Re O'Brien

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Michael Francis O'Brien

2020 IIROC 10

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

Heard: March 11, 2020 in Calgary, Alberta
Decision: March 26, 2020

Hearing Panel:
Shelley L. Miller, Q.C. Chair, Peter McWilliams and Don Milligan
Appearance:
Tayen Godfrey, Senior Enforcement Counsel
Jeffrey N. Thom, Q.C. and Christopher Jones for Michael Francis O'Brien

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PENALTY DECISION

¶ 1 In the decision issued on December 31, 2019, this Panel found that the following allegations against the Respondent Michael Francis O'Brien (the Respondent) were proven to the required standard:

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).

Findings as to Contravention 1

¶ 2 The Respondent admitted that between May and September of 2017, he engaged in personal financial dealings with a client, one Ms. H, without the knowledge or approval of his firm, contrary to Dealer Member Rule 43 and further admitted the following particulars of Contravention 1:

(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) After an employee who was helping Ms. H with her day-to-day affairs was terminated, 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.

(d) 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.

(e) 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 The Panel also received documentary and oral evidence of the Respondent which satisfied the Panel that Contravention 1 including those particulars were proven.

Findings as to Contravention 2

¶ 4 As regards Contravention 2, the Panel found that:

(a) the Respondent failed to act in a forthcoming and candid manner, made false and misleading representations during investigations by both his firm and IIROC Enforcement Staff and over the course of investigations with RBC Fraud Detection and IIROC Enforcement Staff,

(b) during a phone call he returned to the RBC Fraud Detection on the client's behalf, he falsely claimed that he was the client's Power of Attorney,

(c) 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,

(d) during the interview with Enforcement Staff, the Respondent was evasive and not forthcoming, and failed to adequately explain the circumstances surrounding the $24,000.00 payment the client made to the CRA on his behalf.

¶ 5 Each of the Contraventions included detailed particulars which were set out in full in our Reasons for Decision on the merits, which may be accessed at 2019 IIROC 33 and should be read together with this Penalty Decision.

¶ 6 On March 11, 2020, the Panel reconvened to hear penalty submissions, received oral and written submissions by both parties, as well as an affidavit on behalf of the Respondent as to his suitability to continue as a registrant and an affidavit from IIROC with respect to the costs of this proceeding. The Panel then adjourned to deliberate on all the material put before it.

¶ 7 An item raised at the outset was as to a statement by the Respondent, in the written and oral submissions, that an appeal has been filed to the Alberta Securities Commission with respect to the finding on Contravention 2.

¶ 8 The Panel advised the parties that it would view this fact only as a step taken to preserve the rights in respect to any limitation period for appeals and would otherwise exclude it from any consideration in deliberations as to penalty.

¶ 9 The Panel reserved its decision and after deliberation has now made the following orders:

(a) prohibiting the Respondent's registration with an IIROC Dealer Member firm for a period of two years,

(b) requiring the Respondent to pay a fine of $100,000 to IIROC,

(c) requiring the Respondent to be ineligible for reinstatement until he has rewritten and passed the CPH examination following conclusion of the suspension period,

(d) be subject to strict supervision for the first 18 months upon re-entry to the investment industry,

(e) requiring the Respondent to pay costs in the amount of $20,000 to IIROC.

¶ 10 These are our written reasons.

Contravention 1

¶ 11 There was an issue at the hearings on the merits and the penalty as to whether the client in question was vulnerable as set out in one of the particulars alleged in respect of Contravention 1.

¶ 12 Proof of engaging in personal financial dealings with a client without the knowledge or approval of his firm is sufficient to make out Contravention 1 without consideration of whether the client was or was not vulnerable.

¶ 13 However, in the Panel's view, the mitigating effect of the Respondent's admission to Contravention 1 prior to the hearing is diminished by his decision to continue to litigate the issue of Ms. H's vulnerability at both the merits and penalty hearings.

¶ 14 The particular allegation in Contravention 1 read as follows:

> 2(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.

¶ 15 The findings were not resolved in the Respondent's favor. Those findings against the Respondent took into account his own characterization at the RBC interview of that person as a "nanny", and his statements that the nanny was doing Ms. H's banking for her and after the nanny went, the Respondent took over to help with bill payments.

