

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of  
Department of Enforcement,  
Complainant,  
vs.  
David B. Tysk  
Eden Prairie, MN,  
Respondent.

DECISION

Complaint No. 2010022977801

Dated: May 16, 2016

**Respondent materially altered computer notes of customer-related information subsequent to a customer complaint, and failed to disclose his alterations when he produced a copy of the notes as discovery in an arbitration proceeding. Held, findings affirmed and sanctions increased.**

**Appearances**

For the Complainant: Leo F. Orenstein, Esq., Jeffrey Pariser, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Brian L. Rubin, Esq., Charles M. Kruly, Esq., Sutherland Asbill & Brennan LLP

**Decision**

David B. Tysk is a general securities representative with Ameriprise Financial Services, Inc. (“Ameriprise”), a FINRA member firm. In April 2008, Tysk’s customer, GR, sent a complaint to Ameriprise raising suitability concerns regarding his \$2 million investment in variable annuities. Subsequent to GR’s complaint, Tysk accessed the ACT! Notes program (“ACT! Notes”) on his computer and made substantial changes to his notes under GR’s contact name including, among other things, adding entries related to his investment recommendations of the variable annuities to GR. In some cases, he backdated his notes to make it appear that the entries were contemporaneous with the event. Tysk’s conduct went undisclosed for several months. In the arbitration proceeding that followed, Tysk produced the revised version of his ACT! Notes during discovery, but did not inform GR or his firm of his alterations. Ultimately, GR did discover that Tysk had altered his notes, but only after repeated discovery requests and an order by the arbitration panel mandating a forensic examination of Tysk’s computer. The arbitration panel issued sanctions against Tysk for his attempts to block the discovery process

during an arbitration proceeding. The matter was then referred to FINRA's Department of Enforcement ("Enforcement") for disciplinary action.<sup>1</sup>

An Extended Hearing Panel found that Tysk violated FINRA's ethical standards of FINRA Rule 2010, its predecessor, NASD Rule 2110, and IM-12000 of FINRA's Code of Arbitration Procedure for Customer Disputes ("Arbitration Code") by altering customer-related information after the customer complained about the suitability of a recommendation, and failing to inform his firm or the customer of his alterations when he produced the notes in discovery in an arbitration proceeding.<sup>2</sup> For his misconduct, the Extended Hearing Panel suspended Tysk from association with any member firm in any capacity for three months and fined him \$50,000. After a review of the record on an independent basis, we affirm the Extended Hearing Panel's findings of violation, but increase the sanctions to a \$50,000 fine and one year suspension in all capacities.

## I. Procedural History

Enforcement filed an amended complaint on July 24, 2013 alleging four causes of action against two respondents, Tysk and Ameriprise. Two causes of action remain at issue in this case.<sup>3</sup> In the first cause, Enforcement alleged that Tysk altered his computer contact notes after receiving GR's complaint to bolster his defense to GR's suitability claims and concealed his alterations when he responded to subsequent discovery requests, in violation of NASD Rule 2110 and FINRA Rule 2010.<sup>4</sup> In the second cause, Enforcement alleged that Tysk failed to

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<sup>1</sup> See generally FINRA Rule 12212, and *infra* note 16 (permitting the arbitration panel to issue sanctions for a party's failure to comply with any provision of the Arbitration Code, and initiate a referral for disciplinary action at the conclusion of the arbitration proceeding).

<sup>2</sup> The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

<sup>3</sup> Enforcement's complaint also alleged violations against Ameriprise for its failure to immediately advise GR and his attorneys that the ACT! Notes previously produced in discovery were altered by Tysk; and its failure to produce a relevant exception report until the eve of the scheduled arbitration hearing (causes three and four). For its misconduct, the Extended Hearing Panel censured Ameriprise, fined it \$100,000, and imposed hearing costs for which it was jointly and severally liable. Ameriprise did not appeal the Extended Hearing Panel's decision, and the National Adjudicatory Council did not call for review the Panel's decision related to Ameriprise's case. The Extended Hearing Panel's decision issued on October 13, 2014 therefore constitutes FINRA's final disciplinary action against Ameriprise. Accordingly, the findings set forth in this decision solely pertain to Enforcement's allegations against Tysk.

