

Re Fairclough

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Nancy Fairclough (Woods)

2022 IIROC 20

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

Heard: July 18, 2022 in Toronto, Ontario via videoconference

Decision: July 18, 2022

Reasons: August 4, 2022

Hearing Panel:

Philip Anisman, Chair, Mary Savona and Vanessa Gardiner

Appearances:

April Engelberg, IIROC Enforcement Counsel

Usman Sheikh and Alexandra Psellas, Counsel for the Respondent, Nancy Fairclough

In attendance:

Nancy Fairclough

REASONS FOR ACCEPTANCE OF SETTLEMENT

TABLE OF CONTENTS

- I. INTRODUCTION
- II. HEARING PROCESS
- III. AGREED FACTS
- IV. AGREED CONTRAVENTIONS AND SANCTIONS
- V. STANDARD OF ACCEPTANCE
- VI. ACCEPTABILITY OF THE SETTLEMENT AGREEMENT
- VII. DECISION
- APPENDIX: SETTLEMENT AGREEMENT

I. INTRODUCTION

¶ 1 A registered representative's ("RR") relationship with her clients is one of trust. A professional broker-client relationship necessarily involves personal elements and may grow into a friendship in which a client's reliance on the RR, especially with clients who are seniors, may lead to arrangements that involve conflicts of

interest. To address this potential, IROC Dealer Member Rule 43 (“Rule 43”) was adopted in 2013 to prohibit RRs and other employees and approved persons of member firms from engaging in personal financial dealings with clients.¹ Personal financial dealings expressly include the acceptance of any consideration for activities on behalf of a client, borrowing money from or lending money to a client and acting as a power of attorney (“POA”), trustee or executor of a client.²

¶ 2 This proceeding was brought to consider a settlement agreement dated June 16, 2022 (the “Settlement Agreement”) between enforcement staff of IROC (“Staff”) and Nancy Fairclough in which Ms. Fairclough admitted that she contravened Rule 43 by acting as a power of attorney for a client (“MB”) between January 2019 and July 2020 and by accepting a gift of \$50,000 from the client, for which she agreed to pay a fine of \$17,500 and costs of \$5,000. On July 18, 2022, at the conclusion of a settlement hearing, the hearing panel (the “Panel”) accepted the Settlement Agreement, with reasons to follow.

II. HEARING PROCESS

¶ 3 Settlement agreements invariably reflect negotiations conducted by the parties, sometimes including mediation, and compromises with respect to both the facts on which the parties can agree and the sanctions to be imposed on the respondent.³ Settlements enhance IROC’s enforcement capacity by avoiding the costs of potentially lengthy contested hearings, allowing it to allocate its resources to other matters, and they enable a respondent to resolve allegations against her with less expense and focus her energies on the future.⁴ In both respects, settlements of disciplinary proceedings may further the public interest.⁵

¶ 4 To ensure that they do, IROC’s rules require that a settlement be accepted by a hearing panel before it becomes effective. Rule 8215 authorizes Staff to settle a proceeding through a settlement agreement that contains the facts, contraventions, sanctions and costs agreed to by Staff and the respondent. A settlement agreement becomes effective and binds the parties only when it is accepted by a hearing panel after a settlement hearing.⁶

¶ 5 A hearing panel may accept or reject a settlement agreement, but may not require its modification.⁷ A panel’s decision to accept or reject must be based on the facts contained in the settlement agreement and any additional facts disclosed in the settlement hearing. Hearing panels often have difficulty because settlement agreements omit facts;⁸ a panel must take into account that it is not privy to all the facts that would be relevant in a contested hearing as a result of the parties’ negotiations and compromises.⁹ A panel may not require disclosure of additional facts, as such disclosure is prohibited unless all parties to the settlement agreement consent to it.¹⁰ If the parties do not disclose facts that a hearing panel considers necessary to determine the acceptability of a settlement agreement, the panel may have no alternative but rejection.¹¹

¹ IROC Rules Notice 13-0162, June 13, 2013 (new Dealer Member Rule 43). Rule 43 was replaced by IROC Rule 3115, effective as of December 31, 2021.

² The prohibition against acting as a power of attorney, trustee or executor did not come into effect until October 6, 2017; see IROC Rules Notice 17-0079, April 6, 2017.

³ Respondent’s counsel informed the Panel that the Settlement Agreement in this matter followed extensive, adversarial negotiations.

⁴ See *Re Donnelly*, 2016 IROC 23, para. 7; *Re Prusky*, 2017 IROC 43, para. 6.

⁵ See *Re Milewski*, [1999] I.D.A.C.D. No. 17, p. 10.

⁶ To facilitate the settlement process, settlement agreements are treated as confidential, unless and until they are accepted by a hearing panel; Rules 8215(2)(vii), 8215(3) and 8428(5). This is an exception to the general “open court” rule that mandates access to documents filed in a proceeding; see Rules 8203(5)(i) and 8406.

