

Re O'Brien

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Michael Francis O'Brien

2019 IIROC 33

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District)

Heard: October 22, 23 and 25, 2019

Decision: December 31, 2019

Hearing Panel:

Shelley L. Miller, Q.C. Chair, Peter McWilliams and Don Milligan, Panel Members

Appearance:

Tayen Godfrey, Senior Enforcement Counsel

Jeffrey N. Thom and Christopher Jones for Michael Francis O'Brien

REASONS FOR DECISION

INTRODUCTION

The Allegations

¶ 1 Michael Francis O'Brien (Respondent) is a Registered Representative (RR). The Investment Industry Regulatory Organization of Canada (IIROC) alleges that he contravened its Rules. The specific allegations are as follows:

Contravention 1

Between May and September of 2017, the Respondent engaged in personal financial dealings with a client, without the knowledge or approval of his firm, contrary to Dealer Member Rule 43.

Contravention 2

In September 2017 and April 2018, the Respondent made misleading representations regarding client dealings, contrary to Rule 1400 of the IIROC Consolidated Enforcement, Examination and Approval Rules (Consolidated Rules).

¶ 2 Contravention 1 included the following particulars:

(a) The Respondent had been working in the securities industry since 2002 and since then had been the financial advisor for a certain client (Ms. H) and her husband. He remained her advisor after her husband died in 2010.

(b) The Respondent was a Registered Representative at RBC Dominion Securities Inc. (RBC

Securities) at the time of the subject Allegations.

(c) Ms. H had in her employ until May 2017 a person to assist her with day-to-day affairs, including helping to manage her daily finances.

(d) After that person left Ms. H's employ, between approximately May and September 2017, the Respondent without the knowledge or approval of RBC Securities borrowed at least \$156,603.82 from the client, then aged about 81 years.

(e) The borrowings from Ms. H's personal bank account were detected as suspicious activity by the National Fraud Detection Group of Royal Bank of Canada (RBC Fraud Detection), which after investigation notified RBC Securities of the borrowing of the client's money by the Respondent.

(f) The Respondent admits he borrowed the said funds over a four-month period by way of:

- (i) a series of online electronic payments from the client's personal bank account to the Respondent's various credit cards and line of credit;
- (ii) expenses incurred on the client's Visa account through a credit card he was issued as a secondary cardholder; and
- (iii) an online electronic payment from the client's account to a line of credit belonging to the Respondent's mother-in-law totalling \$981.50;
- (iv) five payments to the Respondent's American Express account, totaling \$68,741.99;
- (v) three payments to the Respondent's Master Card account, totaling \$3,573.67;
- (vi) a payment to the Respondent's Diners Club account, totaling \$4,985.78;
- (vii) two payments to the Respondent's Line of credit, totaling \$39,758.10; and
- (viii) charges to the client's Visa account, totaling \$38,562.78.

¶ 3 In addition, the Allegations state that the client made a further \$24,000.00 online electronic payment to the Canadian Revenue Agency (CRA) on the Respondent's behalf.

¶ 4 The Respondent in his Reply to the Allegations admitted to Contravention 1 including the above listed particulars except paragraph 2(c) and paragraph 3.

¶ 5 The Allegations contained additional particulars of Contravention 2, which are summarized as follows:

- (a) The Respondent made misleading representations and failed to act in a candid and forthcoming manner over the course of investigations with RBC Fraud Detection and IIROC Enforcement Staff (sometimes hereafter referred to as the IIROC investigator).
 - (i) Despite working in the industry since 2002, the Respondent claims he was not aware he needed his firm's approval to borrow money from his client;
 - (ii) The Respondent claims he borrowed money to repair damages to his home caused by a storm. However, the credit card and line of credits statements between June and September of 2017 do not reveal expenses relating to home repairs. They do show approximately \$70,000 in new charges on his American Express card, including expenses incurred in London, Paris and Las Vegas.
 - (iii) On September 25, 2017, the Respondent returned a phone call to the RBC Fraud Detection on the client's behalf. During the conversation, he falsely claimed that he was the client's Power of Attorney.

- (iv) In an interview with Enforcement Staff, the Respondent falsely claimed that he did not tell the RBC Fraud Detection he was the client's Power of Attorney.
- (v) When asked specific questions about the \$981.50 payment, the Respondent was evasive and not forthcoming, neglecting to inform Enforcement Staff that the transaction was a transfer of money to his mother-in-law's line of credit.
- (vi) The Respondent was evasive and failed to adequately explain the circumstances surrounding the \$24,000.00 payment the client made to the CRA on his behalf.

The Applicable Rules

¶ 6 The provisions of Dealer Member Rule 43 relevant to Contravention 1 read as follows:

PERSONAL FINANCIAL DEALINGS WITH CLIENTS

43.1 An employee or approved person of a dealer member must not, directly or indirectly, engage in any personal financial dealings with clients.

43.2 Personal financial dealings include, but are not limited to, the following types of dealings:

(1) Accepting any consideration

(i) Except as described in sub-clauses 43.2(1)(i)(a) and 43.2(1)(i)(b) below, accepting any consideration, including remuneration, gratuity or benefit, from any person other than the Dealer Member for any activities conducted on behalf of a client.

(a) Consideration that is non-monetary, of minimal value, and infrequent such that it will not cause a reasonable person to question whether it created a conflict of interest or otherwise improperly influenced the Dealer Member, its employees or agents would not be considered to be consideration for the purposes of clause 43.2(1)(i).

(b) Compensation received from a client in exchange for services provided through an approved outside business activity would not be considered to be consideration for the purpose of clause 43.2(1)(i).

43.2(3) Borrowing from clients

(i) Borrowing money or receiving a guarantee in relation to borrowing money, securities or any other assets from a client, unless:

(a) the client is a financial institution whose business includes lending money to the public and the borrowing is in the normal course of the institutions business; or...

¶ 7 IIROC Rules are amended from time to time. In 2017, the relevant provisions of Consolidated Rule 1400 read as follows:

Standards of Conduct

1401. Introduction

(1) This Rule sets out the general standards of conduct that apply to Regulated Persons.

1402. Standards of Conduct

(1) A Regulated Person

(i) in the transaction of business, must observe high standards of ethics and conduct and must act openly and fairly and in accordance with just and equitable principles of trade, and

(ii) must not engage in any business conduct that is unbecoming or detrimental to the

public interest.

(2) *Without limiting the generality of the foregoing, any business conduct that:*

(i) is negligent;

(ii) fails to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a Regulated Person;

(iii) displays an unreasonable departure from standards that are expected to be observed by a Regulated Person; or

(iv) is likely to diminish investor confidence in the integrity of securities, commodities or derivatives markets may be conduct that contravenes one or more of the standards set forth in subsection 1402(1).

1403. Applicability

(1) *For purposes of IIROC requirements:*

(i) Dealer Members are responsible for all acts and omissions of their employees, partners, Directors and officers;

(ii) non-Dealer Member users and subscribers to a Marketplace for which IIROC is the regulation services provider are responsible for all acts and omissions of their employees, partners, directors, and officers.

(2) *In addition to complying with all IIROC requirements that expressly apply to him or her:*

(i) an Approved Person must avoid any act or omission that would cause his or her Dealer Member to violate any IIROC requirement; and

(ii) an employee, partner, director or officer of a non-Dealer Member user or subscriber of a Marketplace for which IIROC is the regulation services provider must avoid any act or omission that would cause the user or subscriber to violate any IIROC requirement.

(3) *For purposes of section 1402, the obligation of Regulated Persons that are non-Dealer Member users or subscribers of a Marketplace for which IIROC is the regulation services provider is limited to the obligation to transact business openly and fairly when trading on a Marketplace or otherwise dealing in securities that are eligible to be traded on a Marketplace.*

(hereafter referred to as Rule 1400)

¶ 8 The Conduct and Practices Handbook Course (CPH) first printed in 1971 has been revised and reprinted regularly between 1993 and 2017. In 2017, the provisions pertaining to professionalism included the following commentary:

Personal financial dealings with clients: Subject to certain exceptions, registrants must avoid personal financial dealings with clients, including the lending of money to or the borrowing of money from them, ... and sharing a financial interest in an account with the client. Dealer Members must have adequate policies and procedures and supervision in place to address personal financial dealings with clients.

¶ 9 The Respondent had been a RR since 2008 and employed at RBC Securities since 2012.

¶ 10 During his employment at RBC Securities, the Respondent would have signed annual attestations, which typically require an RR to confirm compliance with applicable regulatory rules and regulations and Dealer Member policies and procedures.

Burden of Proof

¶ 11 IIROC bears the burden of demonstrating on a balance of probabilities that each of the allegations against the Respondent has been proven. Evidence must always be sufficiently clear, cogent and convincing to satisfy the balance of probabilities test.

¶ 12 Any inability on our part to be satisfied on the balance of probabilities in relation to any allegation would require us to dismiss that allegation.

¶ 13 Under the IIROC Rules of Practice and Procedure, we are permitted to admit relevant evidence such as certain hearsay evidence, which would be inadmissible in civil proceedings. Where the veracity of evidence was challenged, particularly by the Respondent, we carefully considered whether the evidence was shown to be reliable and whether the Respondent had a meaningful opportunity to test that evidence. These considerations were relevant to the weight to be given to the evidence.

¶ 14 In our reasons, although we do not refer to all of the evidence, we have considered all of the evidence tendered by both parties, including *viva voce* testimony and exhibits, the prior statements made by the Respondent to the RBC investigator, the statements made by the Respondent to the IIROC investigator, a recorded audiotape presented during the hearing and later transcribed and entered as an exhibit, the defence expert evidence, the oral submissions of both parties and the Reply filed by the Respondent.

¶ 15 In our reasons, we have referred to the client and other affected parties by initials to provide some level of privacy.

SUMMARY OF EVIDENCE

The Client, Ms. H

¶ 16 Ms. H and her husband met the Respondent between 2000 and 2002 when he was employed with Canadian Wealth Management.

¶ 17 Ms. H had no children and, at the material times, was estranged from her stepchildren.

¶ 18 After her husband died in 2010, the Respondent was in much greater contact with Ms. H. She employed a nanny who helped her with daily tasks.

¶ 19 According to evidence of the Respondent at the hearing, at the time of the alleged contraventions, Ms. H held assets of between \$3.5 and \$4 million.

Preceding Events

¶ 20 In May 2017, three events occurred which involved the Respondent:

- (a) He sustained window damage to his home during a storm, the majority of which he understood was considered by his insurer to be pre-existing and thus outside of coverage.
- (b) He sustained whiplash injuries and a concussion in a motor vehicle accident.
- (c) He discovered the nanny had been putting personal expenses on Ms. H's credit card, and attended with Ms. H to terminate the nanny's employment.

