UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

DEVIN L. WICKER

for Review of Disciplinary Action Taken by FINRA

File No. 3-20705

BRIEF OF RESPONDENT DEVIN LAMARR WICKER IN SUPPORT OF THE APPLICATION FOR REVIEW OF DISCIPLINARY ACTION TAKEN BY FINRA

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I. INTRODUCTION

This case is unique in that it demonstrates the perilous unwillingness of FINRA to fairly apply its own procedural rules for disciplinary proceedings, and its steadfast refusal to acknowledge and allow discovery of unethical conduct of its Department of Enforcement ("Enforcement") during the course of the disciplinary process. That unethical conduct stems from Enforcement secretly negotiating employment with a hearing officer who was simultaneously presiding over a disciplinary hearing between Enforcement and Respondent Devin L. Wicker ("Respondent" or "Wicker"). Those negotiations culminated in Enforcement hiring the hearing officer.

FINRA's refusal to acknowledge application of the "unclean hands" doctrine and willingness to apply Rule 9280 to its own behavior reflects a callous disregard for the rights of Respondent and the prejudice that such injustice imposes on him.

Respondent was also prejudiced by a systemic breakdown of FINRA's procedures that Respondent encountered in attempting to exercise all of the rights he has to receive fundamental fairness by this regulator, including through notice and discovery provisions. Shockingly, the systemic breakdown involves all four segments of its organization responsible for ensuring a fair disciplinary process – Enforcement, the Office of Hearing Officers ("OHO"), the Office of General Counsel ("OGC"), and the National Adjudicatory Council ("NAC").

This is not simply a Respondent concocting theories of FINRA's bad behavior. Indeed, the NAC decision itself is replete with admitted failures to follow its own procedures that were established to ensure both the U.S. Securities and Exchange Commission ("Commission") and the public-at-large that its procedures are fundamentally fair and can be counted on in helping to protect our securities markets. FINRA's numerous excuses for failing to follow established procedures belies the fact that Respondent, who has maintained his innocence of the charges throughout two hearing panel hearings and two NAC appeals to date, was denied his rights to fair proceedings, including the ability to pursue discovery regarding FINRA's unethical behavior. Respondent therefore implores the Commission to hold FINRA to the appropriate standards of accountability and fairness and dismiss this disciplinary proceeding.

This Respondent is not creating a fanciful scheme of abuse to avoid charges. To the contrary, the NAC Decision now on appeal went out of its way to avoid addressing the significant concerns of Enforcement's

employment negotiations with the Hearing Officer during the pendency of the matter, and its refusal to allow for proper discovery of that behavior. Rarely does a NAC decision, in describing the procedures employed to get to this point include *all* of the following language as it does here:

- "we note that this case presents us with unusual circumstances"[1]
- "an unusual set of facts and circumstances"[2]
- "this unique procedural history"[3]
- "to the extent errors were made, they constituted, at most harmless errors"[4]
- "These documents and other documents related to Wicker's appeal …were inadvertently omitted from the record….The record was supplemented after Wicker's counsel raised the issue"[5]
- "the omission [of critical documents in the Record"] was regrettable"[6]
- "We agree that the Remand Request was unusual"[7]
- "The Chief Hearing Officer did not copy the parties on the Remand Request"[8]
- "The parties were not copied on the Remand Order"[9]
- "FINRA Rules do not require that parties be copied on these documents [seeking and granted remand to OHO]"[10]
- "We acknowledge that the Remedial Order did not include the items set forth in FINRA Rule 9349(b)"[11]
- "The failure to strictly comply with Rules 9349(a) and (b) was harmless error"[12] and
- "[I]n the future we encourage that in similar circumstances the parties be notified of such matters."[13]

Indeed, in the last quote, the NAC on one hand suggests that a procedural rule regarding notice to parties was not violated while suggesting that the rule be changed.

[1] NAC Decision, p. 15.
[2] NAC Decision, p. 2.
[3] NAC Decision, p. 2.
[4] NAC Decision, p. 2.
[5] NAC Decision, n. 19.
[6] NAC Decision, p. 19.
[7] NAC Decision, p. 21.
[8] NAC Decision, n. 8.
[9] NAC Decision, n. 9.
[10] NAC Decision, n. 23.
[11] NAC Decision, p. 24.
[12] NAC Decision, p. 24
[13] NAC Decision, n. 23.

Based on a precious few documents discussed herein that became known only when Respondent's counsel pressed OGC to disclose them as part of the appeal process, did OGC supplement a record after FINRA had already certified as complete, with documents that it described as "inadvertently omitted" but for which Respondent considers critical. FINRA's failure to disclose those documents to Respondent helps demonstrate why FINRA was more concerned about hiding Enforcement's unclean hands than in finding a fair resolution to this original matter. It reflects for the first time that the Hearing Officer was disqualified prior to issuance of the hearing panel decision and that the basis for her disqualification was tied to her subsequent employment with Enforcement. This invariably leads to the conclusion that Enforcement engaged in undisclosed employment negotiations with an Adjudicator while simultaneously appearing before her in prosecuting the case against the Respondent.

By trying to square the procedural and ethical deficiencies through these awkward and unsubstantiated explanations, FINRA was abrogating its responsibilities to ensure fairness in its process. For the sake of the integrity of the securities regulatory scheme, this cannot be tolerated.

This disciplinary process began with the filing of the Complaint on August 8, 2018,[14] and has gone through a hearing before a hearing panel, an appeal to the NAC, a request for remand made by the OHO Chief Hearing Officer Maureen A. Delaney ("Chief Hearing Officer" or "Delaney"), a remand by NAC, a vacated decision by the Chief Hearing Officer, a second hearing before an extended hearing panel, a second appeal to the NAC, and now this appeal to the Commission. Respondent appeared *pro se* for parts but not all of the process. While Respondent has acknowledged shortcomings in the manner in which the funds at issue in the Complaint were managed, he has maintained throughout that such conduct does *not* constitute a violation of FINRA Rules 2150 or 2110. Wicker is an honest broker who simply got involved in an underwriting deal that went awry.

Respondent argues that there are multiple bases for the Commission to find that FINRA engaged in error or misdeeds that, at this point in the process can only be rectified by dismissal of the Complaint. Specifically, Respondent argues:

- FINRA failed to properly address Enforcement's contemptuous conduct under FINRA Rule 9280;
- FINRA failed to properly address Enforcement's unclean hands;
- FINRA erred failing to assign the first appeal to a NAC Subcommittee;

[14] FINRA Record FINRA000006-013.

- FINRA erred in Permitting the Chief Hearing Officer to submit the Delaney Remand Request to the NAC, and without notice to the Parties;[15]
- NAC erred in its remand based on Delaney's Remand Request;
- FINRA erred in ordering that the initial decision be vacated;
- FINRA erred in the NAC's consideration of evidence of a non-party - Delaney's Remand Request, and that it constitutes "other papers submitted," in contravention of FINRA Rule 9346;[16]
- FINRA erred in the NAC remanding the original OHO decision without Subcommittee consideration and findings, in contravention of FINRA Rule 9349;[17]
- FINRA erred in the NAC remanding the original decision without providing notice to the Parties;[18]
- FINRA erred in refusing to allow Respondent to adduce new evidence once the already "Certified" Record on Appeal was supplemented;[19]
- FINRA erred in determining that the scope of discoverable material under *Brady* and FINRA Rules excluded employment negotiations with the Adjudicator during the proceedings;[20]
- FINRA erred in finding that the Delaney Remand Request and NAC Remand Order did not contain materially different information from what Respondent already knew;[21] and
- FINRA failed to properly consider the undue burden placed on Respondent based on Enforcement's own unethical conduct.

II. RESPONDENT'S BACKGROUND

Respondent, Devin Lamarr Wicker, age 43, received his Bachelor of Business Administration, with a focus on International Business from Howard University. Wicker lives in Redding, Connecticut with his wife and family. Wicker first became registered with FINRA as a General Securities Representative (Series 7) in 2000. In 2010, Wicker became registered as a General Securities Principal (Series 24) and in 2011, he became licensed as a Municipal Securities Principal (Series 53), Financial and Operations Principal (Series 27), Registered Options Principal (Series 4), and Equity

[15] NAC Decision, p. 21.
[16] NAC Decision, p. 22.
[17] NAC Decision, p. 23.
[18] NAC Decision, p. 24.
[19] NAC Decision, p. 19.
[20] NAC Decision, p. 20.
[21] NAC Decision p. 19.

Trader (Series 55). In 2013 and 2018, he also became licensed as a Research Analyst (Series 87), and passed the Securities Industry Essential Examination (SIE), respectively.[22]

From 2000 until 2010, Wicker worked for Goldman Sachs & Co. In 2010, Wicker and an ex-Goldman colleague founded Bonwick Capital Partners ("Bonwick"), using their own capital and partnered with Odeon Capital Group, who provided the expertise in running and operating a broker-dealer. Bonwick also outsourced compliance and financial operations to experienced professionals to help ensure compliance. When Wicker's partner withdrew from Bonwick because of family matters, Wicker was unexpectedly left without financial and operational support.

Due to Wicker's acknowledged inexperience in all aspects of a brokerage firm, in 2015 he partnered with Burnham Financial Group which provided financial, strategic, and operational leverage for Bonwick. Unfortunately, because of that arrangement, Wicker was obligated to take on investment banker Daniel McClory. Wicker and McClory's relationship became toxic and contributed to the financial issue that is the subject of the Complaint.

III. PROCEDURAL BACKGROUND

A. Introduction

Wicker acknowledges a significant dilemma he faced in the appeal before the NAC and faces again in this appeal is that FINRA has steadfastly refused to allow for discovery of key facts necessary to get a full picture of the abusive behavior by Enforcement, and the communications between Enforcement, OHO, Hearing Officer Jennifer L. Crawford ("Crawford"), OGC, and the NAC, that further establish that abusive behavior. As described herein, FINRA is employing unusual steps to hide behind a procedural fence to avoid detection rather than addressing such behavior head-on as a responsible regulator.

B. Events Occurring While Case was Pending Before Hearing Officer Crawford

Crawford was the original Hearing Officer assigned by the Chief Hearing Officer to preside over the disciplinary proceeding following Enforcement's filing of a Complaint against Respondent on August 8, 2018. A hearing was conducted February 4-6, 2019, in which Respondent appeared *pro se*. Enforcement charged Respondent with conversion of funds in a single cause of action. The funds alleged to have been "converted" did not involve any customer securities brokerage account, but rather funds being used to pay expenses as part of an underwriting for a

[22] See Respondent's CRD.

planned public offering. Respondent has consistently maintained that his actions did not constitute violations of Rules 2150 and 2110.

While the case was pending before Crawford, on January 16, 2019, FINRA posted a job opening for the position as Enforcement's Chief Litigation Counsel, a senior but non-officer position at FINRA.[23] FINRA would eventually repost that same position as an officer position, listed as VP, Litigation – Enforcement.[24] It is that position that Enforcement and Crawford eventually successfully negotiated for her hire, with her beginning that position sometime in May 2019.

On March 21, 2019, FINRA issued a hearing panel decision authored by Crawford, finding that Respondent violated FINRA Rules 2150 and 2110 by converting funds, barred him and ordered that he pay restitution. Respondent filed an appeal to the March 21, 2019 decision.

