the thoughtfulness going into [the] changes. He said that "I am very impressed at the thought you are putting into things." . . . I reviewed the surrender charge options and he said "Why wouldn't I take the 10yr [annuity] with the 3% bonus?". . . I said that he was right, for tax deferred growth he[] would likely never spend this money and his heirs would inherit it. He said fine, "they can pay the taxes...What do I care."

Ameriprise's Code of Conduct required its registered representatives to "maintain complete and accurate business records." It expressly required registered representatives not to "shred, destroy, or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, [or] examination."

E. GR's Arbitration Claim and Discovery Dispute

On November 21, 2008, GR filed an eleven-count Statement of Claim in FINRA's arbitration forum against Tysk and Ameriprise, alleging that Tysk and Ameriprise recommended and sold more than $2 million in "unsuitable" variable annuities using funds from a fixed-income account and charged excessive fees in connection with the management of his portfolio. The issues raised in GR's arbitration claim were similar to those raised in his demand letter, including that "Tysk sold two annuities contracts to [GR], a financially secure 77-year old, knowing that these annuities were unsuitable, carried heavy surrender fees for 10 years, and would generate income taxed at a rate nearly double that of other more prudent investment choices."

In a letter dated December 1, 2008, FINRA's arbitration case administrator, Patrick Walsh, sent Tysk GR's Statement of Claim, along with FINRA's Discovery Guide. The Discovery Guide, which is used as a supplement to the discovery rules under the Arbitration Code for customer disputes, provided a list of presumptively discoverable items in customer arbitration cases, including "All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the custom[]er's account(s) at issue."[5]

On March 25, 2009, Tysk produced the altered version of his ACT! Notes concerning GR in discovery but did not inform GR's counsel that he had altered his notes. The version he produced stated that it was "Edited on 5/27/2008" and "Last edited by David Tysk." Based on the edited date, which was after GR complained to Ameriprise, GR's counsel requested, in a letter dated May 8, 2009, that Tysk produce "[a]ll documents showing edits made by Mr. Tysk to the notes in the Contact Report . . . including but not limited to the edits made on May 27, 2008."

GR's counsel testified that Tysk's ACT! Notes were important evidence in the arbitration case because "brokers will often rely on their contemporaneous notes of meetings [], to show that disclosures were made, that conversations happened, that meetings happened, and they can be difficult to rebut [], at a hearing." He also testified that, while "the assumption is that people are making these notes at the time these meetings were held," he had a hunch, based on the edited date and other key dates of the version Tysk produced, that Tysk's ACT! Notes "had been doctored or made at least after the date that they indicated they were made on."

Before responding to GR's discovery request, Tysk's counsel sent Tysk an email on June 22, 2009, asking whether he knew anything about "any edits being made to the contact reports?" Tysk replied stating in part, "There are no other documents showing edits per the request." Based on this response, Tysk's counsel responded to GR's discovery request on July 7, 2009, stating, "there are no such responsive documents."

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[5] The Discovery Guide further instructed, "Absent a written objection, documents on Document Product Lists 1 and 2 shall be exchanged by the parties within the time frames set forth in the . . . Code."

A three-day arbitration hearing was scheduled to begin on December 14, 2009. On the eve of the hearing, counsel for Tysk and Ameriprise produced the exception report that they claimed was inadvertently left out of their previous document production. GR's counsel maintained that the exception report was important evidence that purportedly proved that Ameriprise had previously questioned whether GR's annuity investments were suitable.

Referring to the report's late production as a "smoking gun" document, GR's counsel requested a continuance of the hearing so that he could propound additional discovery. Because GR's counsel suspected that previous versions of Tysk's ACT! Notes were accessible, but not produced in discovery, he also requested that Tysk and Ameriprise "turnover all relevant computer files and back-up media" so that a forensic examination and search for all relevant files could be performed. Tysk and Ameriprise opposed the postponement request.

