Re Eley

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Douglas John Eley

2019 IIROC 35

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

Heard: September 9 and 19, 2019 in Toronto, Ontario
Post Hearing Submissions: October 30, 2019, November 25, 2019 and December 2, 2019
Reasons for Decision: January 28, 2020

Hearing Panel:
Louise Barrington, Chair, Charlie Macfarlane and Ron Smith
Appearance:
Robert DelFrate, Senior Enforcement Counsel
Jay Naster, for Douglas John Eley

REASONS FOR DECISION

INTRODUCTION

¶ 1 This is a disciplinary decision following a hearing pursuant to a Notice of Hearing dated November 22, 2018. The hearing in this matter took place at IIROC's office at 121 King Street West, Toronto, over nine days between September 9 and 19, 2019. Post hearing submissions were received on October 30, 2019 from IIROC Enforcement Staff, on November 25, 2019 from the Respondent and on December 2, 2019 from IIROC Enforcement Staff.

¶ 2 The Statement of Allegations filed by IIROC Enforcement Staff ("IIROC") alleges that, "[b]etween May 2015 and November 2015, the Respondent altered previously signed client documents, contrary to Dealer Member Rule 29.1."

¶ 3 Dealer Member Rule 29.1 provides as follows:

> *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.... Each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.*

¶ 4 This Panel has considered all the written and oral pleadings and arguments of both parties, as well as the testimony adduced at the Hearing, in order to arrive at this Decision.

BACKGROUND AND UNDISPUTED FACTS

¶ 5 The Respondent was first registered with IIROC as an Investment Representative in 2000 and as a Registered Representative ("RR") in 2004. Between September 2006 and April 2013, he was registered as a RR. In May 2013, he changed firms. At his new firm, he was unregistered, acting as assistant to another RR, Ms. M, who assumed carriage of most of his former client files.

¶ 6 In March of 2015, the Respondent again changed firms. He joined Dealer Member Euro Pacific Canada, later known as Echelon Wealth Partners Inc. ("Echelon"),[1] in its Burlington branch office. Mr. Eley was at that time unregistered and working as assistant to Ms. M, the RR who still had carriage of his former clients' accounts and who moved with him to Echelon.

¶ 7 On April 2, 2015, the Respondent applied to re-activate his registration with IIROC. Six weeks later, on May 19, 2015, the Respondent became re-registered as an RR with Echelon. On May 28, 2015, he became registered as a Portfolio Manager. He resumed carriage of his former clients' accounts and Ms. M became his assistant. Ms. M subsequently ceased to be registered as an RR and became registered as an Investment Representative ("IR").

THE RULES

¶ 8 Dealer Member Rule 29.1 provides only general standards of conduct and ethics, without defining what kind of practice or conduct is unbecoming or detrimental to the public interest, nor what kind of character or business reputation is in keeping with its standards. The Rule may encompass a number of activities; within this general framework, this Panel is tasked with weighing the nature and seriousness of the conduct alleged.

¶ 9 The Compliance Manual of Euro Pacific Canada Inc. ("EPC Manual")[2] states in article 3.26:

> *It is a serious violation of industry regulations and Euro Pacific Canada Inc. policies to forge a client's signature, inappropriately alter a document after it was signed, or otherwise knowingly represent that the client signed a document when that was not the case.*

ALLEGATIONS OF IIROC

¶ 10 Many of the documents referred to in this Decision were generated as a result of the transition between firms and from one RR to another. IIROC alleges that, beginning in March 2015, the Respondent and/or Ms. M began providing account documentation to clients in order to facilitate the transfer of the Respondent's former clients from his former firm to Echelon, and subsequently from Ms. M to himself. The account documentation included forms required to allow the former clients to open portfolio managed accounts with the Respondent. IIROC Staff alleges that the Respondent altered documents after they had been signed by clients - including investment management agreements - which set out the parameters pursuant to which the Respondent would make investments on his clients' behalf, and that he retained pre-signed mutual fund trade switch tickets which were or could have been used to effect trades in client accounts.

¶ 11 IIROC alleges that several clients provided signed copies of their account documentation electronically via email to the Respondent and/or Ms. M, and that the Respondent made certain changes to account documentation prior to submitting it to his firm to be processed. Specifically, the Respondent changed dates

[1] Echelon Wealth Partners Inc. was at the relevant time known as Euro Pacific Canada Inc. However, in most of the evidence and argument, the company was referred to as Echelon; throughout this Decision, the company is referred to as Echelon.

[2] Euro Pacific Client Manual, clause 3.26 in Respondent's Compendium of Documents, Ex. R4, Tab 1, p.62.

on which the clients purportedly signed the account documentation, then submitted these altered documents to his firm. This meant that the dates which appear on record in client files as the client signature dates are not accurate.

¶ 12 IIROC also alleges that the Respondent completed fee schedules after the clients had signed their account documentation and added client objectives and risk tolerances after the account documentation had been signed by the client.

¶ 13 IIROC also contends that the Respondent maintained previously signed mutual fund switch tickets to facilitate transfers of 10% free units from the deferred sales charge ("DSC") version of a fund to the front-end load ("FE") version of the same fund. He photocopied or amended signed switch tickets and re-used them for subsequent transactions instead of obtaining newly signed switch tickets from his clients. These switch tickets were either: 1) provided to mutual fund companies to effect transactions in client accounts; 2) submitted to Echelon as evidence of client instructions; or 3) kept in client files as evidence of client instructions. Clients did not sign these photocopied or amended switch tickets.

¶ 14 IIROC alleges that some switch tickets appear to have been from the company where the Respondent had previously worked, with the new Echelon letterhead and updated instructions superimposed on the amended switch ticket.

¶ 15 IIROC contends that the changes were significant and required written confirmation by the clients. Instead, according to IIROC, Mr. Eley either made changes himself or allowed the alterations to be made, then either (a) submitted altered documents to various third parties without notice that alterations had been made after clients had signed the documents; or (b) retained the altered documents in client files as evidence of client instructions.

¶ 16 IIROC's contention is that the Respondent made or instructed others to make significant alterations to client documents, which were then submitted to third parties, who were unaware that the alterations had been made after the clients signed them, or he retained the documents on file where they were misleading as evidence of the client's instruction. This practice, IIROC argues, does not meet the standards of trustworthiness and integrity expected of a registrant, and as such is a serious misconduct warranting a finding that the Respondent has breached the requirements of Rule 29.1.

THE RESPONDENT'S POSITION

¶ 17 The Respondent denies the allegations and further contends that even had the allegations been true, the conduct impugned by IIROC does not constitute a contravention of Dealer Rule 29.1. He denies the allegations of IIROC and states, *inter alia,* that:

- Any client documents alleged to have been altered or amended by the Respondent or others after having been signed by the client were only altered or amended, if authorization was required, with the client's authorization. The Respondent's evidence was that he made only a few entries and that he was unaware of others having been made.
- IIROC Staff made its allegations without evidence and without enquiring as to client authorization and without regard to the context in which the alterations could have been made.
- At no time did the Respondent engage in a transaction that did not accord with the parameters agreed to and authorized by the client.
- The "pre-signed mutual fund trade tickets" or "re-used switch tickets" were never used or contemplated to be used by the Respondent to effect a trade in a client's account. Signed switch tickets were not required by Echelon policies and procedures, nor by IIROC, nor by any counterparties with whom Echelon conducted business. They were kept on file as

"memoranda" for the company's own records. These switch tickets were never used or intended to be used to execute a trade.