C. Events Occurring After Issuance of March 21, 2019 Hearing Panel Decision: Respondent's Appeal of the OHO Decision and Crawford Leaves OHO to Join Enforcement

1. Notice of Appeal Filed and Accepted

Respondent filed an appeal to the March 21, 2019 decision on April 12, 2019. (FINRA002021) Thereafter, on April 17, 2019, Lisa Jones Toms, Associate General Counsel in FINRA's Office of General Counsel issued a letter to the parties ("Toms Letter"). (FINRA 003421) In the Toms Letter, FINRA acknowledged Wicker's appeal to the NAC and further advised, among other things: "The appeal proceedings before the NAC will be conducted in accordance with FINRA's Code of Procedure, as set forth in the Rule 9300 Series."

As of April 17, 2019, with the NAC accepting Respondent's appeal, the proceedings were squarely in the appellate process and to be governed by the Rule 9300 proceedings of FINRA's Code of Procedures. Thereafter, the parties were subject to the notices, rulings, and a calendar as determined by NAC through its attorney. Thus, the authority to make rulings on the matter moved from the procedures under the Rule 9200 Series to those under the Rule 9300 Series.

[23] Chief Litigation Counsel – Enforcement (OCHE) – Rockville, MD or NY,NY; Job Posting Requisition ID 007266. https://www.financialish.com/article/finra-recent-job-postings-as-of-january-22-2019

[24] VP, Litigation – Enforcement (OCHE) Rockville, MD or NY,NY; Job Posting March 25 – Job Posting Requisition ID 007388. https://www financialish.com/article/finra-recent-job-postings-as-of-march-25-2019-

On May 8, 2019, Delaney transmitted the Certification of Record which notes that she is attaching and transmitting the Record and Index to the Record of the disciplinary proceeding to the National Adjudicatory Council. (FINRA002075)

2. Crawford Leaves OHO to Start Position of VP- Litigation in Enforcement

Thereafter, in May 2019, approximately two months after the issuance of the hearing panel decision and while the matter was on appeal before the NAC, Crawford left OHO and started a position as Vice President of Enforcement and Head of Litigation. While it was obviously known in real time to both the Chief Hearing Officer and Enforcement that Crawford left OHO to take the officer position at Enforcement, there is nothing in the record to indicate that Respondent was notified; that Crawford changed positions; when the negotiations took place that led to the change; or the date in which Crawford accepted Enforcement's job offer to begin that new position.

Because Respondent was denied a request to obtain additional information about the circumstances leading to her job change, Respondent is denied several critical pieces of evidence that demonstrates Enforcement's unethical conduct engaged in offering employment to an Adjudicator while simultaneously appearing in front of her. That includes:

- The date between the initial posting for the Chief Litigation Counsel on January 16, 2019, and the date she left OHO to take her new position, that Enforcement and Crawford first engaged in employment application or discussion;
- The terms of the negotiations and whether Enforcement raised the profile of the position from a non-officer position (Chief Litigation Counsel) as first posted, to an officer position of Vice President of FINRA as part of its negotiations with Crawford;
- The difference in compensation FINRA offered her for the Enforcement position than she was receiving as a Hearing Officer;
- Communications between Enforcement and Crawford regarding the cases Enforcement had pending before Crawford including the instant case and notification of the conflict of interest presented by their communications;

These facts reflecting Enforcement's potential unethical behavior during the pendency of Respondent's disciplinary action before Crawford began engaging in these discussions remains known only by Enforcement and Crawford.

Respondent was not aware of Crawford's change in position until November 12, 2019, when he received Delaney's notice vacating the original hearing panel decision.

3. Appeal Briefs Filed and Parties Await NAC Decision

Pursuant to the appeal proceedings, Wicker filed his appeal brief on August 19, 2019, and Enforcement filed its brief on September 27, 2019. There was no reply brief, no request for oral argument. The matter awaited a decision by the NAC as of the end of September 2019. The parties never received notice of the assignment of a NAC Subcommittee to consider the appeal even when motions were made by the Parties and ruled on by the NAC.

D. Chief Hearing Officer Exceeds Authority in Seeking Remand of Case Pending before the NAC

On Friday, November 8, 2019, during the pendency of the appeal process, Delaney took the unprecedented step of delivering a letter to Evan Charkes, Chair of the NAC, c/o Alan Lawhead, Vice President of FINRA's Office of General Counsel's Appellate section ("OGC") (FINRA 003501) in connection with the NAC appeal ("Delaney Remand Request"). This letter was written and hand delivered to OGC apparently more than six months after Crawford left OHO to join Enforcement, and the same six months after Delaney was aware that Respondent had appealed the matter to the NAC. Delaney's Remand Request reads:

> The Office of Hearing Officers has received information regarding whether *the Hearing Officer in the above proceeding was subject to disqualification on or before the date the decision in this proceeding was issued, March 21, 2019*. Based on that information, which the Office of Hearing Officers received after the decision was issued, I request that the National Adjudicatory Council remand the case to the Office of Hearing Officers for consideration and further proceedings. If you have any questions, please do not hesitate to contact me. [Emphasis added]

This letter focuses solely on Crawford's actions that led her to conclude that Crawford was disqualified. The letter failed to reference any concern for the actions of one of the parties - Enforcement - that led to the same finding of potential unfairness.

The NAC decision admits that Delaney failed to copy either of the Parties.[25] Upon receipt of the Delaney Remand Request, the NAC likewise failed to provide a copy of the Delaney Remand Request to the Parties. Wicker never saw or obtained a copy of the Delaney Remand Request until January 12, 2021, during the second appeal to the NAC. It was produced only after Respondent's new counsel petitioned OGC on January 9, 2021, questioning the completeness of the "Certified" record.

[25] NAC Decision, n. 8.

As described below, this letter from Delaney was unprecedented, without notice to the parties on appeal, and without legal authority. Delaney's authority as Chief Hearing Officer rests within the FINRA's 9200 Series rules as essentially a trial level tribunal. As noted in the April 17, 2019 notice to the Parties, once on appeal, the Rule 9300 Series becomes the operative rules that guide the proceeding.

E. FINRA's NAC Improperly Considers Delaney Remand Request, and without Notice to Parties, Remands Case to OHO.

Upon receipt of Delaney's Remand Request, the NAC failed to notify Respondent of its receipt of this request from Delaney. There is nothing in the record to reflect whether the NAC made any legal or factual inquiry as to the legality of acceding to Delaney's request. There is nothing in the record to reflect whether Delaney's Remand Request was reviewed and decided by a NAC Subcommittee that should have been established to review this appeal.

Respondent was not afforded an opportunity to be heard as to the legality or appropriateness to remand without any further proceedings. Nor was Wicker given the opportunity to adduce additional evidence under Rule 9346 based on the new information contained in the Delaney Remand Request because he was not provided that letter and the NAC did not allow for notice or the opportunity to be heard.

The NAC did not issue any written order or decision articulating its findings or setting forth a basis for the acceding to Delaney's Remand Request. There is no record of whether the NAC engaged a subcommittee to hear the matter on appeal or whether it was decided by the NAC Chair.

Instead, on the very next business day, Monday, November 11, 2019, Alan Lawhead, FINRA Vice-President and Director – Appellate Group in OGC ("Lawhead") sent a very brief letter by email to Delaney ("NAC Remand Letter"). The NAC acknowledges that Wicker was not copied on this correspondence either.[26] The letter reads:

> Dear Maureen:
>
> On behalf of the National Adjudicatory Council (NAC), I am relaying the following ruling. Pursuant to the letter from the Chief Hearing Officer dated November 8, 2019, the NAC hereby remands the above-referenced case to the Office of Hearing Officers. The entire record in the proceeding is being sent to the Office of Hearing Officers.
>
> Please call me if you have any questions.

[26] NAC Decision, n. 9.

F. Order Vacating Decision and Assigning New Hearing Officer Pursuant to Rule 9233(a)

The day after receiving Lawhead's NAC Remand Letter on behalf of the NAC, on November 12, 2019, Delaney took the unprecedented step of issuing an "Order Vacating Decision and Assigning New Hearing Officer" ("Order Vacating"). (FINRA002085) Delaney cited Rule 9233(a) as her authority to vacate the hearing panel decision dated March 21, 2019. The stated basis for her decision to vacate the hearing panel decision was:

> Based upon information received by the Office of Hearing Officers after the decision in this proceeding was issued on March 21, 2019, I find that circumstances exist where the fairness of the Hearing Officer in the proceeding ("Former Hearing Officer") *might reasonably be questioned as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement.* [Emphasis added]

As described in the Argument section below, the explanation Delaney provided to the NAC for seeking a remand of the original OHO hearing panel decision was materially different than the explanation provided to Respondent in the NAC Remand Letter. Again, the continued lack of transparency here or concern for unethical behavior by Enforcement in this proceeding is shocking. Delaney failed to disclose how or where the Office of Hearing Officers received the information she referenced, what the information was, when it was received, or why she felt the fairness of the Former Hearing Officer, Crawford, might reasonably be questioned. [27] Clearly, those basic facts would be important to inform the NAC in its consideration of Delaney's request for a remand, but they were never requested or provided.

Indeed, on November 12, 2019, nearly eight months after the Crawford OHO hearing panel decision was issued, Respondent learned for the first time that, as Delaney obliquely described it "I find that circumstances exist where the fairness of the Hearing Officer in the proceeding ("Former Hearing Officer") might reasonably be questioned *as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement*. (Emphasis added). Unlike Enforcement and Delaney, Respondent had no knowledge of when Crawford left OHO, when she joined Enforcement, whether she was employed somewhere else in between, or any circumstances leading to the change.

[27] After receiving the correspondence between Delaney and Lawhead as part of the Supplemental Record on January 12, 2021, Respondent requested that Enforcement provide documentation reflecting the timing and other details surrounding the negotiations between Enforcement and Crawford that took place in 2019. Respondent also filed with NAC a motion to adduce new evidence in accordance with Rule 9346. Finally, Respondent requested that OGC identify any additional communications between the NAC, or OGC and Delaney regarding the request and decision to remand the pending appeal back to OHO. As of the filing of this brief, Enforcement has not responded to either the request for information concerning the hiring of Crawford or the motion. OGC has not responded to Respondent's request for information on any additional communications related to the remand request.

All Respondent was told and could therefore piece together was that sometime between March 2019 when she served as a hearing officer in his matter, and November 12, 2019, some eight months span, Crawford became employed with Enforcement. Respondent did not consider Crawford's mere subsequent employment alone to be a red flag that she or Enforcement engaged in unethical content during the pendency of the proceeding, given the eight months had already passed between the OHO panel decision and this notice that Crawford worked for Enforcement.

G. Second Hearing Officer Claims not to Know any Additional Facts Relating to the Remand

Upon remand, Delaney appointed Lucinda McConathy ("McConathy") to serve as the new Hearing Officer for the second OHO proceeding against Respondent. (FINRA002087) At the initial pre-hearing conference, and indeed throughout that second proceeding, Enforcement never revealed that it was the department's own engagement in employment negotiations with Crawford that caused the remand and necessity to retry the case.

