Re Kelly

IN THE MATTER OF:

The Mutual Fund Dealer Rules

and

Simon Christopher Kelly

2024 CIRO 09

Canadian Investment Regulatory Organization
Hearing Panel (Alberta District)

Heard: July 19, 2023, in Calgary, Alberta (via videoconference)
Decision and Reasons: January 18, 2024

Hearing Panel:
Sherri Walsh, Chair, Chair
Kathleen Jost, Industry Representative
Richard Sydenham, Industry Representative

Appearances:
Alan Melamud, Senior Enforcement Counsel
Andrew Wilson, Counsel for the Respondent
Christopher Carmichael-Powell, Counsel for the Respondent
Simon Christopher Kelly, Respondent (absent)

DECISION AND REASONS (PENALTY)

I. INTRODUCTION

¶ 1 On December 17, 2021, the Mutual Fund Dealers Association of Canada (the "MFDA") commenced disciplinary proceedings against Simon Christopher Kelly (the "Respondent") by issuing a Notice of Hearing pursuant to sections 20 and 24 of MFDA By-law No. 1 (now Mutual Fund Dealer Rules 7.3 and 7.4.)

¶ 2 Effective January 1, 2023, the MFDA and the Investment Industry Regulatory Organization of Canada ("IIROC") were consolidated to form the New Self-Regulatory Organization of Canada which, on June 1, 2023, was officially named the Canadian Investment Regulatory Organization ("CIRO"). [1]

¶ 3 On May 24, 2023, Staff of CIRO ("Staff") and the Respondent entered into an Agreed Statement of Facts

[1] CIRO adopted interim Rules that incorporate the pre-amalgamation regulatory requirements contained in the Rules and policies of IIROC and the by-law, Rules and policies of the MFDA (the "Interim Rules"). The Interim Rules include (i) the Investment Dealer and Partially Consolidated Rules, (ii) the UMIR and (iii) the Mutual Fund Dealer Rules. These Rules are largely based on the Rules of IIROC and certain by-laws, Rules and policies of the MFDA that were in force immediately prior to amalgamation. Where the Rules of IIROC and the by-laws, Rules and policies of the MFDA that were in force immediately prior to amalgamation have been incorporated into the Interim Rules, Enforcement Staff have referenced the relevant section of the Interim Rules. Pursuant to Mutual Fund Dealer Rule 1A and s.14.6 of By-Law No. 1 of CIRO, contraventions of former MFDA regulatory requirements may be enforced by CIRO.

(the "ASF") in which the Respondent made the following admissions:

> 51. The Respondent admits that between September 2017 and September 2019, he was named as a beneficiary of a client's investment accounts, which gave rise to a conflict or potential conflict of interest between the client and the Respondent, which he failed to disclose to the Member or otherwise ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Member's policies and procedures and MFDA Rules 2.1.4, 2.1.1 and 1.1.2 (as it relates to Rule 2.5.1) (now Mutual Fund Dealer Rules 2.1.4, 2.1.1, 2.5.1, and 1.1.2).
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> 52. The Respondent admits that between March 2018 and August 2019, he accepted an appointment as power of attorney for a client's property, contrary to the Member's policies and procedures, and MFDA Rules 2.3.1(a), 2.1.4, 2.1.1 and 1.1.2 (as it relates to Rule 2.5.1) (now Mutual Fund Dealer Rules 2.3.1(a), 2.1.4, 2.1.1, and 1.1.2).

¶ 4 A hearing was held electronically on July 19, 2023, to determine the appropriate sanctions and costs, if any, to be imposed upon the Respondent (the "Hearing"). Both Enforcement Counsel and the Respondent's counsel provided the Hearing Panel (the "Panel") with written submissions and Books of Authorities.

¶ 5 Following the Hearing, at which both counsel made extensive oral submissions, the Panel reserved its decision.

¶ 6 Having carefully considered the evidence before us and the written and oral submissions made on behalf of both parties, we have determined that the following sanctions should be imposed on the Respondent:

a) a six month prohibition on the Respondent's authority to conduct securities related business while in the employ of or in association with a Dealer Member of the Corporation registered as a mutual fund dealer pursuant to section 24.1.1(e) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b));

b) a fine in the amount of $70,000 pursuant to section 24.1.1(b) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b)); and

c) costs in the amount of $10,000, pursuant to section 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2).

¶ 7 These are the reasons for our decision.

A Hearing Panel's jurisdiction in a Sanction Hearing

¶ 8 Hearing Panels have consistently recognized that the ability for parties to reach a settlement or rely on an agreed statement of facts plays an important and necessary role in facilitating the regulator's principal goal of protecting the investing public. These efforts provide an efficient and effective way for the regulator to proscribe conduct that is harmful to the public, while providing a flexible remedy that can be tailored to address the interests of all parties.

Smith (Re) 2021 LNC MFDA 133 at paras. 9 & 10

¶ 9 In matters where parties agree on the facts but cannot agree on penalty, as is the case in these proceedings, the panel's role is to determine the correct sanction having regard only to the facts and contraventions contained in the respective agreed statement of facts. As the Ontario Securities Commission stated:

> In my view, the case law is clear. As stated by the Ontario Superior Court of Justice in *McGarrigle*, when parties to a disciplinary proceeding have entered into an agreed statement of facts, those are the only facts regarding the alleged improper conduct of the Respondent that the panel is allowed to consider.
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> *Vickers (Re)*, 2015 ONSEC 13 at para. 58

II. AGREED FACTS

¶ 10 All of the facts which are relevant to our decision are found in Part IV of the ASF as follows:

IV. AGREED FACTS

6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV, and no other information, facts or documents, subject to the content of this paragraph and paragraph 7 below. Staff and the Respondent agree that the Respondent may lead evidence at the hearing on the merits that is relevant to the Respondent's personal and financial circumstances subject to the following conditions:

a) disclosure of such evidence has been provided to Staff prior to the hearing on the merits in accordance with Rules 10.2 and 11 of the Mutual Fund Dealer Rules of Procedure;

b) the Respondent shall not tender any evidence that is inconsistent with the agreed facts set out in Part IV of this Agreed Statement of Facts;

c) this evidence will be tendered solely for the purpose of determining the appropriate sanction to be imposed on the Respondent as a consequence of admissions of misconduct that are set out in this Agreed Statement of Facts and for no other purpose; and

d) Staff may challenge any evidence tendered by the Respondent pursuant to this paragraph, cross-examine any witnesses who testify in support of the Respondent and lead evidence responding to the evidence tendered by the Respondent.

7. In the event that the Hearing Panel advises one or both of Staff and the Respondent of any additional facts that it considers necessary in order to determine the issues before it, Staff and the Respondent agree that such additional facts may be provided to the Hearing Panel, either: (a) with the consent of both Staff and the Respondent if the additional facts are agreed upon; (b) if the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel; or (c) if the parties are both present at the hearing and are not in agreement about the additional facts requested by the Hearing Panel, the parties will be given a reasonable opportunity to lead evidence concerning the additional facts. In circumstances where a party leads evidence concerning additional facts requested by the Hearing Panel, the opposing party may cross-examine any witness tendered to lead such evidence and shall be given a reasonable opportunity to lead responding evidence if they wish to do so.

8. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

9. Commencing in October 1989, the Respondent was registered in the securities industry.

10. From November 2014 to December 2019, the Respondent was registered in Alberta and British Columbia as a dealing representative with Investia Financial Services Inc., a Member of the MFDA (the "Member") that is now a Dealer Member of the Corporation.

11. On December 31, 2019, the Respondent's mutual fund registration was terminated as a result of the conduct described below. Since the termination of his registration with the Member, the Respondent has not been registered in the securities industry in any capacity.

12. At all material times up to the termination of his registration by the Member, the Respondent carried on business in the Calgary, Alberta area.

Client DC

13. From November 2014 to September 2019, client DC was a client of the Member whose accounts were serviced by the Respondent.

14. The Respondent states that client DC and the Respondent were close, personal friends since at least 2009.

15. Commencing in November 2014, client DC opened and maintained three investment accounts with the Member consisting of a non-registered account, a Registered Retirement Savings Plan ("RRSP") account, and a Locked In Retirement Account ("LIRA"). At the time, client DC's spouse, MC, also became a client of the Member, whose accounts were serviced by the Respondent. DC and MC were the parents of 3 children.

16. In early 2017, client DC and his spouse divorced. In or about May 2017, the Respondent recommended that MC transfer her accounts to a new advisor. From that point on, the Respondent ceased to be the Approved Person responsible for servicing any investment accounts of MC.

17. On September 25, 2017, client DC signed a letter of direction designating the Respondent as the beneficiary on his RRSP account at the Member. On October 4, 2017, the Respondent forwarded client DC's letter of direction to the applicable fund company to effect this change in beneficiary designation. The Respondent did not send a copy of the letter of direction to the Member.

18. The Respondent continued to be the Approved Person responsible for servicing client DC's RRSP account at the Member after client DC designated the Respondent as the beneficiary of this account.

19. The designation of the Respondent as the beneficiary of client DC's RRSP account gave rise to a conflict or potential conflict of interest.

20. The Respondent did not disclose to the Member that he had been named as the beneficiary of client DC's RRSP account or send the Member a copy of the letter of direction that named the Respondent as beneficiary of client DC's RRSP account.

21. On March 9, 2018, client DC signed a further letter of direction which designated the Respondent as the beneficiary on client DC's LIRA at the Member. On March 14, 2018, the Respondent forwarded client DC's letter of direction to the applicable fund company to effect the change in beneficiary designation. The Respondent did not send a copy of the letter of direction to the Member.

22. The Respondent continued to be the Approved Person responsible for servicing client DC's LIRA after he was designated as a beneficiary on this account.

23. The designation of the Respondent as beneficiary of the client DC's LIRA account gave rise to a conflict or potential conflict of interest.

24. The Respondent did not disclose to the Member that he had been named as the beneficiary of client DC's LIRA or send the Member a copy of the letter of direction that named the Respondent as beneficiary of the LIRA.

25. On March 16, 2018, client DC signed an enduring power of attorney (the "POA"), which appointed the Respondent as power of attorney for client DC's financial affairs. The POA granted the Respondent authority to make decisions with respect to client DC's financial affairs even while client DC was capable of doing so himself, as well as in in the event of any incapacity of client DC.

26. On or about March 21, 2018, the Respondent signed the POA acknowledging his appointment as well as an accompanying statutory declaration.

27. The acceptance of power of attorney for client DC's financial affairs contravened the Member's policies and procedures and gave rise to a conflict or potential conflict of interest.

28. The Respondent did not disclose to the Member that he had been appointed as power of attorney and was granted authority to make financial decisions for client DC until August 22, 2019, as described below.

29. In August 2019, client DC was hospitalized in a coma and therefore, he could no longer make decisions with respect to his financial affairs.

30. On August 22, 2019, the Respondent notified his branch manager about client DC's health condition and disclosed for the first time that he had been appointed as power of attorney and had thereby acquired authority to make decisions with respect to client DC's financial affairs.

31. Subsequently, on or about August 27, 2019, the Member discovered that the Respondent had been named as beneficiary of the LIRA and RRSP account of client DC.

32. On August 29, 2019, the Respondent was informed by the Member that he could no longer service the investment accounts of client DC at the Member.

33. The Respondent invoked his authority as power of attorney to transfer client DC's investment accounts from the Member to another mutual fund dealer.

34. On September 4, 2019, the Respondent opened a RRSP account and LIRA at another mutual fund dealer in the name of client DC, and transferred the assets from client DC's Member accounts into the two new accounts, with a value of $147,948 and $69,735 respectively.

35. On September 26, 2019, client DC passed away.

36. Following the death of client DC, in his capacity as the beneficiary of the investment accounts, the Respondent received the after-tax proceeds from the RRSP account and LIRA of client DC, totaling approximately $150,235 as of October 23, 2019, when the after-tax proceeds (total proceeds of disposition less 30% withholding tax that was withheld by the mutual fund dealer to which the accounts were transferred) were paid to the Respondent.