- The Respondent, in every case where client authorization was required, contacted the client to confirm the specific details of the trade.
- At no time did any client of the Respondent object or complain about the Respondent.
- During the period between May 2015 and November 2015, when the Respondent's misconduct is alleged to have occurred, the Respondent was under strict supervision requiring that all orders, including switches, be approved by the supervisor before entry.
- The alleged conduct took place following the transfer of approximately 500 client accounts from Mr. Eley's former firm and then, during the course of transferring those accounts from Ms. M to the Respondent, once he was re-registered on May 19, 2015. The Respondent acknowledges that mistakes were made, but states that they were not material and in no way prejudiced client interests, and thus do not reasonably or fairly give rise to an allegation that Rule 29.1 has been contravened.

¶ 18 The Respondent states that the account documentation referred to in the Statement of Allegations was completed by Ms. M and two or three temporary assistants or by himself, to facilitate the transfer of her clients' accounts from their former firm to Echelon. Changes to the account documentation were made by Ms. M, the temporary employees or himself were made with client authorization and were to ensure that the information in the document was complete and accurate or to correct a clerical error. The Respondent only added a date to a document after obtaining the client's authorization, on the date presented, that is the date when the Respondent spoke to the client to obtain authorization. The document was a note left in the file to document this communication with the client.

¶ 19 The Respondent contends that the date next to a client's signature is not necessarily the date on which the client signed; it may also evidence the date when the client authorized a transaction.

¶ 20 The Respondent states that fee schedules were completed with the authorization of the client in accordance with a fee schedule previously authorized. On one occasion, when client objectives and risk tolerances were added, this was also authorized and done in accordance with the client's information set out in the New Client Application Form ("NCAF"). Changes made to the Respondent's name or code did not require client authorization in the course of a bulk transfer from one representative to another.

¶ 21 The Respondent denies ever using a switch ticket to facilitate the transfer of units from one sales charge version of a fund to another, as switch tickets were not required by his employer, by the carrying broker, or by IIROC's Rules. The switch tickets were never relied on as authorization to execute a switch, and during the relevant period, the Respondent never used a switch ticket to facilitate a transfer. Switch tickets were not necessary to effect a transfer, nor required to conform to any policies or procedures; thus there was no requirement for a client signature on the switch tickets. Many switches were completed and authorized by the Respondent's supervisor without a switch ticket.

¶ 22 To summarize, the Respondent's position is that there is no evidence that he made alterations or removed information, although he did make some additions to documents, always with the authorization of the clients.

¶ 23 The Respondent also argues that the foundations of IIROC's allegations are that 1) any alteration to a document previously signed by a client is conduct unbecoming, regardless of the circumstances; and 2) even if there is no evidence that the Respondent in fact physically made alterations, or instructed someone else do so, as the advisor of record, the mere existence of the alterations constitutes conduct unbecoming. The Respondent contends that this improperly imposes vicarious liability on the Respondent for the conduct of another advisor, rather than addressing actual *conduct*, as required by the Rules.

¶ 24 The Respondent contends that because of his prior disciplinary proceeding, IIROC is "overreaching" its role and its allegations are based on a misguided interpretation of the IIROC Rules ("the Rules"). He argues that the IIROC Investigator "grossly misled" the OSC in a letter to request their assistance in obtaining records by stating that the advisor of record, "[was] subject to an ongoing investigation" and [was] "a person with a prior disciplinary history," when the ongoing investigation was not of Mr. Eley but of Echelon's supervisory controls.[3] The Investigator formally sought authorization to open an investigation of Mr. Eley three months later. Counsel for the Respondent characterizes the decision of IIROC to commence these proceedings as "disparate treatment in a manner that was neither fair nor appropriate… if not abusive exercise of regulatory authority."

ISSUES

¶ 25 The issues to be determined by the Panel in these proceedings are:

(i) Did the Respondent improperly alter or cause to be altered improperly, previously signed client documents as alleged; and

(ii) If the Panel finds that documents have indeed been improperly altered by Mr. Eley or at his direction, does the alteration of those client documents constitute a breach of the high standards and ethics demanded by the Rules or conduct unbecoming or detrimental to the public interest, in contravention of Dealer Member Rule 29.1?

STANDARD OF PROOF

¶ 26 This Panel recognizes that the gravity of the allegations against the Respondent merits close and careful consideration. The Decision in this case will affect the Respondent's reputation and potentially, his ability to continue working at his chosen profession. This however does not mean that IIROC must meet some higher burden of proof to convince the Panel with regard to its allegations against the Respondent.

¶ 27 The Supreme Court of Canada has made it clear that in a civil case, there is only one standard of proof by which to judge the allegations against the Respondent, and that is on a balance of probabilities. It is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending on the seriousness of the case.[4]

EVIDENCE

¶ 28 On behalf of IIROC Staff, the Panel heard and considered the evidence of Mr. Eric Mucchi, senior investigative officer with the Enforcement Department of IIROC. Its second witness was Ms. Crissa Pakkidis, currently a vice-president at Echelon, who from April 2015 to April 2018 was Director of Compliance and Audit at that firm.

¶ 29 The Respondent testified on his own behalf.

¶ 30 Both sides submitted hundreds of documents, including multiple versions of many, in a total of approximately 20 lever-arch files concerning multiple client files, as well as the email correspondence relating to the exchanges of these documents.

¶ 31 IIROC Staff's Statement of Allegations focussed on alterations to (a) managed account agreements and (b) mutual fund switch tickets. At the hearing, there was evidence as well as to (c) multiple dealer representative change forms and to (d) a new client application form (NCAF). At the hearing, scores of documents were considered with each witness in minute detail. We will deal with each category in turn, to

[3] Transcript ("T") Sept. 9, p. 92. Mr. Mucchi testified that IIROC was investigating CPC's supervisory practices as a result of a referral from an audit of Echelon's supervisory practices conducted between July and October 2015. See paragraph 43 below.

[4] *F.H. v McDougall,* [2008] S.C.J. No 54, commenting on the credibility of oral evidence of a plaintiff suing a former teacher at a residential school, for repeated sexual assaults while he was a 10-year-old pupil.

consider their significance.

(i) Did the Respondent improperly alter or cause to be altered improperly, previously signed client documents as alleged?

¶ 32 At the hearing, the Panel examined numerous documents placed before the witnesses for comment and explanation. We deal with the four different types of documents in turn.

