



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

**IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA**

Re: Paul Anthony Dwyer

Heard: July 26-29, 2021 by electronic hearing in Calgary, Alberta
Decision (Misconduct) and Reasons: January 20, 2022

DECISION (MISCONDUCT) AND REASONS

Hearing Panel of the Prairie Regional Council:

Sherri Walsh
Birju Shah
Annette Stephens

Chair
Industry Representative
Industry Representative

Appearances:

Justin Dunphy)	Senior Enforcement Counsel for the Mutual
)	Fund Dealers Association of Canada
)	
)	
Roderick Onoferychuk)	Counsel for Respondent
)	
)	
Paul Anthony Dwyer)	Respondent
)	
)	

I. INTRODUCTION

1. On August 20, 2020 the Mutual Fund Dealers Association of Canada (the “MFDA”) issued a Notice of Hearing against Paul Anthony Dwyer (the “Respondent”) which set out the following allegation:

Allegation #1: In March 2018, the Respondent submitted for processing to the Member two trades for which he stood to earn commissions, after being informed by his Branch Manager that the trades would not be approved, thereby engaging in conduct that fell below the standard of conduct required of Approved Persons, and that gave rise to a conflict or potential conflict of interest which he failed to address by the exercise of responsible business judgment influenced only by the interest of the client, contrary to MFDA Rules 2.1.1 and 2.1.4.

2. On November 27, 2020 the Respondent filed a Reply to the Notice of Hearing that contained statements which were identified as “admissions” or “denials” and statements which were described as “additional facts and conclusions”.

3. The Hearing on the Merits of this matter was scheduled to take place by way of electronic video conference, on May 17, 2021.

4. At the outset of the hearing, however, counsel for the Respondent advised the Panel that because of a last minute development relating to the COVID-19 pandemic, he and his client were not able to proceed. He therefore made a request for an adjournment to which Enforcement Counsel did not object and which the Panel granted.

5. The Hearing on the Merits ultimately took place by electronic video conference on July 26 to 29, 2021.

6. At the end of the hearing, the Panel decided that we wanted to hear further submissions from the parties with respect to the discrete issue of how the Panel should consider the wording of the Notice of Hearing in determining whether Staff had proven Allegation #1 on a balance of probabilities. Specifically, our question related to whether a Panel is confined to considering the wording of the charging paragraph or whether it can consider the wording of the Notice of Hearing as a whole, including the sections which set out the particulars that relate to the charging paragraph.

7. Accordingly, the Panel requested that Enforcement Counsel and counsel for the Respondent provide written submissions on that issue by August 20 and 27, 2021, respectively.

8. Following receipt of those submissions, the Panel met to deliberate.

9. For the reasons set out below, having considered all of the evidence in this matter, the Notice of Hearing and the Respondent's Reply and the submissions, both written and oral, made by Enforcement Counsel and counsel for the Respondent, the Panel has determined that Allegation #1 set out in the Notice of Hearing, has been proven.

II. EVIDENCE

10. The Panel admitted and considered the following evidence:

- a) The Affidavit of Patricia West, MFDA Senior Investigator, affirmed May 11, 2021 with attached exhibits (the "West Affidavit");
- b) The oral evidence of Patricia West;
- c) The Affidavit of Stephen Derek Judd sworn May 11, 2021 with attached exhibits (the "Judd Affidavit");
- d) The oral evidence of Stephen Derek Judd;
- e) The oral evidence of Amy Molnar; and
- f) The oral evidence of the Respondent.

Hearsay Evidence and Evidence by Sworn Statement

11. The Panel admitted the West and Judd affidavits into evidence pursuant to the authorities set out below.

12. MFDA Rule of Procedure 1.6 specifically permits hearsay statements to be admitted as evidence:

1.6 Admissibility of Evidence

(1) Subject to sub-Rule (3), a Panel may admit as evidence any testimony, document or other thing, including hearsay, which it considers to be relevant to the matters before it and is not bound by the technical or legal rules of evidence.

(2) A Panel may admit a copy of any document or other thing as evidence if it is satisfied that the copy is authentic.

(3) Nothing is admissible in evidence which would be inadmissible by reason of a statute or a legal privilege.

13. MFDA Rule of Procedure 13.4 permits evidence to be adduced by way of sworn statements:

13.4 Evidence by Sworn Statement

(1) The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

14. Further, it is well established that MFDA Hearing Panels and other regulatory bodies routinely consider and rely on both hearsay and affidavit evidence in making findings of fact.

Tonnies (Re), MFDA File No. 200503, Hearing Panel of the Prairie Regional Council, Decision and Reasons dated June 27, 2005 at paras 10-12

15. Both Ms. West and Mr. Judd also gave oral evidence at the hearing, including being subjected to cross-examination by counsel for the Respondent.