After hearing arguments from the parties on the exception report's late production, the arbitration panel granted GR's counsel's request for expedited discovery and postponed the hearing until mid-April 2010. The arbitration panel also subsequently ordered a forensic search of Tysk's computer and server. ML, a computer forensic specialist retained by Ameriprise, performed the forensic search of Tysk's computer. ML testified before the Hearing Panel, stating that he found multiple versions of Tysk's ACT! Notes concerning GR in database files on Tysk's computer and narrowed down when, and to what extent, Tysk revised his notes. The arbitration panel awarded GR $197,000 in compensatory damages, plus fees, and found Tysk and Ameriprise jointly and severally liable for obstructing the discovery process, ordering them to pay $20,000 in damages.[6]

III. Discussion

A. Cause One: Tysk Violated FINRA's Rules and His Firm's Policies

The first cause of action in the amended complaint alleged that Tysk violated NASD Rule 2110 and FINRA Rule 2010 when he altered his customer contact notes after receiving the

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[6] Specifically, the arbitration award dated May 14, 2010, included the following findings:

- Respondent Tysk altered the record of his contacts with [GR] after [GR] complained about the suitability of the annuity he purchased;
- Ameriprise failed to update its discovery responses to [GR] after it became aware that Tysk had altered the file;
- Only after an Emergency Motion to Compel Discovery was filed at the eve of the rescheduled hearing did Ameriprise make Tysk's computer available to [GR] and allow [him] to discover the changes; and
- [Ameriprise and Tysk] engaged in other attempts to block discovery by [GR].

customer's demand letter and arbitration claim in order to bolster his defense to the customer's claim, and in violation of his firm's policies.[7]

In its original decision, the NAC affirmed the Hearing Panel's findings that Tysk violated NASD Rule 2110 and FINRA Rule 2010. The Commission, however, found that we were unclear as to which policies Tysk violated. The Commission therefore asked that we clarify our findings of violation, including whether Tysk violated his firm's policies, and if so, which policies were violated and how Tysk's conduct violated the just and equitable principles of trade rule. After reviewing the record anew, a preponderance of the evidence demonstrates that Tysk's conduct contravened Ameriprise's retention policies under its Code of Conduct. We determine that Tysk's misconduct violated FINRA's ethical rule because, by altering his ACT! Notes, Tysk created the false impression that he wrote contemporaneous notes of his conversations with GR.

FINRA Rule 2010 requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade. It is a broad ethical rule that "depends upon general rules of fair dealing, the reasonable expectation of parties, and marketplace practices," *Dep't of Enforcement v. Conway*, Complaint No. E102003025201, 2010 FINRA Discip. LEXIS 27, at *29 (FINRA NAC Oct. 26, 2010), *aff'd*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527 (Nov. 7, 2013), and is "intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11-12 (NASD NAC June 2, 2000) (citing *Timothy L. Burkes*, 51 S.E.C. 356, 359 (1993)). An associated person may be found liable under FINRA Rule 2010 for either engaging in unethical conduct or acting in bad faith. "Unethical conduct is defined as conduct that is '[n]ot in conformity with moral norms or standards of professional conduct.'" *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013).

Ameriprise prohibited its registered persons from altering documents that were related to any investigation. Ameriprise's Code of Conduct outlined the firm's basic business ethics and legal requirements "applicable to all Ameriprise Financial employees and advisers" and directly addressed the retention and integrity of company business records. Per the Code of Conduct, Tysk was required to "maintain complete and accurate business records" and not to "shred,

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[7] Tysk is subject to FINRA's just and equitable principles of trade rule through FINRA Rule 0140(a), which states that associated persons shall have the same duties and obligations as members. As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook, the first phase of which became effective on December 15, 2008, and included certain conduct rules and procedural rules. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008). Tysk was subject to both NASD and FINRA rules depending on the rule in effect at the time of his alleged misconduct. Because the NASD and FINRA rules discussed in this case are equivalent for purposes of this matter, references to FINRA Rule 2010 include, where appropriate, NASD Rule 2110.

destroy, or *alter in any way* documents that are related to *any* imminent or ongoing investigation, lawsuit, audit, [or] examination." (emphasis added).

In early April 2008, GR complained to Ameriprise about the suitability of Tysk's recommendations regarding his annuity investments, and the firm commenced an internal investigation around April 21, 2008. After reading GR's complaint letter and during the firm's investigation, Tysk accessed his business computer and, from May 13 through May 27, 2008, substantively altered his ACT! Notes on GR. By altering his ACT! Notes during the firm's pending investigation, Tysk violated Ameriprise's Code of Conduct.