⁷ Rule 8215(5).

⁸ See, e.g., *Re Small*, 2021 IROC 28, para. 28; *Re RBC Dominion Securities and Benson*, 2021 IROC 30, paras. 13 and 29 (“*RBC DS and Benson*”).

⁹ See, e.g., *Re Prusky*, note 4 above, para. 7; *Re RBC DS and Benson*, note 8 above, paras. 29-30.

¹⁰ Rule 8428(6).

¹¹ See, e.g., *Re Small*, note 8 above, para. 22; *Re Prusky*, note 4 above, para. 10; see also *Re RBC DS and Benson*, note 8 above, para.

¶ 6 A hearing panel, however, is not precluded from asking the parties for further information that it thinks would assist it in its evaluation of a settlement agreement.¹² In this case, the Panel had a substantial number of questions concerning the facts presented in the Settlement Agreement. Accordingly, at the beginning of the settlement hearing, the Panel presented the parties with a list of questions relating to the agreed facts based on its review of the Settlement Agreement and asked them to consider additional disclosure. At the parties' request, the hearing was adjourned to permit them to consider the Panel's questions. When the settlement hearing resumed over an hour later, the parties provided additional information in response to most of the questions. The Settlement Agreement is an appendix to these reasons; the additional information provided by the parties is reflected in the factual summary that follows.

III. AGREED FACTS

¶ 7 Ms. Fairclough has been a registered representative since 1994.¹³ She is currently an RR with RBC Dominion Securities Inc. ("RBC DS"), which she joined in 2006. Ms. Fairclough was the RR for MB, an elderly client living in Italy, who had been a close personal friend for over thirty years and who had no children or other immediate family.

¶ 8 In 2013, in connection with her estate planning, MB told Ms. Fairclough that she was appointed as MB's POA and named in her will as an executor for her estate. Four years later, in 2017, Ms. Fairclough told her RBC DS branch manager about her appointment as MB's executor, but not about the POA.¹⁴ Her branch manager told her that the appointment was contrary to IIROC's rules and RBC DS policy and that she should tell MB to appoint another person and in any event resign as executor. Despite this, Ms. Fairclough was not removed as an executor.

¶ 9 In January 2019, without informing her branch manager, Ms. Fairclough took steps in furtherance of her appointment as an executor in connection with MB's estate planning. She accepted a gift of \$50,000 as compensation for acting as executor of MB's estate.¹⁵

¶ 10 The same month, as MB's POA, Ms. Fairclough implemented a letter of direction from MB to set aside \$50,000 to be held "to cover expenses relating to MB's Italian estate", by having a \$50,000 bank draft issued from MB's bank account at CIBC and delivering the funds to MB's lawyer. Ms. Fairclough also acted as POA on four other occasions by signing documents at CIBC to transfer MB's funds to MB's bank account in Italy. In response to a question whether she acted as POA before 2019, the Panel was informed that she may have, but that the evidence was not conclusive concerning when or whether this occurred. In acting as POA, Ms. Fairclough "was attempting to assist" MB.¹⁶ She did not inform her branch manager that she did so.

¶ 11 In March 2019, Ms. Fairclough transferred MB's account to another RR at RBC DS and on the basis of her POA was named as MB's attorney and made investment decisions for the account. She did not bring the transfer of the account or the addition of her POA to her branch manager's attention. During the settlement hearing, the Panel was informed that Ms. Fairclough believed that transferring the account in this manner would enable her to assist her friend, as MB would no longer be her client. Her counsel said this was a misunderstanding and that Ms. Fairclough accepted Staff's position that the prohibition in Rule 43 applies to

13 ("sufficient objective facts upon which to base a decision to accept").

¹² See, e.g., *Re Prusky*, note 4 above, para. 11.

¹³ Until December 2021, Ms. Fairclough's registration was in the name of Nancy Woods.

¹⁴ The prohibition in Rule 43 concerning these appointments came into effect in 2017; see note 2, above.

¹⁵ Settlement Agreement, paras. 4 and 11. Paragraph 4 says that the \$50,000 gift was "to act as the client's estate executor"; paragraph 11 says that the funds were intended in part as a gift to acknowledge Ms. Fairclough's assistance and friendship and in part as compensation for her future work as executor. In context, Ms. Fairclough's "assistance" must refer to her acting as POA. In response to a question about the purpose of this payment, the Panel was informed that the wording of paragraph 11 resulted from the parties' negotiations. The proportionate purposes of the payment are not significant, as both of the identified purposes are prohibited by Rule 43.

¹⁶ Settlement Agreement, para. 13.

all clients of a member firm.