<sup>4</sup> The first cause of Enforcement's amended complaint also alleged that Tysk continued to alter his contact notes on GR after the arbitration claim was filed in November 2008. In its decision, the Extended Hearing Panel did not find—and neither do we—evidence establishing

adhere to discovery rules in an arbitration proceeding when he altered his computer contact notes to bolster his defense and failed to notify GR or his firm of the changes after repeated discovery requests for his notes in violation of IM-12000 of the Arbitration Code and FINRA Rule 2010. After a five-day hearing, the Extended Hearing Panel rendered a decision on October 13, 2014 that makes the findings and imposes the sanctions as described above. Tysk appealed the Extended Hearing Panel's decision.

## II. Facts

Tysk entered the securities industry in 1987. He has worked for Ameriprise his entire career and is currently associated with the firm as a general securities representative. During the relevant period, Tysk was employed by Ameriprise as an independent general securities representative working in the Bloomington, Minnesota office. He had approximately 200 clients and sold traditional investment products, including mutual funds, stocks and bonds. Sales in variable annuity products accounted for roughly three percent of Tysk's book of business.

### A. Tysk's Relationship with Customer GR

Tysk was introduced to GR at a holiday party in December 2004 by his daycare provider and close family friend, JZ. At the time Tysk and GR met, GR was 75 years old and had a net worth of approximately \$55 million. Tysk testified that, at the holiday party, GR told him that he had heard great things about Tysk and wanted to invest with him, starting with \$1 million.

In March 2005, GR signed an Ameriprise client service agreement and became Tysk's customer. GR's first investment with Tysk was for \$750,000 and he invested primarily in mutual funds. After achieving a 24 percent rate of return on his initial investment, GR invested an additional \$250,000 in June 2006, and ultimately transferred his \$20 million fixed income portfolio to Ameriprise with Tysk as his financial advisor. At this point, Tysk testified that GR became "by far my biggest and most important client."<sup>5</sup>

Tysk also had a personal relationship with GR. Soon after meeting they became friends. They spent birthdays and holidays with each other, and vacationed together, including traveling throughout Europe by motorcycle on two separate occasions. Tysk's family became close to GR as well. Tysk testified that his children spent a considerable amount of time with GR and JZ, and often spent the night at GR's house.

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that Tysk substantively revised his notes after May 27, 2008. We therefore concur with the Panel's conclusion with respect to this allegation.

<sup>5</sup> GR eventually had eight accounts opened at Ameriprise with approximately \$30 million of total investments.

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

Around October 2007, after the market regressed, GR became dissatisfied with the performance of his investment portfolio and the corresponding fees he incurred. Tysk met with GR in January 2008, and again in February 2008 along with GR's business partner, RZ, to discuss GR's concerns with his investments. Tysk testified that approximately one month later, RZ sent him an email informing Tysk that GR was moving his accounts elsewhere. According to Tysk, GR then proceeded to transfer his Ameriprise accounts to another firm, with the exception of his variable annuity investments.

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

In response to GR's complaint letter, Ameriprise commenced an internal investigation on April 22, 2008, which included, among other things, interviews with GR and RZ, Tysk's written response to GR's complaint at or around April 25, 2008, and sometime thereafter, a review of Tysk's recommendations and supporting documentation, including his file notes and other customer records. By letter dated July 7, 2008, Ameriprise denied GR's demand to reverse the annuity purchases and waive the surrender charges, stating that "we are unable to substantiate your allegations of lack of disclosure and suitability."

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

B. The ACT! Notes Program

Tysk used an off-the-shelf computer program called ACT! Notes by Sage to keep track of customer contact information and to manage his business relationships. He had regularly used ACT! Notes since he purchased it in the early 1990s. ACT! Notes is a contact relationship management system designed to record events as they occur and provide reminders of tasks and future events. Features of ACT! Notes include a chronological display of customer-related events, calendar appointments, notes, “to-do” lists, and summaries of meetings and conversations. Although the firm did not require its employees to use ACT! Notes, at least half of Ameriprise’s Bloomington office employees used the program. At Tysk’s instruction, a copy of the ACT! Notes database was backed-up and saved to a remote hard drive on a weekly basis.