(a) Managed Account Agreements[5]

Client DS

¶ 33 Upon arriving at Echelon on April 2, 2015, the Respondent requested and obtained the signature of Mr. S on a Managed Account Agreement necessary for transferring Mr. S's investments from his former firm to Echelon. He forwarded these documents to his colleague Ms. M, who had moved with him from his former firm to Echelon. In April, neither Mr. Eley nor Ms. M was registered as a Portfolio Manager.

¶ 34 Comparison of various versions showed that the document sent to Ms. F (another Echelon employee) was not the same as the one received by Mr. Eley from Mr. S.[6] Between Mr. Eley's receipt of Mr. S's signed Managed Account Agreement on April 9, 2015 and July 17, 2015, when Ms. M sent it to Ms. F, changes had been made, particularly:

(i) Doug Eley was added as the Advisor Name and the Advisor Code was changed from Ms. M's code EP81 to Mr. Eley's code EP 85;

(ii) beside Mr. S's signature the date May 31, 2015 was added;

(iii) Mr. Eley's name, signature, and the date May 31, 2015 were added;

(iv) the Agreement was dated July 17, 2015 on page 1;

(v) the May 31, 2015 date was added beside Mr. S's signature on page 4;

(vi) the date May 31, 2015 was added beside Mr. S's signature on Schedule A;

(vii) account objectives of 100% Long Term Capital Gains and Account Risk Factors of 90% Medium and 10% High were added to Schedule B; and

(viii) the applicable management fee of 1.5% is circled on page 7.

¶ 35 At the hearing, Mr. Eley acknowledged that he had not spoken to Mr. S on July 17, the date at the top of the Agreement. He also acknowledged having added the date May 31, 2015, as well as the objectives and risk factors, after Mr. S had signed it. [7] When asked whether he had added the information, he at first said that he was not sure if it was his handwriting. Upon being reminded of the transcript of his interview with Mr. Mucchi in May 2017[8], the Respondent acknowledged that it was his handwriting.[9] On July 17, 2015, Ms. M emailed a number of Managed Account Agreements, including this one, via Ms. F in Operations to Echelon's managed account supervisor, with copies to Mr. Eley. Once Mr. the supervisor approved, the Agreement was sent to Fidelity Clearing Canada, the carrying broker for Echelon, to open an account for Mr. S.

Clients J&SG

¶ 36 Respondent's Counsel took us to a managed account agreement for Mr. and Mrs. G.[10] In a managed

[5] See IIROC Compendium v.1, Ex 11, Tabs 24 and 25, and T Sept.19, pp.37-38

[6] T Sept 9, pp. 162-170

[7] T Sept.19, p.24-35

[8] IIROC Compendium v.4 Tab 86

[9] T Sept 9, pp. 101-156

[10] IIROC Compendium v.1, Tab 5, pp. 134-139 and T Sept 17, pp. 116-120

account agreement for this couple, alterations made after the clients had signed were the addition of the advisor's name; the change in the advisor code from EP81 (Ms. M's code) to EP85 (Mr Eley's); a box ticked indicating "charge each account separately"; dates added beside the client signatures; and the advisor name, signature and date added.[11]

¶ 37 The Respondent testified that he had received the completed document, reviewed the document on the date posted at the bottom, that is June 23rd, 2015 (accepted and agreed). Other versions of the same document appeared at subsequent pages. The Respondent testified that he had no knowledge that the document before him had been altered, or that it had been previously dated and then had the date erased.

> *Q*: *… is it your evidence that you had no knowledge that this document had been previously dated?*
> *A: I had no knowledge of that.*
>
> *Q : When you saw the date area, was it completed or was it empty?*
>
> *A: It was empty.*
>
> *Q: Now, you understand that the document had been signed by the client?*
>
> *A: Yes.*
>
> *Q: Did you know when it had been signed?*
>
> *A: I didn't know when it was signed.*

¶ 38 Other similar incidents were disclosed by Mr. Mucchi's investigation, and details of IIROC's findings are set out in Exhibits referred to at the hearing and summarized by Mr. DelFrate in a document entitled "Evidence Chart" included in the IIROC post-hearing submissions. A total of ten client files[12] with post-signature alterations to managed account agreements were identified during the hearing by Mr. Mucchi of IIROC and summarized in the Evidence Chart. IIROC produced evidence of the following changes to managed account agreements:

- Changes or additions regarding account objectives and risk tolerances;
- Additions of management fees to apply;
- Re-use of an agreement being altered by deleting one of two joint investors and opening a new account in the name of one of them;
- Changes or additions of advisor code or name; and
- Additions or changes to date.

¶ 39 The altered management account forms were submitted to the company's account supervisor for approval and then forwarded to the dealer. Ms. Pakkidis testified that in line with the company policy, changes to investment objectives and changes to fees – anything requiring a new account number or account type - would require a client's signature.[13] These documents were submitted for internal approval and forwarded.

¶ 40 Ms. Crissa Pakkidis, who was Director of Compliance and Audit at Echelon at the time, testified at the hearing that she advised Mr. Eley by email that a signed, updated managed account form or a letter of direction was required in some cases by "David", (apparently someone at the fund company) for example, to

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[11] T Sept 9, pp. 112-119

[12] Managed account agreements identified by IIROC's Mr. Mucchi as containing post-signature alterations: J&SG and DS, above; R&YH in T Sept.9, pp. 128-156; T&RT in T Sept.9, pp. 146-152; RL in T Sept.9, pp. 173-182; M&SF in IIROC Compendium v. 4 Tab 82, mentioned in T Sept.10, p.6 and in T Sept.16, pp.53-58 and T Sept.17 at pp. 63-64 and 134-135; NC in T Sept 9, pp.189-192; H&TE in T Sept.9, pp.195-209; K&TN in T Sept.9, pp. 199-202; and MM in T Sept. 9, pp.202-206

[13] T Sept 16, pp.57-64

suppress a client confirmation.[14]

¶ 41 Mr. Mucchi pointed out that a supervisor "would have to have the two documents in front of you or you would have to know the existence of a prior document…if the supervisor is reviewing a managed account form, for example, they would have to know the existence of another managed account form to pull that up and compare them next to each other. That's not typical. It happens, but it's not typical." [15]

¶ 42 Mr. Mucchi acknowledged in his testimony that a change from one RR to another could be done by a bulk transfer, and Mr. Eley confirmed that Echelon did a bulk transfer in three letters on May 22, 2015, with no client signature required. Mr. Naster noted that Mr. Mucchi made no inquiry as to whether those documents were relied on to effect the transfers. The Respondent's position is that if the altered documents were simply memoranda of record on the files, then there was no misconduct.[16]

¶ 43 Mr. Naster argues that there is no evidence that Mr. Eley made the alterations, instructed that they be made, or even had knowledge that the alterations had been made. Nor is there any evidence in these proceedings that Mr. Eley acted without instructions from clients. Mr. Eley provided unsworn statements from a number of clients confirming that he had never acted without their authorization. Ms. Pakkidis confirmed that she was unaware of any unauthorized trade made by Mr. Eley in any of his accounts.