¶ 12 MB died in July 2020 and Ms. Fairclough “began acting as executor” by collecting the \$50,000 from MB’s lawyer on behalf of MB’s estate, again without informing her branch manager. The Settlement Agreement does not contain any other information on Ms. Fairclough’s acting as an executor.¹⁷

¶ 13 In October 2020, “RBC DS became aware of the facts above” when it received a complaint from beneficiaries of MB’s estate.¹⁸ It reported to IIROC and began an investigation. IIROC opened an investigation in March 2021. Ms. Fairclough was aware of RBC DS’s investigation in 2020.

¶ 14 In June 2021, RBC DS disciplined Ms. Fairclough for acting as a POA for MB. It required her to pay a fine of \$12,500 to a charity, to rewrite and pass the examination based on the Conduct and Practices Handbook (“CPH”) and to review and acknowledge her understanding of the CPH’s Standards of Conduct chapter and of the RBC Code of Conduct. Ms. Fairclough paid the fine to a charity; her counsel informed the Panel that she did not receive a tax receipt. She also fulfilled the other requirements.

¶ 15 The Settlement Agreement says that during IIROC’s investigation, Ms. Fairclough ceased acting as executor and repaid the \$50,000 gift to MB’s estate and that as a result, she did not benefit from her contraventions.¹⁹ Her counsel said that she returned the \$50,000 once it became clear that she was not serving as executor, but did not say when this occurred. In response to a question about how long Ms. Fairclough acted as executor, he said that she renounced in or about September 2021.

¶ 16 In January 2022, Ms. Fairclough was again disciplined by RBC DS, this time for accepting the \$50,000 gift from MB, and she paid an additional fine of \$7,500 to a charity, for which she also did not receive a tax receipt.

IV. AGREED CONTRAVENTIONS AND SANCTIONS

¶ 17 The Settlement Agreement says that by engaging in the described conduct, Ms. Fairclough committed two contraventions of IIROC’s Rules, namely, (1) she acted as a POA for a client between January 2019 and July 2020 contrary to Rule 43.2(5)(i), and (2) she accepted a \$50,000 gift from a client in January 2019 contrary to Rule 43.2(1). The agreed sanctions are a fine of \$17,500 and costs of \$5,000. The fine reflects a thirty per cent discount from a \$25,000 fine because Ms. Fairclough accepted Staff’s early resolution offer.

¶ 18 Rule 43 consists of two sections. Rule 43.1 prohibits an employee or approved person of a member firm from engaging in any personal financial dealings with a client. Rule 43.2 contains a non-exhaustive list of arrangements that are personal financial dealings.²⁰ Although it defines such dealings, Rule 43.2 does not itself

¹⁷ Settlement Agreement, para. 17; see paragraph 15, below.

¹⁸ Settlement Agreement, para. 20. The dates in this paragraph were provided to the Panel in the settlement hearing.

¹⁹ The Panel asked whether she had obtained a benefit through use of the \$50,000 and was told there was no additional benefit.

²⁰ The provisions of Rule 43 that are relevant in this proceeding follow:

43.1 An employee or Approved Person of a Dealer Member must not, directly or indirectly, engage in any personal financial dealings with clients.

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

(1) Accepting any consideration

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

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

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

(3) Borrowing from clients

prohibit them. Engaging in any of these personal financial dealings is a contravention of Rule 43.1, which contains the prohibition.

¶ 19 When the Panel asked whether the Ms. Fairclough's agreed contraventions are technically correct, Staff submitted that the contraventions of Rules 43.2(5)(i) and 43.2(1) agreed to in the Settlement Agreement are implicitly contraventions of Rule 43.1 and specify the conduct that constituted the contraventions. While this is correct in practical terms and in substance reflects the parties' agreement to a contravention of Rule 43.1, it would be preferable to specify the contravention correctly. If the Panel had authority to require changes, it would have required that the Settlement Agreement be amended to state that the respondent, by engaging in the conduct specified in paragraph 27, contravened Rule 43.1.²¹

V. STANDARD OF ACCEPTANCE

¶ 20 The standard applicable in IIROC settlement hearings has long been settled; a hearing panel will accept a settlement agreement that is within a reasonable range of appropriateness, taking into account the benefits of settlements to the parties, to IIROC and its members and to the public interest, the nature of the settlement process and the fact that Staff and the respondents have reached agreement. This standard was articulated in 1999 in *Re Milewski*, a contested penalty hearing of the Investment Dealers Association of Canada, as follows:

Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

This understanding is reflected in paragraph 20.26 of the By-laws which authorizes the District Council to "accept", rather than approve, a settlement agreement. In each case a District Council must determine appropriateness, but the standards applicable to its doing so on a settlement hearing differ from those in a contested hearing. Thus, the penalties imposed under settlement agreements, while