Background Information

Registration History

16. From October 2007 to July 2018, the Respondent was registered in Alberta, British Columbia, Manitoba and Ontario as a dealing representative with Investors Group Financial Services Inc. (the “Member”). At the time of the hearing the Respondent was registered under a different MFDA Member.

17. Starting in May 2017 Mr. Judd was the Member’s Interim Regional Director for the region of Calgary Centre. At all material times to this matter, Mr. Judd acted in a supervisory and Branch Manager role with respect to the Respondent.

Client KM and Guardian SE

18. KM was a client of the Member whose accounts were previously serviced by the Respondent until September 2014, when her accounts were reassigned to another dealing representative at the Member.

19. KM was mentally incapacitated and as of September 2013, was subject to a Trustee and Guardianship Order under the guardianship of her nephew SE.

20. KM’s accounts were eventually transferred outside the Member. However, commencing in January 2018 the Respondent and SE entered into discussions with respect to bringing KM’s assets back to the Member.

21. On February 16, 2018, SE had a meeting with the Respondent and Branch Manager, Stephen Judd, to discuss bringing KM's assets back to the Member.
22. Those discussions resulted in SE signing account documentation that same day, to open both a non-registered account and a TFSA for KM.
23. Between February 16, 2018 and March 28, 2018, delays occurred in the processing and transferring of KM's assets to the Member.

March 6, 2018

24. Mr. Judd's evidence was that on March 6, 2018 the Respondent informed him by email that there were issues with the processing of account opening and transfer documentation for KM's accounts.
25. An email thread between the Respondent, Mr. Judd and Mr. Judd's assistant - subject line: "Re: [KM]/[SE] IMMTransfer ..." shows that the Respondent told Mr. Judd that it seemed that Head Office had lost the paperwork completely regarding KM's transfer.
26. Mr. Judd's assistant confirmed that the paperwork was faxed to Head Office on February 21, 2018 but said that if Head Office could not locate the paperwork, the "admin team" could resubmit it for the Respondent, if he wished. The Respondent confirmed that he would appreciate if Mr. Judd's assistant could ensure that the paperwork was re-submitted.

March 23, 2018 – March 29, 2018

27. The Respondent's evidence was that on March 23, 2018, while he was working out of town in Toronto, he received a call late at night from SE in which SE told him that KM had passed away.
28. The Respondent said he thought that SE might be playing a prank on him because, he said, SE had told him that KM had passed away, on two previous occasions.
29. The Respondent said that those occasions were during the time when KM was not his client and, therefore, he did not have any notes of those previous calls.
30. He also said he thought that it was uncharacteristic of SE to be calling at what he thought would have been late for SE, who was in another time zone. He said it sounded like SE was in a crowded noisy space which he also thought was uncharacteristic for SE.

31. For all of these reasons, he said he was uncertain as to whether to believe SE's statement that KM had passed away.

32. Nonetheless, after receiving SE's call, the Respondent immediately sent an email to Mr. Judd.

33. The Panel pauses to note that there was some discussion between counsel as to how to read the meta data on the emails which were exchanged between the Respondent and Mr. Judd on March 23 and 24 in terms of identifying what time they were sent or received, especially since the parties were in different time zones.

34. Ultimately, counsel agreed there was not sufficient information to conclusively determine the exact time that those emails were sent or received and they did not seek to pursue the issue. The Panel did not believe that anything turned on that issue and therefore did not seek further information on the point.

35. What is important to note is that on the evening of Friday, March 23, 2018 after receiving the phone call from SE, the Respondent sent the following email to Mr. Judd with the subject – "*Re [client]. Update*":

Hi boss. [SE] called late tonight...

We should talk sooner than later.

P

36. Mr. Judd immediately responded:

Can you talk now?

37. The Respondent replied:

Can you call me. I don't have your number... [Respondent's cell phone number]

38. The parties did not speak that night but early the next morning, on Saturday, March 24, the Respondent sent an email to Mr. Judd saying:

I guess theres [sic] a contractual technicality that may void our arrangement with [SE].

Im home on Sunday...

P

39. During the weekend of March 23 to 25 the Respondent and Mr. Judd had a number of discussions about KM and SE. Mr. Judd's evidence was that during those discussions he told the Respondent that KM's monies needed to go into an estate account and that no further trades could occur in her accounts due to her death.

40. On Monday, March 26, 2018 the Respondent sent another email to Mr. Judd with the subject - "*When you can... Just a word*", saying:

Hi SJ...

Quick Pow wow when you have a moment.

I'm here until late.

P

41. Mr. Judd's evidence was that later that day he and the Respondent had another discussion about KM's accounts and that he maintained his position to the Respondent that no trades could occur in her accounts and that the matter had to be addressed by the estates department, because KM had passed away.