¶ 21 The Respondent testified at the hearing that he urged Ms. H to press criminal charges against the nanny but Ms. H declined to take any such action.

¶ 22 After the nanny's termination in May 2017, the Respondent took it upon himself to assist Ms. H with her day-to-day banking activities.

The Borrowing

¶ 23 According to the Respondent, during one of his conversations with Ms. H, she noticed that he was upset and upon inquiry, he explained his worries about the cost of his home repairs.

¶ 24 Ms. H offered to give the Respondent some of her money to allay his concerns and, while he initially declined, when she subsequently repeated her offer, he accepted.

¶ 25 The Respondent said that he expected his home repairs to land in the range of \$100,000 and that at his request, Ms. H agreed, in July 2017, to sign an unsecured promissory note for that amount.

¶ 26 The Respondent drafted the note himself, attended at the home of Ms. H for execution without the presence of any witnesses, and told no other persons of this event.

¶ 27 Despite the promissory note limit of \$100,000, the amount of borrowing exceeded that sum by approximately \$56,000, and as of the first week in September, only approximately \$3,500 was applied to home repairs.

¶ 28 The Respondent produced certain authorizations in writing and signed by Ms. H regarding payments that did not pertain to home repairs.

Events following detection of suspicious activity on Ms. H's bank accounts

¶ 29 On September 25, 2017, Ms. H asked the Respondent to come to her home because she had received a telephone message about suspicious activity on her bank accounts and wanted the Respondent to return the call.

¶ 30 With Ms. H present, the Respondent spoke on the return call to RBC Fraud Detection.

¶ 31 Among other things said on the call, the Respondent was asked if he was Ms. H's Power of Attorney.

¶ 32 RBC Corporate Investigations (RBC investigator) called asking him to meet with her on the last Tuesday of September 2017 (September 26).

¶ 33 On that date, the Respondent answered that he had borrowed something from Ms. H, and the RBC investigator requested him to bring copies of whatever documentation, statements or information he had.

¶ 34 On October 6, 2017, the RBC investigator interviewed the Respondent about the circumstances surrounding the borrowing (RBC interview).

¶ 35 By letter dated November 17, 2017, RBC terminated the Respondent's employment which stated:

"following an internal investigation, it was identified that you were involved in inappropriate personal financial dealings, specifically, borrowing funds from a client. In addition, you misrepresented yourself to RBC as having Power of Attorney for that client." (emphasis is ours)

... you have failed to comply with mandatory regulatory rules and regulations as well as the firm's policies and procedures. You have acted contrary to our code of conduct, specifically our culture of integrity – doing what's right, integrity and how we do business – business dealings, avoiding and managing conflicts of interest.

¶ 36 RBC Securities reported the circumstances to IIROC, which opened an investigation. IIROC's investigation included an interview of the Respondent by an IIROC investigator on April 4, 2018 (IIROC interview) about the circumstances surrounding the borrowing and his termination from employment.

¶ 37 The testimony the Respondent gave at the IIROC interview was under oath and in the presence of counsel for both IIROC and the Respondent.

¶ 38 During the course of each of the RBC interview and the IIROC interview, the Respondent gave some verbal response to each question posed to him.

¶ 39 The documentation produced by the Respondent to the IIROC investigator following the interview revealed that he used credit cards and lines of credit between June and September of 2017 that related not to home repairs, but showed approximately \$70,000 in new charges on his American Express card, including

expenses incurred in London, Paris and Las Vegas.

¶ 40 IIROC issued a Notice of Hearing dated February 21, 2019 alleging the two contraventions.

¶ 41 A day prior to the hearing, the Hearing Panel received a copy of the Respondent's Response.

¶ 42 At the outset of hearing, the parties advised that Ms. H would not appear to give evidence as a witness. However, IIROC filed a letter from her legal counsel, which said that she had loaned money to the Respondent, which was repaid, and that at no time in the past or the present was he her Power of Attorney.

¶ 43 At the hearing the IIROC investigator (sometimes referred to as Mr. Choy), gave testimony on behalf of IIROC Enforcement, and the Respondent gave oral testimony on his own behalf. The Respondent also presented expert neuropsychological evidence.

¶ 44 The position of IIROC is that the Respondent was not forthcoming or candid and made misleading representations during the course of these interviews.

¶ 45 The Respondent's position is firstly that he cooperated in all investigations and answered all questions honestly and to the best of his ability and recollection.

¶ 46 The Respondent's position secondly is that if it is not found that he answered all questions honestly, it is because his ability and recollection was compromised by sequelae from a motor vehicle accident in May 2017 that resulted in injuries, including whiplash and concussion and, as such, his ability and recollection must be considered in that light.

¶ 47 The Respondent's position thirdly is that if he did not provide correct, complete or responsive answers on all occasions to questions posed to him, the investigators were not misled by earlier representations he made that were subsequently corrected or completed by other information or by other answers he supplied.

¶ 48 The Respondent's position fourthly is that, if it is found that the Respondent was not forthcoming or candid and made misleading representations about his dealings with the client, the misconduct does not contravene the Consolidated Rule 1400.

Remaining Contravention 1 Issues

¶ 49 As noted above, there are two remaining issues for determination under Contravention 1, namely, whether the person Ms. H had in her employ until May 2017 to assist her with day-to-day affairs, including helping to manage her daily finances and whether the client made a further \$24,000.00 online electronic payment to the CRA on the Respondent's behalf.

¶ 50 As the second of these issues is also a component of the Contravention 2 Allegations, we will address those issues together later in these reasons.

¶ 51 Before turning to the issues for determination under Contravention 2, we will now summarize the evidence on the remaining Contravention 1 issues.

Whether the nanny had helped to manage Ms. H's daily finances

¶ 52 In the transcript of the RBC interview (RBC transcript) in October 2017, the Respondent said:

- (i) the nanny had been using Ms. H's bank accounts to make bill payments up to May (2017),
- (ii) the nanny was doing Ms. H's banking for her,
- (iii) after the nanny went (*sic*), the Respondent took over to help with bill payments.

¶ 53 At the hearing, the Respondent denied that the nanny assisted with Ms. H's banking before she was terminated from employment.

¶ 54 Under cross-examination, when asked if the Respondent told the RBC interviewer that he believed the nanny helped paying the bills, he answered, “I would have to go back in the transcript and look.”

¶ 55 When taken to the RBC transcript page and line where he answered Ms. H was making bill payments “since the nanny went, but that’s only because the nanny was doing it”, the Respondent said “no I didn’t say the nanny was doing it.”

¶ 56 When asked if that answer meant that the nanny was merely driving Ms. H to the bank, the Respondent said “that’s what I believe the comments were at that point.”

¶ 57 When put to the Respondent that at RBC transcript page 30 the next question was “so the nanny was doing her banking”- the Respondent’s answer was “correct.” (emphasis is ours)

¶ 58 When confronted with the responses he gave at the RBC interview in October 2017 to the effect that the nanny did assist with the client’s personal banking, the Respondent asserted, “RBC should have asked for clarification.”

Contravention 2 Issues

¶ 59 The issues for determination under Contravention 2 are whether the Respondent:

- (a) made misleading representations, and failed to act in a candid and forthcoming manner over the course of investigations with the RBC Fraud Detection and Enforcement Staff, specifically:
 - (i) was not aware he needed his firm’s approval to borrow money from his client
 - (ii) returned a phone call on September 25, 2017 to the RBC Fraud Detection on the client’s behalf during which conversation, he falsely claimed that he was the client’s Power of Attorney
 - (iii) falsely claimed in an interview with Enforcement Staff that he did not tell the RBC Fraud Detection he was the client’s Power of Attorney
 - (iv) was evasive and not forthcoming when asked specific questions about the \$981.50 payment, neglecting to inform Enforcement Staff that the transaction was a transfer of money to his mother-in-law’s line of credit
 - (v) was evasive and failed to adequately explain the circumstances surrounding the \$24,000.00 payment the client made to the CRA on his behalf
- (b) had a reasonable explanation for the discrepancy between his initial contention that he borrowed the money to repair damages to his home caused by a storm, and the evidence of the credit card and line of credits statements between June and September of 2017 revealing instead approximately \$70,000 in new charges on his American Express card, including expenses incurred in London, Paris and Las Vegas
- (c) whether psychological evidence presented as to the consequences flowing from the Respondent’s motor vehicle accident injuries establishes that the Respondent in all the circumstances was answering honestly and to the best of his ability and recollection
- (d) whether in any event Contravention 2 must be dismissed as not constituting a breach of Rule 1400.

¶ 60 We now turn to consideration of each of the above issues in the order presented by IIROC Enforcement Counsel at the hearing:

Whether the Respondent falsely claimed that he was Ms. H’s Power of Attorney in a phone call with RBC Fraud Detection on September 25, 2017

Audio Transcript

¶ 61 IIROC produced and played an audiotape recording and later entered a written transcript of the conversation into evidence. On a joint application by counsel for the parties to move in-camera for a portion of the hearing by reason that the recorded conversation included voices of two persons who were not present at the hearing, and to protect their identity and privacy as far as possible, and hearing no objection, we granted the application.

¶ 62 The audio transcript disclosed that:

- (a) the Respondent began a conversation with one "M" at the RBC Fraud Detection giving his name and advising, "there was a bill payment on her account that she put- /we put through and it is not a fraud."
- (b) M asked if he was a Power of Attorney, the Respondent replied "yes".
- (c) The Respondent then arranged to put Ms. H on speaker and when M repeated the question "Michael, you said you were her Power of Attorney?", he replied "Correct".
- (d) After the Respondent provided the client card number to M, M put the call on hold, and after some time, returned and said "so at this time we are going to refer Ms. H over to the branch with two pieces of ID. We cannot further disclose or discuss this on the phone."

¶ 63 At the hearing, the Respondent admitted that the audio tape was of his voice and he had never been Ms. H's Power of Attorney.

¶ 64 The Respondent said prior to hearing the audio recording that he did not believe that he did give those answers when asked.

¶ 65 The Respondent said it was clearly an error at the time, he was not sure why he would have said it, and he did not recall saying it.

¶ 66 The Respondent said that what led to the phone call being placed to the RBC Fraud Detection was that Ms. H called and informed him that she had received a phone call from someone at RBC and that there were some issues and asked him to come to her home. She said she was given this number to call, to please dial this number and find out.

¶ 67 While he denied having any understanding of what was the issue that led the RBC Fraud Detection to phone Ms. H, under cross-examination, he then admitted believing the point of the call was a concern by the RBC Fraud Detection about fraudulent activities, including a payment made to one of his credit cards or lines of credit.