The Respondent was Named as a Beneficiary on a Client's Investment Accounts

37. At all material times, the Member's policies and procedures required its Approved Persons to, among other things:

a) avoid activities that might interfere or appear to interfere with the best interests of the clients; and

b) disclose any actual or potential conflicts of interest to the Member.

38. When the Respondent became aware that he was the designated beneficiary of client DC's LIRA and RRSP accounts, those circumstances gave rise to a conflict or potential conflict of interest which he was required to immediately disclose to the Member.

39. By failing to disclose the conflict or potential conflict of interest, the Member was deprived of an opportunity to investigate the circumstances that gave rise to the conflict or potential conflict of interest, disclose the conflict or potential conflict of interest to client DC, or to take steps to ensure that the conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

The Respondent Accepted an Appointment as Power of Attorney

40. At all material times, the Member's policies and procedures prohibited its Approved Persons from having full or partial authority over the financial affairs of a client, including accepting or acting upon a power of attorney of a client.

41. In addition, MFDA Rule 2.3.1 (now Mutual Fund Dealer Rule 2.3.1.) prohibited Approved Persons from accepting or acting upon a power of attorney from a client who is not a Related Person, as defined by the *Income Tax Act* (Canada), of the Approved Person.

42. As described above, accepting a power of attorney for client DC's financial affairs also gave rise to a conflict or potential conflict of interest. The Respondent did not disclose to the Member that he had been appointed as power of attorney until after client DC was no longer able to make decisions with respect to his financial affairs. As a result, the Member was deprived of an opportunity to investigate the circumstances that gave rise to the conflict or potential conflict of interest, or to take steps to ensure that the conflict was addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

The Member's Investigation

43. As described in paragraph 30, above, the Member became aware of the Respondent's conduct on August 22, 2019, upon the Respondent notifying his branch manager that he had been designated as

power of attorney over client DC's financial affairs. The Member subsequently commenced an investigation into the Respondent's conduct. As regulatory requirements prohibit an Approved Person from accepting or acting upon a power of attorney from a client, the Member directed the Respondent to immediately transfer client DC's assets out of the Member.

44. On December 31, 2019, following the completion of its investigation, the Member terminated the Respondent's registration as an Approved Person of the Member.

Additional Factors

45. The Respondent will turn 62 years old on April 24, 2023. The Respondent states that his health has declined since 2019.

46. The Respondent states that following his termination from the Member, he has not received any consideration or monetary benefit from his book of business.

47. There is no evidence that indicates that client DC lacked capacity to make legal decisions.

48. The Respondent has not previously been the subject of MFDA disciplinary proceedings.

49. The Respondent has co-operated with MFDA Staff during its investigation of his conduct.

50. By entering into this Agreed Statement of Facts, the Respondent has saved the MFDA the time, resources, and expenses associated with conducting a fully contested hearing of the allegations.

Misconduct Admitted

51. The Respondent admits that between September 2017 and September 2019, he was named as a beneficiary of a client's investment accounts, which gave rise to a conflict or potential conflict of interest between the client and the Respondent, which he failed to disclose to the Member or otherwise ensure was addressed by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the Member's policies and procedures and MFDA Rules 2.1.4, 2.1.1 and 1.1.2 (as it relates to Rule 2.5.1) (now Mutual Fund Dealer Rules 2.1.4, 2.1.1, 2.1.1, and 1.1.2).

52. The Respondent admits that between March 2018 and August 2019, he accepted an appointment as power of attorney for a client's property, contrary to the Member's policies and procedures, and MFDA Rules 2.3.1(a), 2.1.4, 2.1.1 and 1.1.2 (as it relates to Rule 2.5.1) (now Mutual Fund Dealer Rules 2.3.1(a), 2.1.4, 2.1.1, and 1.1.2).

Additional Facts

¶ 11 In addition to the facts contained in the ASF set out above, counsel for both parties agreed that the Panel could consider the following 2 pieces of information:

- the Respondent earned the following income from his mutual fund business for 2017 through 2019:
  - 2017 - $217,000
  - 2018 - $225,000
  - 2019 - $233,000; and
- the Respondent's wife was named as the estate trustee for client DC's estate.

¶ 12 Further, at the outset of the Hearing, the Panel was told that the Respondent had declined to testify because he did not wish to be subjected to cross-examination. Both parties agreed that additional information which was contained in Schedule A to the written submissions submitted on behalf of the Respondent and identified as "Anticipated evidence as to Mr. Kelly's personal and financial circumstances" would be entered into the record as the Respondent's evidence, as if he had testified about those matters. This evidence included letters from a registered psychologist.

¶ 13 The parties advised that they had agreed that the Panel was not to draw any inferences from

Enforcement Counsel's failure to cross-examine the Respondent on the evidence in Schedule A to the Respondent's submissions. However, Enforcement Counsel said they would still be making arguments with respect to the sufficiency of the evidence.

Information Delivered After the Hearing Had Concluded

¶ 14 On October 3, 2023, after the Hearing had concluded but before the Panel had issued its decision, the Chair of the Panel received an e-mail from the Respondent's wife. The Chair immediately forwarded the email to the other two Panel members and to CIRO's Corporate Secretary, asking the latter to forward it to both counsel and to schedule an appearance so that counsel could make submissions to the Panel as to what, if anything, the Panel should do with the communication.

¶ 15 There is no need to provide details of what the e-mail said other than to note that it appeared to provide information about the Respondent's state of health and well-being.

¶ 16 An appearance was held on October 5, 2023, at which both counsel told the Panel that neither of them had previously been aware of the email.

¶ 17 They both submitted that the e-mail was not properly in evidence before the Panel and that we should, therefore, disregard it as if it had never been received.

¶ 18 The Panel agrees.

¶ 19 To the extent that the e-mail contained information that the Respondent's wife wanted the Panel to consider, after the Hearing had concluded and pending receipt of our decision, such information was clearly not properly before us.

¶ 20 Similarly, to the extent that the e-mail may be viewed as an attempt to influence the Panel's decision-making process after the Hearing had concluded and while we were still deliberating, again it was not information which would be appropriate for us to consider and we have proceeded as if we never received the communication.

III. THE RULES

¶ 21 The Respondent has admitted to contravening the following MFDA Rules:

1.1.2 Compliance by Approved Persons

> Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1.(c)(i) or (ii) shall comply with the Bylaws and Rules as they relate to the Member or such Approved Person.

2.1.1 Standard of Conduct

> Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
>
> (b) observe high standards of ethics and conduct in the transaction of business;
>
> (c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and
>
> (d) be of such character and business repute and have such experience and training as is consistent with the standards described in this Rule 2.1.1, or as may be prescribed by the Corporation.

2.1.4 Conflicts of Interest

> (a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

(b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).

(c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.

(d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

2.3.1 (a) Control or Authority

No Member or Approved Person shall have full or partial control or authority over the financial affairs of a client, including:

(i) accepting or acting upon a power of attorney from a client;

(ii) accepting an appointment to act as a trustee or executor of a client; or

(iii) acting as a trustee or executor in respect of the estate of a client.

2.5.1 Member Responsibilities

Each Member is responsible for establishing, implementing and maintaining policies and procedures to ensure the handling of its business is in accordance with the By-laws, Rules and Policies and with applicable securities legislation.

IV. FACTORS CONCERNING THE APPROPRIATENESS OF THE PROPOSED PENALTY

¶ 22 Disciplinary sanctions imposed in a securities regulatory context are intended to restrain future misconduct. The primary goals of securities regulation are protection of investors and fostering public confidence in the capital markets and the securities industry as a whole.

¶ 23 Sanctions imposed by a Hearing Panel should, therefore, be protective and aimed at preventing likely future harm to the markets and the public.

Tonnies (Re), 2005 LNCMFDA 5 at para. 45

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at para. 59

Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132 at para. 42

¶ 24 As the Hearing Panel in *Tonnies (Re)* stated:

The Ontario Securities Commission has set out succinctly its role, not dissimilar to the role of this Panel, in determining penalty in *Re Mithras Management Ltd. et al.* (1990), 13 O.S.C.B. 1600. The Commission stated at 1610:

... [T]he role of this Commission is to protect the public interest by removing from the capital markets - wholly or partially, permanently or temporarily as the circumstances may warrant - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient.

Tonnies (Re), *supra,* at para. 45

¶ 25 To determine whether a sanction is appropriate, a Hearing Panel should consider the following factors:

(a) the protection of the investing public;

(b) the integrity of the securities markets;

(c) specific and general deterrence;

(d) the protection of the MFDA's Membership; and

(e) the protection of the integrity of the MFDA's enforcement processes.

Tonnies (Re), *supra* at paras. 44, 46

¶ 26 Hearing Panels have also considered the following additional factors when determining whether a sanction is appropriate:

(a) the seriousness of the allegations proved against the Respondent;

(b) the Respondent's past conduct, including prior sanctions;

(c) the Respondent's experience and level of activity in the capital markets;

(d) whether the Respondent recognizes the seriousness of the improper activity;

(e) the harm suffered by investors as a result of the Respondent's activities;

(f) the benefits received by the Respondent as a result of the improper activity;

(g) the risk to investors and the capital markets in the jurisdiction, were the Respondent to continue to operate in capital markets in the jurisdiction;

(h) the damage caused to the integrity of the capital markets in the jurisdiction by the Respondent's improper activities;

(i) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;

(j) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets; and

(k) previous decisions made in similar circumstances.

Tonnies (Re), supra at para. 48

Breckenridge (Re), 2007 LCM FDA 38 at para. 77

¶ 27 Finally, a hearing panel may refer to the MFDA Sanction Guidelines (the “Sanction Guidelines”). The Sanction Guidelines, while not mandatory or binding on a hearing panel, provide a summary of the key factors upon which discretion can be exercised consistently and fairly. Many of the factors listed above, which have been considered in previous decisions of hearing panels, are reflected and described in the Sanction Guidelines.

V. THE PARTIES’ POSITIONS ON THE APPROPRIATE PENALTY

¶ 28 Enforcement Counsel submitted that the appropriate sanction should be:

(a) a permanent prohibition on the Respondent’s authority to conduct securities related business while in the employ of or in association with a Dealer Member of the Corporation registered as a mutual fund dealer, pursuant to s. 24.1.1(e) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(e));

(b) a fine in the amount of at least $250,000, pursuant to s. 24.1.1(b) of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.1.1(b)); and

(c) costs in the amount of $10,000, pursuant to s. 24.2 of MFDA By-law No. 1 (now Mutual Fund Dealer Rule 7.4.2).

¶ 29 Counsel for the Respondent submitted that this case is “one of the very rare cases” where the material facts and surrounding circumstances call for no sanction at all or in the alternative, only minimal sanctions.

(i) Seriousness of the Misconduct

Staff's Position

¶ 30 Enforcement Counsel argued that the Respondent's conduct constitutes "highly serious" misconduct.

¶ 31 They submitted that MFDA hearing panels have repeatedly found that an Approved Person being designated the beneficiary of a client's account, gives rise to a conflict or potential conflict of interest, which requires immediate disclosure to the Member in accordance with MFDA Rule 2.1.4. In making this argument, they cited the following decisions:

Marrone (Re) (Misconduct) 2022 ONCMT 13 at para. 153

Sukman (Re) 2016 LNCMFDA 48

Levine (Re) 2013 LNCMFDA 13

Karasik (Re), 2015 LNCMFDA 64

¶ 32 In such circumstances, Enforcement Counsel submitted, the Approved Person can no longer provide objective investment advice because they have a direct pecuniary interest in how and for whose benefit the investments are managed.