42. According to Mr. Judd, the Respondent expressed concern to him that based on the terms of the guardianship order that SE had obtained, KM's accounts could not sit in a cash position and had to be invested.

43. Mr. Judd said the Respondent was also upset with what he viewed as a delay in processing and transferring KM's assets to the Member.

44. Mr. Judd's evidence was that between March 27 and March 28, 2018 he reached out to two of the Member's Regional Directors – Karen Erickson and Tim Richardson, to discuss the situation regarding KM. The two main points of those discussions, he said, involved the lack of a death certificate for the client and the Respondent's understanding that according to the terms of the court ordered guardianship, KM's accounts could not be held in a cash position.

45. Mr. Judd said that based on his discussions with those Regional Directors he maintained his position that the trades could not occur in KM's accounts, once her assets arrived at the Member from the other financial institution.

46. Mr. Judd said that between March 27 and March 28, 2018, he continued to have periodic discussions with the Respondent about KM's accounts.

47. He was adamant in saying that at no time did he tell the Respondent that the trades could proceed based on the information that the Respondent had given him.
48. Between March 27 and March 28, 2018, KM's assets arrived at the Member, totaling approximately \$1,160,000.00.
49. On March 28, 2018, the Respondent processed two purchases in the non-registered and TFSA accounts which had been opened for KM and in doing so, generated commissions for himself totaling \$16,279.22.
50. On March 28, 2018 the Respondent sent SE an email informing him that the transfer of the funds had been received by the Member and would be invested in accordance with his instructions. He ended the email by stating "I am pleased to be starting the adventure with you and your Aunt."
51. The Respondent testified that he had a phone conversation to confirm the transactions with SE, prior to making them, on March 28, 2018. In response to a question from the Panel he confirmed that during that phone call there was no discussion about KM's death. His explanation was that he assumed that if he had brought it up it was extremely likely that SE would have carried on with what he described as the "farce".
52. Mr. Judd's evidence was that in the afternoon of March 28, 2018 as he was about to leave the office the Respondent came in and told him that he had processed the trades in KM's accounts.
53. Mr. Judd said that he expressed "distaste" about the Respondent's action because, he said, the agreement with the Respondent was always that the trade should not be made. In the back-and-forth discussion, he said, the overall consensus and advice was - the trade should not be made.
54. On cross-examination Mr. Judd definitively said "I never agreed to the trades being made". He explained that that was because the client was dead and the Power of Attorney therefore lost his ability to act.
55. Mr. Judd testified that as he was leaving the office he spoke with Rob Bisson, who had previously been a Regional Director of the Member's Calgary office. He said he told him about the situation and said: "Here's the case: Paul just made the trade. Is there any reasons for us to allow this?" to which Mr. Bisson replied said no, he did not see any reason to allow the trade.

56. The next day, on the morning of March 29, 2018 when the trades appeared on the Transact Dashboard for him to review, Mr. Judd flagged the trades as being “under review”. At 8:26 a.m. he called Kate Schroeder who was an associate manager in the Member’s Compliance Department. Mr. Judd described her as his “go-to” compliance officer.

57. On cross-examination Mr. Judd confirmed that the reason for his discussion with Kate Schroeder was to ask whether there was any reason why the trade should be allowed - that is, whether he was missing something because of the two situations that the Respondent had presented to him, namely - not having the death certificate; and his understanding that the Court had ordered the client’s monies could not stay in a cash position. Mr. Judd testified that Ms. Schroeder said she did not believe that those were reasons to allow the trade but that he should talk to Compliance Operations for a “hundred percent definitive answer”.

58. Email correspondence between Ms. Schroeder and Mr. Judd confirms that Ms. Schroeder sent Mr. Judd an email on the morning of March 29, 2018 giving him the email address to contact Compliance for confirmation that the trades could not be processed.

59. Following receipt of that email Mr. Judd sent an email to: “Operations Compliance” with the subject - “*Urgent Situation: Importance: High.*” in which he indicated that he had an urgent situation that needed to be addressed that day and asked that he be called at the number on his email signature.

60. He testified that he was hoping to hear back from Compliance before the end of the day but that he did not receive a reply that day.

April 3, 2018

61. On April 3, 2018 the Respondent said he got a phone call from SE telling him that he should pick up KM’s death certificate from SE’s mailbox. SE was working out of town at the time.

62. The Respondent said he expected there would be some practical joke inside but in fact the mailbox did contain the death certificate which showed that KM had indeed passed away on March 23, 2018.

63. In the afternoon of April 3, 2018, the Respondent sent SE an email offering condolences on the passing of his aunt. His email included the following statements:

... I am sorry to hear about the news especially after the recent transactions. I commit to respecting your privacy during this time of grief.

...

By the way...