¶ 68 While IIROC produced the audio recording with the release of documents from IIROC sometime in May 2019, the Respondent's evidence was that he had not heard the audio recording until the date of the hearing.

¶ 69 Under cross-examination, the Respondent said the first time he heard the recording was after filing his Response to the Statement of Allegations.

¶ 70 The Respondent argued that this false statement was an unintentional mistake and was not materially misleading to the RBC Fraud Detection because he took steps the following day to withdraw the statement and straighten out everything.

¶ 71 The RBC interview transcript shows that the Respondent gave more details at the RBC interview about his movements on September 26, 2017 and thereafter, including:

- (i) after the Respondent's attendance with Ms. H at the Britannia branch, her bank account was unlocked

- (ii) on that same day, he was questioned by the RBC investigator and was told to gather the documents for subsequent meeting
- (iii) that subsequent meeting became the RBC interview, which took place on October 2017

¶ 72 On November 17, 2017 RBC Securities gave the Respondent a letter of termination for cause citing reasons including his money borrowing from his client and making a false statement that he was the client's Power of Attorney.

Whether in the interview with Enforcement Staff, the Respondent falsely claimed that he did not tell the RBC Fraud Detection that he was the client's Power of Attorney

Evidence from the IIROC Interview

¶ 73 At the date of the IIROC interview, the IIROC investigator, Mr. Choy, was told by the RBC Fraud Detection about the statement the Respondent made on the audio tape. Mr. Choy testified that he thus knew the Respondent had lied to the RBC Fraud Detection in the phone call but did not disclose his information or belief to the Respondent at the IIROC interview.

¶ 74 IIROC was provided with a copy of the audio tape on April 20, 2018.

¶ 75 The IIROC investigator did not tell the Respondent before or during his questioning that he had in hand the RBC transcript of this answers on this issue.

¶ 76 When first asked at the IIROC interview about substance of the call with the RBC Fraud Detection on September 25, 2017, the Respondent gave the following narration:

“they asked me specifically did I know of any fraudulent activity on Ms. H's account and I said that no, there was no fraudulent activity, that these were authorized payments at the time. And then the person asked me if I had had power of attorney and I said no. They... or they asked could we speak with the power of attorney and at that time I believed it to be Mr. K.” (emphasis is ours)

¶ 77 Mr. K was at all material times Ms. H's lawyer.

¶ 78 When asked if the RBC Fraud Detection knew that he was Ms. H's financial advisor, the Respondent said: “I did say on that phone call that I was also an RBC employee and I was her financial advisor.”

¶ 79 Contrary to these answers to the IIROC investigator, the audio transcript shows that the Respondent:

- (a) was not asked if he knew of any fraudulent activity on Ms. H's account
- (b) did not say “no there was no fraudulent activity, that these were authorized payment at the time”
- (c) did not say “no” when asked if he had the power of attorney
- (d) was not asked if they could speak with the power of attorney and
- (e) did not say he was also an RBC Securities employee and her financial advisor.

¶ 80 After he provided the narrative in the interview quoted at paragraph 76 above, and then answered a subsequent question, the Respondent was then asked: “so you never told them you were Ms. H's power of attorney?” and said: “ I do not believe I did, no.”

¶ 81 Under cross-examination at the hearing, the IIROC investigator admitted he did not know, nevertheless, did not consider it possible and so disputed the Respondent had made an honest mistake when he said at the IIROC interview “I do not believe I did, no.”

¶ 82 The IIROC investigator agreed that he was not misled by the testimony at the interview, because he knew the Respondent was lying, he did not tell the truth and believed the Respondent's answer in the

interview was a lie.

¶ 83 At the hearing, the Respondent said that he recalled being asked at the IIROC interview “so you never told them you were Ms. H’s power of attorney and answering “I do not believe I did, no.” At the hearing, he said this response represented his recollection at the time.

¶ 84 The Respondent was not asked in direct evidence to explain his earlier narrative quoted at paragraph 76 above containing his unconditional denial.

Respondent’s Hearing Testimony - Cross-examination

¶ 85 When asked about audio recording under cross-examination, the Respondent’s reply in oral testimony was “Until I heard the recording the other day, that is the first time I heard that”.

¶ 86 The Respondent then agreed the first time he heard the audio recording was in May 2019.

Whether the Respondent claimed, in the interviews with the RBC Fraud Detection and Enforcement Staff that he borrowed from Ms. H to repair damage to his home caused by a storm

Evidence from the RBC Interview

¶ 87 When first asked about the incident that brought him to the interview on October 6, 2017, the Respondent told the RBC investigator:

- (a) He thought his home had one window damaged in a storm in May 2017, which was discovered in early June. On further inspection, he found it was every window.
- (b) “We’re into it for well over \$100,000 and as of yesterday the renovator said probably every window within the next year or so is going to have to be replaced.”
- (c) He never produced or showed Ms. H any bills for which the \$100,000 amount would be applied. He simply told her the balances he owed and she told him to pay whatever he wanted to pay. She has never seen any of the invoices the Respondent incurred after the borrowing from Ms. H.

¶ 88 When the RBC investigator asked if there was any other debt or expense he had incurred that Ms. H had taken care of for him besides what he had disclosed, the Respondent said he was not trying to put her off, he was thinking in his head and that he would have to look and asked if he could get back to her on it.

¶ 89 When asked if he informed Ms. H that the funds he borrowed were not all for the cost of home repairs, the Respondent answered that a couple of weeks ago he did and also that he had exceeded the sum of \$100,000.

¶ 90 When asked by what amount he had exceeded the \$100,000, the Respondent said he was not completely sure, but thought it might have been up to 150 range.

¶ 91 When the RBC investigator pointed out a few days earlier that the Respondent informed her the sum was \$90,000, the Respondent said that amount was just for the renovations.

¶ 92 When asked if he added Ms. H as a payee to his Visa cards, the Respondent said that she performed the additions on her iPad while he was present, sitting next to her and showing her his credit card information and stuff and “how it was” (*sic*).

¶ 93 When asked if he had the CIBC line of credit, the Respondent stated it was not his and guessed it was hers. (emphasis is ours)

¶ 94 When questioned whether he was an authorized user (of her CIBC line of credit), however, he answered “Correct”.

¶ 95 When asked if he signed in to Ms. H’s bank account, the Respondent then answered: “I have on

occasion, yes.”

¶ 96 The Respondent admitted he occasionally signed in from his personal laptop either at his home or at his office.

¶ 97 When asked what was going on other than home repairs that his cards were in such a high state, the Respondent answered that he had “some travel related issues, having to go to his grandmother’s funeral and some issues like that and he and his wife “had some issues and separation would probably be an eventuality”.

¶ 98 The RBC investigator commented that there might be support funds and financial costs associated with separations and there were quite a few e-transfers at BMO possibly to his wife--- to which the Respondent answered “correct”.

Evidence from the IIROC Interview

¶ 99 When asked if the various charges were toward getting his house fixed, the Respondent said he was freeing up capacity on these cards to have these purchases go through, which have since gone through. (emphasis is ours)

¶ 100 The Respondent, in cross-examination at the hearing, admitted that he charged \$25,000 in purchases to his AMEX between June 20 and July 19, 2017 and \$27,658 in purchases between July 20 and August 19, 2017 and then \$14,000 between August 19 and September 19, 2017 for a total of \$67,000.

¶ 101 The Respondent, at the hearing, admitted his AMEX card was a charge card and “if you carry a balance, they charge you excessively high interest rates.”

¶ 102 The Respondent admitted that he claimed he was clearing off credit facilities, but in the meantime was running them back up without any charges relating to home repairs.

¶ 103 The Respondent, at the hearing, admitted that he had run the AMEX payments out of Ms. H’s account up to \$67,000 up to September 10, 2017.

¶ 104 The Respondent, at the hearing, admitted that he made \$68,000 in payments through Ms. H’s funds, none of which related to home repairs.

¶ 105 The Respondent testified that he had heard from his insurer sometime in “October or Novemberish” (2017) that it would cover remediation costs.

¶ 106 At the hearing, documentation presented by the Respondent revealed that at the date of the RBC interview he had in hand home repair quotes of only \$17,703.39 and as of October 6, 2017, had paid only \$8,602.50.

Evidence at the Hearing

¶ 107 When asked what was the amount the insurer paid, the Respondent said he did not bring that documentation to the hearing.

¶ 108 IIROC Counsel examined the Respondent’s back-up documentation and found that the home repairs he paid were approximately \$29,000 and had been paid off over a long period of time, whereas \$77,000 dollars was borrowed and used for personal unrelated purposes before he paid in the first week of September 2017 a deposit of \$3,300 for a home repair estimate.

Whether the Respondent neglected to inform Enforcement Staff that the payment of \$981.50 was a transfer to his mother-in-law’s line of credit

Evidence from the RBC Interview

¶ 109 The transcript of the RBC interview disclosed that the Respondent did answer twice in that interview

that the TD line of credit was his:

- (a) when asked about the documents produced to the investigator prior to the RBC interview dated July, August and September, the Respondent answered “*my lines of credit*”, and when asked if they were all his bills, he said “*Correct. These are my bills.*”
- (b) when asked to confirm which credit cards and lines of credit were his, the Respondent said, (*inter alia*), the TD line of credit “*is mine*”.

¶ 110 The Respondent was questioned again beginning on page 40 of the transcript. After several questions and indirect responses from page 40 to page 43, he eventually admitted that he made a payment to his mother-in-law’s line of credit.

Evidence from the IIROC Interview

¶ 111 Unlike the answers given to the RBC investigator, the testimony given by the Respondent at the IIROC interview was under oath. The series of questions on this issue are set out in full below.

¶ 112 Enforcement Staff showed the Respondent the authorization dated of September 4, 2017 that stated “This is my authorization for Michael O’Brien to pay TD line for \$981.50”:

Question: “So this is a line of credit, or what is it?”

Respondent: “Yes, I’m --- believe it’s a line of credit. “

Question: “...How much is the line of credit for?”

Respondent: “Again, I would have to look at the statement but I believe maybe \$10,000.”

Question: “And what did you borrow \$10,000 for?”

Respondent: “No, I didn’t borrow \$10,000. It was \$981.50.”

...

Mr. Godfrey: “That’s the total amount he can draw on it.”

...

Mr. Godfrey: “*Is that correct, the full...*”

Respondent: “Yes”

Mr. Godfrey: “---amount you can draw on it is...”

Respondent: “yeah, per...”

Mr. Godfrey: “\$10,000?”

Respondent: “Yeah, it’s a reoccurring line.

Question: “And I guess while we’re on the subject, I’m going to ask you the same question regarding the Nova Scotia line of credit.”