¶ 33 Enforcement Counsel noted that dating back to October 3, 2005, the MFDA provided the following guidance to the industry concerning personal financial dealings with clients:

> All monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member. The Member must be notified of any such arrangements, so that the Member is in a position to determine the significance of the benefit and to monitor the activity. With respect to the resolution of complaints, in accordance with MFDA Policy 3, no Approved Person may enter into any settlement agreement with a client without the prior written consent of the Member.
>
> In general, monetary and non-monetary benefits provided to or from clients that are of nominal value do not present concerns regarding conflicts of interest. As an exception to the above requirements, Approved Persons may provide monetary or non-monetary benefits of a nominal nature to the client without notice to the Member, provided this is done in accordance with procedures established by the Member.
>
> MFDA Staff Notice 0047, Personal Financial Dealings With Clients, October 3, 2005, p. 3

¶ 34 Enforcement Counsel also pointed to the fact that the Respondent has admitted that he accepted and acted upon an appointment as client DC's attorney for property (the "POA").

¶ 35 They submitted that the prohibition in MFDA Rule 2.3.1(a)(i) on accepting powers of attorney is unambiguous and, subject to a limited exception for family Members, absolute and citing the following authorities, noted that hearing panels have recognized that the prohibition articulated by Rule 2.3.1 was put in place to eliminate conflicts of interest:

Marrone (Re) (Misconduct) *supra* paras. 145-147, 178-179

Cadigal (Re), 2019 LCN MFDA 128 at para. 31

¶ 36 Citing the following paragraphs from the majority opinion in *Gebhardt (Re),* Enforcement Counsel submitted that hearing panels have repeatedly recognized that the contravention of MFDA Rules 2.1.4 and 2.3.1(a) constitutes "highly serious misconduct":

> In our view, the Respondent's misconduct was serious. Approved persons hold a position of trust in the securities industry. As a result, it is critical to the reputation of the industry that Approved Persons avoid situations that may give rise to a conflict of interest between their interests and those of their clients and inform their Member firms immediately of any such conflict or potential conflict so that the issue can be appropriately managed to protect the interests of the clients...
>
> *Gebhardt (Re),* 2023 LNCMFDA 9 at para. 61

¶ 37 Enforcement Counsel submitted that by accepting the POA from client DC and failing to disclose it to

the Member, the Respondent contravened both MFDA Rules 2.3.1(a) and 2.1.4 and also failed, therefore, to adhere to the high standards of conduct expected of an Approved Person, contrary to MFDA Rule 2.1.1.

¶ 38 The standard of conduct codified by MFDA Rule 2.1.1 requires that Members and Approved Persons: deal fairly, honestly and in good faith with clients; observe high standards of ethics and conduct in the transaction of business; and refrain from engaging in conduct or practice detrimental to the public interest. Enforcement Counsel noted that the Rule has been held to articulate the most fundamental obligations of all registrants in the securities industry.

> *Breckenridge (Re)*, *supra,* at para. 71

¶ 39 They submitted that the Respondent also contravened the standard of conduct rule by even permitting his designation as a beneficiary of his client's account.

¶ 40 In support of this position Enforcement Counsel cited the following MFDA Panels' decisions which have held that Rule 2.1.1 has been recognized as a broad and purposive rule, such that it can capture conduct that while not expressly prohibited by the other more specific rules is nonetheless contrary to the public interest - a common example being misappropriation of funds or fraud:

> *Connor (Re)* 2018 LCM MFDA 237 at paras. 74-76
>
> *Sopel (Re)* 2022 LCM MFDA 42 at para. 26
>
> *Lee (Re)* 2019 LNC MFD 133 at paras. 9-11

¶ 41 In this regard, Enforcement Counsel submitted that an Approved Person accepting a financial interest in a client's accounts is inconsistent with the trusted position that a mutual fund adviser holds and prevents the Approved Person from being able to fulfill their role as an independent and impartial adviser influenced only by the best interest of the client. Accepting a beneficiary designation, they submitted, undermines trust and confidence in the mutual fund industry as a whole since the public would rightly be concerned if the perception were that Approved Persons could insert themselves into their clients' testamentary plans, particularly where those clients are elderly or are vulnerable for other reasons.

¶ 42 In making their submission Enforcement Counsel referred to the decision of the IIROC Hearing Panel in *McCullough (Re)* which held that even the mere appearance of a lack of probity by an Approved Person can harm public trust in the investment industry and therefore constitutes conduct unbecoming:

> It is our view that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eye of the public and the effect which the transgression could have upon that reputation. The public interest demands that Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people's money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming.
>
> *McCullough (Re)*, 2017 LNIIROC 27 at para. 12

¶ 43 Enforcement Counsel submitted that the Respondent's misconduct was further aggravated by the fact that he not only "permitted" himself to be named as a beneficiary of client DC's accounts but also "actively facilitated" his designation as beneficiary in a manner that avoided notification to the Member. In Counsel's view, the Respondent subsequently used the authority he had accepted as POA contrary to regulatory requirements and the Member's policies and procedures, to move the client's accounts outside the Member, thereby ensuring that he received the financial benefit of his designation as beneficiary of the client's retirement savings accounts. Enforcement Counsel described this as resulting in the Respondent receiving a "substantial windfall" of $150,235.

¶ 44 They also argued that it was in no way mitigating that the Respondent and client DC were close personal friends or that client DC acted willingly when designating the Respondent a beneficiary to his accounts and naming the Respondent as his attorney for property.

¶ 45 In making this argument Enforcement Counsel relied on the decision in *Marrone* where the panel found

that the close personal relationship between the Approved Person and the client in that matter, increased the client's vulnerability and was accordingly an aggravating factor.

¶ 46 Enforcement Counsel also relied on the decision in *Salina (Re)* 2022 LNCMFDA 103 where the client named the respondent as a beneficiary to her Will without informing the respondent. The client left a letter with her Will expressing that the respondent was her friend and that she was acting of her own free will. In that case the hearing panel nonetheless concluded that that letter did not absolve the respondent from contravening MFDA Rules 2.1.4 and 2.1.1 when the respondent failed to disclose to the Member that he had been named a beneficiary in the client's Will.

¶ 47 Enforcement Counsel submitted that in this case client DC was vulnerable by the fact that he had recently undergone a divorce when he first designated the Respondent a beneficiary to one of his accounts.

Respondent's Position

¶ 48 The Respondent's counsel submitted that the Respondent's actions are not nearly as serious as Enforcement Counsel alleges and that to the extent that there is a spectrum of seriousness, the Respondent's breaches are at the low end of the spectrum and do not warrant the punitive sanctions Enforcement Counsel has proposed.

¶ 49 In making this submission, Respondent's counsel pointed to the decisions in *Gebhardt* and *Marrone,* both of which were relied upon by Staff, where the respective hearing panels described the misconduct at issue as "serious".

¶ 50 In *Gebhardt*, the respondent received a testamentary gift and their spouse was designated as the sole beneficiary of the client's estate. Although the respondent did not become aware of this until after the client had died, he did not disclose the matter to the Member in accordance with his regulatory obligations. The total financial benefit to the respondent was more than $674,000. The hearing panel in that case described the respondent's misconduct as being of a "serious nature".

¶ 51 In *Marrone*, both the hearing panel and subsequently the Merits Committee characterized the Respondent's conduct as "serious".

¶ 52 Respondent's counsel submitted that panels' previous rulings have consistently reserved the heightened terms "very serious" or "highly serious" for instances of misconduct that surpass the magnitude of the conduct in this case – in particular, ones which involve acts of fraud or misappropriation of funds. They pointed to the decision in *Smith (Re),* 2021 LNCMFDA 133, by way of example.

¶ 53 They also disagreed with Enforcement Counsel's submission that the Respondent's misconduct was significantly aggravated by allowing himself to be named beneficiary and POA and with the characterization that he played an "active role" in facilitating his designation as a beneficiary.

¶ 54 Respondent's counsel pointed out that while the Respondent did assist in facilitating his designation he did not initiate or actively permit himself to be named as a beneficiary. The letters of direction which named the Respondent as beneficiary were signed by client DC 10 days and six days respectively before the Respondent forwarded them to the fund companies for the RSP and LIRA accounts. These facts, Respondent's counsel, submitted suggest that DC independently made his decisions prior to involving the Respondent and without the Respondent's awareness.

¶ 55 In response to Enforcement Counsel's argument that the Respondent invoked the POA with the intention to ensure his own financial benefit, Respondent's counsel pointed out that it was the Member who, in the midst of their investigation, expressly instructed the Respondent to use his power of attorney to immediately transfer DC's assets out of the Member. Respondent's counsel submitted that the Respondent's actions, therefore, were not a discretionary exercise of power but rather were executed under explicit directives from the Member and should not be viewed as a manifestation of the Respondent's self-interest, saying that the Respondent's actions were borne out of an intention to fully cooperate with the Member during its investigation.

¶ 56 Respondent's counsel also took issue with Enforcement Counsel's position that the relationship between the Respondent and DC was an aggravating factor.

¶ 57 Respondent's counsel submitted that Enforcement Counsel's assertion that the Respondent used his relationship with the client for pecuniary gain is not made out on the facts and that the characteristics and dynamics of the relationship between the Respondent and his client differ significantly from those in the *Marrone* case. As a result, the aggravating factor of exploiting a close relationship with a vulnerable individual for personal gain that was found in *Marrone*, Respondent's counsel submitted, does not exist in the present matter.

¶ 58 In fact, the Respondent's counsel submitted, the Respondent's relationship with his client, was a mitigating factor.

¶ 59 Counsel highlighted that the facts clearly established that the Respondent's relationship with client DC extended beyond a simple advisor-client bond and that after meeting each other in 2009, five years before the Respondent began acting as DC's advisor, the two had cultivated a close personal friendship. It was within this context that the Respondent was named beneficiary on the client's retirement accounts and eventually received his appointment as POA for DC's financial affairs.

¶ 60 In focusing on the factual distinctions between this matter and *Marrone*, Respondent's counsel pointed out that in *Marrone*, the respondent's client was an elderly, formally uneducated, financially unsophisticated and terminally ill individual and that the respondent went to the extent of providing the client with a list of estate lawyers, initiating a house visit to hasten the estate planning process, attempting to execute documents in a hospital setting despite the client's questionable capacity as assessed by their estate lawyer and attending the signing of said documents, fully aware of the inappropriate nature of his presence.

¶ 61 Respondent's counsel submitted that in those circumstances the respondent's actions reflected an opportunistic exploitation of his relationship with his client which can be contrasted with the Respondent's interactions with client DC in this case where the Respondent neither suggested nor insisted upon being named as beneficiary or power of attorney. Further, client DC was educated and there was no evidence suggesting that he lacked the capacity to make informed legal decisions or was in any way exploited.

(ii) Respondent's experience in the capital markets

¶ 62 Enforcement Counsel argued that given the Respondent's extensive experience in the mutual fund industry he either was or ought to have been aware of his regulatory obligations pursuant to MFDA Rules 2.1.4 and 2.3.1(a), as well as the Member's policies and procedures which prohibited him from accepting an appointment as POA and required him to inform the Member about conflicts of interest with clients so that such conflicts could be appropriately addressed.

(iii) Respondent's Past Conduct

¶ 63 Respondent's counsel submitted that for more than 30 years, across changing economic climates and evolving regulatory frameworks this matter represents the first and only instance of noncompliance in the Respondent's lengthy career.

¶ 64 They submitted, therefore, that the Respondent's long-standing record alongside his commitment to the industry for over three decades should be taken into account as a mitigating factor in these proceedings.

(iv) Respondent's Recognition of the Seriousness of the Misconduct

¶ 65 Enforcement Counsel said they were satisfied that the Respondent recognizes the seriousness of his misconduct, noting that he has fully admitted his misconduct, thereby accepting responsibility for his actions and avoiding the time and expense of a fully contested disciplinary hearing.