(b) Switch Tickets

¶ 44 IIROC's investigation of Echelon's supervision of Mr. Eley involved looking at pre-trade supervision.[17] Mr. Mucchi followed up on specific instances flagged by the Business Conduct Compliance department of IIROC ("BCC"), for example the processing of switches. Switch tickets can be used to effect a trade (also called a "switch"), but are not necessary where the trade is executed electronically through a system called Dataphile.

¶ 45 Mr. Eley, as part of his supervision, was required to execute all orders on Dataphile.[18]

The Respondent's supervisor was Ms. Pakkidis, then the Director of Compliance at Echelon. She set out in writing to him the terms of his supervision. A paper switch ticket would require the signature of a supervisor before being used to execute a trade; in the case of a trade executed through Dataphile, that supervisor's signature would be added electronically. Without the supervisor's signature the switch ticket could not be used to effect a trade. Further, if anyone tried to use a switch ticket to effect a trade that had already been made on Dataphile, the trade would be rejected.

¶ 46 Mr. Mucchi testified that some switch tickets bearing Mr. Eley's signature, his name as advisor and his code EP85 were sent to fund companies despite the terms of his supervision. Mr. Mucchi acknowledged that he did not have any evidence as to who actually sent those switch tickets to the fund companies, nor as to Mr. Eley's knowledge of them being sent, other than his having signed them.[19] He also was not aware of anyone actually using a switch ticket to execute a trade on Mr. Eley's account.[20]

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[14] Respondent's Compendium v.1 Tab 17 email of August 13, 2015 at 6:28pm from Pakkidis to Eley: *"Doug: I spoke with David and unfortunately we need something corroborative from the client identifying that thy are aware no statements will be sent to them. They can either sign the updated managed account form or I can create an LOD for them to acknowledge by mail if that email address was on their NCAF."*

[15] T Sept.11, pp. 53-54

[16] Respondent's Closing Submissions, paras. 88-91

[17] T Sept 11, pp.6-15

[18] T Sept.11 p.16 quoting from Ms. M's email to Mr. Eley: All orders "for your accounts under your advisor code EP85"… must be entered through the Dataphile system.

[19] T Sept. 11, p.19

[20] T Sept. 11, p.59

¶ 47 Mr. Eley testified that on one file he wrote the instructions on a switch ticket and initialed the Advisor box, the client signed, and he then put the document into the file as a "note to file or memo order", but Ms. M then sent the document to be executed by the fund company. In another file, he entered the client's instructions on a switch ticket, but did not know whether the switch ticket had been photocopied. Again, Ms. M sent the switch ticket to the fund company for execution. [21] He also wrote two switch tickets on his own account as memoranda of orders on that account. He signed and initialed both, and one of them was forwarded.

Allegations concerning Client MT

¶ 48 IIROC produced four switch tickets on Mr.T's account, of which three[22] appeared to have identical features. All were electronic versions, where the signature form and placement were identical and where information had clearly been obliterated, with partial lines below partially obliterated. The BCC referral had noted that in Mr. T's account "it appeared as though the switch ticket dated June 19/15 for EP:2956A was pre-signed – an identical switch ticket dated June 29/15 was received for EP2957A". They appeared to have been created by photocopying a ticket signed by the client and then changing the details. The instructions on each were different. Mr. Eley agreed that the three signatures were identical and that the instructions on each were in his handwriting that he had initialed each in the Advisor's Initial box. He testified at the hearing however, that he did not know how these switch tickets were created nor how the client's three identical signatures came to be on three different documents.

¶ 49 IIROC contends that Mr. Eley either photocopied these switch tickets himself or that he at least knew that he was entering instructions on a previously signed photocopied switch ticket, and he then initialled each. As Ms. Pakkidis testified, "If there was a signature on a document that was identified as a client signature, I would expect that the client signature would be authentic."[23] IIROC's position is that the Respondent must have known that Mr. T had not physically signed each of these switch tickets and that his signature was not authentic, but he kept the documents in his files nevertheless.

¶ 50 Switch tickets were not necessary to effect trades, as most trades were executed electronically via Dataphile. Neither Echelon nor IIROC requires that switch tickets be used to process trades and the switch tickets, although they bore the necessary signature authentication, were not used to execute a trade on Mr. T's account.

¶ 51 Despite the label "Switch Ticket" on the document, the Respondent characterized the switch tickets in Mr. T's file as "a convenient note to file."

> *A: It was a note. It was a convenient note to file. … It was a note, so it needed to be dated.* [24]

¶ 52 IIROC's investigation identified nine files in which switch tickets had been altered after having been signed by clients and then remained in the files.[25] In Ms. M's case, the switch ticket was in the Respondent's handwriting and he initialed the Advisor's box. Ms. M. signed the switch ticket, and Mr. Eley put it into his file as a "note to file or memo of order". Ms. M subsequently took the switch ticket and forwarded it to TD Asset Management (the fund company) for execution.

Allegations concerning Clients R&YH

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[21] T Sept. 19, pp.81-82

[22] June 19, June 29 and August 29, IIROC Compendium v.3, Tab 64 at pp. 929, 930 and 931

[23] T Sept. 17 pp. 91-92

[24] IIROC Compendium v.3, Tab 64 and T Sept 17, p.166

[25] Aside from Mr. T, three other clients (R&YH, RL and H&TE) whose managed account agreements had allegedly been altered, also had altered switch tickets. Five other client files were found to contain switch tickets, which appeared to have been altered after signature by the clients.

¶ 53 For Mr. H, the Respondent testified that he had entered the instructions on the switch ticket and recommended the transaction. He did not know whether it was photocopied, and that Ms. M, instead of simply entering the transaction details on Dataphile, sent the ticket to TD for execution.

¶ 54 Mr. Naster's position is that a switch ticket is a document that *has been used* to execute a trade, or switch, with a mutual fund company, and if that document has never been used to effect the trade then it is not a switch ticket and need not conform to the requirements of a switch ticket, such as signature by the client. Without a signature guarantee it cannot be used to execute a trade so is not a switch ticket but only a memorandum on the file to record the order that was entered via Dataphile.

¶ 55 IIROC's complaint is even if the switch tickets were not used to trade, that they contained misleading information, and that they might be used at some future date. In leaving these signed but inaccurate documents on file, the Respondent created the risk that they could be misused. Client files exist to preserve accurate notes of the client's history.

¶ 56 Aside from the danger that someone might use them wrongfully to execute a switch at some future date, they provide a misleading picture of what has actually happened – and when – on a client's file, making it impossible for a third party – an auditor or regulator for example – to rely on the file notes to understand the sequence of events purported to have taken place on the client's account. Even if every client authorized each trade, this practice results in the files containing confusing, misleading documentation. The alterations were inappropriate because the resulting documents make it appear that the client has signed *that document* when that was not the case. Citing the case of *Re Reaney*[26], IIROC contends that leaving misleading documents in the file "effectively destroys the integrity of the audit trail relating to that form."