I'm looking at the dates, and I'm a little concerned that the final confirmation on the transaction was done after [KM] Passed. While we are working on the written instructions dated in January and approved and executed in February, would you take a quick look when you're able to confirm that you are still authorize to act for your Great aunt. I'd hate to make any mistakes... given the history and the solemn commitment to do better.

64. Shortly after that, the Respondent sent an email to the Member's Estates Department and copied Mr. Judd with the subject line - "*Death of client – [KM]*".

65. The email said:

Hi

Just received terrible news about Mrs. [KM]... late of March 23, 2018. (DOD)

...

Attached is a certified copy of the Death Certificate ...

[SE] has been notified of our process and is waiting on your letter. Thanks

April 6, 2018

66. On April 6, 2018 Mr. Judd followed up with the Member's Compliance Department about the email he had sent on March 29, 2018 regarding the trades which the Respondent had processed on March 28, 2018.

67. He finally received a response from the Compliance Department on April 9, 2018 advising him that someone would contact him and later that day he was contacted by an individual who said they would get back to him on the situation.

68. In late April 2018, Mr. Judd went on vacation and returned on May 8, 2018. His evidence was that as at the time he left, KM's trades were still flagged as being "under review" and had not been approved, and he had not heard back from the Member's Compliance staff.

69. It was Mr. Judd's understanding that during this time the Member's Estates Department was in the process of opening an estate account for KM which he believed required his approval.

70. On May 9, 2018 after returning from vacation, Mr. Judd said he reviewed the Member's Transact system and saw that his approval was required for KM's estate account regarding her non-registered assets and he therefore approved the opening of that estate account.

71. Soon after May 9, 2018 Mr. Judd was asked by the Member to take over as Regional Director of the BC interior region and as of May 16, 2018 Tim Richardson took over from him as Regional Director of the Calgary office.

72. Mr. Judd said he was subsequently informed that in fact he had approved the March 28, 2018 trade in KM's non-registered account and that that trade was going to be reversed.

73. Mr. Judd said that at no point did he ever intend to approve that trade and he believed at the time that he was only approving the opening of KM's estate account.

74. On June 13, 2018 another of the Member's supervisors approved the trade in KM's TFSA account. Both trades were approved by Tier 2 supervisory staff but were subsequently reversed.

75. The Respondent's commissions of \$16,279.22 were also reversed.

76. On cross-examination Mr. Judd testified that he did not think he had the ability to reverse trades – that he could only flag them and Head Office could reverse them.

77. He also testified that he did not believe he had the ability to classify trades as “not approved” although he was not completely certain. He said he believed he could only place trades under review.

The Respondent's testimony

78. The Respondent described SE as being devoted to his aunt.

79. He said that SE lived in work camps in the north and he described him as being unsophisticated.

80. He testified that he stayed in touch with SE after KM stopped being a client of the Member in 2014. During that time, he said they were in contact maybe twice a year and that SE liked to “kid around” and that he “took things way too far all the time”. The Respondent recalled, for example, that on two separate occasions SE made what he described as “farces” alleging that his great aunt had passed away.

81. He also testified that he believed that the terms of the guardianship order required that KM's monies be invested rather than being held in cash.

82. On cross-examination he confirmed that he had no documentation or other evidence supporting the position that SE had twice informed him previously that KM had passed away.

83. He also confirmed that none of the guardianship documentation which was provided to the Member or MFDA Staff stated that the client's monies had to be invested in an interest-bearing investment.

84. He testified that Mr. Judd told him he could proceed with the trades based on the prior instructions of SE while he sought confirmation of KM's death.

85. He confirmed on cross-examination, however, that he knew that if KM died intestate, her estate became the client and not SE.

86. He testified that he was unaware that he would receive commissions as a result of the trades he processed on KM's behalf although on cross-examination he admitted that he was aware that he would receive trailing commissions.

87. The Respondent testified that he did attempt to visit KM's care home on Monday, March 26, 2018 in an attempt to see if she were still alive but he confirmed on cross-examination that between March 23, 2018 and March 28, 2018 he never followed up with SE to confirm whether KM had actually passed away and that he did not call out the "farce", to his words, until after the trades were processed.

88. The Respondent said that by emailing SE after the trades were processed on March 28, 2018 stating "I am pleased to be starting this adventure with you and your aunt" he was "calling out the farce" of KM's death.

The Reply filed by the Respondent

89. In the Reply he filed to the Notice of Hearing, the Respondent stated that between receiving SE's phone call on March 23, 2018 and April 3, 2018, he did not believe that KM had actually died. But he acknowledged:

The Respondent chose to ignore what he thought was a prank. The Respondent should not have.