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

C. Tysk’s Alterations to his ACT! Notes

It is undisputed that, from May 13 through May 27, 2008, after Tysk received GR’s complaint, he opened ACT! Notes on his computer and substantially altered his contact notes on GR. Tysk added 54 new entries—with several of them containing substantial details about GR’s investment strategy—and supplemented 13 pre-existing note entries adding more event details.<sup>6</sup> He also overrode the ACT! Notes default prompts that would automatically populate the current date, and instead backdated his new entries to make it appear as if his notes were entered contemporaneously with the past event. In some cases, his altered notes provided extensive details about events and conversations with GR that occurred up to three years prior, including new entries that supported his investment recommendations at issue.<sup>7</sup>

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

<sup>7</sup> For example, Tysk’s ACT! Notes as of May 27, 2008 included an entry that Tysk backdated to January 9, 2006. More than two years later, and after receiving GR’s complaint, Tysk wrote:

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

Ameriprise's Code of Conduct required its employees to "maintain complete and accurate business records." It expressly required employees not to "shred, destroy, or alter in any way documents that are related to any imminent or ongoing investigation, lawsuit, audit, [or] examination . . .". Regarding customer complaints, Ameriprise's compliance policy and procedures advised that "any documentation you produce is subject to 'discovery' in litigation" and that "complete documentation is your best defense against complaints[,] " which included dated notes and documented conversations. Finally, Section 12.4.3 of Ameriprise's Regulatory Information Center Manual specified that if an employee were to receive a lawsuit or demand for arbitration regarding an Ameriprise client, the employee "must retain copies of all documents and notes about the client. Do not destroy, revise or alter these documents in any way."

D. GR's Arbitration Claim and Discovery Dispute

On November 21, 2008, GR filed an eleven-count FINRA arbitration complaint against Tysk and Ameriprise, alleging that Tysk and Ameriprise recommended and sold more than \$2 million in "unsuitable" variable annuities using funds from a fixed-income account and charged excessive fees in connection with the management of his portfolio.<sup>8</sup>

In a letter dated December 1, 2008, FINRA's arbitration case administrator, Patrick Walsh, sent Tysk GR's statement of claim, along with FINRA's Discovery Guide. The Discovery Guide, which is used as a supplement to the discovery rules under the Arbitration Code, provides a list of discoverable items for customer arbitration cases, including the following:

- 6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the custom[er]'s account(s) at issue.

Tysk produced the revised version of his ACT! Notes on GR in discovery but did not inform GR's counsel that he had altered his notes. The version he produced stated that it was "Edited on 5/27/2008" and "Last edited by David Tysk." Based on the edited date, which was after GR complained to Ameriprise, GR's counsel requested in a letter dated May 8, 2009 that

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could improve already good performance would be icing on the cake.  
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<sup>8</sup> The issues raised in GR's arbitration claim were similar to those raised in his demand letter, including that "Tysk sold two annuities contracts to [GR], a financially secure 77-year old, knowing that these annuities were unsuitable, carried heavy surrender fees for 10 years, and would generate income taxed at a rate nearly double that of other more prudent investment choices."

Tysk produce “[a]ll documents showing edits made by Mr. Tysk to the notes . . . including but not limited to the edits made on May 27, 2008.”

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

Before responding to the discovery request, Tysk’s counsel sent Tysk an email asking whether he knew anything about “any edits being made to the contact reports?” Tysk replied, “There are no other documents showing edits per their request.” Based on this response, Tysk’s counsel responded to GR’s discovery request stating “there are no such responsive documents.”

A three-day arbitration hearing was scheduled to begin on Monday, December 14, 2009. On the eve of the hearing, counsel for Tysk and Ameriprise produced an exception report that they claimed was inadvertently left out of their previous document production. The exception report was important evidence that purportedly proved that Ameriprise had previously questioned whether GR’s annuity investments were suitable.<sup>9</sup>

Referring to the report’s late production as a “smoking gun” document, GR’s counsel requested a continuance of the hearing so that further discovery could be conducted. Because GR’s counsel suspected that previous versions of Tysk’s ACT! Notes were accessible, but not produced in discovery, he also requested that Tysk and Ameriprise “turnover all relevant computer files and back-up media” so that a forensic examination and search for all relevant files could be completed, which Tysk and Ameriprise refused.