(c) Dealer Representative Change Forms

Client C

¶ 57 There was no allegation in the Statement of Allegations regarding dealer representative change forms announcing the transfer of files from Ms. M to Mr. Eley. The Respondent objected to the production of Ms. C's documents on that basis, and also because the evidence concerned activities which occurred before the Respondent was registered on May 19, 2015 and thus fell outside the relevant time period. The Panel also heard evidence that no client signature was required on a form which simply announced a transfer of the file from one RR to another.

¶ 58 The Respondent sent forms necessary to transfer Ms. C's accounts from his former firm to Echelon. Included were two Dealer Representative Change Forms, which authorized TD Asset Management to change the dealer and dealer rep code on record to Echelon and Ms. M's code. Ms. C signed the forms and they were submitted for signature guarantee on April 2, 2015. On May 11, after being signature guaranteed, the forms were submitted to TD Asset Management. On June 9, 2015, altered versions of the forms were submitted to TD. The amendments were to replace Ms. M's name and code with those of Mr. Eley as the New Advisor of Record. Changes on the forms, and others submitted to TD[27] are clearly visible.

¶ 59 Ms. Pakkidis testified that she would not be able to tell if the changes had been made before or after she had signature guaranteed the document.[28] However it is clear by comparing the two versions of each form submitted it is apparent that the alterations were done after the clients had signed, and after the signatures had been guaranteed by supervisors at Echelon.

¶ 60 Mr. Eley's explanation was that the Forms were used to update the cross reference numbers on the

[26] 2015 NONOSC 407 at para 103 in IIROC Authorities Tab 9

[27] In addition to Ms. C, the Dealer Rep Change Forms of two other were also altered to show Mr. Eley as the new RR. Some 20 Dealer Rep Change Forms were similarly altered after being signed by clients, as summarized in the Evidence Chart Item 18

[28] T Sept. 16, pp. 46-47

accounts.[29] Yet, as Counsel for IIROC points out, the wording on the forms is not that of a memorandum or reference, but rather a clear direction to the fund company to change the dealer and code on record to Mr. Eley's EP85. The fund company could expect to rely on these instructions, apparently signed by the client. In each case, it was Mr. Eley and his number that were now recorded as the dealer of record.

¶ 61 This alleged activity is not within the period referred to in the Statement of Allegations, but does go to the question of Mr. Eley's involvement in altering documents after clients had signed, and to the fact that these documents remained in the files after he was registered. As such, it provides context for the alleged conduct of the Respondent once he was registered.

(d) The New Client Application Form (NCAF)

¶ 62 There is no allegation in the Statement of Allegations with respect to an altered NCAF. The subject arose during the testimony of Mr. Mucchi[30] and involved an additional account opened on or about August 17, 2015 for an existing client, Ms. F. Mr. Mucchi referred to IIROC's volume 2, Tab 4 at page 648. In fact, on page 648 there was no NCAF; the NCAF for Ms. F's new account was in the same Tab, but at pages 640 to 645. Mr. Mucchi said that he did not have evidence that the NCAF for Ms. F was altered by the Respondent, other than signing and dating his signature after the client had signed.[31] The document on page 648 of Tab 40 was in fact a single, untitled page referring to a new managed account and bearing the signature of Ms. F in two places. Below the first and beside the second were spaces where a second signature had clearly been obliterated by whiteout, although below both lines were identical partial letters remaining. The date next to Ms. F's second signature also appears to have been altered. The form of the date and the writing are identical to that of the date next to Mr. Eley's signature as advisor.

¶ 63 Counsel for the Respondent contends that the changes which Mr. Eley admits to making on documents already signed by the clients were appropriate in the circumstances: adding a new account number, signing his own signature and adding the date of his signature. He denies making other changes to previously signed documents or knowing that they had been altered.

¶ 64 The documentary evidence is clear on its face that alterations were indeed made, as shown by various versions of the same document exchanged on particular dates, and in several cases by obvious "whiteout" erasures clearly visible, despite the fact that at the hearing only electronic versions were available.

¶ 65 As there was no reference in the Statement of Allegations regarding this particular incident, the Panel makes no finding as to whether Mr. Eley was involved in making that change or knew of it. However, the document remained in the file after he was registered and provides context for the alleged conduct of the Respondent once he was registered.

Who Altered the Documents?

¶ 66 Unfortunately, although there is no testimony or explicit evidence implicating Mr. Eley in the changes, neither is there any evidence as to who else made the changes. Ms. M, who worked hand in hand with the Respondent over a period of several years, both before and after the period concerning the allegations, was not called to testify. There were only two (briefly three) other advisors working in a small Burlington branch office of Echelon. Two temporary assistants, hired by Mr. Eley, helped with the transfer documents required for the transfer from his former firm to Echelon. Neither appears to have been in a position of authority, as evidenced by Mr. Eley's comment that they did not even have email addresses at the company. Some 250 clients' files were transferred from the firm where Mr. Eley had acted as Ms. M's assistant, to Echelon, where he expected to be reinstated as an RR and then as Portfolio Manager. Many of the impugned documents were

[29] T Sept. 17, pp. 131 – 134.

[30] T Sept. 13, pp. 92-94 and IIROC Compendium v. 2 Tab 40 p. 648

[31] T Sept.13 at p. 95

involved in the transfer of those client files from Ms. M to Mr. Eley.

¶ 67 Despite the Respondent's denials, there is compelling circumstantial evidence indicating that it would have been difficult for Mr. Eley not to have been aware of the changes. His testimony at the hearing was that he was unaware that the changes had been made and did not know how the changes were made or who could have made them. The documents speak for themselves; the identically formed and placed signatures on multiple documents and clear obliterations are clearly visible despite the fact that they were electronic copies and not originals. The alterations on documents presented to the Panel were clearly apparent to the three panelists who examined them and compared them at the hearing. In some cases, multiple versions of the same document, with identical signatures, had been used.

¶ 68 There is no evidence to support Mr. Eley's suggestion that temporary assistants could have been capable of making the inappropriate alterations without direction. Despite the Respondent's intention stated at the hearing to call one or both, neither was called to address the question in evidence. Nor was there any suggestion that either of the two other advisors in the Burlington office ever accessed the EP85 and EP81 files for which he and Ms. M were responsible.[32] Ms. M was not called to explain the alterations.

¶ 69 The British Columbia Court of Appeal offers guidance in the judgment of O'Halloran, J.A in *Faryna v Chorney*[33]:

> *A witness by his manner may create a very unfavorable impression of his truthfulness upon the trial judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth.… The credibility of interested witnesses…cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. 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 a 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 of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth.*

Conclusions on the Facts

¶ 70 Having considered the evidence and arguments submitted by the parties, the Panel finds that there were several different types of alterations made to documents contained in client files for which Mr. Eley was responsible as the Registered Representative. Some alterations made to documents, which had been previously signed by clients, were innocuous and acceptable practice in the industry. Others were not.