-
- (i) Borrowing money or receiving a guarantee in relation to borrowing money, securities or any other assets from a client, unless:
 - (a) The client is a financial institution whose business includes lending money to the public and the borrowing is in the normal course of the institution's business; or
 - (b) The client is a Related Person as defined by the Income Tax Act (Canada) and the transaction is addressed in accordance with the Dealer Member's policies and procedures; and
 - (c) In the case of Registered Representatives and Investment Representatives, the arrangement set out in sub-clause 43.2(3)(i)(b) is disclosed to and approved in writing by the Dealer Member, prior to the transaction. ...
 - (5) **Control or authority**
 - (i) Acting as a Power of Attorney, trustee, executor, or otherwise having full or partial control or authority over the financial affairs of a client, unless:
 - (a) The client is a Related Person as defined by the Income Tax Act (Canada) and the existence of such control is addressed in accordance with the Dealer Member's policies and procedures; and
 - (b) In the case of Registered Representatives and Investment Representatives, the arrangement in sub-clause 43.2(5)(i)(a) is disclosed to and approved in writing by the Dealer Member, prior to the transaction.
 - (ii) In the case of discretionary and managed accounts, clause 43.2(5)(i) does not apply to the extent that the control or authority exercised is consistent with the Corporation's applicable requirements for such accounts.

²¹ E.g., "the Respondent engaged in personal financial dealings with a client by acting as a Power of Attorney for the client contrary to Dealer Member Rule 43.1."

relevant to a District Council exercising its discretion to penalize, provide only limited assistance in a hearing like this one.²²

¶ 21 Although a settlement agreement and the agreed sanctions will rarely be found to clearly fall outside a reasonable range of appropriateness, this is not a deferential standard, as Ms. Fairclough’s counsel argued. Rule 8215 requires acceptance of a settlement agreement by a hearing panel. While a hearing panel recognizes the benefits of settlements and takes into account the settlement process and the parties’ agreement, the reasonableness standard it applies is not the same as the deference accorded by courts when reviewing the decisions of primary decisionmakers such as administrative tribunals or corporate directors.²³

¶ 22 In a settlement hearing, the hearing panel is the primary decisionmaker. A decision concerning the acceptability of a settlement agreement is the panel’s responsibility; its consideration of whether the settlement agreement adequately addresses the public interest cannot be fulfilled by deferring to the agreement of the parties or a mediation that facilitated it.²⁴

¶ 23 The range of appropriateness and its reasonableness are determined in light of IIROC’s Sanction Guidelines, which are intended to assist hearing panels in deciding whether to accept settlements, as well as in determining appropriate sanctions in a contested proceeding.²⁵ Thus, protection of the public interest requires consideration of the conduct admitted by a settling respondent with respect to specific deterrence of the respondent, general deterrence of similar conduct by others and the proportionality of the agreed sanctions in light of industry expectations and prior hearing panel decisions.²⁶

¶ 24 The \$17,500 fine reflects a reduction resulting from acceptance by Ms. Fairclough of an early resolution offer made by Staff under a Staff policy adopted in April 2021 (the “Policy”).²⁷ The Policy is intended to encourage cooperation by persons subject to investigation and discipline and to promote timely resolution of cases. An early resolution offer is made before a proceeding is commenced and grants a thirty per cent reduction on the sanctions Staff would otherwise be prepared to accept in a settlement agreement.

¶ 25 In view of the recent adoption of the Policy, the Panel requested submissions on the application of the standard of acceptance to a settlement agreement that follows acceptance by a respondent of an early resolution offer. In particular, the Panel asked whether it should consider the amount of the fine without a reduction or the reduced fine contained in the settlement agreement. It also asked how it should address the appropriateness of an early resolution offer in light of the respondent’s conduct and the criteria outlined in the Policy that Staff considers when deciding whether to make an early resolution offer.

¶ 26 Although Staff counsel initially submitted that the Panel should consider the unreduced amount in light of the cases cited in the Staff Settlement Book and should simply accept the discount, she ultimately agreed that the Panel could consider the conduct of the respondent with respect to the reduced fine and its appropriateness. In the Panel’s view, this concession was correct.

¶ 27 A settlement agreement that follows acceptance of an early resolution offer, like any settlement

²² *Re Milewski*, note 5 above, pp. 9-10. In view of the requirement in Rule 8215 that a settlement agreement be conditioned on and is only effective upon acceptance by a hearing panel, the participation of industry members in hearing panels, and the responsibility of a hearing panel to consider the public interest, this is a less stringent standard than the one required to reject a plea bargain in criminal proceedings; see *R. v. Anthony-Cook*, 2016 SCC 43, paras. 30-31; see also *Re Jacob*, 2017 IIROC 17, paras. 24-30; *Re M Partners Inc. and Isenberg*, 2018 IIROC 25, paras. 20-27; *Re Crane*, 2019 IIROC 14, para. 36; *Re Small*, note 8 above, paras. 8-14; and see *Re Wing*, 2018 ONSEC 25, paras. 5-12.