90. He also said in the Reply under the heading "Additional Facts and Conclusions":

The Respondent was in a dilemma, if [KM] had passed, though technically an unauthorised transaction he believed that [the Member] would be able to reverse the transaction quickly and easily. If [KM] actually were alive and he did not proceed, the Respondent would have delayed the transaction, and dishonored written instructions.

Statements made by the Respondent and Mr. Judd, to the Member in 2018

91. Both the Respondent and Mr. Judd provided statements to the Member in the latter's investigation of this matter.

92. Copies of those statements were attached as exhibits to Ms. West's affidavit.

93. The information contained in those statements, which were made closer to the time of the events in question, was consistent with the testimony the Respondent and Mr. Judd gave at the hearing.

94. The Respondent provided an initial response to the Member's investigative staff between June 19, 2018 and June 25, 2018 which detailed the history of his relationship with KM and SE.

95. In the statement he gave to the Member on June 21, 2018, he said, among other things, that:

- a) He was told by SE on March 23, 2018 that KM had passed away;
- b) He did not believe SE because SE had stated that KM had died, on two previous occasions;
- c) He wanted to wait for verification with a death certificate and did not challenge SE on his claim that KM had passed away;
- d) He notified Mr. Judd about the information he got from SE, on Friday, March 23, 2018; and
- e) Mr. Judd permitted the trade to proceed.

96. He also said that he recognized that Mr. Judd did not make the trades; he did.

97. Among other things, he said that Mr. Judd told him:

... clearly that I cannot continue the trade because the trustee's power ends at death. I pleaded with Stephen Judd to allow the trade to proceed, and he permitted for the following mitigating circumstances.

My argument to proceed was because:

- a. My first big mistake. I didn't believe [SE] was telling the truth about [KM]'s death. He had fooled me two times before with false claims death claims before. I promised Stephen that I would confirm death with a death certificate ASAP.

- b. As the trustee [SE] gave clear instructions when we initiated the transfer to invest the funds when they arrived without delay. Undue delays in trading are also problematic for their own reasons.
- c. I promised Stephen Judd that once I confirmed the death by the death certificate, that I would find out if [SE] had received additional powers that would allow him to act after [KM]'s death. Since he had been referred to a lawyer months earlier, this inevitability is a reasonable assumption.
- d. Stephen Judd allowed this trade and was CC'd on the email response to [SE] where I specifically questioned his authority to act for [KM] by asking for confirmation or proof of additional post death power to administrate [KM]'s affairs.

98. In the statement he gave to the Member, Mr. Judd said he told the Respondent that he believed the trustee had lost ability to make the trade from cash into the portfolio that he wanted, because the Power of Attorney was only good when the client was alive. He said they left it at that but that the Respondent was upset.

99. Mr. Judd went on to say in that statement that on March 26, 2018 the Respondent emailed him to chat about things and popped into his office sometime later at which point they reviewed the situation again. Mr. Judd said he again told the Respondent his impression was that the Respondent could not make the trades from the cash when it arrived, because the trustee had lost his power due to the client's death.

100. Mr. Judd said he asked the Respondent if he had a copy of the death certificate and the Respondent told him he did not. All he had at that point was a call from the trustee telling him that the client had died.

101. Mr. Judd said he asked the Respondent why there would be any reason to, in his words, "circumvent" his belief that the trade could not happen and that the Respondent said that the court order would not allow the money to be held in a cash position and that it had to be in an interest-bearing investment. Mr. Judd said he told the Respondent that his view was that that was not a good enough reason to allow the trade to happen.

102. Mr. Judd told the Member said that at 8:00 a.m. on March 29, 2018 when he saw the trade on his Transact Dashboard, he called Kate Schroeder in Compliance to explain the situation, telling her that he felt he could not approve the trade and did not see any solid reason to allow it. He said he told Kate Schroeder the scenario and that the two points he wanted clarity on were: that they did not have proof of death, i.e. no death certificate at that point; and the information from the Respondent that the court said the money could not stay in cash. He asked her whether that would affect the trade in any way and she said she thought that the Respondent did not have the right to act on the account even though they did not have the death certificate because the Power of

Attorney had told the Respondent that the client was dead. She recommended that Mr. Judd contact Jan Failing in Operations Compliance “to confirm 100%”, saying that Jan Failing would get back to him within the day to connect on the situation.

Evidence of Amy Molnar

103. At the Hearing on the Merits, Staff called Amy Molnar to testify. Ms. Molnar is one of the senior specialists in the Member’s Estates Department.

104. She testified that Approved Persons are expected to notify the Estates Department as soon as they have been notified of a client’s passing. On cross-examination, she was asked who an advisor should consult if they have reason to believe that a notification of death may not be true. She responded that she believed they could always reach out to their Regional Director for assistance in difficult cases. She also said that pending a Death Certificate the Estates Department might place restrictions on the account to avoid improper trading occurring.