After hearing arguments from the parties on the exception report’s late production, the arbitration panel granted GR’s counsel’s request for expedited discovery and postponed the hearing until mid-April 2010. The arbitration panel also subsequently ordered a forensic search of Tysk’s computer and server. Mark Lanterman (“Lanterman”), chief technology officer of Computer Forensics Services, performed the forensic search of Tysk’s computer. At Tysk’s hearing, Lanterman testified that he found multiple versions of Tysk’s ACT! Notes on GR and narrowed down when, and to what extent, Tysk revised his notes. The arbitration panel found Tysk and Ameriprise jointly and severally liable for obstructing the discovery process and ordered Tysk to pay \$20,000 in sanctions.<sup>10</sup>

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<sup>9</sup> GR’s counsel testified that the exception report “was very significant because . . . in the exception report it states why there was an exception report created and it says the age of the insured party, 77, exceeds the age recommended for this type of product, which is 76.”

<sup>10</sup> Specifically, the arbitration order dated May 14, 2010 included the following findings:

### III. Discussion

Based on an independent review of the record, the NAC finds that Enforcement proved by a preponderance of evidence that Tysk committed the alleged rule violations. Accordingly, the NAC affirms the Extended Hearing Panel's findings of violation.

#### A. Tysk Violated the Just and Equitable Principles of Trade Rule

We affirm the Extended Hearing Panel's finding that Tysk altered his ACT! Notes after receiving GR's complaint letter, and deliberately failed to disclose to his firm or GR that he had done so for several months in violation of NASD Rule 2110 and FINRA Rule 2010.

FINRA Rule 2010 requires members, in the conduct of their business, to observe high standards of commercial honor and just and equitable principles of trade.<sup>11</sup> It is an ethical provision that "serves as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession." *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at \*17 (Dec. 11, 2014) (citation and quotation omitted). The impact of FINRA's just and equitable principles of trade rule is not limited to legal conduct; rather, the rule "states a broad ethical principle . . . intended to encompass a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace." *Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at \*11-12 (NASD NAC June 2, 2000), citing *Timothy L. Burkes*, 51 S.E.C. 356, 359 (1993); *Daniel Joseph Alderman*, 52 S.E.C. 366, 369 (1995), *aff'd*, 104 F.3d 285 (9th Cir. 1997).

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

<sup>11</sup> See NASD Rule 2110; FINRA Rule 2010.



On appeal, Tysk argues that Enforcement had not proven a just and equitable principles of trade violation. Tysk argues that he did not make changes to his ACT! Notes to “bolster his defense to GR’s claim” because he altered the notes after he responded to GR’s claim. He states that, at that time, Tysk believed that GR’s claim was meritless and it was not reasonably foreseeable that GR would file an arbitration claim against him. According to Tysk, his sole purpose of altering his ACT! Notes was to preserve details of his personal and business relationship with GR that had not been recorded. Tysk also argues that he did not act in bad faith, stating that the production of his altered notes was part of a voluminous production that “he mechanically assembled and produced to his firm” and was of no significance to him.

Tysk raised these arguments at the hearing. The Extended Hearing Panel found that Tysk anticipated that GR would file a claim and altered his ACT! Notes to strengthen his defense; and by making his alterations indiscernable and failing to disclose them for many months, Tysk acted in bad faith. The Extended Hearing Panel did not find Tysk’s arguments credible, and neither do we. *See Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at \*65 (Dec. 10, 2009) (holding that “the credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses’ testimony and observing their demeanor”).

In determining whether a person has violated FINRA’s ethical rule, the pertinent inquiry is the person’s conduct rather than their state of mind or intent. *Tomlinson*, 2014 SEC LEXIS 4908, at \*17. Although bad faith is one indicia of determining whether the conduct at issue was unethical and thus violated FINRA’s ethical rule, *see Shvarts*, 2000 NASD Discip. LEXIS 6, at \*13 (“[t]he concepts of excuse, justification and ‘bad faith’ may be employed to determine whether conduct is unethical in these cases”), bad faith in the sense of “malicious intent” or “deceitfulness” need not be established, and unethical conduct alone without scienter or bad faith can constitute a just and equitable principles of trade rule violation. *Id.* at \*16. Thus, the “analysis that is employed is a flexible evaluation of the surrounding circumstances with attention to the ethical nature of the conduct.” *Id.* at \*15.