²³ See *Re Electrovaya Inc.*, 2017 ONSEC 25, paras. 6-8.

²⁴ *Re RBC DS and Benson*, note 8 above, paras. 14 and 17-21.

²⁵ IIROC Sanction Guidelines, February 2, 2015, p. 2 (“Sanction Guidelines”).

²⁶ Sanction Guidelines, p. 4 (Principle 1); and see, e.g., *Re Prusky*, note 4 above, para. 5.

²⁷ IIROC Staff Policy Statement: Early Resolution Offers, Appendix A to IIROC Enforcement Notice 21-0058, April 1, 2021.

agreement, is subject to Rule 8215 and must be accepted by a hearing panel before it becomes effective.²⁸ Indeed, the Policy expressly states that this is the case.²⁹ Accordingly, a hearing panel must consider whether the reduced sanctions agreed to in the resulting settlement agreement are within a reasonable range of appropriateness, taking into account the benefits of the settlement process and the agreed conduct of the respondent, including conduct that led Staff to make an early resolution offer.³⁰

VI. ACCEPTABILITY OF THE SETTLEMENT AGREEMENT

¶ 28 The Panel considered the acceptability of the Settlement Agreement in light of the facts admitted in it, the additional facts disclosed by the parties in the settlement hearing and inferences arising directly from them. The Panel also took into account the fact that the agreed contraventions of Rule 43 do not include all the contraventions that Staff could have alleged in a contested proceeding based on the agreed facts.

¶ 29 On the basis of the agreed facts, Ms. Fairclough contravened Rule 43 in three ways: by acting as a POA for MB, by acting as MB's executor and by accepting the \$50,000 gift.

¶ 30 Ms. Fairclough acted as POA in transferring funds from MB's bank account on five occasions to assist an elderly client living in Italy who had been her friend for over thirty years. She also transferred MB's account to another RR and, as POA, maintained control over investment decisions for the account, also to assist MB, as counsel informed the Panel. There is no suggestion that MB was vulnerable or was harmed.³¹ Rather, Ms. Fairclough seems to have acted in each case at MB's request, and Ms. Fairclough did not benefit from acting as POA to assist her.³²

¶ 31 Ms. Fairclough's misunderstanding of the application of Rule 43 to clients of her firm, however, indicates that she was aware of the prohibition in Rule 43 when she acted as a POA, thus suggesting her contravention was intentional.³³ She was well-advised to accept that the transfer of MB's account to another RR did not take her acting as a POA outside of the Rule. Rule 43 prohibits employees and approved persons from engaging in personal financial dealings with clients; thus it necessarily applies to individuals who are not RRs or advisers and who do not themselves have clients, as was clear in the releases proposing and adopting Rule 43.³⁴ In any event, a RR is expected to know and comply with IIROC's rules.³⁵

¶ 32 Ms. Fairclough's single act as executor was related to her acting as a POA. On the facts, the only act taken as executor was to implement MB's direction with respect to her estate.³⁶ Although she remained an executor from July 2020 to September 2021, the Settlement Agreement does not disclose any additional information concerning her conduct as executor of MB's estate. She remained an executor, however, after having been instructed by her branch manager in 2017 to resign and accepted a gift as advance compensation for acting as executor.³⁷ Her conduct as executor, therefore, however well intended, must be taken seriously from a regulatory perspective.

¶ 33 Acceptance by Ms. Fairclough of the \$50,000 gift, although a clear contravention of Rule 43, appears to have been unsolicited. The wording in the Settlement Agreement is palpably neutral; Ms. Fairclough merely

²⁸ See *Re IA Private Wealth Inc.*, 2021 IIROC 22, para. 53 ("subject to acceptance by an IIROC hearing panel in the usual way").

²⁹ Policy, para. 5.

³⁰ See *Re IA Private Wealth Inc.*, note 28 above, paras. 76-78 and 102.

³¹ See *ibid.* (factors 5-7).

³² See Settlement Agreement, paras. 8, 11 and 13; Sanction Guidelines, p. 5 (principle 4); and see paragraph 33, below.

³³ See Sanction Guidelines, p. 8 (factor 4). In addition, she acted as POA in January 2019, two months before the account was transferred; Settlement Agreement, paras. 13 and 15.

³⁴ See IIROC Dealer Member Rule 1.1, "Approved Person"; see also Rules Notice 10-0155, May 28, 2010, pp. 3-4 (proposed rule); Rules Notice 13-0162, note 1 above, p. 2, and Attachment C, pp. 7-8 (adopting Rule); *Re Rudensky*, 2018 IIROC 28, paras. 118 and 152-156; see also *Re Coccimiglio*, 2019 IIROC 27, para. 4 and accompanying Settlement Agreement, paras. 11-13.