¶ 71 **Additions.** Mr. Eley concedes that he added account numbers to NCAFs after receiving the forms signed by the client, once the account had been activated and its number generated. And he also says he added his own signature and RR number and the date he signed. The Panel finds these post-signature additions were indeed acceptable as they had no bearing on the terms of the client-advisor relationship.

¶ 72 On the other hand, it is inappropriate to make additions regarding a client's risk level, the calculation of fees payable, or other elements affecting the client-advisor relationship. It is also unacceptable to make any addition to file records which tends to obscure what has taken place or mislead the observer as to when an event took place.

¶ 73 **Erasures.** It was clear from looking at some of the documents submitted to the Panel that material had

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[32] T pp.182-183

[33] *Faryna v Chorney* [1952] 2 D.L.R. 354 (BCCA), Panel's emphasis

been erased. This was evident in the case of clients Mr. and Mrs. G.,[34] where the name of one spouse had been erased on a document previously used for both spouses. This practice presents two dangers. First, in the case of an erased date, it becomes impossible to tell from the document when it was originally signed. Second, simply erasing the client's name after signature is misleading as it misrepresents the original relationship, and indeed the practice invites abuse, for example, if one party could unilaterally instruct the RR to remove his or her spouse's name from an account without the knowledge or consent of the other.

¶ 74 **Substituted information.** By substituting a new date after erasing the original one, the record becomes unreliable. Although not a forgery in the sense of physically signing a client's name, the result is the same. It leads the outside observer (supervisor, auditor) astray, by implying that a client had signed the document when in fact what the client signed was something entirely different, whether as to content or as to the date it was signed. Looking at the file without having the previous version to compare, the observer would naturally assume that the signature was affixed on the substituted date, and have no idea that the substituted date was simply the last date on which the RR had received some instruction from the client. By erasing one date and substituting a different one, the original "note to file" is effectively destroyed. To say that the document was not used to execute a trade does not change this. To say that the correct information was stored elsewhere, electronically, does not change the fact that in a client's records there is a document which is misleading. The prime purpose of keeping accurate notes is to enable an auditor or supervisor, or even the RR, to go back and retrace the actions that took place and when they took place. The presence of altered documents frustrates that purpose by obscuring the truth.

¶ 75 The Respondent concedes having made innocuous additions as characterized above but denies making any others. He testified that he did not make improper additions; he did not erase and substitute information to re-use previously signed documents. Nor did he instruct such alterations. He testified that he had no knowledge of these alterations which appeared in the files for which he is responsible. When asked who could have produced the alterations, his only explanation was to suggest that perhaps Ms. M or one of the temporary employees could have done it:

> *Q. Now, at this point you are unregistered. Was there any issue about you being concerned about making sure you didn't engage in registered activity?*
>
> *A. I was quite concerned about that, yes.*
>
> *Q. Insofar as the preparation of the documents are concerned, did you have any involvement in populating any of the fields?*
>
> *A. I helped with some of the documentation, especially early on before all the appointments started with Tricia. So, yeah, but fairly mild participation in that.*
>
> *Q. Did you date any documents, sir?*
>
> *A. I didn't date the documents.*
>
> *Q. Were you aware or did you participate in preparing managed account agreement in any way, shape or form at that point?*
>
> *A. No, not that I'm aware of.*
>
> *Q. Now, we've seen evidence, and you recall just recently Mr. DelFrate took Ms. Pakkidis in re-examination to some emails that appear to have gone out under your name, this is during the onboarding process.*
>
> *A. Yes.*

[34] See above, para. 35 and following

Q. Do you recall, did you send out emails?

A. I sent some emails out to help out as I was asked to, yeah.

Q. And how did that come about, to the best of your recollection?

A. One of the temps or Patricia would ask me to forward on some documentation.

Q. Did you review the documentation you were forwarding?

A. No, I was not reviewing documentation.

Q. Was it a package that had already been assembled?

A. Well, because the temps didn't have emails, so it would have to go, either through Patricia or myself. [35]

¶ 76 The Panel, having viewed these documents at length during the hearing and considered the testimony of the three witnesses as to the circumstances of the case. Having heard no other testimony about other persons who might have produced the alterations or might have had reason to do so, we cannot credit the Respondent's denial that he was involved in these practices.

¶ 77 Who else could have made the alterations? Who else *would* have made the alterations? It is simply implausible that Mr. Eley was not aware of the alterations as he testified to the Panel. The evidence before the Panel leads to an inescapable conclusion that either Mr. Eley made the changes, that he instructed others to make the changes, or that others made them with his knowledge. At the very least, he turned a blind eye with implicit approval. Once he was registered, he allowed the altered documents to stay in the files client files that he took over from Ms. M.

¶ 78 The standard of proof in a civil case is the balance of probabilities. In the present case, the appearance of the documents viewed and compared, the testimony regarding the circumstances in which these alterations took place, and the absence of any other evidence as to some other person who would be both capable and motivated to make the changes lead inexorably to the conclusion that the Respondent is responsible for the improper alterations, either by making the changes himself or by instructing someone else to do so.

¶ 79 The Panel finds that the Respondent, between May 2015 and November 2015, executed not only the innocuous alterations which he acknowledges, but also that he either executed, or directed someone to make improper alterations, and then knowingly allowed the improperly amended documents to remain in his client's files.

(ii) Does the alteration of client documents attributed to Mr. Eley constitute a breach of the high standards and ethics demanded by the Rules or conduct unbecoming or detrimental to the public interest, in contravention of Dealer Member Rule 29.1?

¶ 80 Mr. Mucchi of IIROC took the position that no post-signature changes were permitted, and that the Respondent was responsible for whatever happened on files bearing his personal RR number ER85. He softened his stance somewhat when asked about adding an account number on a NCAF once the account had been activated and its number generated.

¶ 81 The Respondent contends that some post-signature alterations are in fact *permitted* by the EPC Compliance Manual.[36] The Panel found no explicit reference to post-signature alterations being <u>permitted</u>. On the contrary, the words of article 3.26 provide that it is a serious violation of regulations and policies to "*forge a client's signature, <u>inappropriately alter a document after it was signed, or otherwise knowingly represent</u>*

[35] T. Sept. 17, pp. 110-111

[36] See Note 2 above (Panel's emphasis)

that the client signed a document when that was not the case." The Panel has already decided that some of the alterations at issue here were inappropriate. Furthermore, the altered documents in a file created the impression that a client had signed a document when the client had indeed never seen or touched that document but had signed some other version which no longer exists on the file.

¶ 82 The Respondent explained that the conduct attributed to him took place in a context of two major transitions: approximately 250 clients were first transferred from his former firm to Echelon and then, once he was registered, all their accounts were transferred from Ms. M to himself. Given the enormous amount of paperwork involved in an intensive period, with some of the work performed by two temporary workers hired by Mr. Eley, in the words of his counsel, "it is only reasonable that some mistakes would occur". He contends that these mistakes do not constitute a pattern but are the result of a "chaotic transfer" of 700 files in a period of some four months.