Regardless of his motives for doing so, Tysk acted, at the least, unethically. He admitted that he purposely altered his notes after receiving GR’s complaint. He knew that GR was dissatisfied with Tysk’s recommended investments and that the firm was conducting an investigation. Although Ameriprise’s code of conduct explicitly prohibited the altering of documents related to an imminent or ongoing investigation, Tysk intentionally backdated new entries and revised significant portions of his notes that directly addressed GR’s concerns raised in the complaint letter.<sup>12</sup> Not only did Tysk fail to disclose that he altered his notes, he

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<sup>12</sup> Contrary to Tysk’s argument on appeal that his alterations did not violate firm policies and procedures, we support the Extended Hearing Panel’s finding that Tysk’s actions called into serious question whether he complied with Ameriprise’s retention policies. With 26 years of securities experience as an Ameriprise employee, Tysk either knew or should have known to observe the firm’s policies and procedures related to the maintenance of complete and accurate records. His supervisor testified that he believed the code of conduct was one of the firm’s most important documents, and that Tysk’s alteration of his notes was not in the spirit of the code.

prolonged his concealment by intentionally producing an indiscernible copy of the ACT! Notes contact report to GR's counsel during the arbitration proceeding, and deflecting his attorney's questions about it, which also exhibits bad faith. *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at \*23 (Jan. 9, 2015) (finding respondent's concealment of his actions from his customer demonstrated deliberate intent and bad faith in violation of the just and equitable principles of trade rule) (citations omitted). Given the totality of the circumstances, Tysk's conduct was unethical and violated FINRA's just and equitable principles of trade rule.

B. Tysk Violated FINRA's Code of Arbitration

We also affirm the Extended Hearing Panel's findings that Tysk violated IM-12000 of the Arbitration Code and FINRA Rule 2010 when he concealed his altered notes and deliberately submitted discovery that was misleading in an arbitration proceeding.

The Arbitration Code requires the parties in an arbitration proceeding to cooperate in the voluntary exchange of documents and information "to the fullest extent practicable . . . to expedite the arbitration." *See* FINRA Rule 12505; *NASD Notice to Members 03-70*, 2003 NASD LEXIS 80 (Nov. 6, 2003) (reminding members and associated persons of their duty to cooperate in the exchange of documents and information). IM-12000(c) of the Arbitration Code also provides that it is inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010 for an associated person to "fail to . . . produce any document in his possession or control as directed pursuant to provisions of the Code."<sup>13</sup> Pursuant to the Code, an associated person is required in good faith to use their best effort to produce all required documents.<sup>14</sup> The failure to produce documents and information in accordance with the Arbitration Code, along with other discovery abuses, is subject to disciplinary action under FINRA's conduct rules.<sup>15</sup>

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Indeed, the firm's code of conduct expressly prohibited the shredding, destroying and "altering" of documents "in any way" that are related to an imminent or ongoing investigation. Although Tysk argued that an "investigation" meant something other than the firm's inquiry into his activities, the Extended Hearing Panel was not, and neither are we, persuaded by such literal nuances because Tysk also testified that he was unfamiliar with the firm's policies and procedures and never read the code of conduct.

<sup>13</sup> *See* IM-12000(c) of FINRA Rule 12000 ("Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes").

<sup>14</sup> *See* FINRA Rule 12506(b)(2) (requiring good faith efforts by the parties in producing requested documents).

<sup>15</sup> *See* FINRA Rules 12104(e) and 12212(b).

Tysk argues that he produced “all of the documents in his possession or control.” He claims he cooperated by timely searching for and producing responsive documents and volunteered his computer for a forensics exam. According to Tysk, discovery objections are permitted by the Arbitration Code, yet he in good faith used his best efforts to produce all relevant documents. The record, however, does not support Tysk’s assertions.