³⁵ See *Re Rudensky*, note 34 above, paras. 158-161.

³⁶ Settlement Agreement, paras. 8, 11, 13 and 17; paragraphs 10 and 12, above.

³⁷ Sanction Guidelines, p. 9 (factor 21: prior warnings).

“received and deposited a personal cheque from MB”.³⁸ More significantly, Ms. Fairclough returned the \$50,000 to MB’s estate and received no other benefit from MB. She has thus not benefitted financially as a result of her misconduct.³⁹

¶ 34 The Settlement Agreement emphasizes that Ms. Fairclough did not inform her branch manager of her acting as a POA and executor or of her receipt of the \$50,000 gift.⁴⁰ Her failure to inform her branch manager of the POA in 2017, when she told him about her appointment as executor suggests concealment.⁴¹ The Settlement Agreement, however, does not say that Ms. Fairclough attempted to conceal her conduct, and her use of the POA in connection with MB’s transferred account indicates otherwise, as the opening of this new account for MB would have been subject to supervisory review.

¶ 35 On the other hand, it appears that Ms. Fairclough was less than forthcoming.⁴² The incidence of the internal discipline imposed by RBC DS suggests that the firm was not informed of MB’s \$50,000 gift until after Ms. Fairclough renounced her executorship. RBC DS disciplined Ms. Fairclough in June 2021 with respect to her acting as POA for MB; it imposed a further fine with respect to her acceptance of the gift six months later, in January 2022. As Ms. Fairclough’s counsel said in the settlement hearing, it is reasonable to assume that RBC DS addressed information as it became aware of it. The imposition of the second fine suggests that RBC DS was not informed of the gift until some time after Ms. Fairclough’s resignation as executor. Moreover, both of these disciplinary actions were taken by RBC DS well after Ms. Fairclough became aware of its investigation.⁴³

¶ 36 Nevertheless, the discipline imposed by RBC DS is a mitigating factor with respect to IIROC’s sanctions.⁴⁴ And the fact that Ms. Fairclough has never before been the subject of discipline by IIROC is also relevant.⁴⁵

¶ 37 Staff referred to six prior hearing panel decisions that accepted settlement agreements admitting contraventions of Rule 43. The respondents in only two had obtained a POA and one of them had not used it.⁴⁶ In five, the respondent had obtained one or more loans from clients, not all of which had been repaid;⁴⁷ one of these respondents had his client’s account transferred to his firm’s discount broker before obtaining the loan.⁴⁸ The respondent in the sixth case invested with her client in her own account at the client’s request to enable him to conceal his investment.⁴⁹ As here, the respondents did not inform their supervisors of their personal financial dealings.

¶ 38 As the standard of acceptance in a settlement hearing is based on whether the agreed sanctions are within a reasonable range of appropriateness, it is not necessary to compare Ms. Fairclough’s conduct to the detailed facts in each of these cases as a panel would in a contested hearing. It is worth noting, however, that the loans in all of the five cases were obtained to benefit the respondent. In only one case, was the contravention intended to assist the client, but the assistance in concealing the client’s identity was suggestive

³⁸ Settlement Agreement, para. 11; paragraph 9, above.

³⁹ Sanction Guidelines, p. 5 (principle 4) and p. 8 (factor 14: voluntary return of benefits); and see note 19 above.

⁴⁰ Settlement Agreement, paras. 10, 12, 14, 16 and 18.

⁴¹ *Ibid.*, para. 9; see Sanction Guidelines, p. 9 (factor 19).

⁴² See Sanction Guidelines, p. 6 (principle 8: cooperation). The Settlement Agreement does not refer to cooperation. In the circumstances, it might be inferred that Staff’s early resolution offer in 2022 was based on other factors and that the thirty per cent reduction in the fine was itself a part of the settlement negotiation; see note 3 above.

⁴³ See paragraphs 13-16, above.

⁴⁴ See Sanction Guidelines, p. 8 (factor 19).

⁴⁵ See *ibid.*, p. 4 (principle 2).

⁴⁶ *Re Small*, note 8 above; *Re Coccimiglio*, note 34 above, p. 4 (Settlement Agreement, para. 19; POA not used).

⁴⁷ *Re Small*, note 8 above (not repaid); *Re Coccimiglio*, note 34 above (repaid); *Re Michetti*, 2017 IIROC 22 (undertaking to repay); *Re Sabet*, 2021 IIROC 3 (repaid); *Re Barkwell*, 2018 IIROC 49 (not repaid).

⁴⁸ *Re Coccimiglio*, note 34 above, paras. 4(b) and (c).