(v) Harm Resulting from the Misconduct and Benefits received by the Respondent

Staff's Position

¶ 66 Enforcement Counsel submitted that the Respondent took advantage of his position of trust as client DC's mutual fund advisor to benefit himself and therefore "inherently caused harm" to his client.

¶ 67 While they acknowledged that there is no evidence that client DC was coerced or acted unwillingly when

designating the Respondent as beneficiary to his accounts or naming the Respondent as his attorney for property, Enforcement Counsel submitted that because of the Respondent's misconduct there is no way to know how client DC would have reacted had the conflicts of interest been disclosed to him or how the Member would have addressed the resulting conflicts of interest if they had been informed at a point in time when the client was still in good health.

¶ 68 Enforcement Counsel further argued that the Respondent benefited from his receipt of the after-tax proceeds of the LIRA and RRSP accounts upon client DC's death, totaling approximately $150,235.

Respondent's Position

¶ 69 Respondent's counsel submitted that neither DC nor his heirs suffered any harm as a consequence of the Respondent's actions. They noted, for example, that there is no evidence to suggest that any claims or complaints were lodged against the Respondent from the client's estate and that again, that is in contrast to the facts in *Marrone* where the client's son-in-law filed a complaint with the regulator.

¶ 70 They submitted that this lack of complaints not only illustrates an absence of harm but also the lack of any perceived wrongdoing on the part of the Respondent.

¶ 71 In making this submission the Respondent's counsel cited the decision in *Gebhardt (Re)* where, he argued, the panel reached a similar conclusion:

> Client Harm
>
> 65 We did not find that there was any harm to the Respondent's clients as a result of his misconduct. There was no evidence before us that the Respondent was involved in the preparation of the subject clients' wills or in their decisions respecting their wills or was aware before the clients' deaths that XX had been named as estate trustee and sole beneficiary of client #1's estate and the Respondent was a beneficiary under client #2's estate. Consequently, there was no evidence that the Respondent coerced or manipulated the clients into leaving bequests to him or his wife or that he otherwise took advantage of them.
>
> 66 We also noted that there were no complaints by any relatives of the subject clients about the dispositions relating to the Respondent and his wife in the clients' wills. Also, there was no evidence before us that the Member, upon becoming aware of the conflict or potential conflict, required that the bequests be relinquished.
>
> 67 We considered the factors set out in the two preceding paragraphs to be significant mitigating factors in our decision as to an appropriate penalty.
>
> *Gebhardt (Re), supra,* at paras. 65-67

¶ 72 Respondent's counsel pointed out that in finding there was no harm to the respondent's clients resulting from his actions, the Panel in *Gebhardt* noted that there was no evidence of manipulation or coercion in regard to the clients' Wills. Further there were no complaints by any relatives about the dispositions relating to the respondent and his wife. The panel in that case found that the absence of complaints and a lack of evidence of any harm to be, in fact, significant mitigating factors in its decision on appropriate penalties.

¶ 73 Respondent's counsel also submitted that Staff's assertion that the Respondent manipulated his role under the POA to accrue a "substantial windfall" of $150,235 upon DC's passing, mischaracterizes the facts.

¶ 74 They emphasized there is no evidence suggesting any form of coercion or manipulation on the part of the Respondent in relation to the client's designations of him as beneficiary or POA and the Respondent's receipt of funds from the client DC's investments should therefore not be misinterpreted as a manifestation of misconduct.

¶ 75 They submitted that while the estate was deprived of the value of the RRSP and LIRA accounts, that was done by DC purposefully at a time when he was mentally competent, indicating a conscious and deliberate execution of his testamentary intentions. Any alleged diminishment in DC's estate's value should not and cannot be attributed, they argued, to any misconduct on the part of the Respondent.

¶ 76 Respondent's counsel also argued that the Respondent's failure to disclose his position as beneficiary and POA did not directly lead to his being named or remaining the beneficiary of DC's retirement funds and it would be inappropriate to infer such a causal connection.

¶ 77 They pointed out that this is consistent with the panel's decision in *Marrone* where it recognized that it would be speculative to link non-disclosure of a testamentary gift to the subsequent receipt of said gift and refused to find that accepting receipt of the gift, on its own, constituted misconduct. They cited the following statements by the panel where it noted that it was not in a position to know or decide what would have transpired had the respondent immediately disclosed his client's testamentary gift to the Member:

> 72 The Merits Panel found breaches of MFDA Rules 2.3.2(a)(1) and 2.3.1(a)(ii) arising from Marrone's acceptance of the Power of Attorney for property and his failure to renounce his appointment as alternate executor. In addition, the Merits Panel's finding of a breach of Ontario securities law was based upon Marrone's failure to comply with MFDA Rule 2.1.4, which mandates a multi-step process for the identification, reporting, assessment, and management of conflicts of interest[28] and his failure to comply with IPC's policies and procedures Manual 4.2 that mirrored MFDA Rule 2.1.4.[29] Marrone was found to have breached Ontario securities laws because, in part, he failed to immediately disclose to IPC the conflict or potential conflict of interest arising from his being designated as sole beneficiary and alternate executor under MU's will and being appointed attorney for property.
>
> 73 There is nothing in the Merits Decision that supports a conclusion that Marrone's failure to properly disclose MU's testamentary bequest to IPC either resulted in Marrone being named as a beneficiary under MU's will or remaining as a beneficiary under MU's will.
>
> 74 To the contrary, the Merits Decision addresses the question of what might have happened had Marrone disclosed the bequest to IPC and goes only so far as to observe that such disclosure "may have put his significant inheritance at risk."[30] The Merits Decision's recognition of the possibility that timely compliance by Marrone with his disclosure obligations "may" have put the inheritance under MU's will at risk, is very different than a finding on a balance of probabilities that Marrone's failure to disclose the conflict accounts for or resulted in his interest or continued interest under MU's will.
>
> 75 Based on the available record, we are not in a position to know or decide what would have transpired had Marrone immediately disclosed MU's testamentary gift to IPC. Nor can we know or decide what MU would have done and whether she might have revoked the bequest had she been advised of the conflict or potential conflict of interest.
>
> *Marrone (Re) (Penalty)*, 2023 ONCMT 9 at paras. 72-75

(vi) Deterrence

Staff's Position

¶ 78 Citing the Supreme Court of Canada's often referenced decision in *Cartaway Resources Corp (Re)*, Enforcement Counsel submitted that deterrence is intended to capture both specific deterrence of the wrongdoer as well as general deterrence of other participants in the capital markets in order to protect investors.

> *Cartaway Resources Corp (Re)* 2004 SC 26

¶ 79 Enforcement Counsel also relied on the Ontario Securities Commission's decision in *Marrone (Re)* where the panel stated:

> In addition, it is our view that other registrants need to understand that a breach of their duty to deal honestly, fairly and in good faith with their clients, by not managing client conflicts of interest in the interests of their clients, will have significant consequences. We agree with Staff that sanctions should be such that registrants will realize the risks associated with putting their interests ahead of their client's [sic] are too high.
>
> *Marrone (Re) (Penalty)*, *supra,* at para. 43

¶ 80 Enforcement Counsel submitted that because it can be quite financially beneficial to an Approved Person to disregard such conflicts of interest when they arise and deterrence is a critical objective that must be emphasized in such cases.

¶ 81 Enforcement Counsel submitted, therefore, that imposing a permanent prohibition is appropriate not only to ensure specific deterrence of the Respondent but also to send a strong message to the industry that Approved Persons cannot take advantage of their position of trust and must put clients' interests ahead of their own. In making this submission Staff relied on the penalty decision in *Marrone* where the panel stated:

> Marrone submits that specific and general deterrence would not be achieved in this case. The findings against him, he submits, were isolated to a set period involving only one client, with whom he shared a unique pre-existing personal relationship. He submits there is no evidence to suggest the breaches form part of a repeated pattern of behaviour.
>
> We conclude that permanent market bans are appropriate in this case for the following reasons. Marrone, as a registrant, was in a position of trust with a vulnerable client. The Merits Panel took his pre-existing relationship with his client into consideration and concluded that it was an aggravating, rather than mitigating, factor. Clients need to be able to trust that their advisors will properly manage conflicts and potential conflicts by putting their clients' interests ahead of their own. This obligation is at the heart of the client relationship. The Merits Panel found that Marrone put his interests ahead of his client's interests and, as a result, failed to deal honestly, fairly and in good faith with her. Marrone and other like-minded individuals need to understand that a breach of this obligation will not be tolerated and will have serious consequences.
>
> *Marrone (Re) (Penalty)*, *supra,* at paras. 51-52

¶ 82 They also submitted that imposing a fine that would amount to the Respondent both "disgorging" the benefit he received under the client's Will and paying an additional penalty, was also necessary in order to achieve both specific and general deterrence.

¶ 83 They submitted that the importance of a monetary penalty satisfying both of these aims has been expressed by the OSC in *Northern Securities Inc (Re)*:

> . . . Imposing that fine, in addition to disgorgement, is necessary as a matter of general deterrence. There may be significant financial benefits that can be obtained as a result of a contravention of IIROC Rules. As a general principle, no registrant should be able to profit from the breach of IIROC Rules. It is not sufficient deterrence simply to pay to IIROC an amount equal to the profit obtained from the misconduct. IIROC Dealer Members and Approved Persons must recognize that there will be a substantial cost to misconduct. A substantial fine, in addition to disgorgement, is appropriate in these circumstances.
>
> *Northern Securities Inc. (Re)* 2014 LNONOSC 581 at para. 215

¶ 84 Relying on the following decisions, Enforcement Counsel submitted that MFDA hearing panels have also applied the same principle when ordering fines in other cases involving a contravention of MFDA Rule 2.1.4:

> *Elwood (Re)* 2020 LCM MFDA 183 paras. 37-39
>
> *Davidson (Re)* 2021 LNC MFDA 98 paras. 58-61

¶ 85 In both their written and oral submissions, Enforcement Counsel acknowledged that in the penalty decision in *Marrone*, the Tribunal refused to order disgorgement notwithstanding that the Respondent in that case could potentially receive a benefit of approximately $1.8 million under his client's Will as the sole beneficiary.[2]

¶ 86 Enforcement Counsel identified that the basis for the Tribunal's refusal to order disgorgement was because it could not conclude that the precondition for disgorgement required under the *Ontario Securities Act*

[2] At the time of the hearing the Will was subject to litigation – hence the reference to "potentially".

had been satisfied, namely that the respondent Marrone obtained or kept his interest in his client's estate as a result of his misconduct or non-compliance with Ontario securities law.

¶ 87 Enforcement Counsel noted for the Panel that the *Marrone* decision is under appeal with both parties appealing various aspects of the decision.

¶ 88 In any event, they submitted, the Panel in this case is not constrained by a similar impediment to ordering a fine that reflects disgorgement of the amount the Respondent received from DC, should it so choose.

¶ 89 In making this argument Enforcement Counsel pointed out that under MFDA By-law No.1, section 24.1.1(b) grants a hearing panel authority to order a fine that is "the greater of: (i) $5 million per offense; and (ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation."

¶ 90 Accordingly, Enforcement Counsel submitted, this section alone gives the Panel sufficient authority to order a fine that substantially exceeds the Respondent's gain and has no prerequisite that requires that the Respondent's benefit be a direct result of non-compliance with the MFDA Rules.

¶ 91 In other words, they argued, the Panel's powers are not circumscribed in the same way as were the powers of the panel in *Marrone* and that it is open to the Panel to find that the Respondent benefited from his misconduct by failing to avoid having DC name him as a beneficiary of his investment accounts and by facilitating that designation.

¶ 92 With respect to the amount of the additional fine Enforcement Counsel was seeking, they relied on the Tribunal's decision in *Marrone* which concluded that a $500,000 administrative fine was appropriate to send the message that Tribunal sanctions cannot be viewed as a mere licensing fee for failing to properly address conflicts of interest". Counsel noted that in so finding, the Tribunal held that Marrone's conduct was particularly egregious given: a) the client's vulnerability; b) the size of the client's account; c) the value of the client's estate; d) the extent of Marrone's involvement with the preparation and execution of the client's estate documents; and e) the fact that Marrone's conduct deprived Marrone's Member and the client the opportunity to address the conflicts of interest.