105. She testified on cross-examination that the approved Power of Attorney is only allowed to make transactions on the account while the client is living.

106. She confirmed on re-examination that the Estates Department would place restrictions on a client’s account even if they did not yet have the date of death, in order to avoid any improper trading because if trades were allowed to go through, there was a risk that somebody would be acting improperly or someone would get access to the funds without having authority for the transaction.

III. ISSUES

107. The issues to be determined in this proceeding are:

- a) Whether the Panel finds, on a balance of probabilities, that the Respondent processed two trades in KM’s accounts after being advised by his Branch Manager that the trades would not be approved; and
- b) If so, whether that conduct fell below the standard of conduct required of an Approved Person, and gave rise to a conflict or potential conflict of interest which the Respondent failed to address by the exercise of responsible business judgment influenced only by the interest of the client, contrary to MFDA Rules 2.1.1 and 2.1.4.

IV. ANALYSIS

Findings of Fact

Standard of Proof

108. The main issue in this proceeding is a factual one because our determination revolves around deciding whether the Respondent had the approval of his Branch Manager to proceed with the transactions at issue, on the client's behalf.

109. In making the findings in this decision, we have applied the standard of proof known as the "balance of probabilities", taking into account the evidence which was put before us and deciding whether it was more likely than not that certain events took place. This standard, of course, is markedly different from the criminal standard of proof known as "beyond reasonable doubt".

110. To satisfy the balance of probabilities test, evidence must be sufficiently clear, convincing and cogent.

F.H. v McDougall, 2008 SCC 53 at para 46

111. A Panel must be satisfied that the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

Faryna v. Chorney, 1951 CanLII 252 (BCCA) at para 8

112. It is also well accepted that the validity of evidence does not depend in the final analysis on whether it remains uncontradicted.

Assessing the Evidence

Credibility and Reliability

113. In assessing the evidence in this matter, we have considered the credibility and reliability of each witness' testimony. In *R. v. Taylor* the Court explained the distinction between these two concepts as follows:

[58] "Credibility" is omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive, psychological, developmental, cultural, temporal and environmental factors that

impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.

[59] All of this has been said many times before, including by Doherty J.A. for the Court of Appeal in *R. v. Morrissey* 1995 CanLII 3498 (ON CA), 1995 CanLII 3498 (ON C.A.), (1995), 97 C.C.C. (3d) 193, at 205:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[60] Depending on the circumstances, some portions of a witness' testimony may be more credible or worthy of belief than other portions. Accordingly, I can, with good reason, accept all, some or none of any witness' evidence: see *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3, at para. 65.

R v Taylor, 2010 ONCJ 396 at paras 58-60

114. We also recognize that a decision maker should not consider the evidence of one witness in isolation but must look at the totality of the evidence to assess the impact of any inconsistencies in a witness' evidence on questions of credibility and reliability pertaining to the core issue in the case.

McDougall, supra at para 58

115. Accordingly, we have considered the evidence of each witness in the context of the totality of the evidence which was adduced in these proceedings.

116. Overall, the Panel finds that the Respondent's evidence was neither clear, cogent, nor credible. His evidence was not given in a straight forward manner but was instead rambling and at times inconsistent.

117. By contrast, we find that Mr. Judd testified in a straight forward, clear and consistent manner.

118. That said, we note that the evidence of the Respondent and Mr. Judd, regarding their communications about the trades in question, including whether the trades could be processed, was essentially the same with the exception of the issue which is at the heart of these proceedings, namely - whether the Respondent had Mr. Judd's approval to proceed with those trades.

119. The Respondent's evidence and position was that although he initially recognized once he received the call from SE that KM had passed away, that the trades could not be made, and although Mr. Judd confirmed that position to him, he was able to convince Mr. Judd that there were mitigating circumstances such that Mr. Judd allowed him to proceed with the trades on the understanding that they could be reversed if necessary, depending on further information they might receive in the future.

120. The mitigating circumstances that the Respondent said he referred to were that he:

- a) Was uncertain whether the client had in fact died; and
- b) He understood that the order which put the guardianship in place required that all of KM's monies be invested rather than being held in cash positions.

121. Staff's position was that Mr. Judd's evidence - that his consensus with the Respondent was that the trades could not be completed, is more credible than the Respondent's evidence that Mr. Judd told him he could proceed with the trades, for the following reasons:

- a) Mr. Judd's position that the trades could not be approved was supported by his actions on March 29, 2018 which are documented and which include emailing the Member's Compliance Department at 8:26 am and marking the trades as being "under review" through his Tier 1 Review Process;
- b) It is not reasonable that Mr. Judd would instruct the Respondent that he could proceed with the trades, only to reach out to the Compliance Department on March 29, 2018 and then place the trades under review on the Transact System; and
- c) It is not reasonable that upon the Respondent receiving information that a mentally incapacitated client had passed away, Mr. Judd would instruct him to rely on the prior instructions of the client's guardian and trustee while waiting to confirm that the client had actually died, only to have to be in a position to reverse the trades at a later date.