¶ 16 The very use of the term "nanny" in the context of doing personal banking for an 81-year-old woman connotes a high degree of reliance by the client in the care and service provider as well as a corresponding expectation, need and desire for a responsible and trustworthy adult to perform the personal financial services honestly and in her own best interest.

¶ 17 The evidence at the merits hearing established that Ms. H was vulnerable to the Respondent's actions in securing loans from her. The Respondent's decision to continue to press the contention that Ms. H was not a vulnerable client took on increased relevance through the penalty hearing.

¶ 18 There, the Respondent applied to submit affidavit evidence that Ms. H was not a vulnerable client at the time of the Contraventions and that he had a good employment record since December 2017.

¶ 19 The Panel ruled the affidavit admissible but accorded little weight to the contents of the affidavit for the following reasons:

(a) The inquiries made by the affiant to Ms. H, her attorney, six other clients of the Respondent and five other industry participants including two from RBC, all appeared to have been made between November 15, 2017 and December 2017 when the affiant offered employment to the Respondent,

(b) In that interval of time, there was no evidence that any of those persons would be aware of the allegations subsequently made by IIROC in Contraventions 1 and 2 against the Respondent,

(c) The information sought and known by those sources at that date appeared to be addressed solely to the question of whether those sources had any information of other incidents or conduct to suggest the Respondent should not be hired by the prospective employer,

(d) The affiant omitted any mention of the fact that RBC gave a second reason for terminating the Respondent, namely, that the Respondent misrepresented himself to RBC as having Power of Attorney for Ms. H,

(e) The affiant's inquiries to Ms. H omitted any mention of the Respondent's false misrepresentation to RBC that he was her Power of Attorney,

(f) The affiant and the Respondent's current employer may have a vested commercial or business interest in maintaining the services of the Respondent and his inventory of clients.

¶ 20 Whereas Ms. H's letter of reference states as at November 22, 2017 that she found the Respondent to be very ethical and very honest. The audio tape evidence demonstrated that she heard him tell the RBC Fraud Department he was her Power of Attorney, and the evidence presented at the merits hearing from her lawyer confirmed that was never the fact.

¶ 21 The Panel concluded that Ms. H trusted all the statements the Respondent made to her or on her behalf in relation to the borrowing and subsequent actions, including to the RBC Fraud Department, whether it was truthful or otherwise, and for that reason, maintained her trust in the Respondent even after:

(a) he misrepresented in her presence that he was her Power of Attorney,

(b) he attended with her at her own branch on the following day to explain the transactions that she could not explain to the satisfaction of RBC Fraud Department,

(c) she was informed that "*RBC has decided that he is no longer an employee*."

¶ 22 The Respondent's other submissions to be considered in mitigation in respect of Contravention 1 were the following:

(a) The misconduct occurred during a limited period of time, and

(b) applied only to a single client,

(c) Ms. H suffered no loss,

(d) there is no evidence Ms. H considered herself exploited by the Respondent,

(e) the Respondent received no financial or other benefit as a result of the misconduct,

(f) the proceedings were not initiated as a result of a client complaint.

¶ 23 However, the evidence established at the merits hearing that Ms. H would not consider contacting the police to report theft from the nanny in May 2017. In the Panel's view, the Respondent must have known she was not the type of person to initiate or press complaints to authorities when persons she entrusted

mishandled her finances. That fact, among others, should have alerted him to her vulnerability.

¶ 24 The evidence established that the Respondent's taking of the client's funds was not a one- time momentary error of judgment. The borrowing originated because, when she expressed concern one day about his mood, he chose to discuss with her his personal financial difficulties.

¶ 25 The Respondent initially refused the client's offer of her money because he knew such borrowing was contrary to his professional duties. Shortly after, he gave in to the temptation by somehow persuading himself that she was a close, personal friend, and her statements that she did not need her money and was happy to give him any amount he desired and those circumstances relieved him of his professional responsibilities to her, to his employer and to the investment industry as a whole.

¶ 26 The Respondent's temptation led him to borrow beyond the $100,000 limit of funds he claimed to need for home repairs until September 2017 when his borrowings totalled $156,503.82.