Tysk failed to use his best effort as required by the provisions of the Arbitration Code to produce previous versions of his contact notes when GR’s counsel requested them in discovery. GR’s counsel explicitly requested all documents showing edits to the revised contact report. Instead of cooperating, Tysk stonewalled producing the requested information until he was compelled by an arbitration order to have his computer examined by a forensic expert. Tysk knew or should have known that previous versions of the ACT! Notes existed. Lanterman testified that a number of saved ACT! Notes database files existed on Tysk’s computer. Tysk himself testified to the business practice of backing up the ACT! Notes database on a weekly basis so evidently he had the information. Yet, he never asked for technical assistance in retrieving the files or disclosed that they existed. *See generally St. Andrews Park, Inc. v. U.S. Dep’t of the Army Corps of Eng’rs*, 299 F. Supp. 2d 1264, 1269-70 (2003) (denying summary judgment for failing to conduct a thorough search of requested documents on computer hard drives “where they might reasonably be found”) (citations and internal quotations omitted).

We also are unpersuaded by Tysk’s argument that FINRA’s discovery rules only contemplate the production of documents, and little else. Tysk argues that disclosing that his notes were altered, or providing explanations about discovered documents, is contrary to arbitration practices. Tysk’s argument, however, constricts too narrowly his obligations under the Arbitration Code, and FINRA’s conduct rules.

As noted in *FINRA Regulatory Notice 14-40*, “[t]he discovery process allows the parties to an arbitration to obtain facts and information from other parties to the arbitration to support their case and prepare for the hearing.”<sup>16</sup> Indeed, the Arbitration Code requires full cooperation in the exchange of such documents *and information*—not solely the exchange of documents. We support the Extended Hearing Panel’s finding that Tysk not only failed to produce all requested documents, but “subverted the arbitration process” when he significantly altered a discoverable item and produced a misleading document. Even if Tysk could not readily provide previous versions of his notes, his lack of providing full information during the discovery process runs afoul of FINRA rules. *Cf. DBCC v. John Francis Noonan*, Complaint No. C04930026, 1994 NASD Discip. LEXIS 25, at \*13 (NASD NBCC Aug. 3, 1994) (barring respondent for knowingly producing fabricated evidence in an arbitration proceeding and concealing his actions until his later confession), *aff’d*, 52 S.E.C. 262 (1995). We therefore affirm the Extended Hearing Panel’s decision and find that Tysk violated the Arbitration Code and FINRA Rule 2010.

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<sup>16</sup> *FINRA Regulatory Notice 14-40*, 2014 FINRA LEXIS 53, at \*5 (Oct. 2014).

#### IV. Sanctions

For Tysk's misconduct, the Extended Hearing Panel suspended him from associating with any member firm in any capacity for three months, and imposed a \$50,000 fine along with hearing costs for which he was jointly and severally liable. For the reasons set forth below, we find that stronger sanctions are in order to redress Tysk's serious misconduct.

FINRA's Sanctions Guidelines ("Guidelines") are not absolute, yet instructive "to achieve greater consistency, uniformity, and fairness in its sanctions." *West*, 2015 SEC LEXIS 102, at \*32.<sup>17</sup> Although the Guidelines do not address the specific misconduct at issue, we disagree with the Extended Hearing Panel's conclusion that the forgery or falsification of records guideline was not helpful, and find it to be the most analogous guideline to the case at hand.<sup>18</sup> Similar to falsifying records, Tysk opened his ACT! Notes on GR, deleted the current date and backdated new entries with events and conversations that purportedly occurred several years in the past. He then provided the altered and backdated notes in discovery, purporting them to be a true and complete reflection of a customer record.

For falsification of records in violation of FINRA Rule 2010, the Guidelines recommend a fine between \$5,000 to \$100,000, a suspension in any or all capacities for up to two years, and in egregious cases, a bar.<sup>19</sup> The sanctions we impose today for Tysk's violations are within these recommended ranges.

Tysk's misconduct was certainly misleading and deeply conflicted with his ethical obligations as a securities professional to act with candor and transparency for the protection of investors. *See Tomlinson*, 2014 SEC LEXIS 4908, at \*16 (noting that FINRA's just and equitable principles of trade rule "protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market"); *Henry Irvin Judy*, 52 S.E.C. 1252, 1256 (1997) (noting that the securities industry "relies heavily on candor and truthful representation" by associated persons).