122. The Panel agrees with Staff's submission and finds that on the issue of whether he told the Respondent he could process the trades, Mr. Judd's evidence is credible and the Respondent's is not.

123. We find that Mr. Judd's actions before and after he found out that the trades had been processed was consistent with his evidence that he did not approve the trades; that is, that he did not tell the Respondent to go ahead with processing them.

124. Mr. Judd's evidence shows that he certainly understood the Respondent's reasons as to why he thought the trades should be processed and he did not outright dismiss them.

125. Instead, he reached out to two other Regional Directors on March 27 and 28, 2018 to canvass their views as to whether those reasons would support approving the trades. His understanding from those individuals was that they would not.

126. Then, on March 29, 2018, once he saw that the trades had been made, he placed them under review and reached out to Compliance to see whether the Respondent's reasons for processing the trades would support approving the trades after all.

127. Kate Schroeder's email to Mr. Judd on March 29, 2018 confirms his evidence that he called her that morning to seek her views on whether the Respondent's reasons for having processed the trades were in fact valid.

128. We find that Mr. Judd's actions on March 29, 2018 to place the trades under review and immediately contact Compliance, are consistent with his evidence that he did not tell the Respondent that the trades could be processed.

129. The evidence Mr. Judd gave at the hearing is consistent with the information that he gave to the Member and to the MFDA in their respective investigations and that that evidence supports his testimony that he did not give the Respondent approval to process the trades in question.

130. By contrast, we find that the evidence that the Respondent gave during the hearing was not consistent with the information he gave to the MFDA during its investigation.

131. For example, during the hearing, the Respondent's explanation for what he meant by the email of March 23 in which he said: "*I guess theres [sic] a contractual technicality that may void our arrangement with [SE]*" referred to their arrangement or "their bond" that the Respondent and Mr. Judd would support SE through whatever he had to go through.

132. He testified that SE's authority to act on KM's behalf was by a Trustee Order which had been issued by the Court and "their bond" was to support SE in looking credible to the Courts. He

said he was concerned that he would have to tell the truth about the prank if they acted on SE's instructions that KM had passed away and that if KM was not dead, it would be SE's responsibility to tell the Court that he was just kidding and that that would not go well.

133. The "contractual technicality", he testified, was that they (he and Mr. Judd) would not have SE's back anymore. They would not be "overlooking" what he described as perhaps not SE's "finest moment" and would have had to void their arrangement to have his back by exposing SE's prank to the Court.

134. On cross-examination the Respondent explained that if he and Mr. Judd acted on SE's instructions, they would make SE look even "further an imbecile".

135. Following that answer, Staff took the Respondent to the transcript from his interview with Patricia West, which took place on February 27, 2019 as part of the MFDA's investigation.

136. In the course of that interview Ms. West asked: "So what's the 'contractual technicality' that you're referring to?", to which the Respondent replied:

That if this woman is actually dead, the trade can't go through, but she's probably not dead because he's lied to me a couple of times before.

137. The Respondent agreed that the statement he made during the course of his interview with the MFDA in February 2019 did not discuss any contractual arrangement between himself, Mr. Judd and SE as per the explanation he had given during his testimony at the hearing.

138. We also find that in the emails the Respondent sent to SE and to the Member's Estate Department on March 28, 2018 and April 3, 2018 he deliberately worded the messages to make it appear as though he had not previously been made aware of KM's death.

139. For example, in the email he sent SE on March 28, 2018 in which he informed him that the transfer of the funds had been received and would be invested in accordance with his instructions he ended the email by stating: "*I am pleased to be starting the adventure with you and your aunt*".

140. Similarly, in the email he sent SE on April 3, 2018 offering him condolences on the passing of his aunt he included the following statements:

... I am sorry to hear about the news especially after the recent transactions. I commit to respecting your privacy during this time of grief.

...

By the way...

I'm looking at the dates, and I'm a little concerned that the final confirmation on the transaction was done after [KM] Passed. While we are working on the written instructions dated in January and approved and executed in February, would you take a quick look when you're able to confirm that you are still authorize to act for your Great aunt. I'd hate to make any mistakes... given the history and the solemn commitment to do better.

141. And, as indicated earlier in these Reasons, on that same day the Respondent sent an email to the Member's Estate Department, copying Mr. Judd, in which he stated:

Hi

Just received terrible news about Mrs. [KM]... late of March 23, 2018. (DOD)

...

142. We find that the Respondent's explanation that the wording in the March 28 email was intended to "call out the farce" is simply not credible.