¶ 27 As pointed out by Enforcement Counsel, the borrowing ceased only when the RBC Fraud Department identified the frequent suspicious activity on Ms. H's accounts and initiated inquiries. Given the most unusual action of linking his CRA account to that of Ms. H, the Panel is suspicious as to whether the Respondent may have had even longer term plans in mind for Ms. H's money.

¶ 28 Had the Respondent acknowledged his breach of duty when first discovered in September 2017 by the RBC Fraud Department and more fully exposed in his interview with the corporate investigation department of his employer, the Panel could have viewed his submissions as to Contravention 1 in a more favorable light.

¶ 29 Instead, the Panel views his continuing insistence on the narrative that his client was not vulnerable through to the penalty hearing as further indication that he still does not recognize or feel any remorse for the nature and extent of his misconduct.

¶ 30 Further, the Panel does not accept that the misconduct applied only to a single client. The false statement to the RBC Fraud Department was a separate act of misconduct also affecting RBC and adversely affected his employer.

¶ 31 As a result, both RBC and his employer's corporate fraud department were required to devote time and resources to investigate his misconduct, including collecting and examining all the relevant documentation and endeavoring to satisfy themselves as to the full extent of his improper activity. These actions were necessary to protect the integrity of RBC, RBC Dominion Securities and the entire investment industry.

¶ 32 The Respondent then compounded the initial misconduct he committed in September 2017 against RBC and his employer by pursuing a continued strategy to cover up and minimize the extent of his misconduct.

¶ 33 The Respondent contended that Ms. H suffered no loss and in fact emphasized that he repaid Ms. H the sum of $160,000, an amount somewhat higher than the exact amount of the borrowing. In the written submission that additional sum was characterized as representing interest on the sums borrowed.

¶ 34 When the Panel inquired whether Ms. H might also have also incurred legal fees in responding to all the queries arising from the Respondent's misconduct, as documented at the hearing on the merits, the Respondent's Counsel pointed to the fact that he had paid a sum in excess of the exact sum borrowed.

¶ 35 This small detail reveals the Respondent's entire focus is solely upon the minimizing of his wrongful conduct, without any consideration of whether his client sustained additional financial or emotional expense in being involved for around two years in investigations and his disciplinary proceedings.

¶ 36 Further, despite the Respondent's contention that he received no financial or other benefit as a result of the misconduct, the ability to use Ms. H's funds to continually pay his AMEX monthly payments in full would seemingly have allowed him to avoid at least some financial charges.

¶ 37 These two points are not deciding factors in the Panel's decision on penalty, but do further illustrate the Respondent's persisting avoidance of awareness of his sole authorship of the consequences of his act and inability to even consider how his misconduct could have negatively impacted his client, his family or members of his profession.

¶ 38 In addition, at the penalty hearing, the Respondent continued to shift the blame away from himself, by asserting that IIROC should have called Ms. H as a witness and if it thought him ungovernable, should have sought an interim ban against him pending the outcome of the proceedings.

Contravention 2

¶ 39 The proven allegations under Contravention 2 were all the consequences of his own creation. More particularly, the Respondent committed even more serious misconduct by seeking to cover up the extent of his wrongful behaviour under Contravention 1 including the following:

(a) failing to act in a forthcoming and candid manner,

(b) making false and misleading representations over the course of investigations by the RBC Fraud Detection and IIROC Enforcement Staff,

(c) being evasive and not forthcoming, and

(d) failing to adequately explain the circumstances surrounding the $24,000 payment the client made to the CRA on his behalf.

¶ 40 The Respondent's written submissions were silent with respect to the above particulars of Contravention 2, except for submitting the following:

(a) The Respondent's actions would not have had any impact on market integrity or the reputation of the marketplace.

(b) Involved parties, RBC Dominion Securities and IIROC, did not experience any loss and they were not misled by any misrepresentations made by the Respondent.

¶ 41 The Respondent's failure to express any recognition of his responsibility for his conduct under Contravention 2 further emphasizes that he still does not recognize or feel any remorse for compounding his initial breach with a sustained intentional strategy of making false and misleading representations, being not forthcoming to the investigators as well as the Hearing Panel.