¶ 93 Enforcement Counsel repeated their arguments that significant aggravating factors are equally present in this case. Namely that where an advisor becomes a beneficiary of the very accounts that he is servicing the resulting conflict of interest is particularly egregious and is likely to give rise to the concern that clients and their family members may fear dealing with advisors who may use their trusted position in a client's life to enrich themselves.

¶ 94 Ultimately, Enforcement Counsel argued, regardless of the approach the Panel adopts, what is important is that the total fine the Panel orders be sufficient to achieve specific and general deterrence and maintain public confidence in the mutual fund industry and the regulatory process. If the sanction for accepting a designation as the beneficiary of a client's investment account is less than the financial benefit derived from doing so, Counsel submitted, the financial penalty will be perceived as no more than a "licensing fee" or a "tax" on the proceeds from the account and in such cases is unlikely to achieve deterrence. Accordingly, in their submission, the fine imposed in this case must exceed the Respondent's benefit. In making this argument Staff also referred to the following sections in the Sanction Guidelines:

> A fine is a monetary sanction imposed on a Member or an Approved Person found to be in contravention of MFDA By-laws, Rules and Policies. Fines are frequently imposed in disciplinary proceedings, but are not required in all cases. Generally, the amount of a fine should, at a minimum, have the effect of disgorging the amount of the financial benefit received by the Respondent as a result of the misconduct.
>
> The amount of a fine should be commensurate with the seriousness of the misconduct. In the most egregious cases, Hearing Panels may consider the maximum fines permitted under s. 24 of MFDA By-law No. 1. A fine should not be tantamount to a licensing fee to engage in the misconduct.

Respondent's Position

¶ 95 In support of their position that no further or alternatively only minimal sanctions should be imposed on the Respondent, the Respondent's counsel submitted that disciplinary sanctions, while central to maintaining the integrity of the securities industry should primarily aim to safeguard the public and must not unjustifiably penalize a Respondent.

¶ 96 In making this argument they relied on the Supreme Court of Canada's decision in which the Court emphasized the protective and preventative nature of sanctions, ruling that administrative sanctions are not to be remedial or punitive:

> The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets.
>
> *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission) (Asbestos), supra,* at para.36

¶ 97 Respondent's counsel also argued that the application of general deterrence must be exercised in a proportionate and reasonable manner and sanctions must not be in "crushing" or "unfit":

> The Commission determined that general and specific deterrence were important factors in assessing the sanctions required to protect the public interest, while recognizing that the circumstances of some of the appellants made specific deterrence less important for them (sanction reasons para. 45). Those are legitimate considerations, but at the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant.
>
> *Walton v. Alberta (Securities Commission)* 2014 ABCA 273 at para. 154

¶ 98 Respondent's counsel argued that the levying of disproportionate sanctions with the intent of setting a deterrent example that results in undue harm to individuals exceeds the jurisdictionally proper protective objective of securities regulation and strays into improper and "impermissible punitive or remedial sanctions".

¶ 99 In other words, Respondent's counsel argued, it is not open to a panel to impose an unfit sanction on a particular respondent in an effort to satisfy the goal of general deterrence.

¶ 100 They argued that Staff's proposed penalty was not only excessive and punitive but also disproportionately severe considering the nature of the offense and the Respondent's personal and financial circumstances and capacity.

¶ 101 On this latter point, Respondent's counsel also relied on the Alberta Court of Appeal in *(Re) Eisenberg*, which stated that decision makers are required to carefully consider an individual's personal circumstances in conjunction with proportionality:

> However, the Court cautioned, "[t]he respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act" (at para. 61). The same may be said of specific deterrence. As explained in *Homerun* (at para. 14)
>
> > The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondent's misconduct. [Emphasis added]
>
> *(Re) Eisenberg* 2022 ABA SC22 at para. 155

¶ 102 On the issue of specific deterrence, Respondent's counsel argued that the Respondent has already suffered significant harm both financially and personally – including to his health, such that no further sanction is therefore justified or required.

¶ 103 They submitted that the Respondent does not present any imminent threat to the capital markets. In this regard they cited the decision of *Northern Securities Inc., et al, supra,* where an IIROC panel discussed the circumstances in which a permanent ban is merited saying that it is only merited for severe misconduct in specific circumstances including where it is clear that the respondent's conduct is indicative of resistance to governance, the misconduct has an element of criminal or quasi-criminal activity or there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients and the securities industry as a whole.

¶ 104 Respondent's counsel submitted that none of those circumstances apply in this case and that the Respondent's expressions of regret, admission of wrongdoing and the immense psychological toll the proceedings have exacted on him diminished the likelihood of him engaging in similar misconduct in the future.

¶ 105 In response to Enforcement Counsel's argument that *Marrone* provides instructive guidance concerning sanctions in this matter, the Respondent's counsel again spent considerable time distinguishing the facts between the circumstances in that decision and the present case.

¶ 106 First, they submitted the financial benefit realized by *Marrone,* which was in excess of $1.8 million, was a significant differentiating factor. They argued that this amount undeniably played a significant role in the decision regarding penalty. Comparatively, they argued, the Respondent's financial gain in this case was a mere fraction of what the respondent in *Marrone* received. Further, unlike in *Marrone*, here there is no evidence that the Respondent's financial benefit was derived from any malicious intent or coercion.

¶ 107 The Respondent's counsel also pointed out that the bequest Marrone received constituted a major portion of his book of business, representing nearly 1/3 of it, and that the panel's decision in that case undoubtedly took that into account as an aggravating factor while the Respondent's book of business in this case exceeded $38 million making the $150,000 bequest, a mere fraction of his business.

¶ 108 Further, in *Marrone* Respondent's counsel argued, the respondent was an active participant in his designation as beneficiary and executor despite challenges to the client's capacity. In contrast, here there is no evidence that the Respondent took any active role in his designation nor is there any indication of coercion or undue influence, nor evidence to suggest that client DC lacked the capacity to make financial decisions.

¶ 109 For all of these reasons, Respondent's counsel submitted, in light of what he described as "strikingly disparate circumstances" to *Marrone*, the submission that that case would serve as instructive guidance for determining an appropriate fine in this matter, is fundamentally flawed.

Ability to Pay

Respondent's Position

¶ 110 Respondent's counsel argued that the Respondent's financial situation should be a key determinant in any decision regarding an administrative penalty and that the Panel should bear in mind the considerable personal and professional costs that the Respondent has had to bear as a result of these proceedings.

¶ 111 They also urged the Panel to consider the Respondent's age which would likely preclude his potential for substantial future income.

¶ 112 In making these arguments, Respondent's counsel relied on the following passage from the decision in *Northern Securities Inc. et al* where the OSC held that sanctions must be proportionate to the conduct and the specific circumstances of the Respondent.

> We accept that a respondent's personal and financial circumstances are relevant factors to be considered, along [...] in determining the amount of a fine. We also accept that considering ability to pay is consistent with the principle of proportionality in determining sanctions, and we are not persuaded that it is inconsistent with achieving general deterrence.
>
> *Northern Securities Inc. et al*, *supra,* para. 181

Staff's Position

¶ 113 Enforcement Counsel submitted that the Respondent has failed to provide any evidence to support his

position. For example, he has not provided the Panel with any documentation relating to his credit card statements, tax returns, bank account or investment accounts or the value of, for example, assets such as his home; nor has he provided evidence of attempts to find work outside the industry. Enforcement Counsel noted that the information that was entered into the record at the outset of the Hearing shows that for the three years commencing in 2019, the Respondent earned well over $100,000 and there is no evidence as to how he has spent the $150,000 he received as a beneficiary under DC's Will.

¶ 114 Plus, although the Respondent provided evidence that showed he had paid a further $27,895 in taxes relating to DC's estate, the evidence was that the Respondent's wife was named as the estate trustee for the client's estate and there was no evidence as to why the estate did not pay that amount.

¶ 115 Accordingly, relying on the Sanction Guidelines and the following cases which they submit say that the onus is on the respondent to establish inability to pay, Enforcement Counsel submitted that the Respondent has failed to satisfy that requirement.

> MFDA Sanction Guidelines
>
> *Ramogolam (Re)*, 2021 LNCMFDA 3
>
> *Chow (Re)*, 2022 LNCMFDA 9, paras. 102-104 and 107
>
> *Elwood (Re)*, 2020 LNCMFDA 183, paras. 41-43

¶ 116 Enforcement Counsel also submitted that to the extent that the Panel finds that the Respondent has satisfied his burden to establish a limited ability to pay a fine, this factor should not be overemphasized, noting that in the Sanction Guidelines, ability to pay "is only one of the factors to be weighed in relation to all other applicable factors including general and specific deterrence and the need to ensure public confidence in the MFDA's disciplinary processes." They also submitted that in circumstances such as this case where the misconduct may seriously undermine public confidence in the mutual fund industry, it is important that the fine not be so reduced on account of ability to pay as to undermine the goals of specific and general deterrence. In making this submission, they relied on *Kowalsky (Re)*, 2022 LNCMFDA 31 at paras. 29-32.

Personal Circumstances

Respondent's Position

¶ 117 As noted above, part of the additional evidence which the Respondent adduced by agreement with Staff, included three letters written by a registered psychologist who said that they had been treating the Respondent intermittently between March of 2021 and July of 2023.

¶ 118 The letters said that the Respondent was diagnosed as suffering from a major depressive disorder and that he continued to experience significant difficulties as a result. The psychologist identified a number of risk factors to the Respondent's well-being including:

> "stress-related health challenges, hopelessness, perceived burdensomeness, financial and occupational problems and significant social isolation. Particular stressors experienced by [the Respondent] include financial stressors, stressors regarding his health and quality of life, and an ongoing investigation and likely disciplinary action from his professional regulatory body. [The Respondent] identifies the latter stressor as the most impactful."

¶ 119 The Respondent's counsel submitted that the Panel should take this evidence into account with respect to assessing both specific and general deterrence and the overall proportionality of any sanctions imposed.

Staff's Position

¶ 120 Enforcement Counsel argued that to the extent that the Respondent is relying on the psychologist's letters to support his argument that no further sanctions should be imposed because of the financial and emotional suffering he has sustained as the result of having been dismissed from the Member and participating in these proceedings, such consequences are natural consequences of the Respondent's misconduct. Citing the panel's decision in *Marrone, supra*, at paras. 57 and 58, Staff submitted that such "foreseeable consequences" from an Approved Person's misconduct are irrelevant to a panel's determination of the appropriate

administrative penalty.