Respondent was not aware that the Chief Hearing Officer had determined that Crawford was disqualified on or before the date the decision was issued on March 21, 2019. When McConathy held the initial pre-hearing conference on November 20, 2019, she made it clear that she had no information about the prior proceeding other than what she read in Delaney's Remand Order. She informed the Parties:

> I want to address the question that I imagine is on your mind why are we here. What I know about this is in the order vacating the prior decision. And that is all I know about why we are here and how we got here. (FINRA002101)

H. FINRA comments publicly but tells Respondent nothing.

FINRA has never explained to the Respondent its basis for determining that "the fairness of [Crawford] in the proceeding …might reasonably be questioned as a result of the subsequent employment of [Crawford] by the Department of Enforcement."[28] It never informed Respondent how it determined that the appropriate remedy for Enforcement's serious ethical misconduct was to wipe the slate clean, give Enforcement another bite at the apple and require Wicker to endure the burden of going through yet another hearing.

However, FINRA has been willing to speak publicly about this matter. In a *Wall Street Journal* article appearing on November 22, 2019, it quoted A FINRA spokesperson addressing this case saying,

> While there is no evidence of any bias on the part of the hearing officer, FINRA is rehearing the case out of an abundance of caution to ensure that all participants can have confidence in the impartiality of FINRA's hearing process.[29]

[28] Order Vacating Decision and Assigning New Hearing Officer, Dated November 12, 2019 (FINRA 002065)
[29] https://www.wsj.com/articles/regulator-to-rehear-disciplinary-case-due-to-potential-conflict-11574463613

Beyond that quote, according to the Wall Street Journal, "Ms. Crawford, through a FINRA spokesman, declined to comment. FINRA declined to comment on Ms. Crawford's job negotiations at the time of the Wicker hearing and decision in March."[30]

Quite surprisingly, to Respondent's knowledge, neither OHO nor the NAC ever sought any information in this proceeding that asks Enforcement to explain its negotiations with Crawford. Enforcement refused Respondent's request that it produce documents regarding its offer to hire Crawford and establish her as the department's head of its litigation group. One might even question Enforcement's judgment in wanting to hire someone to run its litigation group who just so blatantly violated a basic precept to FINRA's disciplinary process and judicial ethics by both being willing to negotiate with a party appearing before her and also not disclose the conflict of interest. Again surprisingly, at least to the Respondent, to this day, despite clear, serious ethical violations while serving as a hearing officer, Crawford continues to serve in her officer-level position in Enforcement.

I. Second Hearing Panel Ignores Respondent's Argument for Rule 9280 Sanctions Against Enforcement

During this second proceeding, Wicker argued in his post-hearing brief that Enforcement engaged in contemptuous conduct under Rule 9280 during the first proceeding, and that consequently, the Extended Hearing Panel should dismiss the Complaint against him. (FINRA003279)

The decision issued by the Extended Hearing Panel following the second hearing cited Wicker's argument as having been raised, but failed to actually address the merits of Respondent's argument as to Enforcement's misconduct.[31] Instead, the decision focused solely on Delaney's remand order based on Crawford's conduct. The extended hearing panel's determination not to address Enforcement's misconduct raised by Wicker demonstrates the difficulties that respondents have in FINRA's disciplinary process. Noting only Crawford's misdeed (and not Wicker's opponent who she was negotiating with), the panel determined that a mere redo of the hearing was the appropriate remedy. The decision states:

> The remedy in a case where an adjudicator should have disqualified him or herself for an appearance of potential impropriety is to vacate that adjudicator's decision and provide another trial free from any appearance problem. Wicker is incorrect that the circumstances here entitle him to dismissal of the charges against him.[32]

FINRA's persistent approach of ignoring Enforcement's unethical conduct was demonstrated in the second OHO decision.

[30] Id.
[31] Extended Hearing Panel Decision (FINRA 003330)
[32] Extended Hearing Panel Decision(FINRA 003331)

IV. ARGUMENT

A. FINRA Failed to Properly Address Enforcement's Contemptuous Conduct under Rule 9280.

This case presents such a departure from the fundamental fairness in the proceedings required to be provided to respondents that it justifies the striking of the Complaint. FINRA acknowledges in the NAC Decision that "a Hearing Panel may sanction a party who engages in contemptuous conduct during a proceeding."[33] It further cited Rule 2980(b)(1)(c), for the proposition that sanctions available to a Hearing Panel include striking proceedings.[34] The NAC Decision noted that a ruling under Rule 9820(b)(1)(c) is equivalent to a motion to strike a complaint.[35] It states that "[d]ismissal is "a severe and extreme sanction" and should be imposed only "to the extent necessary to induce future compliance and preserve the integrity of the system." (citing *Larson*)

In analyzing whether to hold a party in violation of Rule 9280 and subject to its sanctions, it is necessary to consider the actions of the party during the course of the proceedings. FINRA erred in doing just the opposite. Instead of focusing on Enforcement's conduct during the proceeding, it focused on the behavior of the Hearing Officer and how it accommodated for Crawford's failure to disclose her conflict of interest.

While acknowledging that "[a]s and initial matter, we note that this case presents us with unusual circumstances," it then immediately pivots to proclaim the importance of having "impartial adjudicators" rather than the importance of having *parties* not engage in contemptuous behavior, which is the point of the rule.[36] Again, focusing on the behavior of the Adjudicator and not the adverse party complained of by Respondent, the NAC Decision notes:

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[33] NAC Decision, p. 14.

[34] 9280. Contemptuous Conduct

(a) Persons Subject to Sanctions

If a Party, attorney for a Party, or other person authorized to represent others by Rule 9141, engages in conduct in violation of an order of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, or other contemptuous conduct during a proceeding, a Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may:

(1) subject the Party, attorney for a Party, or other person authorized to represent others by Rule 9141, to the sanctions set forth in paragraph (b); ….

(b) Sanctions Other Than Exclusion

A Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may make such orders as are just in regard to a Party, an attorney for a Party, or other person authorized to represent others by Rule 9141.

(1) Such orders may include:

(C) an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the Party subject to the order obeys it;

[35] NAC Decision, p. 14, citing *Dep't of Enforcement v. Larson*, Complaint No. 2014039174202, 2020 FINRA Discip. LEXIS 44, at *20 n. 18 (FINRA NAC Sept. 21, 2020).

[36] NAC Decision, p. 15.

> We find, however, that under the circumstances currently before us, the proper course of action to address the Former Hearing Officer's employment by Enforcement subsequent to the First Hearing Panel's decision was taken here.[37]

In addressing Respondent's arguments under Rule 9280 for dismissing the Complaint based on Enforcement's behavior, the NAC gave the most glancing attention to it – relegated to a legal conclusion in a footnote, where it claims that "the record does not show that Enforcement acted willfully or in bad faith…."[38] It is not explained how Enforcement's efforts to negotiate the hiring of an Adjudicator while simultaneously appearing before her, and not even disclosing such behavior to the *pro se* party opponent can be any *but* a willful act and in bad faith.

There is no other way to reasonably view the facts than to find that Enforcement's actions were willful and in bad faith. Although Enforcement has never acknowledged that the department was negotiating to hire Crawford as head of its Litigation Group while appearing before Crawford in this matter, there is only one way to interpret the basis for Delaney's stated basis for seeking a remand – that she "received information regarding whether [Crawford] was subject to disqualification *on or before the date the decision … was issued, March 21, 2019*." (Emphasis added) The only reasonable explanation for taking this unprecedented action of seeking to remand a completed hearing that was pending on appeal was that Crawford was disqualified because she was negotiating employment with Enforcement on or before March 21, 2019, that eventually came to fruition.[39] The unethical act was the negotiations by Crawford and Enforcement during the proceeding, not her eventual taking of a position with Enforcement well after the Hearing Panel decision was issued.

In discussing the application of Rule 9280, the NAC further attempted to avoid the focus on Enforcement's actions by claiming that "the Chief Hearing Officer vacated the First Hearing Panel Decision within several months

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[37] NAC Decision, p. 15. The NAC Decision is replete with references to Crawford's behavior causing the remand order but ignores the fact that it takes two parties to negotiate employment. Enforcement, the Complainant in this matter, was the other party. *See* e.g., NAC Decision, p. 2: [The Chief Hearing Officer] learned that circumstances existed where the fairness of the presiding Hearing Officer who authored the March 21, 2019 decision … might reasonably be questioned." See NAC Decision, p. 9: The Hearing Panel also rejected Wicker's argument that the entire proceeding should be dismissed pursuant to FINRA Rule 9280. It found that the appropriate remedy to rectify any failure by the Former Hearing Officer to recuse herself was applied here. See NASD Decision, p. 14: Wicker claims that Enforcement had unclean hands…. We find that the Hearing Panel did not abuse its discretion in denying Wicker's request to dismiss the proceeding. Wicker received a faire proceeding before an impartial adjudicator….As a final example, see NAC Decision, p. 16, which says "the remedy applied here to address any appearance of a conflict of interest by [Crawford] is consistent with how other adjudicators have handled similar situations. In each of those examples, the NAC simply ignored Respondent's argument of the need to look at Enforcement's behavior outside the hearing room to determine whether it had unclean hands, and not simply repeat that Craford's conflict of interest was cured.

[38] NAC Decision, n. 15.

[39] The NAC Decision further attempts to minimize the impact on Respondent, claiming that "the Chief Hearing Officer vacated the First Hearing Panel Decision within several months of learning that the Former Hearing Officer had accepted a job with Enforcement.

of learning that the Former Hearing Officer [Crawford] had accepted a job with Enforcement."[40] Obviously, the Chief Hearing Officer was aware Crawford's move to Enforcement at least as of the day she left OHO in May 2019, and likely had some advance warning if Crawford gave notice of her intention to leave. The fact that Delaney's Remand Request was written approximately six months after Crawford left OHO demonstrated that the basis for the disqualification based on an appearance of fairness went well beyond her mere subsequent employment with Enforcement.

Instead of conceding that fact that it had engaged in such negotiations, and arguing from that point, and instead of allowing for transparency and discovery on that issue, Enforcement continued to insist that the NAC disregard what it knows to be unethical employment negotiations because of a lack of "citations to the relevant portions of the record, including references to specific pages relied upon, and by concise argument, including citations of such statutes, decisions, and other authorities as may be relevant."[41] Regrettably, the NAC adopted Enforcement's position, denying to consider Enforcement's actions.

In determining whether this matter rises to the level of threatening the integrity of the system, the Commission should consider whether Enforcement and other FINRA departments can be any more disingenuous than to argue for lack of a reference to the record when: Enforcement is the party that possesses all the information, and the disclosure of Crawford's disqualification at the time the matter was still before her was first made to Respondent on January 12, 2021 – after the record was closed. This questions whether this self-regulatory organization is truly committed to the integrity of its own disciplinary process and yearning for the disclosure of truth and justice.

It is not only Enforcement's *original sin* of engaging in the negotiations with Crawford while appearing before her, but its subsequent, persistent efforts to hide its unethical behavior that demonstrates that dismissal of the matter is necessary under Rule 9280 to induce future compliance by FINRA and to preserve the integrity of the system, as *Larson* so requires.