Respondent: “It’s the same thing. “

Question: “Same thing, roughly \$10,000?”

Respondent: “Correct.”

Question: “Okay. Do you have any other lines of credit?”

Respondent: “I have had a line of credit with RBC Bank”.

Respondent's Hearing Testimony - Cross-examination

¶ 113 When questioned about these statements at the hearing, the Respondent deflected questions on the basis that he did not understand, e.g. when put to the Respondent that at the interview he was being evasive, he answered: "is that a question or a statement?" When then posed as a question: "Is that not correct?" his response was to answer with another question, e.g., "that he was being evasive?"

¶ 114 The Respondent denied that he gave the answer: "I would have to look at the statement, but I believe it to be maybe \$10,000." to give the impression he owned the line of credit. He denied that he gave the above answers because he knew it looked bad that he was sending Ms. H's money directly to his mother-in-law's line of credit.

Whether the Respondent was evasive and failed to adequately explain the circumstances surrounding the \$24,000.00 payment from Ms. H to the Respondent's CRA account

Evidence from the RBC Interview

¶ 115 The Respondent was asked in both RBC and the IIROC interviews to explain the circumstances surrounding the payment of approximately \$24,000.00 to CRA on his behalf.

¶ 116 In the RBC interview, the Respondent admitted he set up his CRA account on Ms. H's bank profile and it may have been set up a while back. (emphasis is ours)

¶ 117 While Ms. H was on her iPad, with him sitting next to her, the Respondent gave her his CRA information and his SIN, which was necessary to set him up as a payee.

¶ 118 When asked why he would set up his CRA account on her profile, the Respondent instead answered that he did not owe any taxes.

¶ 119 The question was put to him again several times, and he responded several times to say only that he did not owe money to CRA. The Respondent finally gave a direct response, which was "I'm not 100% certain".

¶ 120 The Respondent said that in his presence at her house, Ms. H inadvertently made the \$24,000.00 payment into his CRA account, while trying to make a quarterly tax installment payment to her own CRA account.

¶ 121 The Respondent said he "requested the day after it happened for it to come back."

¶ 122 The Respondent then stated "CRA told him it takes 16 weeks for that to go back to the account it came from." (emphasis is ours)

¶ 123 He said he could obtain confirmation from CRA that it was a mistake they had caught.

Evidence from the IIROC Interview

¶ 124 At the IIROC interview, the Respondent was again asked about the \$24,000.00 payment made by Ms. H through online banking to his CRA account.

¶ 125 When asked why he would set up his CRA account on her profile, the Respondent answered "I'm not 100% certain. When we put in some ---when the credit card number information went in, it must have been set up as well."

¶ 126 When asked a second time, the Respondent then answered "oh, because at one point it might have been part of the loan."

¶ 127 The Respondent said "when we caught that that was an error, CRA put the money back into Ms. H's account." He said the error was caught at the end of September 2017. (emphasis is ours)

¶ 128 At the both interviews, the Respondent stated several times that he never owed CRA any money.

¶ 129 From IIROC's perspective three issues arose from the Respondent's answers at the interviews: why he set up his CRA tax account on his client's profile in purported connection to the loan, and whether and when CRA put the funds back into the account they came from.

Respondent's Hearing Testimony - Cross-examination

Why the Respondent set up his CRA tax account on Ms. H's bank profile

¶ 130 When asked to explain further why he set up his CRA tax account on Ms. H's bank profile he responded variously: "That's what the transcript shows"; "Those were the questions they were asking"; "I clearly answered you and RBC at the time", and "Are you asking me a new question today?"

Whether CRA put the \$24,000.00 back into Ms. H's account

Respondent's Hearing Testimony

¶ 131 At the hearing, the Respondent gave conflicting answers as to the date he first discovered the erroneous payment, the date CRA was asked to reverse the erroneous payment and when and where the funds removed from his tax account would be redeposited.

¶ 132 At the IIROC interview, he asserted that CRA put the money back into Ms. H's account, but at the hearing, he admitted that he did not know if that occurred.

¶ 133 Even though his own documentation showed that CRA removed those funds from his account on July 4, 2017, he said both that CRA reversed the payment on that date and then that the error was discovered in September 2017.

¶ 134 When put to the Respondent that those answers were inconsistent, he said: "I'm trying to understand what question you're asking me", then reframed the question and answered: "when was it caught, it was caught in September."

¶ 135 At the hearing, on consecutive days, the Respondent gave conflicting answers, including both in testimony in-chief that he did not know where the funds went thereafter, and under cross-examination that he asked Ms. H's lawyer, Mr. K who said "yes the money came back"; that he would have asked Mr. K sometime after the RBC interview to confirm the money came back; then said he just knew it came back and he said that from day one."

Whether the motor vehicle accident injuries impacted the Respondent's actions

¶ 136 The Respondent testified that he sustained injuries including a concussion and whiplash in a motor vehicle accident on May 21, 2017, and he had commenced legal action in that respect.

¶ 137 The Respondent presented as a defence expert witness one Dr. Arlin Pachet, who was qualified as an expert in clinical neuropsychology. Dr. Pachet testified that in his practice, he completes neuropsychological assessments, capacity or psychological evaluations to determine quantum of injury, if someone can function at work, and to determine the degree of cognitive impairment or psychological-based issues.

¶ 138 Dr. Pachet presented and explained his findings in two reports, the first of which was prepared following a neuropsychological screen of the Respondent dated of January 25, 2018.

¶ 139 The report dated February 2018 appeared to be intended for the motor vehicle litigation to address the question of the extent to which the accident sequelae affected his optimal employment abilities.

¶ 140 In the interview on January 25, 2018, the Respondent told Dr. Pachet his symptoms affected his optimal performance for several months, which he thought was the cause of termination by his employer. He reported that with his new employment, he had resumed working upwards of 50 hours per week and was performing his job well, which he attributed in part to being provided with additional administrative support.

¶ 141 Dr. Pachet first learned of the IIROC issues from the Respondent's lawyer's letter of May 2, 2019,

which asked him (noting he is subject to disciplinary action by IIROC) to comment on the Respondent's status in and around the dates of September 25 and October 6, 2017 and April 4, 2018.

¶ 142 In his testimony, Dr. Pachet said he did not recall being told why the three dates in question were significant and he was not aware of the underlying issues.

¶ 143 Dr. Pachet saw the Respondent again on July 4, 2019 at which date he undertook a complete neuropsychological assessment, which included review of the Respondent's charts of his family doctor since the date of the motor vehicle accident.

¶ 144 Dr. Pachet opined that the Respondent's mental status in and around September 25 and October 6, 2017 would have been at increased risk for mistakes, errors, and poor judgement due to the quantum of his symptoms. In April 2018, his symptoms would have substantially improved but there could have been potentially some lingering post-concussive issues, although not to the same degree.

¶ 145 Dr. Pachet also noted from his testing certain results, which he found consistent with lingering long-standing issues, the Respondent had probably struggled with his entire life regarding being impulsive, and where he wanted to jump in, and he struggled with his ability to solve problems based on feedback received.

¶ 146 Dr. Pachet said he would anticipate the Respondent's underlying issues upon surprise, novel or pressured circumstances would be flared and more salient and apparent and in his job performance, one would see a resurgence of issues that were long-standing.

¶ 147 Under cross-examination, Dr. Pachet agreed that he does rely on the background information provided by the Respondent to allow him to seek inconsistencies, abnormalities, something uncommon after a concussion or something uncommon within the background that does not support what he is seeing. He agreed that, as he always writes in his reports, he has the right to alter his opinion, if he finds information to the contrary.

¶ 148 Dr. Pachet agreed that if the Respondent's interview information revealed a theme of underreporting or inaccuracies, he would want to consider those (in light of his previously stated conclusions).

¶ 149 Dr. Pachet's report from his neuropsychological evaluation of July 3, 2019 repeats his understanding from the Respondent that slowed work performance lead to the termination from his employment.

¶ 150 Dr. Pachet's second report also documented that in the second interview, the Respondent said that the dismissal from RBC Securities and current IIROC investigation related to accepting a loan from a client in May 2017. He said he borrowed \$100,000 from May to September 2017 from the client who offered funds to pay for repairs for the storm damage.

¶ 151 Dr. Pachet said he had no other discussion with the Respondent regarding whether the predominant reason he was terminated was for borrowing money from his client. What he gleaned from him in the interview was that his persistent symptoms affected his optimal work performance for several months that led to his termination from RBC Securities in the fall of 2017. (emphasis is ours)

¶ 152 Under cross-examination, when asked if he would be concerned about his conclusions if he knew the amount the Respondent borrowed was not \$100,000 but instead \$156,600, Dr. Pachet said if there was a theme of underreporting or inaccuracies, he would want to consider those.

¶ 153 Dr. Pachet agreed that if the Respondent was fired for breaching the policies and procedures of his firm, and for having loans from his client, it would be something he would take into consideration now.

¶ 154 As Dr. Pachet's report indicates, the Respondent said when the loan came to light, he did not attempt to conceal his actions from RBC Securities and that he had been forthright in his communications with both "RBC" (*sic*) and IIROC. When asked if it would have an impact on his opinion if the whole point of the hearing was to ascertain how accurate that statement was, Dr. Pachet said if the Respondent was not being

forthright and there were indications of that, he would consider that information.

¶ 155 Dr. Pachet agreed that if much of the money the Respondent was borrowing for home repairs did not go for home repairs that was not consistent with what the Respondent told him.

Whether the Respondent was aware that he needed his firm's approval to borrow money from his client

Background

¶ 156 The Respondent was licensed as a mutual fund dealer in 1988. He was first licensed with IIROC in 2008. He wrote the Canadian Securities Course and other courses to qualify to be a Registered Representative. He took the required Conduct and Practices Handbook (CPH) examination.

¶ 157 The Respondent admitted it was his responsibility to be knowledgeable about the CPH standards. He admitted the CPH course also refers to not having personal and financial dealings with clients.

¶ 158 The Respondent was shown Section 115 of the CPH handbook, which stipulates that registrants need to protect their clients, who usually do not have the same degree of specialized knowledge, and must continually strive to put the interests of their clients ahead of their own. Registrants must also make a continuous effort to maintain a high standard of professional knowledge. He admitted it looked like the book material.

¶ 159 The Respondent was aware of the CPH standards, but at the hearing said until shown this wording "it's not something I would have said *"ooh, you know on page 15 thou shalt not do this."* (emphasis is ours)

¶ 160 The Respondent was aware that RBC Securities had a rules handbook and a policy that dealt with conflicts of interest, which was given to him in a big folder.