We also find that Tysk's actions were unethical. Tysk did not just enter additional new note entries after GR complained to the firm. He deliberately created misleading evidence regarding when he documented his conversations with GR. Specifically, Tysk created for the first time 54 note entries and intentionally backdated them to make it appear that he had written down notes of detailed discussions with GR, when he had not. Tysk also supplemented 13 pre-existing note entries to make it appear that his alterations were part of the original notes. Tysk's altered notes included new details about events and conversations he had with GR that occurred up to three years prior. Many altered notes directly addressed Tysk's investment recommendations that were the subject of GR's complaint. We find that Tysk engaged in a deceptive business practice that did not conform with the moral norms or standards of professional conduct when he altered his ACT! Notes to create the false impression that he entered notes of his conversations with a customer at the time of those conversations. His unethical conduct violated NASD Rule 2110 and FINRA Rule 2010.

Tysk raises several arguments on remand against his liability, all of which we find lack merit. First, Tysk argues that the Code of Conduct did not apply to his actions because his ACT! Notes were not official firm records and there was no formal investigation or lawsuit imminent or ongoing at the time he altered them. The record, however, demonstrates otherwise. Tysk maintained confidential customer information in ACT! Notes, which was available on his business computer and was subject to the firm's supervision. The ACT! Notes therefore constituted a firm record. Furthermore, Tysk altered his notes during the firm's investigation of GR's complaint, which the Code of Conduct plainly prohibited. Although Tysk attempts now to argue that the firm's review of GR's complaint was not a formal investigation, the record does not support his claim. First, the Code of Conduct does not differentiate between formal and informal investigations. Second, the evidence demonstrates that Tysk was the subject of a firm investigation. After GR complained, the firm opened a case file and investigated Tysk's conduct that was the subject of the complaint. Ameriprise's investigation included, among other things, providing Tysk with a copy of GR's complaint letter, interviewing Tysk and GR, and obtaining Tysk's written, signed statement. Indeed, LZ referred to the firm's review of GR's complaint as an "investigation" when she forwarded GR's demand letter along with an information request to Tysk's supervisor, BS. BS also described GR's demand letter at the hearing as a complaint that led to a formal investigation by the firm. Conversely, Tysk supplied no evidence that Ameriprise's investigation of GR's complaint meant something other than what the Code of Conduct's retention policies were intended to cover. We therefore reject his argument and find that the firm's retention policies under the Code of Conduct applied.

Second, Tysk's argues that he could not be liable for violating the firm's policies because Ameriprise stated, in response to FINRA's information request, that Tysk committed no violation of a particular *section* of the Code of Conduct. But the Code of Conduct plainly provided that Tysk could not "alter" business documents "in any way" during "any imminent or ongoing investigation." Based on the directives in the Code of Conduct and the evidence in this case, we determine that Tysk's actions contravened this firm policy.

Furthermore, based on the record evidence, we reject Tysk's implication that the firm found no wrongdoing. Indeed, BS testified that the firm initially concluded that Tysk violated the Code of Conduct. The firm took remedial action by reprimanding Tysk via an Education Clarification Notice. The Education Clarification Notice specifically stated that, because Tysk added notes to his records regarding a firm customer after the customer filed a complaint regarding a recommendation he made, his actions "raised the question whether the Code of Conduct was properly followed." The firm's action was a far cry from Tysk's claim that the firm found no violation. In any event, FINRA has the authority to discipline its associated persons for rule violations, even if a member firm chooses not to enforce its own policies and procedures or chooses a different course of action. *Cf. Dep't of Enforcement v. McGee*, Complaint No. 201203489202, 2016 FINRA Discip. LEXIS 33, at *54 n.28 (FINRA NAC July 18, 2016) (explaining that "FINRA is not bound by another adjudicator's investigation or findings, and that FINRA's investigations and disciplinary actions are independent of other investigations or adjudications"), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *aff'd*, 733 F. App'x 571 (2d Cir. 2018). The altered and backdated notes that Tysk created in May 2008 during the firm's investigation violated Ameriprise's Code of Conduct.