B. FINRA Failed to properly address Enforcement's unclean hands

The Commission should dismiss this Complaint due to the unclean hands that Enforcement has applied in prosecuting this case. FINRA has long accepted that the doctrine of unclean hands applies to all parties in its disciplinary proceedings. According to the NAC in a 2002 decision:

> One longstanding equitable concept is that a party with "unclean hands" may not benefit from equitable relief, whether in the form of a defense to a claim *or an affirmative cause of action.* The

[40] NAC Decision, n. 15.
[41] Enforcement's NAC Answer Brief, n. 83. (FINRA003708)

> "unclean hands" doctrine permits an adjudicator to withhold equitable relief from a party who is guilty of wrongdoing in relation to the controversy.[42] (Citations omitted) (Emphasis added)

The NAC's acknowledgment of the unclean hands doctrine is consistent with the U.S. Supreme Court, which has held:

> He who comes into equity must come with clean hands. This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [other party]. . . . This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.[43]

Section 15A(b)(8) of the Securities Exchange Act of 1934 requires that FINRA disciplinary proceedings be conducted in accordance with fair procedures.[44] As already discussed, through its negotiations with the Adjudicator while prosecuting the case against Respondent before that same Adjudicator, and thereafter maintaining secrecy around those communications, Enforcement has established itself as a party that lacks clean hands in this proceeding. It is not only appropriate for the Commission to consider Enforcement's unclean hands but its obligations to consider them in meting out a fair outcome. Under the doctrine of unclean hands, the Commission not only can but should withhold the equitable relief sought by Enforcement – that of disciplining Wicker in this matter.

There is nothing unique or new about the concept of dismissing a Complaint against a Respondent in a FINRA proceeding regardless of the charges, in order to ensure the fairness of FINRA's disciplinary process. For example, in *Jeffrey Ainley Hayden ("Hayden")*, the Commission determined that the requirement for fairness dictated that the matter be dismissed to ensure fairness due to the delay.[45] In *Hayden*, the New York Stock Exchange ("NYSE" or "Exchange") censured and barred the respondent for allegedly making unsuitable investment recommendations to customers, material misrepresentations and omissions about investment and returns, and made or caused omissions and inaccuracies in customer account documents. Hayden did not dispute the findings of violation but argued that the proceedings were fundamentally unfair.

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[42] *Department of Enforcement v. Morgan Stanley DW Inc. et al*. 2002 NASD Discip. LEXIS 11 (NAC July 29, 2002)
[43] *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814-15 (1945)
[44] *Mark H. Love*, 57 S.E.C. 315, 323 (2004); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009), *aff'd*, 416 F. App'x 412 (3d Cir. Nov. 23, 2010)
[45] Exchange Act Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000)

In overturning the NYSE decision, the Commission opined: "we have indicated that a fundamental principle governing all SRO disciplinary proceedings is fairness… [T]he Exchange does have a statutory obligation to ensure the fairness and integrity of its disciplinary process."[46]

Hayden was affirmed in *Morgan Stanley,* yet another case where a complaint had to be dismissed in order to ensure fairness to the Respondent. In fact, in *Morgan Stanley*, the NAC applied the unclean hands doctrine to examine whether the respondent in that case was precluded from arguing that the proceeding was unfair by looking at delays cause by the respondent.[47]

Despite the authority cited above, the NAC erred in dismissing Respondent's argument that Enforcement can be sanctioned under the theory of unclean hands. According to the NAC:

> We have previously held that a respondent "may not maintain as a matter of law, any defense that rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct.

For support of that assertion, the NAC cited *Dep't of Enforcement v. Epstein*.[48] However, for that same legal assertion that the NAC relies on, the NAC in the *Epstein* case cited:

> Cf. *FTC v. Image Sales and Consultants, Inc.*, No. 97-Civ.-131, 1997 U.S. Dist. LEXIS 18942, at *7-8 (N.D. Ind. Sept. 17, 1997) (finding that the doctrine of unclean hands may not be invoked as an affirmative defense against a ***regulatory agency*** that is attempting to enforce a congressional mandate in the public interest) (Emphasis added)

As noted in the accompanying notation to the citation and repeated in other cases, the inability to assert unclean hands only applies when the complainant is a "regulatory agency." Unfortunately for FINRA, it is not a regulatory agency and as a result, the doctrine of unclean hands can properly be applied to its unethical behavior. Interestingly, nowhere in its Answer Brief to the NAC did Enforcement deny Respondent's claim that Enforcement's actions constitute "unclean hands." Instead, it relied on the same faulty argument that the doctrine may not be employed against FINRA. That argument is completely contrary to the specific authority cited by NAC above.

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[46] Exchange Act Rel. No. 42772, 2000 SEC LEXIS 946 (May 11, 2000) at *4, *6.

[47] *Department of Enforcement v. Morgan Stanley DW Inc. et al*. 2002 NASD Discip. LEXIS 11 (NAC July 29, 2002) at *36.

[48] *Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *88 (FINRA NAC Dec.20, 2007), aff'd Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009), aff'd 416 F. App'x 142 (3d Cir. 2010)

In Enforcement's brief before the NAC, it also cited the *Morgan Stanley* case for the proposition that the unclean hands doctrine cannot be employed in this matter.[49] Further, Enforcement's citation to the NAC decision in *Neaton*, while ignoring the significant distinction made by the SEC in its decision on appeal is likewise striking.[50]

In *Neaton*, the broker alleged that Enforcement engaged in conduct during the investigative phase that prejudiced him. In the Commission's decision in *Neaton*, the Commission made a clear distinction that is critical here – that Exchange Act Section 15A(b)(8) requires FINRA to provide a fair procedure in an *adjudicatory process*, but not in the *investigative process*, which is what Neaton was complaining about. In so describing the distinction, the Commission affirmed Respondent's argument that he may rightfully raise Enforcement's acts that constitute unclean hands in this matter. In *Neaton*, the Commission opined:

> *Neaton* complains that the Hearing Panel wrongly struck affirmative defenses alleging that FINRA staff prevented him from settling this matter before the issuance of a complaint and failed to provide him notice that he was entitled to have counsel present at an on-the-record interview ("OTR").
>
> FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings. Rather, FINRA is required to "provide a fair procedure for the disciplining of members and persons associated with members" under Exchange Act Sections 15A(b)(8) and 15A(h)(1). Thus, Neaton's arguments with regards to the alleged denial of 5th Amendment due process are inapplicable.
>
> As a general matter, Neaton's affirmative defenses relate primarily to "the conduct of Enforcement during the *investigation*" (emphasis added). Exchange Act Section 15A(b)(8) requires SROs to provide a "fair procedure" in an *adjudicatory proceeding*. This statutory requirement does not extend to investigations. The purpose of an investigation is to "determine whether the [SRO's] investigation has produced evidence meriting further proceedings" -- not to determine whether a violation has actually occurred.[51] (Emphasis added)

Before the NAC, Enforcement cited as authority that "the doctrine of unclean hands may not be invoked as an affirmative defense against a *regulatory agency* that is attempting to enforce a congressional mandate in the public interest."[52] (Emphasis added) However, as noted by the SEC in the *Neaton* decision above, FINRA is not a state actor, and people do not have the same constitutional rights in a FINRA proceeding that they have in a government proceeding.

Black's Law Dictionary defines a "regulatory agency" as a "government body formed under the terms of a statute to ensure compliance with the acts provisions."[53] Britannica Encyclopedia similarly defines it as an

[49] Id.
[50] *Richard A. Neaton*, Sec Act Rel. No. 65598, 2011S.E.C. LEXIS 3719 (Oct. 20, 2011)
[51] 2011 SEC LEXIS 3719, *34-35
[52] Enforcement's NAC Answer Brief at 17. (Citations in Answer Brief at footnote 94 omitted)(FINRA003711)
[53] https://thelawdictionary.org/regulatory-agency/

"independent governmental body established by legislative action in order to set standards in a specific field of activity or operations…."[54] FINRA is *not* a regulatory agency. FINRA is a non-governmental, self-regulatory organization that is not obligated and indeed does not provide the same fundamental rights to its members that those members are afforded under the U.S. Constitution.[55] Similarly, the protections afforded regulatory agencies are not necessarily afforded to FINRA. Indeed, the cases cited by Enforcement claiming that the unclean hands doctrine do not apply were both from federal regulatory agencies – the Federal Trade Commission and the U.S. Securities and Exchange Commission.[56]

Finally, the NAC opined that "even if the equitable doctrine of unclean hands could be used by a respondent to negate his own misconduct, Wicker's argument here is indistinguishable from his claim that the Hearing Panel should have dismissed the proceeding pursuant to FINRA Rule 9280 based upon Enforcement's purport contemptuous conduct."[57] The NAC then rejected the unclean hands claim "for the reasons discussed above [in the Rule 9280 discussion]. As described above, the NAC's faulty analysis in the Rule 9280 discussion wherein it looked only to Crawford's conflict of interest is significantly different from Respondent's rights to claim unclean hands against Enforcement in a non-governmental disciplinary proceeding.

C. FINRA Erred in Failing to Assign the First Appeal to a NAC Subcommittee

There is no evidence in the record that the decision to remand Respondent's initial appeal to the NAC was done in conformity with FINRA's own obligations to have the NAC establish a Subcommittee to review and decide on the appeal.[58] The record reflects only that Delaney's Remand Request was made directly to the NAC Chair and that the OGC attorney advised Delaney the very next business day that the NAC was acceding to her request to have

[54] https://www.britannica .com/print/article/496265
[55] See *Neaton, supra*. For example, FINRA does not recognize an individual's right to assert his or her fifth amendment right against self-incrimination that is a cornerstone of individual rights in the U.S. Constitution. See also *Dep't of Market Regulation v. Alex Lubetsky*, 20110297130-02, (Mar. 13, 2015)
[56] Enforcement's NAC Answer Brief, n. 94. (FINRA003711)

[57] NAC Decision, p. 17.
[58] A review of the record supports a showing that no such Subcommittee was established for the initial NAC appeal, especially when compared to the administration of the second NAC appeal. For example. During the second NAC appeal, Respondent sought to modify the briefing schedule. In response to the request, OGC counsel, Andrew Love sent the parties a letter noting that the request for a modification in the briefing schedule. It then notes, "The Subcommittee empaneled to consider this appeal grants respondent's requests." In a footnote to the letter, the members of the Subcommittee are identified by name. (FINRA003411-13) By contrast, in the initial NAC appeal, Enforcement sought a modification of the briefing schedule. That motion was not opposed. In sending out a letter that is otherwise very similar to the one described above, in this case, the OGC counsel, Lisa Jones Toms acknowledges receipt of the request to modify the schedule and simply notes that "The request is GRANTED" without any reference to a Subcommittee to consider the request. No names are provided for any Subcommittee members who would have been required to rule on the motion, as was done for the second NAC appeal. (FINRA003461-63)

the matter remanded. Failure by the NAC to adhere to its procedural obligations to appoint a Subcommittee for review of the Delaney's Remand Request denied the Respondent the level of procedural protection and fairness that are afforded to him under FINRA's rules.