¶ 161 The IIROC investigator testified about the provisions pertaining to conflict of interest contained in paragraph 5.10 of the RBC Securities IA Compliance Manual- Standards of Conduct Chapter (RBC DS Manual) and quoted the first two paragraphs:

A conflict of interest is defined as a conflict between the private interest of a person or entity and the interest of another person or entity that is reliant on the first person or entity. For this policy, it refers to actual conflicts, potential conflicts (that is, reasonable probability of an actual conflict) and perceived (but not actual) conflicts which will cause reputational damage to RBC.

Any real or perceived conflict of interest must be immediately disclosed in writing RBC DS Retail Branch Manager (or Regional Director as applicable) who must consult with their Regional Compliance Officer and manage the issue in compliance with the RBC Code of Conduct or the applicable RBC DS Retail policy as the case may be.

¶ 162 The IIROC investigator noted that the RBC DS Manual gave examples of conflicts of interest and referenced employee/client conflicts specifically as direct/indirect personal interest in client matters.

¶ 163 In addition, the Respondent's annual employee questionnaire dated March 23, 2017 was entered into evidence.

¶ 164 The Respondent admitted that borrowing money from a client is an inherent conflict of interest.

¶ 165 The Respondent testified he has now read up on "a whole bunch of these rules and at his current employer, RJ, he had to sign off on every page that had read IIROC's rules and everyone else's rules so he cannot ever do anything again and say he didn't understand it." (emphasis is ours)

¶ 166 Notwithstanding that evidence, when the Respondent was taken to the content of Rule 42 and was read this excerpt:

Each Dealer Member and, where applicable, Approved Person shall take reasonable steps to identify

existing and potential material conflicts of interest between the interests of the Dealer Member or Approved Person and the interest of the client. Where an Approved Person becomes aware of an existing or potential material conflict of interest, the existing or potential conflict shall be reported immediately to the Dealer Member.

¶ 167 The Respondent then made the following admissions:

- (i) he was not overly familiar with that rule,
- (ii) he did not know if borrowing money from a client could also be conduct unbecoming,
- (iii) he was not aware of any rule against conduct unbecoming,
- (iv) he had not read any rule about conduct unbecoming,
- (v) conduct unbecoming in his mind would have related to Rule 42,
- (vi) he did not know it is not right to have a conflict of interest with a client.

¶ 168 At the hearing, the Respondent maintained that at the time he was borrowing money, he did not consider it to be a conflict of interest.

¶ 169 The Respondent testified that the time he was borrowing money, he should have asked for clarification if it was a conflict of interest.

¶ 170 The Respondent said now he knows it is a conflict of interest to have personal dealings with a client.

Evidence from the RBC Interview

¶ 171 In the RBC interview, the Respondent said that he met Ms. H and her husband in 2000 or 2002 and:

- (a) Ms. H's husband did a fair bit of the financials in the family,
- (b) Ms. H's husband died in 2010, which was a devastating event for her,
- (c) he began doing much more for Ms. H than other clients since that event,
- (d) Ms. H. would call him probably a dozen times every day just to check in or let him know how things were going,
- (e) he had been employed as a wealth advisor for RBC Securities since May 2012,
- (f) Ms. H became aware that the Respondent was upset at "what was happening with the whole collapse of his house and every day it seemed to get worse" and creating a lot of stress in his life. She also knew that he was in a car accident at the end of May (2017), and was diagnosed with a concussion and whiplash which required daily therapy at the time,
- (g) Ms. H then offered to help by giving him money but he replied to Ms. H "**I can't...you're still a client. I cannot take or receive money from you.**" (emphasis is ours),
- (h) Ms. H wanted to add him as a co-applicant or co-tenant on her bank accounts after the nanny left so that he could go on to her bank accounts and do whatever he wanted to do. He said he told her "no, that wouldn't be appropriate",
- (i) he then came up with the idea of preparing a loan document and promissory note,
- (j) he then said, "in hindsight, maybe that was not the greatest thing in the world, but it was what I wanted to do at the time",
- (k) the Respondent then drafted the document for the sum of \$100,000, dated July 12, 2017, which he printed at his home and brought to Ms. H's house where it was signed, without the presence of lawyers, a notary, or anyone else,

- (l) Ms. H told the Respondent “you borrow whatever you need on this”,
- (m) he never produced or showed Ms. H any bills for which the \$100,000 amount would be applied. He simply told her the balances he owed and she told him to pay whatever he wanted to pay. She has never seen any of the invoices the Respondent incurred after the borrowing from Ms. H.

Evidence from the IIROC Interview

¶ 172 At his interview with IIROC on April 4, 2018, when asked why he prepared the promissory note, the Respondent said:

- (a) he had structural damage to his home in May 2017 due to a wind and rain storm which he thought was going to be a small repair job but turned into being in excess of “one hundred and something thousand dollars”,
- (b) sometime in May 2017, Ms. H in one of their frequent daily telephone conversations asked him why he was a little off and he told her they had some unexpected expenses but he did not know the exact sum and she offered to give him the money to pay his expenses,
- (c) he responded: “no, that would not be something I would want.”
- (d) a week later he attended his financial institution to arrange a line of credit but learned an advance would take a while due to appraisals on completed and uncompleted work,
- (e) at that point, Ms. H asked if she could lend him the money, and he said “possibly”,
- (f) Ms. H said she would just loan him the money and he could pay it back when he feel(s) like it,
- (g) he responded: “no, I was not comfortable with that and I preferred if that was going to happen” that they signed a loan agreement which became the unsecured written promissory note dated July 2017,
- (h) Mr. and Ms. H had been in the business of loaning money to friends, family members and co-workers, and she was quite familiar with that, although in hindsight, the Respondent guessed that they were not a financial institution,
- (i) the promissory note stated that “the creditor will lend to the debtor the sum of up to \$100,000”,
- (j) he did not know the actual amount borrowed off the top of his head, but the Royal Bank (*sic*) said it was more than \$100,000,
- (k) he received a call from the RBC investigator asking him to meet with her on the last Tuesday of September 2017 (i.e. September 26),
- (l) on that date, he answered that he had borrowed something from Ms. H. The RBC investigator requested he bring in copies of whatever documentation, statements or information he had and within a day he did so,
- (m) a day and a half later, the RBC investigator asked him to come back,
- (n) he attended a meeting with the RBC investigator and agreed to answer any questions that she had,
- (o) in the second week of October 2017, the manager of RBC Securities demanded that he make it right with Ms. H as soon as possible, and within a few days of being put on administrative leave, the Respondent paid back to Ms. H’s lawyer the sum of \$160,000,
- (p) he did not believe he would have to disclose the promissory note to RBC Securities prior to

receiving money from Ms. H, so did not so disclose it,

- (q) he knew Mr. and Ms. H lent money to many people, such as Mr. H's relatives and to people who have worked with her over the years,
- (r) Ms. H had knowledge and awareness of, and fully understood how loans were made,
- (s) he had been employed at RBC Securities since May 2012 and had been licensed with IIROC for nine years at the time of these events,
- (t) he had signed an annual attestation in April 2017, before the personal financial dealings in question, and attestation every year before that.

¶ 173 When asked if he was not aware before his interview with the RBC investigator that he was not supposed to have financial dealings with clients, the Respondent said:

"Yes, if I had read all of that, in hindsight and I had asked for clarification, I--- have signed or whatever ...emailed once a year with them, that I wouldn't have. So am I aware of it at the time, I ...it's ---it's a tough answer because when I had the dealings with Ms. H, I thought because she had lent money to other peoples that, you know, it was okay. And only afterwards was it determined that it was not. Does that answer your question or...? (emphasis is ours)

¶ 174 When asked if he was aware whether, if he was going to have personal financial dealings with his clients, he needed firm approval, the Respondent answered "I wasn't aware of it. I wasn't sure if you were asking me if I intentionally knew and did it anyway, the answer was no."

¶ 175 The Respondent never told Ms. H's stepsons of the loans.

Evidence at the Hearing

¶ 176 The IIROC investigator testified that he disbelieved for several reasons the Respondent's testimony at the IIROC interview characterizing Ms. H as a sophisticated businesswoman in the business of loaning money. He testified that it did not make sense in light of his statement in the RBC interview, which demonstrated that he knew at the time of the offer of money from Ms. H, he was not supposed to borrow money from his clients.

¶ 177 At the hearing, the Respondent said that in June 2017, he thought because the clients had been in the business of providing loans to other people that it would be okay.

¶ 178 When reminded of the answers he gave at the IIROC interview, the Respondent said that when he was involved with Mr. and Mrs. H, he knew they had lent money to many people within their community, to some of Mr. H's relations, such as her stepchildren, and to some friends and some people who had worked for her over the years.

¶ 179 The Respondent said he knew Ms. H. had knowledge, awareness and understanding of these types of loans because she had made many of them in the past. She was fully aware and fully understood that he wanted to put it on paper with an interest rate and payment terms.

Respondent's Hearing Testimony - Cross-examination

¶ 180 When asked if the Respondent had any experience drafting promissory notes, he said he did not actually draft it, he received a boilerplate of it from a friend in the legal profession.

¶ 181 The Respondent admitted that Ms. H had assets of close to \$3.5 - \$4 million.

¶ 182 The Respondent denied in the circumstances that he was taking advantage of Ms. H.

¶ 183 When asked to confirm Ms. H was fully aware of what was going on in terms of the loans in a green binder, the Respondent said "she has a green binder, correct."

¶ 184 When asked if he said in the RBC interview that he had only told Ms. H he had exceeded the \$100,000 a couple of weeks before the RBC interview, the Respondent said: “I don’t know. Do we have that in the transcript?”

¶ 185 When shown the transcript, the Respondent answered “Oh I did tell her, yes. Sometime in September.”

¶ 186 When put to the Respondent that if he had told her this a few weeks before the RBC interview, then she was not keeping track of the amounts he was borrowing from her, he answered: “She had the full files. All she would have had to do was open her folder.”

¶ 187 The Respondent said: “I’m sure we would have had a conversation where she opened the folder”.

¶ 188 When asked if he was saying Ms. H was well aware that he had exceeded the \$100,000 limit before he told her, the Respondent answered: “I’m assuming she would be, yes. All the paperwork was present.”

¶ 189 The Respondent admitted that at the time of the IROC interview, he did not think in the traditional sense that Ms. H was a financial institution or would qualify as a financial institution for loaning money the way she does; she was not a big bank.

¶ 190 The wording of Dealer Member Rule 43.2(3) states:

(i) *Borrowing money or receiving a guarantee in relation to borrowing money, securities or any other assets from a client, unless:*

(a) *The client is a financial institution whose business includes lending money to the public*

¶ 191 At the hearing, the Respondent was asked whether, in giving the answer in the IROC interview that Mrs. H was not a financial institution he had taken that language from this clause. He first answered that he did not understand the question. He then said he could not answer whether he did or not.