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<sup>17</sup> *See also FINRA Sanction Guidelines* (2013), at 1 [hereinafter "*Guidelines*"] (noting that the *Guidelines* are not intended to be absolute but to provide direction for imposing sanctions consistently and fairly). We apply the applicable *Guidelines* in place at the time of this appeal.

<sup>18</sup> *See generally id.* at 1 (encouraging adjudicators to look to the Guidelines for recommended sanctions of analogous violations). Regarding the forgery or falsification of record guideline, we note that the Extended Hearing Panel did not make a finding, nor did Enforcement allege, that Tysk's altered notes were false or untrue statements. Tysk's fabrication of a customer record entailed him backdating new entries in ACT! Notes to deceptively make it appear as if his notes were written contemporaneously with the previous event or occurrence.

<sup>19</sup> *Id.* at 37.

Tysk backdated a customer record and concealed the revisions he made during the discovery stage of an arbitration proceeding. We intensely condemn such deception. *See e.g. Mitchell H. Fillet*, 2015 SEC LEXIS 2142, at \*54 (May 27, 2015) (finding respondent's backdating of customer records and providing those false records to FINRA as egregious misconduct), *aff'g in relevant part Dep't of Enforcement v. Fillet*, Complaint No. 2008011762801, 2013 FINRA Discip. LEXIS 26 (FINRA NAC Oct. 2, 2013); *see also Noonan*, 1994 NASD Discip. LEXIS, at \*13 (increasing respondent's sanctions for fabricating evidence in an arbitration proceeding and deeming his actions as "serious misconduct, which cannot be condoned").

In making our sanction determination, we have weighed Tysk's claims of mitigation, and found only aggravating factors associated with his misconduct. Tysk admitted to his actions, and they were intentional.<sup>20</sup> The extent to which Tysk attempted to conceal his misconduct and avoid detection, even after knowing that he was a party to an arbitration proceeding, is also aggravating.<sup>21</sup> As an example, during the arbitration proceeding his attorney directly asked Tysk whether he knew about any revisions to his notes. Rather than being forthright, Tysk chose to remain silent about his wrongdoing until several months after being confronted.<sup>22</sup> By entering the backdated descriptions and attempting to conceal them, Tysk demonstrated a troubling lack of integrity. We agree with the Extended Hearing Panel that Tysk subverted the arbitration process, which is an aggravating factor. *See Noonan*, 52 S.E.C. at 265 ("If arbitration is to be a meaningful alternative to litigation, its processes must be fair and free of abuse.") If Tysk's misconduct had not been discovered by a forensic investigation, the ability of the arbitrators to find the truth would have been undermined. The fact that Tysk's concealment was revealed does not lessen its potential to harm the arbitration process; his concealment is an aggravating circumstance.

Tysk raises a number of defenses to his claim that the sanctions the Extended Hearing Panel imposed are unwarranted and excessive—all of which we have considered and find that they lack merit. First, he claims that after confessing to his attorney, he relied on his attorney's decision not to immediately disclose to GR's counsel that Tysk altered his notes. Tysk's reliance on counsel defense, however, is misapplied. While reasonable reliance on competent legal advice may be mitigating for purposes of assessing sanctions, *see Dep't of Enforcement v. Walblay*, Complaint No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at \*16 (FINRA NAC Feb. 25, 2014); *see also Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7), Tysk's misconduct occurred well before he sought legal advice. The evidence demonstrates that his counsel had no knowledge of Tysk's actions until over one year after its occurrence. While Tysk had the opportunity to seek legal guidance before altering his notes, he chose not to do so. Thus, Tysk's confession to his attorney came much too late in the process for him to

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<sup>20</sup> *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

<sup>21</sup> *Id.*, at 6 (Principal Considerations in Determining Sanctions, Nos. 10 and 12).

<sup>22</sup> *Id.*, at 6 (Principal Considerations in Determining Sanctions, No. 9).

reasonably rely on counsel and absolve any responsibility for his misconduct. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994) (finding reliance on counsel defense misplaced when petitioner failed to demonstrate that “he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith”) (citation omitted).