Third, Tysk argues that there is no evidence he knowingly or even recklessly violated his firm's policies because, at the time of his offense, he did not know that certain firm policies, such as the Code of Conduct, existed. The Hearing Panel observed Tysk's testimony about his awareness the firm's retention policies and found Tysk's claimed ignorance of such policies was not credible. We find no reason to disturb the Hearing Panel's conclusion. *See Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *53 n.71 (Dec. 10, 2009) (finding that credibility determinations of an initial fact-finder are entitled to considerable weight and deference unless the record contains substantial evidence to the contrary). We agree with the Hearing Panel that, as an experienced securities professional of 26 years, Tysk knew or should have known of his obligation to comply with the firm's policies on preserving his business records. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (finding that respondent should have known based on his years of experience that backdating and altering documents are neither ethical nor accepted conduct in the securities industry). In sum, we hold that Tysk's actions violated his firm's policies and constituted unethical conduct in violation of FINRA's rules.

B. Cause Two: Tysk Acted Inconsistently with Just and Equitable Principles of Trade During Arbitration Discovery

The second cause of action alleged that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 when he altered his ACT! Notes after receiving GR's complaint and arbitration claim, and did not notify GR or his firm of his alterations when he responded to discovery requests for his notes and subsequent requests for the edits to his notes. We find that

Tysk violated the arbitration rules when he produced his altered ACT! Notes during discovery and did not disclose that he had manually backdated 54 new entries and supplemented 13 pre-existing notes after GR complained. We find further that Tysk acted in bad faith when he violated the arbitration discovery rules, which violates FINRA Rule 2010.[8]

The Commission noted that IM-12000 of the Arbitration Code states that it *may be* (but not necessarily *is*) deemed conduct inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010 for an associated person to fail to follow certain provisions in the Arbitration Code for customer disputes. The Commission therefore requested clarification of the NAC's findings under the second cause of action as to why Tysk's conduct violated FINRA Rule 2010.

FINRA's arbitration rules emphasize cooperation between the parties when the rules call for the parties to produce documents. FINRA Rule 12505 requires parties in a customer arbitration dispute to cooperate in discovery "to the fullest extent practicable in the exchange of documents and information to expedite the arbitration." FINRA Rule 12506(a) identifies the lists of documents in FINRA's Discovery Guide that are presumed to be discoverable in all customer arbitrations. FINRA Rule 12506(b) requires that the parties must either respond, or object, to discovery requests. Under subparagraph (b)(1) to the rule, the parties must produce "all documents in their possession or control" that are described in Production Lists 1 and 2 of the Discovery Guide and, if they cannot do so, either identify and explain why the document cannot be produced or object to its production in accordance with FINRA Rule 12508. Subparagraph (b)(2) of Rule 12506 states that the parties must act in "good faith" when complying with their discovery obligations, meaning that each party must "use its best efforts to produce all documents required or agreed to be produced."

The failure to produce documents and information in accordance with the Arbitration Code, along with other discovery abuses, may be subject to disciplinary action under FINRA's Conduct Rules.[9] IM-12000(c) of the Arbitration Code warns that it may be inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010 for an associated person to "fail to . . . produce any document in his possession or control as directed pursuant to provisions of the Code."[10] As explained below, we conclude that Tysk's discovery misconduct was wholly inconsistent with just and equitable principles of trade.

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[8] We reject Enforcement's allegation that Tysk further altered the ACT! Notes after GR filed his arbitration claim. As we did previously, we agree with the Hearing Panel's conclusion that a preponderance of the evidence did not establish that Tysk substantively altered his ACT! Notes after GR filed an arbitration claim.

[9] *See generally* FINRA Rule 12104(e) ("Effect of Arbitration on FINRA Regulatory Activities: Arbitrator Referral During or at Conclusion of Case") and FINRA Rule 12212(b) ("Sanctions").

[10] IM-12000(c) ("Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes").

In November 2008, GR filed an eleven-count arbitration claim against Tysk and Ameriprise, claiming among other things that Tysk's variable annuity recommendations were unsuitable investments. The Discovery Guide listed all notes by the firm or an associated person, including Tysk's ACT! Notes, as presumptively discoverable items that were required to be produced. In March 2009, Tysk produced his ACT! Notes in response to the initial discovery request, but he never informed the firm or GR's counsel that he had substantively altered them. Absent disclosing that he altered his ACT! Notes, Tysk deliberately produced a misleading document in discovery, in violation of just and equitable principles of trade. *See John F. Noonan*, 52 S.E.C. 262, 265 (1995) (finding that producing fabricated evidence in an arbitration proceeding is conduct inconsistent with just and equitable principles of trade because it "subvert[s] the arbitration process").