¶ 192 When asked whether he was aware that under the IROC Rules it can be a violation simply by borrowing money from a client whether or not he disclosed it to his firm, the Respondent asked if the question was whether he told his firm it was a violation. His next answer was “if I told the firm and they said no you can’t do it then you wouldn’t do it.”

SUBMISSIONS OF LAW

Applicable Principles of Interpretation

Former Rule 29.1 / Consolidated Rule 1400

¶ 193 Both counsel presented argument as to the type of conduct encompassed by Rule 1400. Before the enactment of Rule 1400, allegations of conduct unbecoming or detrimental to the public interest were treated as contraventions of the former Rule 29.1. Certain case authorities that had interpreted Rule 29.1 were cited to us as guidance to the interpretation of Rule 1400. The former Rule 29.1, read as follows:

Business Conduct

29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member and each of the

foregoing individuals shall comply with all rules required to be complied with by the Dealer Member.

¶ 194 In *Northern Securities Inc., et al*, 2013 ONSEC 48, the court in its reasons referenced a passage from *Re Gareau* which stated:

...

*Finally, the courts have made clear that the absence of a definition of misconduct does [not] prevent a disciplinary tribunal from considering whether there has been misconduct in any particular case. In *Matthews and Board of Directors of Physiotherapy (1987)* 61 O.R. (2d) 475, the Ontario Court of Appeal stated:*

The absence of such definition requires the board to judge the appellant by the objective standards of its own profession. Although these standards are unwritten, they are nonetheless real and it is within the jurisdiction of the appellant's professional brethren who constitute the board to determine in the particular case if he has fallen below that standard.

¶ 195 *Re Deeb* 2013 IIROC 8 held that each case is fact dependent. The panel there held that there must be some element of wrongdoing or falling below the standard of conduct reasonably accepted in the securities industry to maintain the public trust in the members to handle the public's money. This is so whether the conduct is characterized as bad faith, dishonest intent, improper purpose, quasi-criminal, unethical or other similar language.

¶ 196 In *Re Pariak-Lukic* 2014 IIROC 1, although argument was made about the meaning of the term "conduct unbecoming" and the degree of negligence that would result in finding that Rule 29.1 was breached, the panel declined to strictly apply such language merely to the specific events under discussion and instead adopted the guidance of *Re Little* as follows:

Transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect upon 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 would even appear to cast doubt upon that probity, it could be detrimental to the public interest and constitute conduct unbecoming.

¶ 197 In *Re Pariak-Lukic (supra)*, the panel held that even though the respondent honestly believed she was not obligated to disclose her recommendations to her employer or seek its approval, as a registrant, she had an obligation to know and understand the policies and procedures of her employer and the obligations and duties imposed on registered representatives by the by-laws and the rules of the applicable regulatory organizations. Her ignorance or misunderstanding of the rules in this matter was no excuse.

¶ 198 In *Re Deeb (supra)*, the panel concluded that whether the respondent objectively knew or thought the conduct was unbecoming was irrelevant. Whether conduct is unbecoming under Rule 29.1 is to be determined on an objective basis by each panel on a case-by-case basis having regard to the principles of interpretation and prior case law precedent.

¶ 199 In *Re Deeb (supra)*, there was discussion about the fact that the respondent had the opportunity to correct his false statements before the second interview, which would have avoided costs and delays in the second investigation.

Test for credibility of a witness

¶ 200 *Faryna v. Chorney*, [1951] B.C.J. No.152 (BCCA) set out the test for determining credibility (at paragraph 6):

“the test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial expression of the truth.”

¶ 201 *Re Northern Securities (supra)* noted that in assessing the credibility of a witness’s evidence it was relevant to consider what he would hope to gain from the testimony and the outcome of the case, his appearance of sincerity and truthfulness, whether he was candid, frank and responsive to questions asked or evasive and hesitant, inconsistencies in his testimony, whether he had previously given a statement that is inconsistent with his testimony at trial and whether his personal demeanour carried the conviction of truth.

Burden of Proof

¶ 202 The Respondent cited *R. v. Sault Ste. Marie*, [1978] CarswellOnt 24 with respect to the allegations under Contravention 2 for the proposition that IIROC must establish a kind of recklessness to mislead.

¶ 203 The Respondent also cited *Re Lemay 2012 OCRCVM 69* for the propositions that Enforcement is not required to prove either malicious intention or *mens rea* on the part of a respondent unless the wording of the regulatory provision or the count make reference to it.

¶ 204 *Re Lemay (supra)* also held that because a guilty verdict can entail revocation of the respondent’s right to practice his profession or business activity, in disciplinary proceeding, the evidence against him must be strong, clear, reliable and particularly convincing.

FINDINGS

Credibility of the Respondent

¶ 205 Prior to rendering the below listed findings, we reviewed the test for determining credibility of witnesses as laid out in *Faryna v. Chorney (supra)*.

¶ 206 In assessing the credibility of the Respondent’s evidence, we considered those factors listed in paragraph 201 above

Impact of the Accident Injuries

¶ 207 We accepted the professional qualifications of Dr. Pachet and found him to be credible expert witness.

¶ 208 However, Dr. Pachet was not informed by the Respondent about the statements he made on September 25, October 6, 2017 or April 4, 2018, or told by him that one of the reasons given to him for his termination for cause was for making a false representation to RBC that he was the client’s Power of Attorney, or that the statements he made on all of those dates would be in issue at the hearing at which they both attended.

¶ 209 As a result, Dr. Pachet’s written and oral conclusions did not address the issue of whether making potentially false statements or misleading representations could or would be caused or contributed to by accident sequelae.

¶ 210 We took from Dr. Pachet’s evidence only that the accident sequelae put the Respondent at increased risk of mistakes, errors, and poor judgement. We did not hear him go so far as to opine that that the accident sequelae probably caused or contributed to mistakes, errors, and poor judgement, even in general, much less as regards any specific statements the Respondent made in September or October 2017 or April 2018.

¶ 211 Moreover, Dr. Pachet reported from the facts given by the Respondent at two interviews and his view that the Respondent was forthright. However, under cross-examination, when given certain specific examples of underreporting, inaccuracies and not being forthright, he conceded that these circumstances would require him to reconsider the accuracy of his opinions.

¶ 212 In light of the foregoing, we conclude that we could give only little weight to Dr. Pachet's opinions in either report of February 2018 or his report following the July 3, 2019 evaluation.

Whether the nanny had helped to manage Ms. H's daily finances

¶ 213 We took careful note of the Respondent's demeanor during the whole of his oral testimony as regards his testimony explaining his answers given at the RBC interview and the answers given at the hearing.

¶ 214 We do not find credible his explanation or attempt to interpret or reinterpret his previous answers given at the RBC interview. Most striking in this regard was the Respondent's flat denial on this issue in his own answers from the transcript.

¶ 215 We reject the contention that the questions at the RBC interview were unclear or that they confused him. We reject the contention that any cognitive difficulties resulting from the sequelae of the accident injuries affected the accuracy of his answers to the RBC investigator on this issue. We reject entirely his evidence at the hearing that he did not say or did not mean the answers he gave on this point on October 6, 2017.

¶ 216 Instead, we conclude that it is more probable that, as he initially said at the RBC interview, the nanny was helping Ms. H with her daily finances, and after Ms. H terminated the nanny in his presence, the Respondent insinuated himself into Ms. H's home to sit beside her while she performed her banking on her iPad ostensibly to help her with her daily finances, but shortly thereafter to help him with his own financial concerns.

¶ 217 As a result, we find on a balance of probabilities that when he gave those answers at the RBC interview, the Respondent intended his words to be understood to convey the ordinary meaning of those words.

¶ 218 We also conclude that the revised version of events the Respondent proffered at the hearing was untrue. We conclude it was more probably presented at the hearing to bolster his evidence as to Ms. H's financial prowess as an experienced money lender.

Whether the Respondent falsely claimed that he was Ms. H's Power of Attorney in a September 25, 2017 phone call with the RBC Fraud Detection

¶ 219 Having heard the audio recording at the hearing, including the tone of his voice, which sounded to us congenial and confident, we find as a fact that the Respondent made two false statements in that phone conversation with the RBC Fraud Detection.

¶ 220 We find after careful consideration of all of the evidence, including close scrutiny of the Respondent's tone of voice and intonation during the audio tape, his demeanor and responses given in testimony at the hearing, on a balance of probabilities, that when he gave those false answers, he intended his words to be understood to convey the ordinary meaning of those words. In short, he intended on that day by giving those answers that the RBC Fraud Detection believe he was his client's Power of Attorney.

¶ 221 In evaluating his testimony, we took into consideration the facts that the Respondent's testimony as to his prior knowledge of the reason for the call was internally inconsistent, he offered no reasonable explanation for making these false statements, and his contention that he had cured the effect of the false statements, conflicted with subsequent events.

¶ 222 We also considered but rejected the Respondent's evidence as unconvincing that until he heard the voice recording at the hearing, he had no recollection whatsoever of making the statements.

¶ 223 First, from the facts that conversations with him and the RBC Fraud Detection were initiated on the following day, that he was shortly thereafter put on administrative leave and then delivered a termination letter dated November 17, 2017 from RBC Securities expressly referencing the false statement to the RBC Fraud Detection that he was the client's Power of Attorney, we conclude that the Respondent must have been aware at least that RBC Securities was contending he made such a representation on September 25, 2017.

¶ 224 Second, the fact that the Respondent proffered in the IIROC interview a detailed version of the substance of the phone call demonstrated that at best, he was seeking to put forth a clear recollection of the phone call in which he gave an opposite answer.

¶ 225 We reject the contention that injury sequelae from the Respondent's motor vehicle accident caused or contributed to his making of these false statements.

¶ 226 Having regard to other findings listed below, we consider it probable that the reason the Respondent made the false statements on the phone call was because he knew that Ms. H was not capable herself of explaining to the RBC Fraud Detection on that day the many and various transactions from her bank account between June and September 2017, and he thought by attempting to clothe himself with the Power of Attorney authority, he could in that call put an end to the inquiries.

Whether the Respondent falsely claimed that he did not tell the RBC Fraud Detection he was the client's Power of Attorney in the interview with Enforcement Staff

¶ 227 We examined and re-examined the Respondent's testimony on this issue in light of all of defences he presented as well as his earlier contention that his wrong statement on the telephone call was corrected to RBC the following day.

¶ 228 Taking into consideration the entirety of the evidence including numerous inconsistent statements in his own testimony at the hearing and at the IIROC interview, as well as his contention that the initial false answers on the phone call constituted only a time limited false statement, we conclude that the Respondent knew that he made a false statement on the phone call on September 25, 2017.