¶ 121 Enforcement Counsel also submitted that MFDA decisions have said that personal circumstances cannot be relied upon to such an extent that they interfere with or prevent the appropriate message of deterrence that any penalty must send. They specifically cited:

Kowalsky (Re), supra, at paras. 31-32

Fauth 2019 LNA BASC 90 at paras. 85 and 111

(vii) Previous Decisions Made in Similar Circumstances

Staff's Position

¶ 122 Enforcement Counsel attached a schedule to their written submissions which contained a chart setting out the following comparator cases:

CASE	MISCONDUCT	PENALTIES
Marrone (Re) (Misconduct) 2022 ONCMT 13; (Penalty) 2023 ONCMT 9	The Respondent acted unfairly, dishonestly, and in bad faith towards a vulnerable client by failing to follow the required procedures for dealing with conflicts or potential conflicts of interest, contrary to MFDA Rules, the Member's policies and procedures, and OSC Rule 31-505. <u>Details and Other Factors:</u> • The Respondent coordinated with legal counsel to have client MU, who was hospitalized, prepare a new will and POAs. • Client MU signed a will naming the Respondent as sole beneficiary and alternate executor, as well POAs naming him as attorney for both property and personal care. • The Respondent never acted on the POAs. • The Panel rejected the argument that being named as an alternate executor was not a breach of MFDA Rule 2.3.1(a). • The Panel found that being named as a beneficiary was also a breach of Rule 2.1.4. • The Panel also found breaches of MFDA Rules 2.1.1, 1.1.2, and 2.5.1, and the Member's policies and procedures. • Client MU's will was being contested. At the time of the hearing, the Respondent had not received any benefit under the will.	Contested Hearing: • Permanent prohibition from being registered as a registrant, investment fund manager, or promoter • Permanent prohibition and immediate resignation from acting as an officer or director of an issuer, registrant, or investment fund manager • Penalty of $500,000 • Costs of $85,000
Plentai (Re), 2022 LNIIROC 4	The Respondent engaged in personal financial dealings with a client, RC, including accepting payments totaling $6,170 for activities conduct on behalf of the client. The Respondent relied on a Power of Attorney for personal care granted by RC as the basis for conducting activities for RC that went beyond matters of personal care.	Settlement Agreement: • 2 year prohibition • Fine of $45,000

CASE	MISCONDUCT	PENALTIES
	The Respondent had his spouse named as a beneficiary of client RC's will. Details and Other Factors: • Client RC was 87 to 89 years old during the period of misconduct and was diagnosed with Alzheimer's. • The Respondent used the Power of Attorney for personal care to instruct a lawyer and accountant on behalf of client RC. • Client RC initially bequeathed $260,000 to the Respondent's spouse. • Following the intervention of RC's accountant, RC executed a new will that no longer named the Respondent's spouse as a beneficiary.	• Disgorgement of $6,170 • Completion of CPH Course • Costs of $10,000
Gebhardt (Re), 2023 LNCMFDA 9	The Respondent failed to disclose to the Member a conflict or potential conflict of interest that arose when he became aware that a client had named his spouse as the sole estate trustee and sole beneficiary of the client's estate in the client's will. The Respondent failed to disclose to the Member a conflict or potential conflict of interest that arose when he became aware that he was named by a client as the recipient of a $25,000 bequest in the client's will. Details and Other Factors: • Client #1 was 77 years old prior to his death. • Client #1 named the Respondent's spouse as estate trustee and beneficiary after being informed by the Respondent that he was not permitted to act as estate trustee. • The Respondent did not learn his spouse was named as trustee and beneficiary until after client #1 passed away. • The Respondent's spouse inherited investments totaling approximately $480,318, as well as a house which was sold to client #1's sister for $164,000. • The Respondent did not disclose the situation to the Member when he became aware, nor did he disclose that his spouse was redeeming the monies from client 1's accounts as estate trustee. • Client #2 was 93 years old prior to his death and had been hospitalized.	Settlement Agreement: • 8 year prohibition • Fine of $70,000 • Costs of $7,500 Note: There was a dissenting opinion from one Hearing Panel representative on the basis that the financial penalty was not a sufficient deterrent and failed to fall within a reasonable range of appropriateness.

CASE	MISCONDUCT	PENALTIES
	• Client #2 bequeathed a $25,000 gift to the Respondent, which he deposited and failed to disclose to the Member. • The Respondent, when being investigated in respect of Client #1, falsely stated that he had not been named as a beneficiary with respect to Client #2 when asked by the Member.	
McCullough (Re), 2017 LNIIROC 27	The Respondent accepted a gift in the amount of $750,000 from client, without the knowledge or consent of his Dealer Member. The Respondent failed to report to his Dealer Member that he had been served with a Notice of Civil Claim relating to his dealings with that client. <u>Details and Other Factors:</u> • The Client was 85 years old at the time of the gift. • Gift was made inter vivos. • The first lawyer the Respondent sent the Client to felt the client lacked the mental capacity to make the gift. • The Respondent sent the Client to a second lawyer that agreed to draw up the deeds of gift. • The $750,000 gift was drawn upon the Client's investment account and paid to the Respondent. • The client died one year later. • The civil claim was brought by the client's family to contest the gift. The civil claim was settled.	Settlement Agreement: • 5 year suspension • Fine of $80,000 • Costs of $5,000
Smith (Re), 2021 LNCMFDA 133	The Respondent: • accepted and acted upon a power of attorney from a related client without notifying the Member and transferring the accounts to another Approved Person in accordance with the Member's requirements. • engaged in personal financial dealings with a related client when he acted upon a power of attorney to borrow or otherwise obtain monies from the client's accounts. • provided false or misleading responses to the Member on annual compliance questionnaires relating to accepting a power of attorney or borrowing monies from a related client.	ASF with contested financial penalty only: • 1 year prohibition • Fine of $140,000 ($122,000 benefit + $18,000 fine) • Costs of $5,000

CASE	MISCONDUCT	PENALTIES
	• failed to notify the Member within two business days that he had made an arrangement with his creditors. Other Factors: • POA was in favour of the Respondent's mother. He repaid $54,358 out of $149,358 that he withdrew from mother's accounts as POA to support gambling. She also incurred interest on her line of credit totaling $27,000. • Client was elderly.	
Karasick (Re), 2015 LNCMFDA 64	The Respondent: • Accepted a power of attorney from a client in favour of himself. • Was designated as a beneficiary of a client's in-trust account at the Member. Engaged in personal financial dealings with a client by accepting a monetary gift of $309,474. • Misled the Member by falsely answering annual certifications stating that he did not hold a POA, he was not named as a beneficiary, and had not received monetary gifts from clients. Other Factors: • The Respondent had been out of the industry for over 2 years • The Respondent returned the $309,474 gift.	Settlement Agreement: • 1 year prohibition • Fine of $10,000 • Costs of $2,500
Sukman (Re), 2016 LNCMFDA 48	The Respondent accepted and held a power of attorney for property from client XX, and was appointed as estate trustee, executor and trustee of client XX in her Will. The Respondent engaged in personal financial dealings with client XX by: • accepting an entitlement to a $10,000 legacy in lieu of executor fees; and • accepting joint ownership in one account and designation as beneficiary of two accounts held by client XX at the Member Other Factors: • Client was elderly and unsophisticated.	ASF with joint submission on penalty: • 1 Year Prohibition • Fine of $10,000 Fine Costs of $2,500

CASE	MISCONDUCT	PENALTIES
	• There was no evidence that the Respondent received any financial benefit from his misconduct. Panel commented that had this been contested, the suspension would have been far greater.	

¶ 123 At the Hearing, however, Enforcement Counsel argued that the comparator cases were of limited assistance in this matter primarily because, with the exception of *Marrone* and *Smith,* all of the cases involved either settlement agreements or an ASF with joint submissions on penalty.

¶ 124 They urged the Panel, therefore, to rely on the decision in *Marrone* where, because it found that the comparator cases presented to it were of limited value for the same reasons, the panel proceeded on the basis of first principle by directly applying the sanction factors to the circumstances of that case.

¶ 125 Enforcement Counsel submitted that the decision in *Marrone* sets a new precedent and establishes that significantly greater sanctions are appropriate to deter the type of misconduct that is the subject of this case than have been ordered by MFDA hearing panels in the past.

Respondent's Position

¶ 126 Respondent's counsel also prepared a chart of comparable cases for the Panel's review, as set out below. The chart refers to some of the same cases relied upon by Enforcement Counsel – albeit described somewhat differently - highlighting different aspects of those decisions.

Case	Facts	Penalties
McCullough (Re), 2017 IIROC 27	The Respondent: • accepted a gift of $750,000 from a client, without the knowledge of his Dealer Member; and • failed to report to his Dealer Member that he had been served with a Notice of Civil Claim relating to his dealings with that client. • Fine only represented 10.67% of financial benefit. *The Respondent's 85 year old client, BT, told the Respondent she wanted to give him some money. The Respondent prepared a document entitled "considerations for will" for BT to take to a lawyer that listed the Respondent as POA and executor for BT's estate and set out several *inter vivos* gifts, including $750,000 to the Respondent. *BT's first lawyer had concerns about BT's mental competency. The Respondent then obtained the name of another lawyer to facilitate the *inter vivos* gifts. *BT then liquidated her entire account at the Member worth over $900,000 and deposited the proceeds in her bank account. *The Respondent then accompanied BT to her bank where she obtained a bank draft to fund, among other things, the $750,000 gift to the Respondent. *The Respondent received a Deed of Gift and $750,000 from BT. BT died six months later. *The civil claim was dismissed. Also, the next of kin of BT brought an action contesting the validity of the $750,000 gift that was settled out of court.	Settlement Agreement: • 5 year prohibition • Fine of $80,000 • Costs of $5,000
Smith (Re), 2013 IIROC 27	The Respondent: • failed to disclose the following personal financial dealings with two clients (spouses): ◦ the clients sold property to the Respondent and his wife for approx. $300,000; ◦ after one client died, the other client: • gave each of the Respondent's two children a $30,000 monetary gift; and • executed a new will naming the Respondent and his family as a 75% beneficiary of the client's estate (the client later died and the Respondent and his wife received approx. $917,000).	Settlement Agreement: • 4 year prohibition • Fine of $50,000 • Costs of $5,000

Case	Facts	Penalties
	*The clients were elderly and close friends of the Respondent's family. However, there was no basis to conclude that the Respondent took advantage of them.	
Plentai (Re), 2022 LNIIROC 4	The Respondent: • accepted payments from client RC for activities not related to an approved outside activity; • conducted activities for RC that went beyond the POA for personal care that he held for the client; and • failed to take steps to ensure that RC did not name him as a beneficiary under RC's will, directly or indirectly via his spouse. * RC was approx. 88 years old and had been diagnosed with Alzheimer's disease, of which the Respondent was aware. *The Respondent failed to disclose to the Member that he was POA for personal care for RC and exceeded his authority under the POA, including by instructing a lawyer and accountant on RC's behalf. *By draft will dated May 2018, the Respondent was named beneficiary of ten parts of RC's estate valued at approx. $260,000. The Respondent then arranged a meeting between RC and a lawyer, during which RC executed a will naming the Respondent's spouse as beneficiary of the ten parts of her estate. The Respondent then forwarded to his spouse an email from RC's lawyer, attaching the will. *Following intervention by RC's accountant, RC executed a new will which did not name the Respondent's spouse as beneficiary.	Settlement Agreement: • 2 year prohibition • $6,170 disgorgement of payments for unapproved outside activities • Fine of $45,000 • Costs of $10,000 Ethics course

Case	Facts	Penalties
Salina (Re), [2022] Hearing Panel of the Pacific Regional Council, MFDA File No. 202081, Reasons for Decision dated August 30, 2022	The Respondent: • recommended for the account of 95 year old client FD a switch of approximately $498,511 from a no-load mutual fund to the same mutual fund which was subject to a 7 year deferred sales charge (DSC) schedule, generating a commission for the Respondent to which he would not otherwise have been entitled; • failed to disclose to the Member that he had been named a beneficiary in deceased FD's will; and • obtained and possessed 24 pre-signed account forms in respect of 13 clients. *The Member clawed back the commission of approx. $19,000 the Respondent received as a result of the switch. *After FD died, her estate redeemed the investments she held at the Member, which resulted in DSC fees of approx. $25,000. The Member compensated the estate for the DSC fees incurred. *The Respondent had been bequeathed approx. $185,000 from FD's estate. At the direction of the Member, the Respondent disclaimed the bequest.	Settlement Agreement: • ⋅ No prohibition • ⋅ Fine of $30,000 • ⋅ Costs of $5,000