Once a party to a hearing panel decision files an appeal to the NAC, FINRA's rules require that the National Adjudicatory Council appoint a Subcommittee to every appeal from a Hearing Panel Decision. Rule 9331(a) ("Appointment by National Adjudicatory Council") directs that:

> [f]ollowing the filing of a notice of appeal pursuant to Rule 9311 … the National Adjudicatory Council or the Review Subcommittee ***shall*** appoint a Subcommittee or an Extended Proceeding Committee to participate, subject to Rule 9345, in a disciplinary proceeding appealed or call for review. [Emphasis Added]

Rule 9331(a)(1) ("Subcommittee") likewise directs that the establishment of the Subcommittee shall be composed of two or more persons, as follows:

> for each disciplinary proceeding appealed or called for review, the National Adjudicatory Council … shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. *A Subcommittee shall be composed of two or more persons* who shall be current or former members of the National Adjudicatory Council or former Directors or Governors.

Thus, it is a Subcommittee of two or more persons who by these rules is required to be established to consider the appeal.[59] In contrast to that enumerated authority, there is no such enumerated authority for the Chair of the National Adjudicatory Council to make rulings on the disposition of appeals pending before the NAC on his or her own.

Despite the reference above in the letter acknowledging the appeal by Wicker, there is no record that FINRA ever appointed a Subcommittee or Extended Proceeding Committee to consider Respondent's initial appeal in compliance with its obligations with Rule 9331(a). Nor is there any evidence in the record that the NAC Chair, Evan Charkes was a member of any such Subcommittee. The correspondence between the NAC and Chief Hearing Officer Delaney never identified such a Subcommittee. There is no other notice or correspondence with the Parties wherein the members of any Subcommittee are identified as having been appointed. FINRA's failure to appoint a Subcommittee was a significant departure from their procedures and had consequences when it came to the actions it took in remanding the matter.[60]

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[59] FINRA Rule 9120(dd) defines "Subcommittee" to mean "an Adjudicator that is …constituted under Rule 9331(a) to participate in the National Adjudicatory Council's consideration of an appeal or a review of a disciplinary proceeding pursuant to the Rule 9300 Series …."

[60] There is nothing in FINRA's Bylaws or Code of Procedure that grants the NAC Chair the authority to supersede the Subcommittee in determining the outcome of an appeal to the NAC. FINRA Bylaws Section 5.2 states that the Chair of the NAC "shall have such powers and duties as may be determined from time to time by the National

Having a Subcommittee of two to four persons review and decide motions help ensure that the matter will receive sufficient consideration and representation of the NAC as a whole. That is why the requirement for Subcommittee review exists in the first place.

D. FINRA erred in Permitting the Chief Hearing Officer to Submit the Delaney's Remand Request to the NAC, and without notice by Delaney or the NAC to the Parties

Delaney submitted the Delaney Remand Request to the NAC Chair on November 8, 2019. (FINRA 003501). Inexplicably, when she sent the letter to the Chair, the Chief Hearing Officer did not provide a copy of the letter to the Parties. Also, the NAC did not provide the Parties with a copy of the letter it received from Delaney.

Delaney's extrajudicial submission of the remand request triggered several procedural violations that prejudiced Respondent. These include:

a. Delaney was not a party to the proceedings and had no standing to submit the letter to the NAC;

b. Delaney failed to copy the parties to the matter on what is essentially a submission of evidence;

c. Delaney failed to cite any legal authority to intervene in an active NAC appeal; and

d. Delaney failed to provide sufficient factual evidence for the NAC to rule on.

In his appeal before the NAC, Respondent argued, as he does here, that the submission of such document was improper, and that the failure to copy the Parties on this submission of evidence and request for remand compounded that critical procedural error. The NAC's failure to copy the Parties on its receipt was also a critical procedural error as it was plain that the Parties had not been copied.

And yet, in its decision, the NAC rejected Respondent's objections on this issue regarding Delaney's Remand Request Letter saying:

> Wicker complains that the parties were not copied on the Remand Request and the Remand Order. ***FINRA's rules do not require that the parties be copied on these documents,*** and we find that the failure to do so here had no impact on the outcome of this proceeding or our resolution of Wicker's procedural arguments. ***However, in the future we encourage that in similar circumstances the parties be notified of such matters***. (Emphasis added)

To understand why NAC's opinion is in error, we start with FINRA's acknowledgement of receipt of Respondent's notice of appeal in a letter to the parties dated April 17, 2019. (FINRA 003421) That letter stated, among other things:

> - Pursuant to Rule 9346(b), a party who seeks to adduce additional evidence on appeal must file a motion seeking leave to adduce additional evidence…. ***A party who seeks***

Adjudicatory Council" but there is nothing that grants the Chair the authority he exercised in the matter to make the singular decision on behalf the NAC and its Subcommittee.

> ***to adduce additional evidence must provide copies of the motion to all other parties to this proceeding***. (Emphasis added)
>
> - All communications with FINRA's Office of General Counsel regarding this case must be in writing, ***with copies provided to all parties***. (Emphasis added)
>
> - Pursuant to Rule 9143, the Parties are directed not to engage in any *ex parte* communications with any attorney in this office ***or to contact any member of the NAC subcommittee assigned to this matter***. (Emphasis added)

Delaney's submission was fundamentally wrong. FINRA agreed "that the Remand Request was unusual."[61] Indeed it is believed to be unprecedented, and for good reason – it is an extrajudicial act not authorized in the FINRA Code of Procedure.

Jurisdiction of this matter had long passed from the Office of Hearing Officers and the Code of Procedure under the Rule 9200 Series to the NAC and the rules of the 9300 Series. That happened seven months earlier once Respondent filed his Notice of Appeal to the NAC on April 12, 2019. (FINRA 002021). The effect of Wicker's timely appeal, according to Rule 9311(b) is to stay the decision until the NAC issues its decision in the matter. Rule 9311(b) states in relevant part:

> An appeal to the National Adjudicatory Council from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the National Adjudicatory Council issues a decision pursuant to Rule 9349….

FINRA has long had the stay provision contained in Rule 9311(b).[62] In this case, the initial hearing panel decision was issued pursuant to Rule 9268, Decision of Hearing Panel or Extended Hearing Panel. Thus, the clear intent and legal effect of Rule 9311 is to move the jurisdiction of the matter from the trial or hearing level into the exclusive hands of the appellate level, which is the NAC.

FINRA recently rejected a suggestion to abolish the stay provision of Rule 9311(b). In the April 14, 2020 Federal Register, in responding to a public comment to eliminate the stay provision, FINRA stated:

> FINRA does not agree that repealing the provision in Rule 9311(b) that stays the effect of a Hearing Panel or Hearing Officer decision would be appropriate at this time. FINRA's rule that stays the effect of a Hearing Panel or Hearing Officer decision is consistent with rules of other self-regulatory organizations and the SEC.[63]

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[61] NAC Decision, p. 21.

[62] See *Department of Enforcement s. Franklyn Ross Michelin, L.H. Ross & Co., Inc.,* 2002 NASD Discip. LEXIS 1, January 3, 2002, FN 13. ("Procedural Rule 9311(b) provides that the appeal to the NAC of a Hearing Panel decision shall operate as a stay of that decision.")

[63] Federal Register Volume 85, No. 72, page 20768, *citing* footnote 134 which reads:

> See, e.g., 17 CFR 201.360(d) (providing that an SEC ALJ's initial decision shall not become final as to a party or person who timely files a petition for review); CBOE Rule 13.11(b) (providing that sanctions shall not become effective until the Exchange review process is completed or the decision otherwise becomes final); NASDAQ PHLX Rule 9311(b) (providing that an appeal to the Exchange Review Council from a disciplinary decision shall operate as a stay until the Exchange

Courts in other jurisdictions have likewise recognized that Rule 9311(b) stays a decision while it is pending with the NAC.[64] In Florida, a state court upheld the stay provision of Rule 9311, noting:

> Federal circuit courts have held that "[t]he NAC's decision (or the Hearing Panel's decision if there was no appeal) is FINRA's final action unless FINRA's Board of Governors calls for review." (citing *Scottsdale*) Further, "[a]n appeal to the National Adjudicatory Council from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the National Adjudicatory Council issues a decision pursuant to Rule 9349." FINRA Rule 9311(b). Thus, the Extended Hearing Panel's decision is final unless appealed to the National Adjudicatory Council. If appealed to the Council, the decision is stayed.[65]

Courts have held that the purpose of a stay is to preserve the status quo until the appeal is decided. In *Varian Medical Systems, Inc. v. Delfino,* the California Supreme Court explained:

> The purpose of the automatic stay provision … "is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it."[66]

If Delaney had information reflecting improper action by Crawford and Enforcement, she should have notified the parties and the NAC, allow those facts to be incorporated into the matter on appeal, and have the NAC Subcommittee determine the appropriate remedy after reviewing the record. Instead, the NAC opined that:

> [O]nce Delaney learned that [Crawford] may have been subject to disqualification pursuant to FINRA Rule 9233 by virtue of accepting a job with Enforcement subsequent to the First Hearing Panel decision, [Delaney] would have been derelict in her duties if she ignored this information and took no action.

As it turns out, Delaney was in fact derelict in her duties. First, this was first raised six months after Crawford left OHO. Second, Delaney failed to disclose how or where the Office of Hearing Officers received the information she referenced, what the information was, when it was received, or why she felt the fairness of the Former Hearing Officer, Crawford, might reasonably be questioned. [67] Third, it is inconceivable that while the parties to a NAC appeal

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> Review Council issues a decision); NYSE CHX Article 12, Rule 6 (providing that the enforcement of any orders or penalties shall be stayed upon the filing of a notice of appeal pending the outcome of final review by a Judiciary Committee or the Board of Directors)

[64] *Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth., Inc*., 844 F. 3d 414, 418 (4th Cir. 2016).
[65] *Turbeville v. Department of Financial Services*. No. 1D17-221 Court of Appeal of Florida, First District 248 So. 3d 194 2018 Fla. App. LEXIS 6164. (May 03, 2018)
[66] *Varian Medical Systems, Inc. v. Delfino* 35 Cal.4th 180 (Supreme Court of California Mar 3, 2005) p. 189, *citing Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629 [5 Cal.Rptr.2d 742].
[67] After receiving the correspondence between Delaney and Lawhead as part of the Supplemental Record on January 12, 2021, Respondent requested that Enforcement provide documentation reflecting the timing and other details surrounding the negotiations between Enforcement and Crawford that took place in 2019. Respondent also filed with NAC a motion to adduce new evidence in accordance with Rule 9346. Finally, Respondent requested that OGC identify any additional communications between the NAC, or OGC and Delaney regarding the request and decision to remand the pending appeal back to OHO. As of the filing of this brief, Enforcement has not responded to either

must strictly follow rules for adducing new evidence, and communicating with OGC and the NAC – all which require notice to the Parties, the Chief Hearing Officer, a non-party, can present new evidence, request that the pending appeal be abandoned and have the NAC remand the matter and not comply with the most basic obligation of notifying the Parties. Even the NAC admits that to adduce new evidence a party needs to copy the Parties on all correspondence.

Upon remand of the matter, it was also extraordinary to vacate the decision *sua sponte*, of its own accord and without the further consideration it promised in the Delaney Remand Request or input from the parties. By taking these extraordinary steps, again, without making a record or findings as to the basis for vacating the decision, Delaney was protecting OHO and Enforcement at the expense of the Respondent.

In ordering that the initial decision be vacated, Delaney cited Rule 9233(a) as her authority. Rule 9233(a), referenced by Delaney and upon which she relied, reads:

> **(a) Recusal, Withdrawal of Hearing Officer**
>
> If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter. In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer. In such a case, the replacement Hearing Officer shall proceed according to Rule 9231(e).