¶ 83 The record contains examples concerning twenty-three different clients (several couples with joint or individual accounts, plus one transaction where Ms. M sent a switch ticket to effect a trade on Mr. Eley's own file). Mr. Mucchi testified, "what's in here is what we found". It is unclear how many of the 700 files IIROC examined, but even assuming that IIROC investigated all 250 clients' files, the evidence shows "mistakes" in 23 of them.

¶ 84 Does this amount to a pattern? The Respondent's Counsel argues that all the issues about the documentation arose in the context of the transition and were not part of ongoing operations. There was a lot of paperwork involved, it was a small dealer with no transition team, and Mr. Eley's status meant he was of limited assistance. "Mistakes were admittedly made." The Panel finds however, that the available evidence does point to a pattern. The files of twenty-three clients out of 250 clients contained "mistakes". That is not an insignificant fraction.

¶ 85 Mr. Naster reminded the Panel that previous IIROC decisions have held that the standard against which his client's conduct is to be measured is not perfection, but whether mistakes he may have made amount to a level "so egregious that a finding of conduct unbecoming is warranted". That question, argues Counsel, is to be determined "objectively on a case by case basis, having regard to principles of interpretation and prior case law precedent."[37]

¶ 86 Mr. DelFrate referred to a Mutual Fund Dealers Association ("MFDA") panel decision holding that obtaining or using pre-signed forms is a contravention of the standard of conduct for MFDA Approved Persons, as is altering information on account without having the client initial the form to show that the change was authorized.[38]

¶ 87 In *Re Matthews and Board of Directors of Physiotherapy*[39], the Ontario Court of Appeal ruled that the absence of a definition of misconduct in the *Drugless Practitioners Act* did not prevent a disciplinary tribunal from considering whether there had been misconduct:

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

¶ 88 Mr. DelFrate also referred the Panel to the judgment of Cory J. (as he then was) in *Re Milstein and*

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[37] *Re Deeb* 2013 IIROC 08 at para. 92, in which the Panel found that Mr. Deeb had failed to keep a proper set of books and records, in violation of IIROC Rule 17.2

[38] *Re Nash* (2019) 11899 (CA MFDAC) at paras. 12-14 and cases cited

[39] *Re Matthews and Board of Directors of Physiotherapy* (1987) 61 O.R. (2d) 475 (C.A.) at p. 475

Ontario College of Pharmacy et al:[40]

> *One of the essential indices of a self-governing profession is the power of self-discipline. That authority is embodied in the legislation pertaining to the profession. The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely best qualified to establish the standards of professional conduct members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skill that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession. No other body could appreciate as well the problems and frustrations that beset a fellow member.*

¶ 89 Mr. Naster, on behalf of the Respondent, cautioned against accepting a "blanket proposition" that any alteration of a previously signed document is conduct unbecoming, or that the Respondent is responsible for anything done in connection with an account where he was an advisor of record, including the conduct of another registered representative. Citing Mr. Mucchi's comment at the hearing, "…so long as the Respondent is the advisor of record he is accountable even if there is no evidence that the respondent had any knowledge of the alleged misconduct, …" Mr. Naster characterized this as wrongfully imposing vicarious liability, whereas Rule 29.1 sets out a general standard by which to judge *the conduct* in question, informed by the Rules and previous decisions which have applied rule 29.1. Whether conduct is "unbecoming" is to be predetermined objectively by each panel on a case-by-case basis, having regard to principles of interpretation and prior case law precedents. The only way to apply the rule on a case-by-case basis is to have regard to the particular facts and circumstances of each case as it comes before the panel.

¶ 90 The Panel agrees that any application of a general rule imposing liability would be inappropriate and that the standard against which the Respondent's conduct is measured is not perfection. Consequently, in arriving at our decision we have carefully considered both the evidence and the circumstances surrounding the Respondent's conduct, against a backdrop of prior decisions interpreting Rule 29.1 in order to evaluate the gravity of the conduct.

¶ 91 The Respondent's RR number on a file at least creates a presumption that he executed, directed, or approved of the content of that file. In weighing the evidence as to whether the Respondent was involved in inappropriate alterations, the presence of Mr. Eley's RR number on the file does not of itself create vicarious liability. However, especially when his signature appeared on a document, it would likely lead a reasonable reader to assume that Mr. Eley had participated in the creation of its contents.

¶ 92 Mr. Naster also referred to the *Deeb*[41] case where an IIROC panel pointed out, "not every transgression by a registrant causes a breach of [the] Rule 29.1. We are not measuring the Respondent's conduct against a standard of perfection. Mistakes can and will be made. The question is whether those mistakes rise to the level that is so egregious that a finding of conduct unbecoming is warranted. The Respondent accepts that "mistakes were made" and his conduct may not have been best practice but argues that a "potential risk" is not sufficient to conclude that it falls within Rule 29.1.

¶ 93 The Respondent emphasises the absence of client complaints with respect to his client, notes that he was under strict supervision during the relevant time period and that his employer found no fault with his conduct. In contrast, the Respondent cites a number of cases where IIROC panels did find conduct to be unbecoming: unauthorized trading, misappropriation of client funds, forgery, mischaracterization of investments and conflicts of interest.

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[40] *Re Milstein and Ontario College of Pharmacy et al* (1977) 13 O.R. (2d) 700 at p. 8

[41] *Re Deeb, supra,* at para. 92

¶ 94 These cases of egregious conduct causing harm are obvious. Among them however, there is no case holding that harm (to a client, to an employer, or to the public) is *necessary* for a finding that conduct is unbecoming. Rule 29.1 gives no indication that the conduct complained of must have caused harm but rather speaks of ethics and the public interest.

¶ 95 How does the conduct of the Respondent stand up to scrutiny? Creating, altering or knowingly leaving misleading documents on record is certainly not a practice to be encouraged. It may be due to careless inattention or taking "short-cuts" at the very least and, at the other end of the scale, wilful deception or fraud.

¶ 96 The fact that no client complained of misbehaviour does not diminish the risk. There was a danger the altered switch tickets could have been be misused. As to the managed account agreements, the risk is that it would potentially be a simple matter to alter important information such as risk tolerance, fees, and trade instructions without client authorisation. The alterations would make it impossible to detect these improper activities by looking at the file contents. In another MFDA case the panel found that pre-signed forms

> *create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client. While there is absolutely no suggestion that [Price] engaged in any of these activities, the rationale for the prohibition on pre-signed forms becomes clear.*
>
> *Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client's signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account.*[42]

¶ 97 In the words of the Ontario Securities Commission in *Re Reaney*[43], leaving misleading documents in the file "effectively destroys the integrity of the audit trail relating to that form." The decision continues, *"While we accept that Mr. Reaney never intended to use the forms in any way that might injure his clients, these good intentions do not eliminate the risk that the forms might be used in the future in ways that could be devastating to a client."*

¶ 98 In deciding whether the conduct complained of constitutes "conduct unbecoming" and breaches Rule 29.1, the Panel considered the purpose of the Rule. The investment dealers of this country have the privilege and duty of self-regulation. Public trust in Dealer Members and Registered Representatives depends on the reputation of those members and representatives who have received training, who are aware of the rules and standards established by their peers and who comply with them in good faith. Perfection is not the standard, but respect for the rules and standards is.