¶ 42 The core issue for the Panel is whether all the foregoing particulars of the compounding misconduct due to the Respondent's denial to himself and the market participants affected means that the Respondent is ungovernable and should not be permitted to remain as a registrant, or whether he can be rehabilitated through an appropriate array of sanctions.

¶ 43 Enforcement Counsel contended the appropriate penalty in such egregious circumstances was a permanent ban, a fine of $60,000 and costs of $20,000.

¶ 44 Respondent's Counsel submitted the appropriate penalty for conduct that caused no actual harm to anyone was a suspension of 6-12 months, a fine in the range of $25,000-40,000 and costs of $10,000.

¶ 45 Enforcement Counsel tendered into evidence an affidavit appending a draft bill of costs in the amount of $114,361 as at March 5, 2020, the calculations of which were not disputed by the Respondent.

¶ 46 Both counsel agreed upon the importance of the Panel reviewing the IIROC Sanction Guidelines prior to determining the appropriate penalty in these circumstances.

IIROC Sanction Guidelines

¶ 47 The IIROC Sanction Guidelines ("Guidelines") state, among other things, the purpose of sanctions in a

regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, the sanction should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 48 The Guidelines also state that general deterrence can be achieved if a sanction strikes an appropriate balance by addressing the regulated person's specific misconduct but is also in line with industry expectations. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors.

¶ 49 Where there are multiple violations, the overall sanction imposed should not be excessive or disproportionate to the gravity of the total misconduct at hand. A global approach to sanctioning may be appropriate where the imposition of a sanction for each contravention would have the effect of imposing on the respondent a cumulative sanction that is excessive. In addition, numerous similar contraventions may warrant higher sanctions since the existence of multiple contraventions may be treated as an aggravating factor.

¶ 50 The Guidelines indicate a permanent bar should be considered where:

(a) the contraventions involves significant harm to the investing public, the integrity of the market or the securities industry,

(b) the misconduct had an element of criminal or quasi-criminal activity, or

(c) there is reason to believe the respondent cannot be trusted to act in an honest and fair manner in their dealings with the public, their clients in the securities industry as a whole.

¶ 51 The Guidelines also state that a fine should be considered even where a permanent bar is imposed in egregious cases involving significant harm to investors or to the integrity of the securities industry as a whole.

¶ 52 The Guidelines indicate a suspension should be considered where:

(a) there has been one or more serious contraventions,

(b) there has been a pattern of misconduct,

(c) the contraventions involves fraudulent, wilful and or reckless misconduct, or

(d) the misconduct in question has caused some harm to investors, the integrity of the marketplace or the securities industry as a whole.

¶ 53 The Panel reviewed the authorities cited by both counsel. It was clear that none involved circumstances entirely on all fours with this case. However both counsel cited *Re Turenne*, 2015 LNIIROC 38 (*Turenne*), a case which involved counts resembling those in the case at hand. Similarly, the respondent there had admitted to the first count of improper borrowing prior to the hearing and was found guilty of making false statements to IIROC Staff in the course of a prior disciplinary hearing that hindered the evaluation of the complaint and the investigation of the matter at hand.

¶ 54 There, IIROC sought a five-year prohibition, a fine of $25,000 and costs of $10,000. The respondent objected that the monetary sanction was too high and advised that he would not be reapplying for approval. He further contended his only failing was that he misinterpreted the investigator's questions when he failed to disclose he had borrowed from a client.

¶ 55 In *Turenne* (supra), the hearing panel ordered a two-year prohibition, a fine of $20,000 and costs of $10,000. It concluded that the respondent's business conduct was not consistent with the duty of a representative to observe high standards of ethics and conduct at all times. It said such conduct may

undermine the trust not only of the clients but also the marketplace and the general public who expect a representative not to be influenced by his own personal interest. The panel observed no remorse in the respondent notwithstanding his guilty plea on Count 1 but rather he continued to claim his personal circumstances should serve as a mitigating factor in respect of Count 1 and Count 2 was a comprehension error.

¶ 56 The Panel considers that the Contraventions in this case are more extreme in extent and impact on others. We are satisfied that the Contraventions in this case:

(a) constitute more than one serious contravention,

(b) involve a pattern of conduct that is at least wilful and reckless, and

(c) caused some harm to investors, the integrity of the marketplace and the securities industry as a whole.