⁴⁹ *Re Prusky*, note 4 above.

of other impropriety contrary to the registrant's gatekeeper responsibilities.⁵⁰

¶ 39 As all of these precedents addressed personal financial dealings with clients contrary to Rule 43 without disclosure to the respondent's supervisor, the penalties imposed in them are of greater significance. The fines in these six cases ranged from \$10,000 to \$25,000, and in five the respondent was required to rewrite the CPH examination. Close supervision was imposed in one case⁵¹ and a twelve-month suspension was imposed in another.⁵²

¶ 40 On consideration of the Sanction Guidelines and the prior decisions presented to the Panel, the agreed sanctions are reasonable. When added to the \$20,000 in fines paid by Ms. Fairclough as a result of RBC DS's internal discipline, the \$17,500 under the Settlement Agreement exceeds the high end of the range in the precedents, and Ms. Fairclough has rewritten and passed the CPH examination, as required by RBC DS. In the settlement hearing, Staff told the Panel that a period of close supervision was not required because Staff believes there is little or no likelihood that Ms. Fairclough will again engage in similar conduct; on the basis of the facts before the Panel, there is no reason to question this.

¶ 41 The failure to expressly include a contravention for Ms. Fairclough's acting as executor does not bring the Settlement Agreement outside a reasonable range of appropriateness. Acting as a POA and as an executor are both contained in the same provision of Rule 43.⁵³ On the agreed facts, this contravention parallels Ms. Fairclough's acting as POA for MB and is part of a single pattern of conduct. In this case, not treating it as a separate contravention may reasonably be seen as a trade-off in negotiating the settlement. Had it been included as a contravention in the Settlement Agreement, it is far from clear that it would have affected the agreed sanctions.

¶ 42 In sum, the sanctions in the Settlement Agreement are within a reasonable range. In the Panel's view, they provide adequate deterrence against repetition by Ms. Fairclough and are likely to deter others from engaging in personal financial dealings with clients. In all the circumstances, acceptance of the Settlement Agreement is in the public interest.

VII. DECISION

¶ 43 For these reasons, the Panel accepted the Settlement Agreement on July 18, 2022 at the conclusion of the settlement hearing.

Dated at Toronto, this 4 day of August, 2022.

Philip Anisman

Mary Savona

Vanessa Gardiner

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to section 8215 of the IIROC Rules, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Nancy Fairclough (the "Respondent")

⁵⁰ See *ibid.*

⁵¹ *Re Michetti*, note 47 above.

⁵² *Re Barkwell*, note 47 above.

⁵³ See Rule 43.2(5), note 20 above.

or “Fairclough”).

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. This settlement concerns Fairclough acting as a Power of Attorney (“POA”) for an elderly client and accepting a \$50,000 monetary gift from the client to act as the client’s estate executor. Fairclough did not advise her Dealer Member about the arrangement and transferred her client to another adviser at RBC DS. Fairclough has since returned the \$50,000 to the client’s estate and ceased acting as executor.

Background

5. Fairclough is a Registered Representative (“RR”) at a branch of RBC Dominion Securities Inc. (“RBC DS”) where she has worked since 2006.
6. The Respondent was registered on IIROC’s National Registration Database (“NRD”) as Nancy Woods from 1994 to December 2021. In December 2021, the Respondent changed her name on NRD from Nancy Woods to Nancy Fairclough.

Fairclough Appointed as Executor and POA for Client

7. Fairclough was the RR for an elderly client (“MB”) who had retired and moved to Italy. MB had no children or other immediate family and had a close personal friendship with Fairclough of over thirty years.
8. In 2013, Fairclough became aware that she was appointed as executor for MB’s estate in her will and appointed as MB’s POA.
9. In 2017, Fairclough advised her Branch Manager (“BM”) at RBC DS about her appointment as executor but did not advise about the POA. The BM advised Fairclough that the executor appointment was contrary to RBC DS policy and IIROC Rules. The BM advised that Fairclough was expected to tell MB to try to appoint someone else as executor, but if that did not happen that Fairclough needed to take appropriate steps to resign.
10. Fairclough remained appointed as executor for MB’s estate and did not update RBC DS.

Fairclough Received \$50,000 from Client

11. In January 2019, Fairclough received and deposited a personal cheque from MB in the amount of \$50,000. The funds were intended in part as a gift from MB to acknowledge Fairclough’s assistance and friendship, and in part to compensate Fairclough for the work she would be undertaking as executor for MB’s estate.
12. Fairclough did not advise RBC DS at the time that she had received and deposited the \$50,000 cheque from MB.