¶ 229 However, based on his own statements at the RBC interview, we conclude that the Respondent probably was informed that one of the reasons for the RBC corporate investigator conversation on September 26, 2017 emanated from that phone conversation.

¶ 230 Based on his own statements at the RBC interview in response to questions about the phone call, where the Respondent omitted to mention the questions about the Power of Attorney, we conclude that he had elected to maintain from September 26, 2017 onward to anyone who asked that he had never made such false statements on the phone call on September 25, 2017.

¶ 231 Based on the words in the termination letter of November 17, 2017 expressly referencing one of the causes for termination was his false reference to RBC that he was the client's Power of Attorney, we conclude that at the latest, on receipt of the termination letter, the Respondent knew, or should have known, that contents of the telephone call to the RBC Fraud Detection must have been conveyed to his employer, RBC Securities.

¶ 232 We conclude that the termination letter alone would have stood as a continuing *aide memoire* to the Respondent that he was alleged to have misrepresented himself to the RBC Fraud Detection as having Power of Attorney for that client and neither the RBC Fraud Detection nor RBC Securities considered it cured by his alleged corrected statement to the Britannia branch on September 26, 2017.

¶ 233 We conclude that based on the further wording in the termination letter of November 17, 2017

expressly stating... “*you have failed to comply with mandatory regulatory rules and regulations as well as the firms policies and procedures*”, the Respondent would have been aware of at least the prospect of IIROC contacting him to discuss the grounds of his termination.

¶ 234 We reject his contention as unconvincing that at the date of the IIROC interview, the Respondent had no recollection of the initial false statements in the phone conversation.

¶ 235 We conclude that if the Respondent had no recollection of whether he did or not make such statements at the IIROC interview, he could and would have simply said so.

¶ 236 Instead, in response to an open-ended question, the Respondent began with an unqualified, unconditional, clear and unequivocal statement that he did not say he was the client’s Power of Attorney and included unsolicited additional false embellishments about the other contents of the phone call.

¶ 237 From that narrative, we conclude that the Respondent was not asserting that he had no recollection of making such false statements, but instead was asserting a recollection that he did not make such false statements.

¶ 238 We consider it more probable that the Respondent presented to the IIROC investigator his own unsolicited narrative with additional details in an attempt to bolster his revised version of events.

¶ 239 We evaluated the submissions of both counsel as regards a follow up question asking that the Respondent confirm he did not say he was the client’s Power of Attorney, namely “I do not believe I did, no.”

¶ 240 We conclude that in the context of the interview that the words “I do not believe I did...” were not expressed to demonstrate *bona fide* confusion, uncertainty, lack of recall or lack of memory on the part of the Respondent. Instead, we conclude that they were intended to reaffirm the answer he had given on this point in his earlier narrative.

¶ 241 Taking into account all of the foregoing as well as our evaluation of the Respondent’s demeanor and credibility at the hearing, we conclude that in giving the above quoted words the Respondent was not merely replying in the negative, but that was also the meaning he intended to convey.

¶ 242 Having regard to all the evidence presented, we reject as not credible the Respondent’s contention that his denial at the IIROC interview was based on an honestly held belief that he had not done so, both at that date and continuing to and through the hearing.

¶ 243 We reject the Respondent’s contention that his statement on the phone recording was an inexplicable error.

¶ 244 We conclude that in the IIROC interview, the Respondent’s claim that he did not tell the RBC Fraud Detection he was the client’s Power of Attorney was false.

¶ 245 We conclude the fact that the IIROC investigators did not believe his words does not diminish the Respondent’s intent to mislead.

¶ 246 We reviewed the entirety of the IIROC transcript and the RBC transcript and satisfied ourselves that the conduct of the interview was appropriate in the circumstances.

¶ 247 We reject the contention that the failure of IIROC to disclose knowledge of an audiotape or possession of a transcript of the RBC interview rendered the conduct of the IIROC interview unfair to the Respondent, or otherwise impacted the reliability of admissibility of the evidence of the parties on this issue.

Whether the Respondent made misleading representations, and failed to act in a candid and forthcoming manner over the course of the investigations by RBC Securities and IIROC Enforcement Staff in claiming he borrowed money to repair damages to his home caused by a storm

¶ 248 The Respondent’s own admissions at the hearing substantiated that he had represented to the RBC

investigator and IIROC investigator in the first instances that he borrowed the money to pay for home repairs estimated to exceed \$100,000.

¶ 249 We reject the Respondent's contention that his telling the RBC investigator his cards were in such a high state outside of renovations and house costs was due to unfortunate expenses, such as travel related expenses, like having go to his grandmother's funeral, and marital issues was a fair reflection of the money he was spending on his credit cards.

¶ 250 In particular, we note that when the RBC investigator in a follow up question clearly inferred his marital expenses related to financial obligations as typically arise from legal separation agreements, the Respondent gave an affirmative response. Since none of the expenses pertained to any legal separation obligations, we considered this response, not candid, or forthcoming, but misleading.

¶ 251 We conclude that the Respondent was deliberately seeking to induce the RBC and IIROC investigators to believe that his conduct in borrowing more than \$156,600 from Ms. H was due only to a set of life crises that could befall any ordinary person and for which a good friend would wish to assist with. It was for this reason that when pressed, he would supplement with vague other details designed to thwart further questioning.

¶ 252 At the IIROC interview, when asked if the various charges were toward getting his house fixed, the Respondent's statement was that he was freeing up capacity on these cards to have *these purchases* go through. However at the hearing he admitted that incurring new charges, in particular on his AMEX card, that had to be cleared each month, was not freeing up capacity on these cards to have *these purchases* go through.

¶ 253 We conclude that the Respondent was deliberately seeking to induce the RBC and IIROC investigators to believe that his conduct using the borrowed funds initially not for any house repairs but for financial rearrangements to attend to the same, which was another example of supplementing his initial representation with vague other details.

¶ 254 We find that at the IIROC interview, the Respondent's statement that he was freeing up capacity on these cards to have *these purchases* go through, was a misleading representation he made with the intention to thwart further questioning and a failure to act in a candid and forthcoming manner.

¶ 255 Accordingly, we conclude that the Respondent made misleading representations and failed to act in a candid and forthcoming manner over the course of investigations with RBC Securities and IIROC Enforcement Staff.

¶ 256 We conclude that the fact that the IIROC investigator was able to discover and prove that the Respondent's initial statements and representations were misleading does not excuse the Respondent's initial misleading representations.

Whether the Respondent was evasive and not forthcoming in neglecting to inform Enforcement Staff that the \$981.50 payment from Ms. H was to his mother-in-law's line of credit

¶ 257 We considered this question in light of contention at the hearing that although the Respondent's answers to the IIROC investigator were confusing and that he did not fully disclose this payment to the mother-in-law's line of credit, IIROC had the RBC transcript in hand and was thus fixed with the knowledge he had confessed to the RBC investigator that the TD line of credit did belong to his mother-in-law.

¶ 258 We conclude that despite being fixed with knowledge of his ultimate admission to the RBC investigator, a close reading of his answers in the transcript of the IIROC interview persuades us that these were not instances of the Respondent simply standing silent while the IIROC Investigator proceeded with an incorrect understanding of all the relevant circumstances.

¶ 259 Two specific answers he gave in sequence in this line of questioning satisfied us on a balance of

probabilities that he was seeking to induce the IIROC interviewers to believe he was the owner of the TD line of credit.

¶ 260 The first such answer was the Respondent's statements that he "would have to look at the statement to verify the credit limit."

¶ 261 The second such answer was the Respondent's affirmative answer to the question whether *he* could draw \$10,000 from that account.

¶ 262 These answers, in our view, were both evasive and not forthcoming in light of the true fact that his mother-in-law was the owner of this account.

¶ 263 We are satisfied on the balance of probabilities that those responses with those words in their ordinary meaning were intended to mean that the Respondent was the owner of that account.

¶ 264 We are satisfied from a review of the entire line of questioning on this issue that the Respondent in these moments well understood that the IIROC investigators were proceeding under the impression that the TD line of credit belonged to him.

¶ 265 In our view, the facts that the IIROC investigator had in hand the RBC transcript ahead of the interview or that IIROC investigator further pursued the question with the Respondent, who later gave documentation verifying the true owner of the account, does not affect our finding that on the day of the IIROC interview when he was giving evidence, his answers were evasive and not forthcoming.

¶ 266 We also note that in giving his testimony on this topic, the Respondent was being questioned about his earlier testimony that he had made payments to free up his credit facilities to make room for payment for his home repairs. However, evidence at the hearing established that the payment of \$981.50 was made on September 4, 2017, the day after he had made a payment on his AMEX account of \$16,257.41 and the day before his first payment relating to home repairs of \$3,300.

¶ 267 Accordingly, this payment of \$981.50 was not a payment to make room on his own credit facilities. Moreover, since he had cleared off his AMEX account on September 3, 2017, there was ample room on that credit facility on September 5, 2017 for the home repair charge that he paid.

Whether the Respondent was evasive and failed to adequately explain the circumstances surrounding the \$24,000.00 payment from Ms. H to the Respondent's CRA account

¶ 268 At both the RBC and IIROC interviews and again at the hearing, the Respondent persistently resisted providing a reasonable explanation for setting up his own CRA tax account on his client's profile. We found entirely unbelievable the vague suggestion he proffered at the IIROC interview that it was "possibly to do with the loan".

¶ 269 We conclude on all the evidence that the Respondent was evasive and failed to adequately explain the circumstances of why he gave Ms. H his SIN and arranged to link her bank account to his CRA account.

¶ 270 We note that under cross-examination, Mr. Choy admitted that the circumstances of the CRA payment was cleared up after the interview by the written responses delivered by Respondent's counsel.

¶ 271 However, the Respondent then gave answers as to whether the CRA funds, once removed from his account on July 4, 2017, were restored to Ms. H's bank account that were inconsistent with his previous answers. First, he gave an unqualified assertion to the RBC investigator that CRA restored the funds to her account. This answer represented that he knew this to be a fact.

¶ 272 When the IIROC investigator determined from RBC that it had no evidence of such a payment into her account before she closed it sometime in November, 2017, the Respondent then purported to revise his earlier evidence to mean that he had merely "assumed" that CRA restored the funds to her account. On alternate days in the hearing, the Respondent testified both that he did not know where the funds went and

that he knew from Mr. K, her lawyer, that they had gone back to her. He then added that he knew this from “day one”.