Case	Facts	Penalties
Karasick (Re), [2015] Hearing Panel of the Pacific Regional Council, MFDA File No. 201427, Reasons for Decision dated June 18, 2015	The Respondent: • accepted and held a POA from client FM in respect of the sale of FM's condominium; • was designated as a beneficiary of FM's in-trust account at the Member; • accepted a monetary gift from FM in the amount of $309,474; and • misled the Member by falsely answering the Member's Annual Consultant Certifications. *Around the time of FM's death, the Respondent advised the Member in writing he had been named as the beneficiary of the in-trust account. The Respondent did not accept any of the proceeds from the account, which went instead to FM's children. *The monetary gift from FM was made with the benefit of independent legal advice and without solicitation from the Respondent. *Following a complaint from FM's daughter after FM's death, the Respondent returned the monetary gift to FM's daughter.	Settlement Agreement: • 1 year prohibition • Fine of $10,000 • Costs of $2,500
Sukman (Re), [2016] Hearing Panel of the Central Regional Council, MFDA File No. 201519, Reasons for Decision dated May 9, 2016	The Respondent: • held a POA for property from client XX, and was appointed as estate trustee, executor and trustee of XX in her Will; and • engaged in personal financial dealings with XX by: (a) accepting an entitlement to a $10,000 legacy in lieu of executor fees; and (b) accepting joint ownership in one account and designation as beneficiary of two accounts held by XX at the Member. *The client was a 91-year-old widow with no immediate family. *There was no evidence that the Respondent received any financial benefit or that the client suffered harm (the Member removed the Respondent's designation as beneficiary and reversed the transfer of the client's account to the joint account held by the Respondent and the client).	Agreed Statement of Facts: • 1 year prohibition • Fine of $10,000 • Costs of $2,500

Case	Facts	Penalties
Fairclough (Woods) (Re), [2022] IIROC 20	The Respondent: • acted as POA for a client MB; and • accepted a monetary gift of $50,000 from MB to act as the client's executor. *In Jan. 2019, the Respondent received and deposited a personal cheque from MB in the amount of $50,000. She did not advise the Member. *Commencing Jan. 2019, the Respondent also acted as POA on 5 occasions to assist MB who was living abroad. She did not advise the Member. *In July 2020, MB died. The Respondent began acting as her executor, and did not advise the Member. *MB's beneficiaries then filed a complaint, and IIROC launched an investigation. *During IIROC's investigation, Respondent ceased acting as executor and repaid the $50,000 monetary gift to MB's estate. *The Respondent was subject to internal Member discipline: • For acting as POA: fine of $12,500 donated to charity; industry course For receiving gift: fine of $7,500 donated to charity	Settlement Agreement: • Fine of $17,500 • Costs of $5,000

Costs

Staff's Position

¶ 127 Enforcement Counsel sought costs in the amount of $10,000

¶ 128 By awarding costs in a disciplinary hearing, Enforcement Counsel submitted, a panel appropriately holds a respondent accountable for a portion of the costs that Staff has incurred as a result of the respondent's regulatory misconduct and transfers some of the financial costs of investigating and prosecuting the respondent from the regulator's membership, to the respondent who contravened his regulatory obligations.

¶ 129 Enforcement Counsel provided the Panel with a Bill of Costs totaling $17,225 and submitted, therefore, that the amount of costs it was seeking is reasonable and considerably less than the cost of the full amount of time and resources expended by Staff to complete the investigation and prosecution in this case.

Respondent's Position

¶ 130 Respondent's counsel submitted that the Respondent has already suffered significant financial costs stemming from these proceedings in addition to having suffered a loss to his professional standing and incurred extensive medical and legal costs and that any further costs would impose an undue burden on his already strained resources.

¶ 131 They also noted that because the Respondent admitted his misconduct he mitigated the necessity for a full hearing which has resulted in cost savings for all parties involved.

¶ 132 Ultimately, Respondent's counsel argued, the imposition of further sanctions by way of costs would not serve any additional protective purpose but would instead be purely punitive and contrary to the intended and

rightful function of sanctions.

VI. ANALYSIS

Overview

¶ 133 The Panel has carefully considered the parties' submissions both written and oral and is grateful for the assistance those submissions have afforded us.

¶ 134 We agree with Enforcement Counsel's submission that the comparator cases which were presented to us by both parties are of limited assistance because for the most part, they involve either negotiated settlement agreements where the panel's authority to impose a penalty was circumscribed and constrained by the agreement reached between the parties or Agreed Statements of Facts where the parties made joint submissions on penalty.

¶ 135 In light of the limited assistance which these cases afforded us, although we did consider them, in order to determine the appropriate sanction, we proceeded primarily on first principle, consistent with the approach taken by the panel in *Marrone,* apply the relevant factors we discussed earlier, to the facts of this matter.

¶ 136 In reaching our decision, we acknowledge that sanctions must be preventative and focus primarily on protecting the investing public. They must take into account specific and general deterrence, the seriousness of the misconduct, the respondent's record in the industry, any harm caused to the client or benefit received by the respondent as the result of the misconduct and the existence of any mitigating and aggravating factors.

¶ 137 Overall, we were guided by the principle that a penalty must be reasonable and proportionate in light of all of the circumstances of the matter.

Seriousness of the misconduct

¶ 138 Degrees of levels of seriousness are not mathematically calibrated. For example, the panel in *Marrone*, in the same set of reasons, alternately described the respondent's conduct as "serious" or "very serious".

¶ 139 In assessing the Respondent's misconduct in this matter, we note that the Sanction Guidelines, under the heading: "The seriousness of the allegations proved against the respondent" say that:

> In appropriate cases, distinctions may be drawn between misconduct that was unintentional or negligent, and misconduct that was intentional, manipulative, fraudulent or deceptive. Distinctions should also be drawn between isolated incidents and repeated, pervasive or systemic violations.
>
> MFDA Sanction Guidelines, p. 3

¶ 140 Given his years of experience the Respondent ought to have been aware that he was required to disclose the existence of the conflicts of interest which arose from his being named a beneficiary and accepting the POA, to the Member. He also ought to have realized that he was not allowed to accept the designation as a POA in the first place. His misconduct was, however, an "isolated incident", to use the wording from the Sanction Guidelines.

¶ 141 There was also nothing in the Respondent's conduct that was fraudulent or deliberately misleading. This is in contrast to some of the cases that the parties cited to us where, for example, the respondent not only breached the conflict of interest rules but also provided misleading answers to their Member's questionnaire as to whether they had been named as a beneficiary in their client's Will. See, for example: *Smith (Re); Karasick (Re);* and *Gebhardt (Re), supra*.

¶ 142 Although Enforcement Counsel submitted that the panel in *Gebhardt* described the respondent's misconduct as "highly serious" in fact, the description the panel used in that case was "serious".

> *Gebhardt, supra,* at para. 61

¶ 143 Nonetheless, we find that the nature of the Respondent's misconduct was serious because it undermined the integrity of his relationship with both the client and the Member.

¶ 144 Even where a client has willingly made an Approved Person a beneficiary and demonstrates no evidence

of having been misled, panels have found that accepting a gift without complying with the appropriate disclosure requirements in accordance with the Member's policies and the Regulator's rules, contravenes MFDA Rules 2.1.4 and 2.1.1.

Salina (Re), 2022 LNC MFDA 103 at para. 23

¶ 145 When an Approved Person fails to comply with the conflict of interest rules they deprive the Member of its ability to supervise their actions and the client of their ability to make an informed decision.

¶ 146 In this case, however, there is no evidence that the Respondent exploited the close personal friendship that he had with his client.

¶ 147 Nor is there any evidence that the Respondent coerced or manipulated the client who, the evidence discloses, was of full capacity and whose actions, therefore, disclose a willingness to place his trust in both the Respondent and the Respondent's spouse.

¶ 148 We also note there is no evidence of a complaint associated with the bequest.

¶ 149 Accordingly, while we consider the Respondent's misconduct to be serious we do not find that it is at the highest end of severity which is reserved for conduct which is, for example, deliberately misleading, deceitful or fraudulent or which exploits a client who is vulnerable.

¶ 150 On this last point, we distinguish this matter from cases such as *Smith, Sukman, McCullough, Marrone (Misconduct)* and *Plentai, supra,* where the respective panel found the client was vulnerable because of such things as age and lack of mental capacity. Those considerations are not found in this case.

¶ 151 Having regard to Staff's submission that the Respondent's acceptance of the beneficiary designation alone, amounted to misconduct, we note that the panels in *Marrone* and *Gebhardt*, did not find that the benefit each respondent received under the respective Wills, led to the conclusion that the respondent had benefited from his misconduct.

¶ 152 The panel in *Marrone* noted that nothing in the Ontario Securities Act or the MFDA Rules prohibited Marrone from receiving a benefit under a client's Will.

Marrone (Re), supra, at paras. 68-75

¶ 153 The misconduct that was identified in *Marrone* was confined to a finding that the Respondent failed to disclose the conflict that arose from the client's bequest to him and the Respondent's acceptance of and failure to disclose the designation of Power of Attorney.

¶ 154 Similarly, we do not find that the Respondent's acceptance of the beneficiary designation in this matter, amounted to misconduct in this case.

¶ 155 The Panel does not agree, therefore, with Staff's submission that by accepting the beneficiary designation alone, the Respondent contravened the Standard of Conduct Rule 2.1.1.

¶ 156 Nothing in the Member's policies and procedures or the MFDA's Rules prohibits mere acceptance of the designation as a beneficiary, *per se*.

¶ 157 We find no authority to support Staff's submission that Rule 2.1.1, the Standard of Conduct Rule should be interpreted to mean that in every case, Approved Persons are prohibited from accepting a designation as a beneficiary under a client's Will and while in some of the cases relied upon by the parties the respective Member's policies had a specific prohibition on being named as a beneficiary, that was not the case in this matter.

¶ 158 We are not prepared to extend the application of Rule 2.1.1 to say that it means that in every case being named a beneficiary or failing to decline being named a beneficiary results in a finding of misconduct under that Rule and we certainly do not find the circumstances in this case give rise to such a finding.

¶ 159 In this case the facts are clear that the Respondent and his client had a close personal friendship that predated the Respondent becoming the client's financial advisor and there is no evidence that would suggest that designating the Respondent as beneficiary was anything other than the reflection of the client's voluntary

intention. Like the panel in *Marrone (Penalty)*, we cannot know what would have transpired had the Respondent immediately disclosed the gift to the Member nor can we know or decide what the client would have done if he had been advised of the conflict or potential conflict of interest but as the tribunal in *Marrone* found, that in and of itself does not lead us to find that being a beneficiary of a client's estate is a breach of the MFDA's Rules.

¶ 160 Having made this finding, we emphasize that we agree with the panel in *Marrone* that in some cases there may be aggravating circumstances such as, for example, evidence of a respondent having taken advantage of a vulnerable client, that will warrant an increased penalty where a tribunal has found that they breached Rule 2.1.4 and a finding that the specific circumstances of the case amount to a breach of Rule 2.1.1.

Respondent's Record in the Industry

¶ 161 Although the extent of the Respondent's experience in the industry means that he ought to have been aware of his obligations to the Member and the Regulator, we consider the fact that this is the first instance of misconduct in what is otherwise a long and unblemished career, to be a mitigating factor.

Recognition of Misconduct

¶ 162 By admitting his misconduct, the Respondent has clearly demonstrated that he understands the significance of his actions. This acknowledgement is another mitigating factor which we have taken into account and which, we note, was a factor that did not exist in *Marrone*.

Harm suffered by investor or benefit received by the Respondent as a result of the Misconduct

¶ 163 We find no evidence of harm caused to the client or his estate.

¶ 164 Since we did not find that simply accepting the beneficiary designation was prohibited or amounts to misconduct, we do not find that the monetary gift the Respondent ultimately received is a benefit that resulted from his misconduct. Accordingly, as we discuss in further detail below, like the panel in *Marrone*, we see no basis for ordering a fine which amounts to an effective disgorgement of the monies he received.

Deterrence

¶ 165 The Panel is satisfied that the penalty we are imposing achieves the goals of both specific and general deterrence.