Second, in an attempt to invoke Principal Considerations in Determining Sanctions No. 15 of the Guidelines (“Principal Consideration No. 15”) as a mitigating factor, Tysk next claims that the level of his sanction should reflect that he was provided with no notice of Enforcement’s “novel” interpretation of IM-12000 of the Arbitration Code that created a disclosure obligation for respondents in FINRA arbitrations. His argument, however, is baseless. Principal Consideration No. 15 recommends adjudicators to consider “[w]hether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.” *Guidelines*, at 7. As an initial matter, Tysk presented no evidence of his attempt to remedy his misconduct prior to regulatory detection or intervention, and thus Principal Consideration No. 15 is inapplicable as a mitigating factor. Moreover, Enforcement did not provide a new or “novel” interpretation in charging Tysk with an IM-12000 violation. Tysk violated IM-12000 of the Arbitration Code because he failed to use his best efforts to produce documents and information in accordance with the Code’s discovery provisions. Tysk also demonstrated his lack of cooperation when he repeatedly failed to provide full disclosure to GR and his counsel regarding his altered notes. *See Brian L. Gibbons*, 52 S.E.C. 791, 794-95 (1996) (“Providing misleading and inaccurate information to [FINRA] is conduct contrary to high standards of commercial honor and is inconsistent with just and equitable principles of trade.”). We therefore reject Tysk’s claim.

Third, Tysk claims that he demonstrated his intent to be open and not to conceal his actions. To the contrary, we find strong evidentiary support that Tysk deliberately concealed his tampering with customer related documentation. He knew, or was reckless in not knowing, that for an extended period of time he misled his firm and the customer—all factors that we consider aggravating.<sup>23</sup>

Fourth, Tysk asserts that the Extended Hearing Panel’s order of a three-month suspension would effectively force him out of the industry, and thus is punitive and improper under the Guidelines. “In determining appropriately remedial sanctions, however, we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent’s career.” *Dep’t of Enforcement v. DiFrancesco*, Complaint No. 2007009848801, 2010 FINRA Discip. LEXIS 37, at \*22 (FINRA NAC Dec. 17, 2010), *aff’d*, 2012 SEC LEXIS 54 (Jan. 6, 2012). Further, we concur with the NAC’s finding in *McCune* that because of Tysk’s lack of appreciation for the requirements to which he was subject, allowing him to remain in the industry with no suspension is an outcome that would not be in the customers’ best interest. *See Dep’t of*

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<sup>23</sup> *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 13, 9, and 10).

*Enforcement v. McCune*, Complaint No. 2011027993301, 2015 FINRA Discip. LEXIS 22, at \*21-23 (FINRA NAC July 27, 2015) (rejecting respondent's argument that his six-month suspension would improperly incur customer loss of his brokerage services).<sup>24</sup>

In summary, Tysk fashioned his ACT! Notes to make it appear as if they were made contemporaneously with past events, attempted to conceal his misconduct, and has failed to show any mitigating circumstances. We find a three-month suspension is too lenient for Tysk's violative behavior and thus increase his suspension to one year in all capacities and fine him \$50,000. We do so to discourage any future wrongdoing, and to protect the public interest.

#### V. Conclusion

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

For his violations, we suspend Tysk from associating with any member firm in any capacity for one year, and fine him \$50,000. We affirm the Extended Hearing Panel's order that Tysk is liable, jointly and severally, to pay \$3,173.84 in hearing costs, and also order that he pay appeal costs of \$1,551.41.<sup>25</sup>

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith  
Senior Vice President and Corporate Secretary

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<sup>24</sup> We also find that Tysk's comparison to a settled FINRA case in arguing for lesser sanctions has minimal to no probative value. It is well settled that the sanctions imposed in each case depend on the facts and circumstances and "cannot be precisely determined by comparison with action taken in other proceedings." *Tomlinson*, 2014 SEC LEXIS 4908, at \*40 (citation and internal quotation omitted). It is also broadly recognized as a general principle that settled FINRA cases generally result in lower sanctions than fully litigated cases. *See Guidelines*, at 1.

<sup>25</sup> Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.