Rule 9233 does not contemplate the facts in the instant case where a decision has been issued and the matter is proceeding in accordance with the Rule 9300 series. It is intended to remove a hearing officer during the pendency of a disciplinary proceeding at the stage of the initial hearing under the Rule 9200 Series.

In its decision, the NAC rejected Respondent's argument that the NAC improperly accepted and ruled on Delaney's Remand Request. The NAC justified the initial acceptance and consideration of Delaney's Remand Request, explaining:

> As an initial matter, we reject Wicker's argument that the NAC could not consider the [Delaney] Remand Request because the Chief Hearing Officer was not a party to the proceeding. FINRA Rule 9346(a) prescribes the scope of what the NAC may consider on appeal. It ***generally*** limits the NAC's review on appeal to the record, "supplemented by briefs and other papers submitted" to the NAC and any oral argument. ***The Remand Request, although not submitted by Enforcement or Wicker, falls under "other papers submitted" to the NAC for its consideration. (***Emphasis Added)[68]

the request for information concerning the hiring of Crawford or the motion. OGC has not responded to Respondent's request for information on any additional communications related to the remand request.

[68] NAC Decision, pp. 22-23.

FINRA's explanation here fits the definition of what it means to try to fit a square peg into a round hole. It just does not fit no matter how you try. First, FINRA erred in its argument that the "other papers submitted" language extends beyond the parties and allows non-parties to submit evidence for consideration of how the Subcommittee should rule on the matter.

Rule 9346(a) ("Evidence in National Adjudicatory Proceedings -Scope of Review") states that:

> Except as otherwise set forth in this paragraph, the National Adjudicatory Council's review shall be limited to consideration of: (1) the record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee … and (2) any oral argument permitted under the Code.
>
> A Party may introduce additional evidence only with prior approval of the Subcommittee …or the National Adjudicatory Council, upon a showing that extraordinary circumstances exist under paragraph (h).

Rule 9346(h) states that a party must apply to the Subcommittee for leave to introduce additional evidence by motion filed not longer than 30 days after OHO's transmission of the record. The rule goes on to require that in such instances, the parties be served with such application.[69] The reference to the submission to the Subcommittee is also important here as it underscores the obligation for the Subcommittee to rule on the proceedings, rather than, for example, the NAC Chair.

Neither Enforcement nor the NAC have cited any rule, precedent, or other authority for the unlikely proposition allowing for the submission of "briefs or other papers" to the NAC by a non-party, and without notice. Given the strictures applied to parties seeking to introduce evidence for consideration and the requirement for service upon all parties, FINRA's explanation is not credible that the NAC could consider evidence submitted by a non-party, and that the material submitted by a single one-page letter would not be required to be served on the parties. Nor is it reasonable that a NAC Subcommittee would convene, consider but a single paragraph of evidence and rule on the disposition of the appeal without seeking notice and input from the parties before ruling – all in a single business day.

FINRA's statement that "we find that the failure to do so here [copy the parties on the Delaney Letter and NAC Remand Order] had no impact on the outcome of this proceeding or our resolution of Wicker's procedural

[69] Of course, the Delaney Remand Request, which the NAC considered as "other papers submitted" and therefore should have been part of the original record, came well after the 30-day period after OHO's transmission of the record and was not copies on parties. As the NAC described in its decision for not allowing Respondent to adduce additional evidence outside the 30-day window, "the moving party must describe the new evidence he seeks to introduce on appeal, show the evidence is material to the proceeding, and demonstrate that there was good cause for failing to introduce it below … and service the index on all parties." (NAC Decision, n. 18.)

arguments" is presumptuous and self-serving.[70] In fact, Rule 9346(c) specifically provides for the ability for parties to object to the submission of such additional evidence and the introduction of rebuttal.

E. NAC Erred in its Remand Based on Delaney Remand Request

1. NAC failed to dispose of the matter using a Subcommittee and on the basis of the record as defined by Rule 9267

The NAC violated its own rules and Respondent's right to a fair proceeding in its consideration of and agreeing to Delaney's Remand Request.

Rule 9346(a) sets forth the NAC's limited scope of review of a matter on appeal. According to the rule:

> Except as otherwise set forth in this paragraph, the National Adjudicatory Council's review shall be limited to consideration of:
>
> (1) the record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee or, if applicable, the Extended Proceeding Committee, and the National Adjudicatory Council; and
>
> (2) any oral argument permitted under this Code.

The rule does not allow for the consideration of Delaney's Remand Request, which was sent without notice to the parties. The NAC's consideration of a request for a remand from a trial level Adjudicator eight months after the issuance of the decision was completely outside of its permitted scope of review.

According to Rule 9434, any disposition of a matter without oral argument must be considered by a Subcommittee. Rule 9434 (Disposition Without Oral Argument) states:

> If an oral argument is not held, the matter shall be considered by a Subcommittee or, if applicable, an Extended Proceeding Committee, on the basis of the record, as defined in Rule 9267, and supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Adjudicatory Counsel in conjunction with the appeal, cross-appeal or call for review.

In this matter, the record reflects that the NAC disposed of the matter by way of a remand without consideration of a Subcommittee. The NAC also failed to dispose of the matter on the basis of the record as defined by Rule 9267 and allowable supplemental materials.

On May 8, 2019, the Chief Hearing Officer submitted a Certification of Record, Index of Record and underlying record in connection with the appeal (FINRA 002075-283) As of November 8, 2019, the Record

[70] NAC Decision, n. 23.

consisted of those documents provided by the Chief Hearing Officer pursuant to Rule 9321, supplemented by the pleadings and correspondence submitted by the parties.

In August and September 2019, Respondent and Enforcement submitted their respective appeal briefs to the NAC. There was no reply brief and there was no request for oral argument. All arguments had been submitted and the matter was ready for consideration by a NAC Subcommittee.

As noted above, there is no evidence in the record that the NAC established a Subcommittee to consider Respondent's appeal of the initial hearing panel decision. After sitting on the NAC appellate docket for more than six months, Respondent had received no notice of the establishment of a Subcommittee necessary by rule to consider the appeal.

There is nothing in the record to reflect whether the NAC made any legal or factual inquiry as to the legality of acceding to Delaney's Remand Request. It certainly did not provide Wicker with an opportunity to be heard as to the legality or appropriateness to remand without any further proceedings. Nor was Wicker given the opportunity to adduce additional evidence under Rule 9346 based on the Delaney Remand Request because he had not been given the Delaney Remand Request and the NAC did not allow for notice or the opportunity to be heard.

The NAC failed to issue any written order or decision articulating its findings or setting forth a basis for the acceding to Delaney's Remand Request. There is no record of whether the NAC engaged the Subcommittee required to be established to hear the matter on appeal or whether it was decided by the NAC Chair.

Instead of affording Wicker notice and an opportunity to be heard and adduce additional evidence to establish Enforcement's unethical conduct, the very next business day, November 11, 2019, Alan Lawhead sent a very brief letter in an email to Delaney. Wicker was not copied on the email. The letter reads:

> Dear Maureen:
>
> On behalf of the National Adjudicatory Council (NAC), I am relaying the following ruling. Pursuant to the letter from the Chief Hearing Officer dated November 8, 2019, the NAC hereby remands the above-referenced case to the Office of Hearing officers. The entire record in the proceeding is being sent to the Office of Hearing Officers.
>
> Please call me if you have any questions.

Even had the NAC Subcommittee met to consider Delaney's request, (for which there is no record of occurring), precedent cited by Enforcement and the NAC reflect that it should have been incumbent on the Subcommittee to consider evidence and arguments submitted by the Parties before issuing a decision as to the appropriate remedy or next steps in the disciplinary proceeding.

2. NAC Erred in Remanding the Case Without Notice or Fulfilling its Appellate Responsibilities

Rule 9349(a) provides that the NAC is to consider all matters presented in the appeal and the written recommended decision of the Subcommittee before determining the outcome of the appeal. In its resolution of an appeal, the NAC may affirm, dismiss, modify or reverse the decision of the Hearing Panel. The decision issued by the NAC may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the NAC may decide to remand the disciplinary proceeding with instructions for why it is being remanded. Rule 9349 directs that the NAC *shall* prepare a proposed written decision pursuant to Rule 9349(b).

In this case, the NAC issued no written decision and it is not known whether it ever prepared a "proposed written decision pursuant to Rule 9349(b)" as it was obligated to do. There is no such decision or proposed decision in the record. It also does not appear that the NAC followed its obligation to consider the written recommended decision of the Subcommittee before determining the outcome of the appeal, as it appears it never established a Subcommittee to review Respondent's initial appeal.

The NAC also failed in its remand to provide the instructions contemplated by the rule in issuing a remand. For example, in OHO Order 99-19 (CMS920002), the NAC remanded the proceeding to OHO "to conduct an evidentiary hearing pursuant to the NASD Code of Procedure …on the issues raised in the [SEC's] November 8, 1998 Decision and Remand Order."

The NAC was the appropriate body to evaluate the circumstances raised by Delaney and decide for itself, after reviewing all the facts, whether a vacated decision and new hearing was the proper remedy, given the unethical acts of both the Hearing Officer and Enforcement. All of the authority cited by Enforcement and the NAC reflects that when allegations of misconduct were alleged at the trial level, it was the appellate court that first conducted a factual review and issued a fact-based decision for its stated remedy.

For example, the NAC cited *DeNike v. Cupo*, 958 A.2d 446 (S. Ct. N.J. 2008) (decision vacated and new trial ordered where judge should have recused himself "to restore public confidence in the integrity and impartiality of the proceedings, to resolve the dispute in particular, and to promote generally the administration of justice.") and *Scott v. United States*, 559 A.2d 745 (D.C. Ct. App. 1989) (*en banc*) (unanimously reversing defendant's conviction and remanding for a new trial where judge should have recused himself)[71]

[71] NAC Decision, p. 16.

Unlike in the instant case, in both of these cases, *Scott* and *DeNike*, the determinations to remand and retry the cases were made by appellate courts after a review of the evidence and arguments from the parties. This case is strikingly different in that the determination to remove the matter from the NAC appeal calendar was made by only the Chief Hearing Officer at the trial court level without any input or the right to be heard by Respondent or a hearing by the NAC to .ascertain whether remand was the appropriate course of action.

In *Scott,* the defendant was criminally indicted for assault with intent to kill while armed. After he was convicted and sentenced, Scott learned that the trial judge had been engaged in discussions with the United States Department of Justice about employment as an attorney in the Executive Office for United States Attorneys – an office not directly tied to the office prosecuting the case, but still part of the Department of Justice that oversees United States Attorneys. Unlike the instant case, the department with whom the judge was negotiating was only remotely related to the office overseeing the prosecution.

Scott sought a new trial as a remedy to the conflict of interest. The DC Court of Appeals, in deciding the appropriate outcome, first examined and described in the written opinion, all of the appropriate facts that led to the appeal and found that the judge violated Canon 3(C)(1) of the American Bar Association's Code of Judicial Conduct which requires that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Code of Judicial Conduct Canon 3(C)(1). Only after that determination was made did the court turn to the appropriate remedy and granted the new trial sought by the defendant.