Fairclough Acted as POA for Client

13. Also in January 2019, Fairclough received a letter of direction from MB asking that she hold aside approximately \$50,000 for future use to cover expenses relating to MB’s Italian estate. Further to this

letter, Fairclough acted as MB's POA to have a \$50,000 bank draft issued from MB's CIBC banking account and delivered the funds to MB's lawyer. At MB's request, Fairclough also acted as POA on four other occasions by signing documentation at CIBC to transfer MB's funds at CIBC to MB's bank account in Italy. By acting as POA, Fairclough was attempting to assist her close personal friend who was living abroad.

14. Fairclough did not disclose to RBC DS at the time that she had been acting as MB's POA.

Fairclough Transferred Client's Account to Another RR at RBC DS

15. In March 2019, Fairclough transferred MB's account to another RR at RBC DS. Fairclough worked with the new RR to have the POA added to the account which named Fairclough as attorney for MB. As POA, Fairclough was able to make investment decisions for MB's account.
16. Fairclough did not update Branch Management about the reason for transferring of the account or the addition of the POA to the account.

Fairclough Acted as Executor for Client

17. In July 2020, MB passed away. Fairclough began acting as executor by collecting the \$50,000 deposited with MB's lawyer on behalf of MB's estate per the letter of direction set out in paragraph 13 above.
18. Fairclough did not advise RBC DS that she was acting as executor for MB's estate at the time.

Fairclough Ceased Acting as Executor and Repaid \$50,000 to Client's Estate

19. During the course of IIROC's investigation, Fairclough ceased acting as executor and repaid the \$50,000 monetary gift to MB's estate. As a result, Fairclough did not ultimately benefit from the contraventions.

Fairclough Subject to Internal Disciplinary Action at RBC DS

20. RBC DS became aware of the facts above when certain beneficiaries of MB's estate filed a complaint and IIROC launched an investigation.
21. Fairclough was subject to internal disciplinary action by RBC DS twice for the facts listed above:
 - a) For the first Contravention as set out in paragraph 27(a) below, Fairclough was required in June 2021 to:
 - i. pay a fine of \$12,500, which was donated to charity;
 - ii. re-write and pass the examination based on the Conduct and Practices Handbook; and
 - iii. review and acknowledge her understanding of the Standards of Conduct chapter and the RBC Code of Conduct.
 - b) For the second Contravention as set out in paragraph 27(b) below, Fairclough was required in January 2022 to:
 - i. Pay a fine of \$7,500 which was donated to charity.

Additional Factors and Early Resolution Offer

22. Fairclough has admitted the conduct described above reducing the length of time required to investigate this matter and agreed to resolve this matter in a timely manner. Fairclough accepted Enforcement Staff's Early Resolution Offer which granted a 30% reduction on the fine Enforcement Staff otherwise would have sought.
23. Fairclough had a close personal friendship of over 30 years with MB. According to Fairclough, her actions as POA were intended to assist MB with her banking needs and to prepare for her passing given that MB lived abroad and had no immediate family members who could assist.

24. Fairclough has paid a total of \$20,000 in internal disciplinary fines at RBC DS. Fairclough has successfully re-written and passed the Conduct and Practices Handbook.
25. Fairclough has repaid the \$50,000 monetary gift to MB's estate referred to in paragraph 11.
26. Fairclough does not have any disciplinary history with IIROC.

PART IV – CONTRAVENTIONS

27. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:
 - a) Between January 2019 and July 2020, the Respondent acted as a Power of Attorney for a client contrary to Dealer Member Rule 43.2(5)(i); and
 - b) In January 2019, the Respondent accepted a \$50,000 monetary gift from a client contrary to Dealer Member Rule 43.2(1).

PART V – TERMS OF SETTLEMENT

28. The Respondent agrees to the following sanctions and costs:
 - a) A fine of \$17,500
 - b) Costs of \$5,000
29. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

30. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.
31. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under IIROC Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

32. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
33. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.
34. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.
35. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.
36. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

37. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
38. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IROC will post a full of copy of this Settlement Agreement on the IROC website. IROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.
39. If this Settlement Agreement is accepted, the Respondent agrees that neither she nor anyone on her behalf, will make a public statement inconsistent with this Settlement Agreement.
40. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

41. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
42. A fax or electronic copy of any signature will be treated as an original signature.

DATED this 16 day of June, 2022.

“Witness”
Witness

“Nancy Fairclough”
Nancy Fairclough (Woods)

“Ricki Ann Newmarch”
Witness

“April Engelberg”
April Engelberg
Enforcement Counsel on behalf of Enforcement
Staff of the Investment Industry Regulatory
Organization of Canada

The Settlement Agreement is hereby accepted this “18” day of “July”, 2022 by the following Hearing Panel:

Per: “Philip Anisman”
Panel Chair

Per: “Mary Savona”
Panel Member

Per: “Vanessa Gardiner”
Panel Member

Copyright © 2022 Investment Industry Regulatory Organization of Canada. All Rights Reserved