Although GR requested Tysk's edits to his ACT! Notes during discovery, Tysk did not produce them when asked. Having a hunch that Tysk's ACT! Notes were doctored, in May 2009, GR's counsel made another discovery request that Tysk provide "[a]ll documents showing edits made by Mr. Tysk to the notes . . . including but not limited to the edits made on May 27, 2008." Tysk's counsel asked Tysk outright whether he knew anything about "any edits being made to the contact reports." Instead of admitting that he altered his ACT! Notes extensively, Tysk responded: "There are no other documents showing edits per the request." Tysk's counsel then repeated Tysk's falsehood in response to GR's discovery request, stating "there are no such responsive documents." It was only when the arbitration panel granted GR's motion to compel discovery and ordered a forensic search of Tysk's computer that GR learned of Tysk's 54 new note entries and 13 note entries with additional details added. Tysk's intentional withholding of discoverable information was conduct inconsistent with just and equitable principles of trade. *See Dep't of Enforcement v. Westrock Advisors, Inc.*, Complaint No. 2006005696601, 2010 FINRA Discip. LEXIS 26, at *19 (FINRA NAC Oct. 21, 2010) (finding the intentional withholding of discoverable information that is in one's possession or control constitutes conduct inconsistent with just and principles of trade).

Tysk also failed to satisfy the discovery rules under the Arbitration Code. When GR's counsel requested Tysk's edits to the ACT! Notes, FINRA Rule 12506(b)(1) required Tysk to produce them, object to the production, or state the reason why he could not supply the documents showing the edits to his ACT! Notes. The evidence shows that Tysk took none of these courses of action. For example, although Tysk argues that he did not possess previous versions of his ACT! Notes, he still had the obligation under FINRA Rule 12506(b)(1) to explain his inability to produce the requested edits. By failing to act as required in response to GR's discovery request, Tysk violated the rule. Tysk also failed to meet the requirements of FINRA Rule 12506(b)(2). Instead of "us[ing his] best efforts to produce all documents required or agreed to be produced," as required by the rule, the evidence shows that Tysk made no reasonable attempts to search the saved ACT! database files on his computer and determine whether back-ups of his ACT! Notes existed.

We find that Tysk's discovery violations of the Arbitration Code also contravened just and equitable principles of trade because Tysk acted in bad faith when he knowingly withheld providing his edits to his ACT! Notes in response to GR's discovery request. When Tysk

responded to his counsel that there were no documents showing any edits and revealed nothing regarding his extensive alterations, Tysk was deliberately concealing important information from GR and the arbitration panel. He was acting in bad faith. *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, *23 (Jan. 9, 2015) (finding respondent's concealed actions from his customer and his deceit further demonstrated deliberate intent and bad faith), *aff'd*, 641 F. App'x 27 (2d Cir. 2016). Had the arbitration panel not granted GR's motion for a forensic search of Tysk's computer, Tysk may well have hidden the truth from the arbitration panel. Tysk's misconduct threatened the integrity of the arbitration process.[11] His failure to adhere to the discovery provisions under the Arbitration Code and withholding of discoverable information in bad faith violated IM-12000 and FINRA Rule 2010.

Tysk raises two primary arguments on remand against his liability, both of which we find unpersuasive. First, Tysk argues that forcing the parties to affirmatively explain the documents they produce is inconsistent with the Arbitration Code and that he had no notice that not explaining his document production would expose him to liability under FINRA Rule 2010. The essential goal of the discovery process, however, is to ensure that the parties to an arbitration obtain all relevant facts and information to prepare for the hearing. Indeed, the Arbitration Code requires full cooperation in the exchange of such documents *and information*—not solely the exchange of documents. *See* FINRA Rule 12505 (emphasis added). While there were a number of ways that Tysk could have cured producing misleading evidence in discovery, "[a] party's noncompliance with its discovery obligations is not an 'acceptable part of arbitration strategy.'" *Westrock*, 2010 FINRA Discip. LEXIS 26, at *24. Tysk knew firsthand that he altered his notes related to his communications with GR, yet he deliberately withheld this vital information in arbitration after repeated discovery requests in an attempt to conceal his misconduct. As an associated person, Tysk should have known that producing a misleading document in arbitration is conduct contrary to high standards of commercial honor and is inconsistent with just and equitable principles of trade. *See Noonan*, 52 S.E.C. at 263-64.