In *DeNike*, the Supreme Court of New Jersey summarized the facts as: "a lawyer approached a trial judge and asked if he would consider affiliating with the attorney's firm upon retirement. In response, the judge began preliminary negotiations with the lawyer. Throughout the brief period of their discussions, the lawyer was handling a contested, pending matter before the judge."[72] The court determined that "it was error for the trial judge *and plaintiff's counsel* to engage in employment discussions while the instant litigation was still pending."[73] (Emphasis added).

The New Jersey Supreme Court further opined that "we find that [the judge] and [plaintiff's] employment discussions … created an appearance of impropriety that required disqualification under Canon 3(C)(1) and *Rule* 1:12-1(f). That rule holds that "A *judge* shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the j*udge* is participating personally and substantially."

[72] *DeNike v. Cupo*, 958 A.2d 446 (S. Ct. N.J. 2008) at 449; 196 N.J. 502
[73] Id.

That court also cited Canon 3(C)(1) of the *Code of Judicial Conduct* which provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The court continued:

> Similarly, *Rule* 1:12-1(f) directs judges not to sit in any matter "when there is any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."
>
> We agree with the Assignment Judge and the Appellate Division that no evidence in the record shows [the trial judge] conducted the trial or post-trial proceedings in a biased or unfair way. To be clear, though, "it is not necessary to prove actual prejudice on the part of the court" to establish an appearance of impropriety; an "objectively reasonable" belief that the proceedings were unfair is sufficient. *State v. Marshall*,148 *N.J.* 89, 279, 690 *A.*2d 1, *cert. denied*, 522 *U.S.* 850, 118 *S.Ct.* 140, 139 *L.Ed.*2d 88 (1997).

Based on the facts fully developed and discussed by the appellate court, it determined to reverse the court decision and remand for a new trial. Again, the significant distinction here is that an appellate court: (1) reviewed all of the relevant evidence; (2) articulated the nature and extent of the potential or actual bias; (3) tied the acts to specific Canons of Ethics; (4) noted that it was the acts of *both* the judge and plaintiff's counsel that caused the error; and (5) finally determined the appropriate remedy based on those facts and the available remedy for that jurisdiction.

It is unclear how these two cases cited by the panel could have guided its decision not to even seek Respondent's arguments regarding Enforcement's misconduct and justify a new hearing without creating a factual record justifying it.

By contrast, in this case, there was no transparency, and no recitation of the facts that led the Chief Hearing Officer to: determine that she "find[s] that circumstances exist where the fairness of [Crawford] might reasonably be questioned as a result of the subsequent employment of [Crawford] by the Department of Enforcement." (FINRA 002085); or that the appropriate remedy, given all options available under the FINRA Code of Procedures, was to vacate the hearing panel decision and assign a new hearing officer to conduct a new hearing. Indeed, the Chief Hearing Officer completely failed to reference any wrongdoing on the part of Enforcement, who engaged Crawford in these prolonged negotiations and entertained the reclassification of the position to Vice President in order to lure Crawford to accept the position.

FINRA concedes that "the Remand Order did not include the items set forth in FINRA Rule 9349(b).[74] The NAC Decision attempts to excuse its failure to comply with its obligations, noting:

[74] NAC Decision, p. 24.

> Read in conjunction with the [Delaney] Remand Request (which sought a remand so that OHO could consider whether the Former Hearing Officer was subject to disqualification and conduct further proceedings), the Remand Order contained sufficient detail concerning why the NAC granted the Remand Request, and the Remand Order afforded the Chief Hearing Officer wide latitude on how to proceed on remand…. We find, however, that under the circumstances, a discussion of these factors was unnecessary because it was clear to all parties why the remand was ordered. Consequently, the failure to strictly comply with Rules 9349 (a) and (b) was harmless error.

There are multiple critical errors in the NAC's attempt to excuse FINRA's procedural errors, again at Respondent's expense. First, as noted above, the NAC Remand Order not only failed to contain the elements the rule requires to include, but it was never even provided to the parties at the time it was sent to the Chief Hearing Officer. Second, Rules 9349(a) and (b) do not contemplate that the written decision must be read in conjunction with another document that is not part of the record to meet its obligation to explain the ruling. Third, the NAC attempts to claim that it did not need to follow its obligations under the rule "because it was clear to all parties why the remand was ordered." In fact, it was not so clear to Respondent, the party that had *not* been part of the employment negotiations or had the opportunity to read Delaney's Remand Request.

It is now clear that Respondent was significantly prejudiced by not having the NAC issue to the parties a ruling consistent with the obligations under Rule 9349. Had the NAC complied with its obligations, Respondent would have had a significantly clearer understanding of the basis for the remand and would have been able to: seek additional discovery related to Enforcement's pursuit of the Adjudicator; pursue his claim of unclean hands and pursue his request for sanctions under Rule 9280 on a timely basis. Instead, FINRA withheld the information and then blamed Respondent with claims that he should have known.[75]

3. Respondent was Prejudiced by Enforcement's Serious Misconduct and FINRA's Fundamental Procedural Errors

Wicker was significantly prejudiced by both Enforcement's attempt to secretly negotiate an employment contract with an adjudicator he was appearing before, and by FINRA's cascade of procedural blunders in this matter. However, no such showing of actual prejudice is required under the circumstances of this case. In *DeNike*, another case involving an impartial adjudicator cited in the second Extended Hearing Panel decision, that court noted, "To be

[75] The NAC's comparison to the *Datek Sec. Corp*. case is likewise faulty. (NAC Decision, n. 25)(*Datek Securities Corp*., 51 S.E.C. 542 (1993) In *Datek*, the SEC found that the respondent was denied a fair hearing due to the behavior of members of the panel. In this case, the unethical conduct was not by the panel but by a party to the proceeding – Enforcement, and the remedies available to the party-opponent – Respondent likewise allow for the remedies of unclean hands and dismissal under Rule 9280.

clear, though, "it is not necessary to prove actual prejudice on the part of the court" to establish an appearance of impropriety; an "objectively reasonable" belief that the proceedings were unfair is sufficient."[76]

At this point, Wicker has been required to endure two disciplinary hearings, two NAC appeals, and now an appeal to the Commission. Although he has limited means to pay for legal counsel, and indeed tried the first hearing *pro se* and was appealing the first hearing panel *pro se*, Wicker has had to retain counsel for a second round of hearing and appeal that never should have happened. Wicker bears no responsibility for the re-hearing and second appeal, yet he bears significant financial costs, and was disadvantaged by having to put on a defense for a second time, giving Enforcement the advantage of hearing his case and reading his appeal brief stemming from the first hearing. The extended delay in reaching a resolution of the matter by more than a year, caused by the misdeeds of Crawford and Enforcement has significantly impaired Wicker's professional career.

Wicker stands here in this proceeding at a significant disadvantage to his opponent – Enforcement and FINRA because it is Enforcement and FINRA who know what happened but have never been required to provide an accounting of its actions that led to its decision to vacate the initial hearing panel decision. Those facts, which significantly disadvantaged Wicker, remain locked up by Enforcement and FINRA, who have never been asked to account for its abusive behavior in this disciplinary process. Neither Enforcement, the NAC, nor anyone else involved in the underlying scheme that allowed Crawford to sit as an adjudicator while knowing she was negotiating employment with a party appearing in front of her has ever been asked in this proceeding by any adjudicator to explain such basic facts as:

- When did Crawford first approach Enforcement to discuss applying for the position of head of its litigation group?
- Who made the initial inquiry about Crawford applying for the position, Enforcement or Crawford?
- Who are the people that Crawford spoke to in Enforcement during the application process?
- Who interviewed Crawford for the position?

[76] *DeNike v. Cupo*, 958 A.2d 446 (N.J. 2008) at 455; 196 N.J. 502, *citing* ***State v. Marshall***, 148 N.J. 89, 279, 690 A.2d 1, cert. denied, 522 U.S. 850, 118 S.Ct. 140, 139 L.Ed.2d 88 (1997)

- Who participated in the discussion and decision within Enforcement and at FINRA more broadly to increase the job posting from a Level 50 to a Vice President position? When was that decision made?
- Who within OHO did Crawford inform that she was applying for the position in Enforcement and what and when did she tell them?
- How long was OHO and/or the Chief Hearing Officer aware that Crawford had been negotiating a position with Enforcement before notifying Respondent?
- Who did the Chief Hearing Officer consult regarding her unprecedented order to vacate a decision on appeal before the NAC and what legal advice was she given?
- Why hasn't FINRA been more transparent in describing the misconduct?
- Why did the NAC allow an improper Order from the Chief Hearing officer to take away its jurisdiction of the case? Where is that permitted under the Rule 9300 Series?

To achieve fundamental fairness in this case, the Commission needs to dismiss the Complaint and get answers to the aforementioned basic questions.

F. FINRA Erred in ordering that the initial decision be vacated

Delaney cited Rule 9233(a) as her authority to order that the initial hearing panel decision be vacated.[77] Rule 9233 does not contemplate the facts in the instant case where a decision has been issued and the matter is proceeding in accordance with the Rule 9300 Series. It is intended to remove a hearing officer during the pendency of a disciplinary proceeding at the stage of the initial hearing under the Rule 9200 Series. For all the reasons described above, the move by Delaney was extrajudicial and designed to cover FINRA's ethical lapses by Crawford and Enforcement, to the detriment of Respondent.

G. FINRA Erred in Refusing to Permit Respondent to Adduce New Evidence once the Record on Appeal was Materially Supplemented

During Respondent's second appeal to the NAC, Respondent sought to adduce new evidence related to Enforcement's unclean hands due to its apparent employment negotiations with the Adjudicator during the course of the first hearing. FINRA's basis for denying Respondent's request to adduce new evidence was materially flawed.

Had Respondent been permitted to adduce new evidence, it likely would have shed additional light and provided the detailed facts needed to better establish that Enforcement acted in bad faith and unclean hands in offering employment to Crawford simultaneously with appearing before her in the instant matter.

After FINRA issued the Extended Hearing Panel Decision on June 5, 2020, Hearing Officer McConathy submitted a Certification of Record to the NAC pursuant to OHO's obligations under Rule 9321. (FINRA003367) In accordance with requirements under Rule 9321, McConathy declared, "I certify that the attached Record is complete." However, unbeknownst to Respondent who had been relying on that representation, it was not.

On January 4, 2021, Respondent had counsel file a Notice of Appearance on Respondent's behalf. (FINRA003415) Thereafter, on January 9, 2021, Respondent's counsel notified OGC that upon reviewing the Record on Appeal, there appeared to be documents missing from the record including:

> the correspondence, appeal schedule …party filings, or any rulings with regard to the first appeal…. Could you please supplement the record to reflect the correspondence, filings, briefs, and rulings in connection with the first appeal? The record includes the entire first hearing record and the notice of appeal and so it should also include the documents I referenced for the first appeal as part of the record. (FINRA003417-18)

Thereafter, on January 12, 2021, OGC sent Respondent's counsel a letter advising "that the record has been supplemented to include the documents reference in your letter, which were inadvertently omitted. Please find a revised index to the record, as well as copies of the omitted documents." (FINRA003419) [78]

The two most significant documents provided to Respondent for the first time in this amended index to the file was Delaney's Remand Request (FINRA003501) and NAC letter to Delaney granting the remand request. (FINRA003503) Upon seeing those documents for the first time, it became clear that the real basis for the remand by NAC and vacated initial hearing decision was materially different from the explanation Respondent had been told over and over again by FINRA.