¶ 166 First, taking into consideration the fact that the Respondent has already been out of the industry for three years and his age, the imposition of a six month ban on his ability to conduct securities related business in any capacity will satisfy the goal of specific deterrence, especially in light of the fact that he has no prior discipline record.

¶ 167 The Sanction Guidelines say that the permanent prohibition of the authority of an Approved Person to conduct securities related business in any capacity is generally regarded as the most severe sanction that hearing panels may impose.

¶ 168 As discussed above, while we find the Respondent's misconduct was serious, we do not find it was at the most serious end of the spectrum and we do not find, therefore, that the facts in this case support Staff's request for the imposition of a permanent ban on the Respondent's ability to conduct securities related business in any capacity.

¶ 169 With respect to general deterrence, the prospect of receiving a six month ban on their ability to participate in the industry should serve as a warning to any Approved Person that the type of misconduct that occurred in this case is serious and must be avoided.

¶ 170 Next, with respect to the fine we are imposing, based on the admitted facts of this case, the sanction achieves both specific and general deterrence.

¶ 171 Although we agree with Enforcement Counsel's submission that as a panel constituted under the By-laws and Rules of the MFDA, we have the authority to impose a fine that would have the effect of "disgorging" the benefit a respondent receives as the result of their misconduct, in this case we find there is no principled

basis to do so. That is, as we stated above, we do not find that the $150,000 bequest the Respondent received was obtained as the result of his misconduct.

¶ 172 Our analysis in this regard follows the reasoning of the Tribunal in *Marrone* where, in deciding the appropriate sanction, it said:

> The Tribunal may order disgorgement of any amounts obtained as a result of the noncompliance with Ontario securities law. By ensuring that persons do not benefit from their misconduct, a disgorgement order serves the goals of general and specific deterrence.
>
> The preliminary issue for determination by us is whether Marrone obtained (or kept) his interest as sole beneficiary of MU's estate as a result of his non-compliance with Ontario securities law. We conclude, for the reasons set out below, that this pre-condition to a disgorgement order is not met on the facts of this case. Given this conclusion, it was not necessary for us to consider Marrone's other submissions as to why a disgorgement order should not be issued.
>
> The Merits Decision does not find or conclude that Marrone obtained or kept his interest as the sole beneficiary of MU's estate as a result of a breach of Ontario securities law. Furthermore, we conclude that the findings of fact in the Merits Decision also do not permit us to find or conclude that Marrone obtained or has kept his interest as a beneficiary of MU's estate as a result of a breach of Ontario securities law.
>
> The Merits Decision concluded that: "Marrone acted unfairly, dishonestly and in bad faith towards his vulnerable client by failing to follow the required procedures for dealing with conflicts or potential conflicts of interest, which was a significant breach of the MFDA Rules and IPC policies and procedures, and this constituted a breach of OSC Rule 31-505." This was the breach of Ontario securities law that was found.
>
> The Merits Panel found breaches of MFDA Rules 2.3.2(a)(1) and 2.3.1(a)(ii) arising from Marrone's acceptance of the Power of Attorney for property and his failure to renounce his appointment as alternate executor. In addition, the Merits Panel's finding of a breach of Ontario securities law was based upon Marrone's failure to comply with MFDA Rule 2.1.4, which mandates a multi-step process for the identification, reporting, assessment, and management of conflicts of interest and his failure to comply with IPC's policies and procedures Manual 4.2 that mirrored MFDA Rule 2.1.4. Marrone was found to have breached Ontario securities laws because, in part, he failed to immediately disclose to IPC the conflict or potential conflict of interest arising from his being designated as sole beneficiary and alternate executor under MU's will and being appointed attorney for property.
>
> There is nothing in the Merits Decision that supports a conclusion that Marrone's failure to properly disclose MU's testamentary bequest to IPC either resulted in Marrone being named as a beneficiary under MU's will or remaining as a beneficiary under MU's will.
>
> To the contrary, the Merits Decision addresses the question of what might have happened had Marrone disclosed the bequest to IPC and goes only so far as to observe that such disclosure "may have put his significant inheritance at risk." The Merits Decision's recognition of the possibility that timely compliance by Marrone with his disclosure obligations "may" have put the inheritance under MU's will at risk, is very different than a finding on a balance of probabilities that Marrone's failure to disclose the conflict accounts for or resulted in his interest or continued interest under MU's will.
>
> Based on the available record, we are not in a position to know or decide what would have transpired had Marrone immediately disclosed MU's testamentary gift to IPC. Nor can we know or decide what MU would have done and whether she might have revoked the bequest had she been advised of the conflict or potential conflict of interest.
>
> *Marrone (Re) (Penalty), supra,* at paras. 68-75

¶ 173 In addition to finding no basis for imposing a fine which equates to disgorgement of the bequest the Respondent received, we find the additional administrative penalty which Staff has requested in the amount of

$100,000 is excessive given the nature of the Respondent's misconduct and having regard to the facts in the comparator cases, many of which involved conduct which did not exist in this case and which in our view was more egregious, such as deliberately misleading the Member or exploiting a vulnerable client.

¶ 174 We also disagree with Staff's position that the penalty decision in *Marrone* sets a new standard and reflects an evolution in the amount of sanctions which will be imposed by panels.

¶ 175 Rather, as the panel in that case stated, the *Marrone* decision was made on first principle, having regard to the specific facts of that case.

> *Marrone (Re) (Penalty), supra*, at para. 18

¶ 176 We agree with the Respondent's counsel that the distinctions between the factual findings made by the panel in *Marrone* and the facts which have been agreed upon in this case are significant and that while the facts in *Marrone* supported the imposition of a significant administrative penalty, the facts in this case do not warrant a fine of a relatively comparable magnitude.

¶ 177 For example, as counsel for the Respondent identified, the actual dollar amount involved in *Marrone* was considerably higher than the amount involved in this case and represented a much higher proportion of that respondent's book of business than is true in this matter.

¶ 178 Further, the Merits Panel in *Marrone* made specific findings relating to the client's vulnerability and the respondent's extensive involvement in facilitating the drafting and execution of the client's Will in which the respondent was named as a significant beneficiary.

> *Marrone (Re) (Misconduct), supra,* at para. 171

¶ 179 It was clear from the *Marrone* decision that these factors - the large amount of money that the bequest involved and the client's vulnerability - were significant factors which the panel took into consideration in determining the appropriate sanction. These factors may be contrasted with the facts in this case where the client and the Respondent were long-standing friends and where there was no evidence of the type of vulnerability that existed in that case; nor is there evidence of the type of client vulnerability that existed in any of the other cases cited to us by Enforcement Counsel.

¶ 180 The panel in *Marrone* also focused on the respondent's failure in that case to acknowledge the significance of his actions which, the panel said, required a sanction which achieved specific deterrence. That is not a factor which exists in this case where the Respondent has clearly taken responsibility for his misconduct by proceeding by way of an Agreed Statement of Facts which included his unmitigated admission of misconduct.

> *Marrone (Re) (Penalty), supra,* at para. 38

¶ 181 We are mindful that sanctions must not be "crushing" or "unfit" and that the individual respondent's circumstances must be considered to avoid causing unnecessary harm. Further, the application of general deterrence must be exercised in a proportionate and reasonable manner.

> *Walton, supra*

¶ 182 As the court in *Walton* stated:

> The Commission determined that general and specific deterrence were important factors in assessing the sanctions required to protect the public interest, while recognizing that the circumstances of some of the appellants made specific deterrence less important for them (Sanction Reasons para 45). Those are legitimate considerations, but at the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant.
>
> *Walton supra* at para. 154

¶ 183 We recognize that notwithstanding these principles, panels have confirmed that a sanction which has the effect of punishing a respondent is not in and of itself inappropriate. To achieve deterrence, sanctions must

inevitably impose a burden on those who contravene the regulator's rules. An administrative sanction that is too low will not only fail to achieve deterrence but will also erode public confidence in the disciplinary process. As the Hearing Panel in *Kowalsky (Re)* stated:

> While the primary objective of sanctions is to prevent future misconduct by the Respondent and other industry participants, and not to punish the Respondent, some element of punishment of the Respondent is the inevitable result of any sanctions. But the fact that some punishment of the Respondent may occur, should not inhibit the panel from imposing sanctions, so long as the primary goal of those sanctions is the prevention of future misconduct.
>
> *Kowalsky (Re)*, *supra,* at para. 11
>
> *Fauth (Re)*, *supra,* at para. 100
>
> MFDA Sanction Guidelines, pages 2-3 ("Public Confidence")

¶ 184 Having regard to the admitted facts in this matter, we find an administrative penalty in the amount of $70,000 achieves the goals of both specific and general deterrence and certainly sends the message to the industry that sanctions for misconduct of this nature will be more than just the cost of "licensing".

The Respondent's ability to pay

¶ 185 With respect to the Respondent's argument that he is unable to pay a fine, we agree with Enforcement Counsel's submission that in order to take that submission into consideration in determining the appropriate penalty there must be evidence upon which a panel can rely.

¶ 186 No such evidence was offered in this case.

¶ 187 Although the Respondent's counsel argued that the Respondent had an inability to pay a fine, we were not presented with any evidence of the Respondent's financial situation whether, for example, by way of credit card statements, bank statements, tax returns, or statements of investment accounts.

¶ 188 The only evidence we have of the Respondent's financial status was the information he submitted about his earnings for the last three years before he was dismissed from the Member which amounts, we find, were not insignificant. We also know the Respondent received a bequest of $150,000 and there is no evidence to explain why he personally would have had to pay any additional taxes for the estate.

¶ 189 Accordingly, the Panel has not accepted the Respondent's argument that his financial circumstances are such that we should reduce the sanction that we would otherwise be inclined to impose.

Respondent's personal circumstances

¶ 190 We agree with Respondent's counsel's submission that a fine must be proportionate and that principles of general deterrence, for example, must not overwhelm considerations of proportionality or of the actual impact on an individual Respondent.

¶ 191 We also agree with Enforcement Counsel's submission that for the most part the fact that the Respondent has suffered financial and emotional distress as the result of these proceedings is a foreseeable consequence of his misconduct.

¶ 192 Nonetheless, we have considered the Respondent's personal circumstances and in particular his mental health issues and the effect of these proceedings on his well-being in determining what we find is a proportionate and reasonable penalty.

Costs

¶ 193 Enforcement Counsel seeks costs in the amount of $10,000. We note that this represents a significant discount of the actual time and resources Staff expended to complete the investigation and prosecution of this matter. The Respondent does not take issue with Staff's calculation of costs. He simply disputes his responsibility for having to pay them.

¶ 194 We agree with Enforcement Counsel's submission that by awarding costs in a disciplinary proceeding a

panel appropriately holds a respondent accountable for a portion of the costs that Staff has incurred as a result of the respondent's regulatory misconduct. The operations of CIRO are funded by fees assessed on its Members. By awarding costs, a panel transfers some of the financial costs of investigating and prosecuting a respondent from the Corporation's membership to the respondent who contravened his regulatory obligations.

¶ 195 Accordingly, we agree with Enforcement Counsel's submission that the amount of $10,000 is an appropriate amount of costs for the Respondent to pay.

VII. CONCLUSION

¶ 196 For all of the above reasons, the Panel finds that the appropriate penalty in this case is:

- A six month prohibition on the Respondent's ability to conduct securities related business in any capacity;
- a fine of $70,000; and
- costs in the amount of $10,000.

¶ 197 In our view this penalty is reasonable and proportionate in all the circumstances and is in keeping with the purpose of enhancing investor protection. It will prevent future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by investment industry participants and foster public confidence in the industry as a whole.

Dated at Calgary this 18 day of January 2024.

"Sherri Walsh"
Sherri Walsh, Chair

"Kathleen Jost"
Kathleen Jost, Industry Representative

"Richard Sydenham"
Richard Sydenham, Industry Representative