Second, Tysk argues that he did not have possession or control over any previous versions of his ACT! Notes, and the Arbitration Code did not require him to create new documents or use specialized technical knowledge and expertise to obtain them. Although it is true that the discovery rules do not require Tysk to create data, the evidence showed that several versions of his ACT! Notes were stored on Tysk's computer. The contact reports that ML produced were not *creations* as Tysk suggests, but rather were printouts of ACT! database files saved on the hard drive. Both ML and FINRA's forensic tech investigator, Christopher Leigh, confirmed at the hearing that a simple click on "file" and then another click on "open database" in ACT! would have taken Tysk to a "default location within the ACT program of the databases that have been created and saved."[12] Thus a reasonable search of the ACT! database on his

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[11] Our conclusion is bolstered by the arbitration panel's finding that Tysk improperly engaged in attempts to block the discovery process.

[12] Tysk argues that he testified at the hearing that the backed-up ACT! database files were overwritten on a weekly basis and therefore he could not have recovered any data more than a month old. His assertion, however, is refuted by direct evidence in the record identifying eleven

[Footnote continued on next page]

computer would have produced the discoverable information requested. In sum, Tysk indeed had possession of previous versions of the ACT! Notes and was required by the arbitration rules to produce them, or to explain why he could not.

We accordingly determine that Tysk violated just and equitable principles of trade during an arbitration proceeding, in violation of IM-12000 of the Arbitration Code and FINRA Rule 2010.

IV. Sanctions

The Hearing Panel suspended Tysk from associating with any member firm in any capacity for three months and imposed a $50,000 fine. The Hearing Panel also ordered hearing costs, for which he and Ameriprise were jointly and severally liable. For the reasons set forth herein, we find that stronger sanctions are necessary in order to redress Tysk's serious misconduct. We suspend Tysk in all capacities for one year and fine him $50,000.

FINRA's Sanctions Guidelines ("Guidelines") are not absolute, yet instructive "to ensure greater consistency, uniformity, and fairness in its sanctions." *West*, 2015 SEC LEXIS 102, at *32.[13] Although the Guidelines do not address the specific misconduct at issue, our original decision disagreed with the Hearing Panel and found the guideline for the forgery or falsification of records to be the most analogous guideline to the case at hand.[14] Similar to falsifying records, Tysk opened his ACT! Notes on GR, deleted the current date and backdated new entries with events and conversations that purportedly occurred several years in the past. He then represented falsely in discovery that the altered and backdated ACT! Notes were a contemporaneous reflection of a customer record, which they were not.

[cont'd]

ACT! database files that were available on Tysk's computer, some of which were created as early as 2006.

[13] *Accord FINRA Sanction Guidelines*, 1 (2013) [hereinafter "*Guidelines*"] (noting that the Guidelines are not intended to be absolute but to provide direction for imposing sanctions consistently and fairly). We apply the applicable Guidelines in effect at the time of Tysk's appeal to the NAC.

[14] *See generally id.* at 1 (encouraging adjudicators to look to the Guidelines for recommended sanctions of analogous violations). Regarding the forgery or falsification of records guideline, we note again that Enforcement did not allege, nor did the Hearing Panel or NAC conclude, that Tysk's altered notes were false or untrue statements but that Tysk backdated and supplemented his ACT! Notes to create the deceptive appearance that his notes were written contemporaneously with the previous event. We therefore tailor the sanctions to reflect the unique circumstances of this case.

For falsification of records in violation of FINRA Rule 2010, the Guidelines recommend a fine between $5,000 to $100,000, a suspension in any or all capacities for up to two years, and in egregious cases, a bar.[15] The sanctions we impose for Tysk's violations are within these recommended ranges.

Tysk's misconduct was misleading and deeply conflicted with his ethical obligations as a securities professional to act with candor and transparency for the protection of investors. *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *16 (Dec. 11, 2014) (noting that FINRA's just and equitable principles of trade rule "protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market"), *aff'd*, 637 F. App'x 49 (2d Cir. 2016); *Henry Irvin Judy*, 52 S.E.C. 1252, 1256 (1997) (noting that the securities industry "relies heavily on candor and truthful representation" by associated persons).