Until receiving Delaney's Remand Request on January 12, 2021, Respondent was relying on the information contained in Delaney's, 2019, "Order Vacating Decision and Assigning New Hearing Officer" ("Order Vacating"). (FINRA 002085) In that Order Vacating, Delaney cited Rule 9233(a) as her authority to vacate the hearing panel decision dated March 21, 2019. The stated basis for her decision to vacate the hearing panel decision was:

> Based upon information received by the Office of Hearing Officers after the decision in this proceeding was issued on March 21, 2019, I find that circumstances exist where the fairness of the Hearing Officer in the proceeding ("Former Hearing Officer") might reasonably be

[78] OHO never provided a revised Certification of Record to include the omitted documents or explain why such documents were omitted from the record.

> questioned *as a result of the subsequent employment of the Former Hearing Officer by the Department of Enforcement*. (Emphasis added)

Now, as of January 12, 2021, Respondent now understood that Delaney told the NAC other information that caused her to seek a remand. By contrast, Delaney told the NAC:

> The Office of Hearing Officers has received information regarding whether the Hearing Officer … *was subject to disqualification on or before the date the decision in this proceeding was issued, March 21, 2019*. Based on that information, which the Office of Hearing Officers received after the decision was issued, I request that the [NAC] remand the case to the Office of Hearing Officers for consideration and further proceedings.[79] (*Emphasis added*)

The difference between what Respondent was told all along, that sometime after Crawford was employed as a Hearing Officer she began work as an attorney for Enforcement is materially different from what he learned on January 12, 2021, that Crawford was subject to disqualification on or before the date the decision was issued, March 21, 2019. In the first case, there is no clear connection to Crawford's activities while she was presiding as an Adjudicator in the hearing. In the second, it is clear that Crawford continued to be the Adjudicator at a time she was disqualified to do so. What someone does after they leave a job for another job is not a basis for understanding that you were treated unfairly eight months earlier. Knowing that the person was disqualified to serve as adjudicator at the time she was presiding over your disciplinary proceeding does give you enough information to question the process further and gather more evidence.

Based on this new evidence placed in the record for the first time (despite McConathy's certification that the record was complete), on February 1, 2021, Respondent filed a Motion to Adduce Additional Evidence on Appeal with the NAC. (FINRA003513) That motion was opposed by Enforcement and on March 4, 2021, the Subcommittee denied Respondent's Motion to Adduce Additional Evidence on Appeal. (FINRA003585)

On March 4, 2021, the Subcommittee denied Respondent's motion on two grounds, both of which are in error. First, the Subcommittee rejected the argument that knowing of subsequent employment was not materially different from knowing of the Hearing Officer's disqualification at the time she was presiding over the matter. Specifically, the Subcommittee opined:

> [R]espondent has not satisfied all prongs of FINRA Rule 9346(b). Specifically, respondent has not demonstrated that good cause exists for his previous counsel's failure to seek or introduce such evidence during the proceeding below. Beginning with the November 12, 2019 order vacating the March 2019 decision, respondent was on notice concerning former Hearing Officer Crawford's subsequent employment with Enforcement and the potential conflict created by this

[79] (FINRA 003501)

> hire. This issue was again raised during a November 20, 2019 prehearing conference attended by respondent's previous attorney…. The Subcommittee rejects respondent's argument that the January 2021 record supplement contained materially different information from what respondent knew beginning in November 2019 to excuse the failure to seek or introduce such information below.

In ruling that Respondent should have been on notice based on Crawford's subsequent hire by Enforcement, the Subcommittee failed to take into account:

- Respondent had no way of knowing when Crawford left OHO or when she joined Enforcement. Delaney did not disclose in the order vacating the decision that Crawford left for Enforcement just two months after the hearing panel decision was issued. Indeed, it was reasonable to assume from the order that she joined Enforcement only in November, some eight months after the decision was rendered, since that is when the Chief Hearing Officer informed the parties of the move. It is fair to assume that if Crawford joined Enforcement just two months after the decision, Delaney would have known that at the time and informed Respondent at that time.
- Delaney's notice of vacating the order gave no indication that she had found Crawford was disqualified at the time she was presiding over the matter.

Second, the Subcommittee also found that the motion to adduce additional evidence was untimely, even though it occurred within days of OGC supplementing the record. According to the Subcommittee:

> [U]nder the circumstances, the motion to adduce was untimely. Because the January 2021 supplement to the record did not contain material, new information relevant to the motion to adduce, the supplement did not reset the original 30-day deadline to file a motion to adduce additional evidence. For the same reason, the record supplement does not serve as good cause to extend the 30-day deadline.

If the Commission finds, as Respondent argues that the supplemented record contains material, new information, then the NAC's second argument fails as well.

The NAC Decision adopted the Subcommittee's findings and added another observation to support its earlier ruling not to permit Respondent to adduce additional evidence when it opined:

> We agree that during the entirety of the second proceeding, Wicker and his counsel were on notice that because of [Crawford's] employment by Enforcement shortly after the First Hearing Panel decision, circumstances existed where the fairness of [Crawford] might reasonably be questioned…"[80]

[80] NAC Decision, p. 19.

This reasoning by the NAC for denying Respondent's request is a good example of why the matter is now before the Commission. First, it falsely assumes that during the second proceeding the Respondent was aware of what both the hearing officer and Enforcement knew – that Crawford took the position with Enforcement just two months after rendering the opinion in Respondent's case. As noted above, Respondent was not aware that Crawford was working in Enforcement when he received Delaney's Order Vacating on November 12, 2019, and that did not specify that Crawford had been working in Enforcement since May 2019. In this example, the NAC was ascribing knowledge to Respondent that only the Hearing Officer and Enforcement had.

Second, it again focuses solely on Crawford's behavior and ignores the other party with whom Crawford was engaging in behavior that would likewise be unethical – Enforcement. Respondent was seeking to adduce additional evidence to establish Enforcement's unethical conduct that likely violated Rule 9280 - not just Crawford's behavior. NAC failed to account for Respondent's need to discover additional information regarding Enforcement's actions.

FINRA admitted in the NAC Decision that supplementing a record may reset the 30-day period for accruing additional evidence. The NAC opined:

> There may be situations where a record supplementation will reset the 30-day deadline for seeking additional evidence because the supplemental information was previously unknown to a party.[81]

While stating that "the omission was regrettable," the NAC erred in claiming that "nothing in the supplement contained materially new information."[82] Respondent asserts that given that he did not know of the timing of when Crawford left OHO and when she was subsequently employed by Enforcement, as the Subcommittee knew when it viewed the same evidence, this information did constitute materially new information for Respondent and FINRA erred in not resetting the 30-day period for Respondent to adduce additional evidence.[83]

H. FINRA erred in determining that the scope of discoverable material under *Brady* and FINRA Rules Excluded Employment Negotiations between Adjudicator and Enforcement During Proceedings

FINRA erred in its opinion that Enforcement was not required to produce documents related to its negotiations with Crawford.[84] FINRA justifies its position by ingenuously saying that Respondent "does not explain how documents related to negotiations with [Crawford] would have been prepared in connection with Enforcement's

[81] NAC Decision, p. 19.
[82] NAC Decision, p. 19.
[83] It is also worth noting that neither the NAC nor Enforcement argued that what was being sought was not relevant to the case. Instead, FINRA relied on purely administrative tactics to deny Respondent his right to adduce additional evidence to uncover Enforcement's serious misdeeds.
[84] NAC Decision, p. 20.

investigation into Wicker's misconduct."[85] And while it is accurate that such documents would not be material to whether Respondent converted funds,[86] it would be material to the question of whether Respondent received a fair hearing with a Complainant who fairly prosecuted the case or engaged in serious breaches of conduct during the proceeding to disqualify the Complainant from further prosecuting Respondent due to unclean hands.

While the NAC cites Rule 9251(a)(1) for the position that production of such documents are not required, it ignored Rule 9251(a)(3), which holds that "Nothing in paragraph (a)(1) shall limit the discretion of the Department of Enforcement to make available any other Document or the authority of the Hearing Officer to order the production of any other Document." Given the unique circumstances in this case, the documents sought by Respondent could have and should have been disclosed either voluntarily by Enforcement or been compelled through Rule 9251(a)(3).

It appears that in this matter, FINRA is taking the untenable position that if a party to a disciplinary proceeding engages in behavior that either intentionally or unintentionally compromises the impartiality and integrity of the Adjudicator, it need not be disclosed under FINRA's view of its regulatory obligation. There is strong circumstantial evidence that Enforcement did in fact engage in egregious behavior but is making every effort to hide behind its own procedures and using the other willing FINRA offices to help facilitate that coverup. That simply cannot be tolerated under any circumstances. FINRA's goal should be to be transparent in order to preserve the integrity of the financial regulatory scheme.

I. FINRA Failed to Consider the undue burden placed on Respondent because of Enforcement's own violative/unethical conduct requires dismissal of the Complaint

FINRA summarily dismisses the extra, undue burden placed on Respondent based solely on ethical violations by Crawford and Enforcement. Respondent's efforts to a full and fair proceeding that also takes into account FINRA's unethical actions have unnecessarily forced Respondent to continue to represent himself through the vacating of the Initial Decision, a second hearing, a second NAC appeal, and now this appeal to the Commission. We are now three years since the Initial Decision was issued and yet Respondent is still struggling to find justice through the FINRA disciplinary process. FINRA's attempt to white-wash Enforcement's gross unethical behavior in the first hearing by simply ordering a "re-do" is reprehensible enough. For FINRA to spin its unethical behavior to Respondent as "a rare second chance to recalibrate his arguments and defend himself," describing it as a "unique opportunity that almost

[85] NAC Decision, p. 20.
[86] NAC Decision. p. 20.

never arises" demonstrates an unwillingness to see the unfair effect of FINRA's bad behavior on Respondent and also come to grips with its own failings.

Being forced to go through the process this many times due to Enforcement's misconduct is not a boon to Respondent, particularly when the various departments involved in FINRA's disciplinary process join to shield Enforcement from its unethical behavior. It is a significant burden just on him through no fault of his own. Respondent would have preferred to be able to argue Enforcement's misdeeds at the first NAC appeal but was not given that option.

V. CONCLUSION

Respondent has been denied Respondent's right to fundamental fairness in FINRA's disciplinary process on multiple grounds described above. He has been severely prejudiced by the unchecked unethical behavior of both Hearing Officer Crawford and the Claimant Department of Enforcement. His rights to be informed and respond to critical filings by the Chief Hearing Officer and the NAC were denied and excuses were made justifying the denials. The right to have his first appeal considered by a Subcommittee and not a single individual was likewise denied without consequence.

Respondent asks that the Commission restore Respondent's right to fundamental fairness and insist on maintaining the integrity of a disciplinary system at FINRA that clearly failed Respondent in several material ways. Respondent has endured enough in trying to get a full and fair resolution at FINRA. Respondent urges the Commission to dismiss the single cause of action against him.

Respectfully submitted,

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