¶ 57 The Respondent has further maintained the unyielding perspective that since an elderly widow considered herself both his friend and client yet neither vulnerable nor exploited by his conduct, therefore her judgement as to her own vulnerability should prevail over any objective evaluations. He submitted that if she does not believe she was harmed by his conduct, it must be so.

¶ 58 The Respondent, at the penalty hearing, also continued to minimize the effect of his misconduct, demonstrating further that he has no remorse for his conduct under Contravention 2.

Mitigating Factors

¶ 59 The Panel accepts the following as mitigating factors:

(a) the Respondent's admission to Contravention 1,

(b) the loan was repaid in full,

(c) the Respondent's clear prior history of any disciplinary conduct,

(d) the Respondent's termination from employment by RBC Dominion Securities, and

(e) having been subjected to enhanced supervision by his new employer for a period of six months.

Aggravating factors

¶ 60 The Panel considered these factors in this case to be aggravating:

(a) The Respondent's continuing denial that Ms. H was a vulnerable person indicating that he has not accepted full responsibility for his misconduct in respect of Contravention 1,

(b) The failure of the Respondent to recognize, accept and demonstrate any understanding of his responsibilities flowing from Contravention 2 to:

(i) cooperate fully with investigations,

(ii) respond to requests for information from his client's financial institutions, his employer and IIROC Staff in a timely and straightforward manner.

(c) The Respondent's failure to recognize that he must not:

(i) delay IIROC's investigation,

(ii) conceal information from IIROC,

(iii) intentionally provide inaccurate or misleading testimony or documentary information to IIROC.

(iv) attempt to conceal his misconduct, or

(v) mislead or deceive a client, regulatory authorities, or the member firm with which he is associated.

¶ 61 Additional aggravating factors are the Respondent's refusal to recognize how his misconduct could negatively impact on market integrity or the reputation of the marketplace and his refusal to recognize that RBC Dominion Securities and IIROC could and did expend resources and costs as a result of his conduct.

¶ 62 The evidence establishes a clear case for imposing penalties sufficient to prevent and discourage further misconduct by the Respondent. While they must be tailored to the specific misconduct of this Respondent, they must also serve as a sufficient warning to deter others from resisting their duties to comply with investigations into their alleged misconduct.

¶ 63 Although Enforcement Counsel's submissions were highly persuasive, the Panel ultimately declined to impose a permanent ban against the Respondent. It has determined that the goals of specific and general deterrence in this case can be served by a blend of appropriate global set of sanctions, namely, a suspension of at least two years accompanied by a monetary penalty of $100,000.

¶ 64 The two-year suspension together with a $100,000 fine is necessary to bring home to this Respondent the very serious nature of his misconduct and to demonstrate that false statements, repeated acts of evasion and misrepresentation in the course of investigations into a registrant's misconduct:

(a) cause harm to the reputation of the industry and must be deterred,

(b) result in financial costs to market institutions who trust the word of an IIROC registrant,

(c) undermine the trust the members of the public place in IIROC registrants, and

(d) subvert the resources of the regulators who act to protect the public.

¶ 65 Moreover, the misconduct of the Respondent in these circumstances requires specific remedial sanctions after the period of suspension has been served both for purposes of specific deterrence to the Respondent and to serve as general deterrence to others. The Panel concludes that those sanctions must include the Respondent rewriting and passing the CPH examination following conclusion of the suspension period, and being subject to strict supervision for the first 18 months upon re-entry to the investment industry'

¶ 66 Finally, the amount of draft bill of costs submitted by IIROC is substantially higher than the amount it seeks as costs. The costs were all incurred as a result of the Respondent's misguided strategy of covering up his initial misconduct. Moreover, the calculation of costs incurred did not include the costs of the hearing on March 11, 2020. The Panel accordingly concluded a costs award of $20,000 was appropriate.

¶ 67 We thank counsel for the parties for their cooperation throughout.

Dated at Calgary, Alberta this 26 day of March 2020.

Shelley L. Miller

Peter McWilliams

Don Milligan