Tysk *self-servingly* backdated a customer record and concealed the revisions he made both to his firm and GR. His concealment had negative consequences both before and during the arbitration. Tysk's concealment caused Ameriprise's investigation to be flawed because it could not accurately evaluate GR's complaint that Tysk's recommendations were unsuitable. Tysk's deception caused the parties to make more discovery motions and forced a delay in the hearing, increasing costs on the parties. More importantly, Tysk's misconduct—if it had gone undetected—would have undermined the arbitrator's ability to find the truth—that his notes were not a contemporaneous record of his discussions with GR. We strongly condemn such deception. *See, e.g.*, *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *54 (May 27, 2015) (finding respondent's backdating of customer records and providing those false records to FINRA as egregious misconduct); *see also Dist. Bus. Conduct Comm. v. Noonan*, Complaint No. C04930026, 1994 NASD Discip. LEXIS 25, at *13 (NASD DBCC Aug. 3, 1994) (increasing respondent's sanctions for fabricating evidence in an arbitration proceeding and deeming such actions as "serious misconduct, which cannot be condoned").

In assessing sanctions, we have considered Tysk's claims of mitigation, but find only aggravating factors associated with his serious misconduct. Tysk does not dispute that he altered his ACT! Notes concerning GR.[16] The extent to which Tysk attempted to conceal his misconduct and avoid detection, even after knowing that he was a party to an arbitration proceeding, is also aggravating.[17] For example, during the arbitration proceeding, Tysk's attorney directly asked Tysk whether he knew about any revisions to his notes. Rather than being forthright, Tysk chose to remain silent about his wrongdoing until several months after being confronted.[18] By entering backdated notes 54 times concerning his interactions with a firm

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15 *Id.* at 37.

16 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

17 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 10 and 12).

18 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 9).

customer and attempting to conceal them, Tysk demonstrated a troubling lack of integrity. That Tysk's concealment was eventually revealed did not lessen its potential to harm the arbitration process; his prolonged concealment is an aggravating circumstance.[19]

A. Tysk's Reliance on Advice of Counsel Claim Is Not Mitigating

In his appeal to the NAC, Tysk raised several mitigating factors, claiming that the sanctions the Hearing Panel imposed are unwarranted and excessive. We have considered these arguments again and find them unpersuasive.

We recognize that reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *38 (Nov. 14, 2008) (stating that a valid claim of reliance upon counsel could mitigate sanctions), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). To receive mitigation, Tysk must provide sufficient details or evidence that, before acting, he sought legal advice on his intended conduct.

Tysk does not satisfy this requirement. The key element not proven here is that Tysk sought competent advice of counsel and relied in good faith on such advice *before* he committed the misconduct under both the first and second causes of action. *See, e.g.*, *U.S. v. Cheek*, 3 F.3d 1057, 1061 (7th Cir. 1993) (finding that respondent failed to show that he sought or received legal advice on possible *future* conduct, but instead continued his course of illegal conduct before contacting counsel); *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429 (10th Cir. 1988) (requiring receipt of advice from counsel that the action *to be taken* will be legal); *Berger*, 2008 SEC LEXIS 3141, at *38 (requiring respondent to have sought advice on the legality of the *intended* conduct).

The reliance on counsel defense is not available under the first cause of action because Tysk altered his ACT! Notes without consulting an attorney. Indeed, he altered his notes in May 2008, six months before Tysk was represented by or consulted with an attorney.

With regard to the second cause of action, the Commission on remand directed the NAC to clarify why it rejected Tysk's reliance on counsel claim for the discovery violations he committed. Tysk argues that, in August 2009, after confessing to his attorney that he edited his notes, he relied on his attorney's "judgment that the supplements did not need to be disclosed to [GR]." The evidence fails to demonstrate, however, that Tysk's attorney knew about or advised him to produce his *altered* ACT! Notes in discovery in March 2009. The evidence also fails to show that Tysk's attorney advised him to withhold his edits from GR even in the face of a specific discovery request in May 2009. Tysk's confession to his attorney, which took place in August 2009, was too late in the process and provides no mitigation for his deliberate concealment of his edits after repeated discovery requests.