¶ 99 In a decision upholding sanctions imposed by the MFDA on a member who had obtained and maintained pre-signed client forms, the British Columbia Securities Commission stated:

> *we note that…Bansal did not process any trades or changes to client information without the knowledge or authorization of his clients, which is different from not using or altering any form.… Given that the harm with pre-signed forms lies in the mere act of obtaining and maintaining them, we do not see any material distinction in the severity of the misconduct between obtaining a pre-signed form but not using it versus obtaining a pre-signed form and subsequently using or altering it with the client's authority.*[44]

¶ 100 A wilful departure from these rules and standards, or even a negligent act if repeated, results in a crack

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[42] *Re Price,* MFDA File No. 200814 at paras. 123-124

[43] 2015 NONOSC 407 at para. 103 in IIROC Authorities Tab 9

[44] *Re Bansal*, 2017 BCSECCOM 45 at p.144, paras. 2 and 11

in the edifice which has earned public trust and respect. It decreases the value of the self-regulation in the perception of the public generally, and specifically of the clients.

¶ 101 An investigator looking at one of the Respondent's client files referred to in this case could very easily be misled as to what actually took place with relation to that client, and when it took place. The fact that correct information with respect to a transaction exists electronically is immaterial, as the paper file could in fact "paper over" anomalies and dissuade an observer from referring to the electronic system.

¶ 102 The regulatory process is impaired because the information on record in the files is untrustworthy; it might bear no relation to the truth and was useless to any investigator seeking to reconstruct a sequence of events pertaining to those clients' files. This kind of practice creates a crack in the system, which has earned public trust and respect. Consequently, it decreases the value of the self-regulation in the perception of the public generally, and specifically that of clients.

¶ 103 The Respondent insists that no harm came about as a result of his "mistakes". This does not excuse the conduct. This is not a situation where "no foul, no harm" is an appropriate excuse. As a financial services practitioner for fifteen years, the Respondent could not have been unaware of the risks posed by this conduct, and of the objectives behind the prohibition in the EPC Manual.

¶ 104 The Panel finds that by his conduct the Respondent demonstrated his disregard for the consequences of the misleading documents on the file.

The Nature of the IIROC Investigation

¶ 105 It is the Respondent's contention that he has been unfairly targeted because of his past disciplinary record. He points to irregularities in the commencement of the investigation, alleges misleading or even untrue statements to the Ontario Securities Commission ("OSC") and argues that IIROC is overreaching its regulatory authority. He contends that the investigator misled the OSC, failed to interview a material witness and delayed advising Echelon when he recommended that the investigation into its compliance practices be closed.

¶ 106 Mr. Mucchi of IIROC acknowledges having used unfortunate wording in his letter to the OSC on November 1, 2016, prior to obtaining authorization to commence a formal investigation into the Respondent's conduct. As to his having failed to interview a material witness, whether to interview or call a witness is in the discretion of the investigator; in any case, the Panel observes that this witness was not called upon to testify, by either party. The delay in advising Echelon that the investigation of their compliance practices was closed is unfortunate, but immaterial to the outcome of this case.

¶ 107 In order to fulfill the IIROC mandate of protecting the public and encouraging trust in the professionals in the investment industry, its investigators must be able to exercise a certain amount of judgment and discretion in doing their job. Tying their hands with hard and fast rules about who must be interviewed and what questions must be asked will not add to the public's trust in the regulatory system.

¶ 108 The Respondent, having managed to circumvent the most serious consequences of his suspension through his arrangement with Ms. M, should not have been surprised that IIROC would be keenly vigilant when he returned to RR status. Disparate treatment must be evaluated in context and does not mean he was singled out for unfair treatment. The conduct which the Respondent criticizes does not in the Panel's assessment amount to procedural unfairness.

¶ 109 In *Swanson*,[45] the court found that a professional conduct committee investigating a case in order to decide whether a disciplinary hearing was warranted owed "a limited duty of fairness to the member being investigated… It is not the broad duty of fairness…associated with rights to complete disclosure and to a full

[45] *Swanson v Institute of Chartered Accountants of Saskatchewan*, [2007] S.J. No.701, cited in *Re Clinton P. Wayne*, a disciplinary hearing of the Mutual Fund Dealers Association of Canada, CanLii 147827 (CA MFDAC) in which no procedural unfairness was found

hearing. It is a limited duty to act fairly." IIROC's investigative process may have had elements which were flawed, but just as IIROC Rule 29.1 does not demand perfection of its advisors, neither should IIROC demand perfection of its investigators.

¶ 110 Even had there been some procedural unfairness in the investigation that would not necessarily result in an unfair hearing. Every departure from best practice is unfortunate, but not every departure from best practice is actionable. A breach of procedural fairness in investigation does not trigger a remedy unless the deficiencies lead to an unfair hearing.[46]

¶ 111 In *Re Youden,*[47] the tribunal cited the Supreme Court of Canada:

> *The duty to provide procedural fairness…cannot exist if an adjudicator is biased…The test is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator.*

¶ 112 At the end of the hearing, the Panel asked Counsel for both parties,

> *Is there anything else anyone needs to address? All right. May I ask you then, if either side wishes to make any comments with respect to the way that this hearing has been conducted, if you have any objections or complaints as to anything that happened in the last nine days, I'd like them to be put on record now.*

¶ 113 Mr. DelFrate for IIROC replied, *"Staff has no issues."* Mr. Naster for the Respondent replied, *"We have no issues."*[48]

Conclusion

¶ 114 The Panel therefore concludes that, between May 2015 and November 2015, the Respondent contravened Rule 29.1(ii) of the IIROC Dealer Member Rules by engaging in business conduct and practices unbecoming or detrimental to the public interest, specifically by inappropriately altering documents after they were signed, and knowingly representing that clients had signed documents when that was not the case, in serious violation of industry regulations and Euro Pacific Canada Inc. policies governing his conduct at the time.

¶ 115 As announced at the start of the hearing, Counsel for both parties agreed that the issues of sanction and costs are to be dealt with separately. In the event the parties are unable to agree, either party is at liberty to apply to this Panel for further orders and directions.

This decision is signed at Toronto on January 28, 2020.

Louise Barrington

Ron Smith

Charlie Macfarlane

[46] *Rosiek v British Columbia (Securities Commission),*2010 BCCA 257, paras. 15-20

[47] [2005] I.C.A.D.C. O 52, citing *Newfoundland Telephone Co v Newfoundland (Public Utilities Board),* [1991] 1 S.C.R. 623 (emphasis by Panel)

[48] T Sept.19, pp. 216-217