¶ 273 Under further questioning about when he and Ms. H discovered that the funds had been put inadvertently into his account, the Respondent offered two possibilities, one that they had discovered it in July, based on the information contained in a CRA statement to him that the sum had been removed from his account on July 4, 2017. The other was that he and Ms. H had discovered the error in September 2017. When put to him at the hearing that both these positions were inconsistent, the Respondent deflected the questions until he ultimately refused to address the contradiction.

¶ 274 The Respondent’s continuous revisions of his various and internally inconsistent answers satisfied us that he was a witness who is careless with the truth and unreliable.

¶ 275 However, based on the CRA statement to the Respondent indicating the transfer was made in error, we conclude the initial payment by the client to the Respondent’s account was made inadvertently, and thus we find in favour of the Respondent on the allegation in Contravention 1 pertaining to the CRA payment.

¶ 276 We do conclude under Contravention 2 that the allegation pertaining to the CRA payment is proven. To be specific, on all the evidence on a balance of probabilities, the Respondent was evasive and failed to adequately explain the circumstances of why he gave Ms. H his SIN and arranged to link her bank account to his CRA account and when and where the \$24,000.00 payment went after it left his CRA account.

Whether the Respondent was aware that he needed his firm’s approval to borrow money from his client

¶ 277 We reject the Respondent’s testimony that he was unaware at any time in 2017 that he needed his firm’s approval to borrow money from his client.

¶ 278 We reject the Respondent’s testimony that he had an honest belief that his firm would have permitted him to borrow money from Ms. H because she was as knowledgeable and experienced as a financial institution.

¶ 279 We conclude that the Respondent’s statements to the RBC and IROC investigators that he did not know borrowing from clients without firm’s permission was not permitted were untrue and were misrepresentations.

¶ 280 We conclude that the facts that he had re-signed his annual employee attestation in March 2017, and that he first told Ms. H he could not take or receive money from her as she was his client, meant that the Respondent knows the industry rules and commits to complying with them and satisfies us that he knew in May 2017 he was not entitled to borrow money from her without the firm’s permission.

¶ 281 Despite his testimony that in December 2017 his current employer had given him a detailed re-education of his obligations under the IROC Rules, the Respondent’s answers at the hearing about the meaning of the Rules pertaining to conflict of interest and conduct unbecoming sounded to us by turns vague and unresponsive, as if he was avoiding answering what was his present understanding of his obligations in order not to be taken to have had that same understanding in 2017.

¶ 282 As an example, the Respondent’s deflection of the question whether he had taken the language of the clause about financial institutions in formulating his answer at the IROC interview convinced us that he did not want to admit the truth of that proposition.

¶ 283 The Respondent’s contention that Ms. H was a sophisticated businesswoman does not square with the facts that he had already borrowed approximately \$10,000 from Ms. H before executing the promissory note. Further, it does not square with the fact that he continued to borrow the sum of \$56,600 after reaching the \$100,000 limit of the promissory note. It does not square with his decision to supply her his SIN to set up his CRA account on her bank profile.

¶ 284 We do not accept as credible that the Respondent's memory improved by reason that he was, over this time period, recovering from accident injuries that affected his judgment, or caused or contributed to a propensity for making errors in statements to the RBC Fraud Detection, his employer or the IIROC investigator.

¶ 285 We conclude it is more probable that the reason the Respondent conducted all or most of his borrowing activity sitting beside Ms. H at her home or from his personal computer, and provided all the documentation pertaining to the borrowing from his own drafts and out of the presence of any objective observers was because he well knew that he was prohibited from borrowing client's money without the approval of his firm.

CONCLUSIONS

Contravention 1

¶ 286 The Respondent has admitted the Allegations in Contravention 1 and despite his election to dispute the one particular allegation that prior to her termination, the nanny assisted Ms. H with her daily finances, we were satisfied on all the evidence on a balance of probabilities that the Respondent breached Rule 43 and as such the allegations of Contravention 1, except as regards the CRA payment, are proven to the required standard.

Contravention 2

Effect of the absence of the right to remain silent

¶ 287 We have already stated our findings on the issues of the credibility of the Respondent.

¶ 288 We are satisfied on an objective test of all the evidence that when the Respondent made assertions that were misleading or omitted information that misled the investigators, he was intending to do so. In arriving at that finding, we conclude that it was not necessary to prove whether or not the RBC investigator, the IIROC investigator or anyone at the RBC Fraud Detection were in fact misled.

¶ 289 We reject the Respondent's argument that the IIROC provision that an RR does not have the right to remain silent is subject to limitations of the type he put forward, namely, that a respondent who has more information to give about the subjects that are raised in any investigation or interview may choose not to disclose it. Or that merely because an RR admits a breach of a particular Rule, he is thereby absolved of consequences of later making misrepresentations about the surrounding circumstances of that initial breach.

¶ 290 In our view an RR may not choose to intentionally withhold relevant information that might be of interest to the questioning authority, if or because it is or may be damaging to the RR.

¶ 291 While we accept it would be unreasonable for IIROC to pursue charges against an RR who innocently misstated a date or a time of an occurrence or forgot a minute particular in respect of one or several transactions, we are satisfied that the Respondent's conduct here does not fall to the level of accidental, innocent or mistaken errors or trivial matters.

Whether the conduct falls within Rule 1400

¶ 292 Despite the dearth of case authority specifically interpreting any of the wording of the new Rule 1400, we are guided by the comments cited in *Re Gareau (supra)* and we conclude that even in the absence of a definition of "business conduct" or "conduct unbecoming" or specific mention of disciplinary or enforcement proceedings, we are entitled and required to judge the Respondent by the objective standards of his own profession.

¶ 293 Even where these standards are unwritten, it is within our jurisdiction to interpret and apply that standard or concept of business conduct that is unbecoming or detrimental to the public interest and to determine whether the Respondent's conduct fell within the meaning of Rule 1400.

¶ 294 We conclude that Rule 1400 has a broad application. It provides for a standard that is able to encompass misconduct not directly captured by the Rules. Accordingly, as argued by the Respondent, we reject the contention that we should consider s. 221.1(2) of the *Securities Act* in our deliberations.

¶ 295 We conclude that the question of whether conduct could amount to “conduct unbecoming” in the investment industry involves a determination by persons in the industry of the standards expected of persons who deal with investments.

¶ 296 We conclude that it is an objective test and a reasonable formulation of the test can be stated as “what would a reasonably informed person with knowledge of the investment industry think of the propriety of the conduct in question?”

¶ 297 We have considered the Respondent’s conduct in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect upon which the transgression could have upon that reputation.

¶ 298 As stated in *Re Little (supra)*, clearly the public interest demands that members of the industry and their employees must be trusted because they handle other people’s money. They must be seen to be trustworthy. If conduct would even appear to cast doubt upon that probity, it could be detrimental to the public interest and constitute conduct unbecoming.

¶ 299 On the test of what would a reasonably informed person with knowledge of the investment industry think of the propriety of the conduct in question, we find that person would conclude in each of the below described instances, the Respondent was engaged in business conduct as an IIROC registrant and:

- (a) On September 25, 2017, the Respondent by making false statements to the RBC Fraud Detection plainly failed to act openly and fairly and in accordance with just and equitable principles of trade.
- (b) Equally, in doing so, he failed to observe high standards of ethics and conduct during the course of answering questions from the RBC and IIROC investigators.
- (c) In the course of inquiries from IIROC as regards to the conduct involving a client and an investigation about possible breaches of IIROC Rules, this Respondent remained obligated to observe high standards of ethics and conduct and not engage in business conduct that is unbecoming or detrimental to the public interest.
- (d) By making false statements, evading answering questions pertaining to such issues, and not being forthcoming committed conduct unbecoming as well as conduct that is detrimental to the public interest. Not only is it a failure to observe high standards of ethics and conduct, but also is a clear case of unethical conduct.

¶ 300 In our view, reasonable and honest RRs know that such conduct would undermine their clients’ trust and confidence as well as the trust and confidence the public currently has in the investment industry.

¶ 301 It is a basic expectation that an RR will provide true and complete answers to queries from their Dealer Members and from IIROC, particularly where an RR solely possesses information about existing or potential conflicts of interest because firms are required to address existing or potential conflicts of interest.

¶ 302 The failure of an RR to provide true and complete disclosure prevents a firm from being able to fulfil its obligation to respond to existing or potential conflicts of interest, thereby exposing the firm to potential damages.

¶ 303 The failure of an RR to provide true and complete disclosure prevents IIROC from being able to fulfil its obligation to investigate breaches of IIROC Rules and regulations and Member Dealers’ policies pertaining to conflict of interest, among other policies, to keep intact and maintain the integrity of the investment

industry and to preserve public trust in investment industry members and registrants.

¶ 304 We conclude that the reasonably informed person would say the Respondent's conduct in withholding and evading answers and misrepresenting the true circumstances of his involvement on the phone call, during the investigation interviews and at the hearing was entirely improper, and would tend to seriously harm the reputation of the Dealer Member, IIROC, and the investment industry as a whole.

¶ 305 We conclude that the Respondent's claim of ignorance of the Rules and policies pertaining to avoiding conflicts of interest, even if we believed it, is no excuse. It reflects no reasonable understanding of his duties and obligations and of the expectations of members of the investing public.

¶ 306 We conclude that the Respondent's conduct in attempting to thwart the efforts of the RBC Fraud Detection to determine the full extent of Ms. H's payments to the Respondent from her various credit cards and bank accounts, and his evasive responses to the RBC and IIROC investigators and at the hearing constituted a continuing breach of his obligation to the Dealer Member, to IIROC and to the investment industry as a whole.

¶ 307 Whether IIROC did or did not fail in performing its own compliance obligations by not asking follow up questions or taking other steps is not an issue in this case. Moreover, we found nothing untoward in the conduct of any of the personnel of RBC or IIROC in the course of their investigations. The issue which concerns us is the Respondent's conduct.

¶ 308 While we accept that such conduct of an RR could in certain circumstances be considered as a mitigating factor, since the Respondent was continually resiling from his previous statements, including on different days of the hearing, his subsequent documentation or reversals did nothing to extinguish the misconduct we have found.

¶ 309 The representations were false and misleading in the circumstances and constituted a failure by the Respondent to observe high standards of ethics and conduct in the transaction of business and constituted business conduct and practice which was both conduct unbecoming and detrimental to the public interest, contrary to Rule 1400.

¶ 310 After considering all of the Respondent's arguments, we conclude that Contravention 2 was proven on a balance of probabilities with clear, convincing and cogent evidence.

¶ 311 We direct this matter to the National Hearing Coordinator to set a penalty hearing date.

Dated at Calgary, Alberta this 15 day of January 2020.

Shelley L. Miller

Peter McWilliams

Don Milligan

Copyright © 2020 Investment Industry Regulatory Organization of Canada. All Rights Reserved