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19 *Id.*

In fact, Tysk's purported reliance on his attorney's judgment not to provide GR his edits until the hearing is also unsubstantiated by the record. While Tysk claims that he relied on his attorney to make decisions about documents and information to produce in discovery and for litigation strategy, we find no evidence that Tysk solicited advice from, and was advised by, his attorney to withhold his edits until he was compelled to do so by an arbitration order. In fact, during discovery, Tysk's attorney outright asked Tysk whether he knew about any edits to his notes. Instead of openly admitting to his actions, Tysk diverted the question and answered that no documents showed his edits. Moreover, Tysk testified that, after his confession, he had no discussion with his attorney about whether to disclose to GR that he altered his ACT! Notes. We therefore find no basis to mitigate the sanctions under a reliance on advice of counsel claim.

B. Tysk's Other Claims of Mitigation Fail

In an attempt to invoke Principal Considerations in Determining Sanctions No. 15 of the Guidelines ("Principal Consideration No. 15") for mitigation, Tysk claimed that the level of his sanction should reflect that he received no notice of Enforcement's "novel" interpretation of IM-12000 of the Arbitration Code that created a disclosure obligation for respondents in FINRA arbitrations. His argument, however, is baseless. Principal Consideration No. 15 recommends that adjudicators consider "[w]hether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor . . . that the conduct violated FINRA rules or applicable securities laws or regulations," which does not apply here. *Guidelines*, at 7. Enforcement did not allege a new or "novel" interpretation against Tysk because the arbitration rules unequivocally obligate him as an associated person to provide documents and information in accordance with the Arbitration Code's discovery provisions. We therefore reject Tysk's claim.

Tysk also claimed that he demonstrated his intent to be transparent and not to conceal his actions. To the contrary, we find strong evidentiary support that Tysk deliberately concealed his alteration of a customer-related document, and in turn, knew, or was reckless in not knowing, that for an extended period of time he misled his firm and the customer—all factors that we consider aggravating, not mitigating.[20]

Lastly, Tysk asserted that the Hearing Panel's order of a three-month suspension would effectively force him out of the industry, and thus is punitive and improper under the Guidelines. "In determining appropriately remedial sanctions, however, we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent's career." *Dep't of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at *22 (FINRA NAC Dec. 17, 2010), *aff'd*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54 (Jan. 6, 2012). Further, we find that because of Tysk's lack of appreciation for the

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[20] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 13, 9, and 10).

requirements to which he was subject, allowing him to continue working in the securities industry with a lesser or no suspension is not in the best interest of the investing public.[21]

In summary, Tysk altered his ACT! Notes to make it appear as if they were made contemporaneously with past events, attempted to conceal his misconduct, and has failed to show any mitigating circumstances. The three-month suspension ordered by the Hearing Panel is too lenient for Tysk's serious violative conduct. Commensurate with the severity of Tysk's misconduct, and to discourage future wrongdoing and protect the public interest, we increase Tysk's suspension to one year in all capacities and fine him $50,000.

V. Conclusion

We affirm the Hearing Panel's findings that Tysk altered customer-related information after the customer complained about the suitability of a recommendation, and failed to inform his firm or the customer of his alterations when he produced the information in an arbitration proceeding, in violation of NASD Rule 2110 and FINRA Rule 2010. His misconduct also violated IM-12000 of the Arbitration Code and FINRA Rule 2010.

For his violations, we suspend Tysk from associating with any member firm in any capacity for one year and fine him $50,000. We affirm the Hearing Panel's order that Tysk is liable, jointly and severally, to pay $3,173.84 in hearing costs, and also order that he pay appeal costs of $1,551.41.[22]

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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[21] We also find that Tysk's comparison to a settled FINRA case in arguing for lesser sanctions has minimal to no probative value. It is well settled that the sanctions imposed in each case depend on the facts and circumstances and "cannot be precisely determined by comparison with action taken in other proceedings." *Tomlinson*, 2014 SEC LEXIS 4908, at *40 (citation and internal quotation omitted). It is also broadly recognized that settled FINRA cases generally result in lower sanctions than fully litigated cases. *See Guidelines*, at 1.

[22] Pursuant to FINRA Rule 8320, FINRA will revoke for non-payment the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanctions after seven days' notice in writing.