143. In our view, these communications, which were sent only after the Respondent had processed the trades, were deliberately worded to make it appear as though he was not in fact aware of the factual circumstances which would have prevented him from being able to make the trades.

144. It was clear from the evidence that the Respondent knew that if the client had in fact passed away, he did not have authority to proceed with the transactions.

145. We find that the wording of these emails was at best disingenuous and was intended to cover up the fact that he had processed trades after being informed of his client's death and without confirming the accuracy of whether that was true.

146. In our view, it is clear from the Respondent's testimony that he wished that KM's monies had transferred into the Member earlier than they did, and he wished that the client had not passed away before the money came in, so that the trades could have in fact been made.

147. Unfortunately, the Respondent acted in accordance with what he wanted to believe and not what he knew to be true.

148. We find that this was the case both with respect to whether the client had in fact passed away before he made the trades and whether Mr. Judd gave him approval to process those trades.

149. The Panel notes the Respondent's evidence and argument in any event that he had authority to process the trades based on the wording contained in one of the Member's internal documents called: "Death of a Client Administrative Procedures – a Learner's Guide."

150. We find, however, that there was no evidence that the Respondent ever consulted or relied on that Guide, in deciding to process the trades. More to the point there was no evidence that the Respondent ever discussed the provisions of that Guide with Mr. Judd or that Mr. Judd told the Respondent that the trades could be approved because of the provisions of that Guide.

151. Based on our review of the totality of the evidence the Panel finds, on a balance of probabilities, that the Respondent processed two trades in KM's account despite being advised by Mr. Judd that those trades would not be approved.

152. In making this finding, the Panel agrees with Staff's submission that we do not need to find that Mr. Judd gave a specific order to the Respondent not to proceed with the trades. It is sufficient for us to be satisfied that on the basis of the discussions between the Respondent and Mr. Judd which took place between March 23, 2018 and March 28, 2018, Mr. Judd made it clear to the Respondent that the Respondent could not process trades in KM's account once he received information that she had passed away, because at that point SE no longer had authority to act on her behalf and the previous instructions given before she passed away, were no longer valid.

MFDA Jurisdiction over the Respondent

153. As a current mutual fund dealing representative and an Approved Person of a Member of the MFDA, the Respondent is bound by and has agreed to observe and comply with the MFDA's By-laws, Policies and Rules.

The Law

154. In order to find that Allegation #1 has been proven, the Panel must determine not only that "the Respondent submitted for processing to the Member two trades for which he stood to earn commissions after being informed by his Branch Manager that the trades would not be approved" but also that by engaging in that conduct he breached MFDA Rules 2.1.1 and 2.1.4.

MFDA Rule 2.1.4

155. The Rule states:

2.1.4 Conflicts of Interest

- (a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.
- (b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).
- (c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.
- (d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

156. Staff submitted that by processing trades in which the Respondent stood to earn commissions of \$16,279.00, after being informed by his Branch Manager that the trades would not be approved, the Respondent was in a conflict of interest - the conflict being between the benefit the Respondent stood to gain from processing the trades; and the best interests of KM and her estate.

157. Staff further submitted that the exercise of reasonable business judgment would have required the Respondent not to process the trades and instead to reach out to the representative of KM's estate to obtain instructions with respect to the monies that were transferred into her accounts after she had died. By failing to do so, Staff submitted, KM's estate was placed into a situation of unnecessary risk due to the possibility that it might have needed the monies to remain liquid for estate expenses or to pay out intended beneficiaries.

158. Staff submitted that the Respondent owed a duty to KM's estate to ensure its protection and that the risk to the estate was even greater in this case because the client had passed away intestate. Without a last will and testament it was not readily apparent who the intended beneficiaries of the estate were going to be.

159. By processing the transactions for the client in a manner that benefited himself through the gain of commissions and that exposed the client to unnecessary risk, Staff submitted, the Respondent's conduct gave rise to a conflict of interest.

160. In making this submission Staff cited the decision of the Hearing Panel in *Gaunt (Re)*:

47. A conflict of interest occurs when one party to a matter advances, uses or pursues his own interests in dealing with another person, to whom he has an obligation of dealing fairly, to the detriment of that other person or to his own advantage rather than the person to whom he owes the duty of fairness.

Gaunt (Re), MFDA File No. 201232, Hearing Panel of Atlantic Regional Council, Decision and Reasons dated September 20, 2013

161. Staff also referred the Panel to other MFDA decisions which have found that a Respondent was in breach of Rule 2.1.4 where they stood to gain commissions due to trading activity that was found to be detrimental to the interests of the client.

Hale (Re), MFDA File No. 202046, Hearing Panel of the Prairie Regional Council, Reasons for Decision dated March 9, 2021

Davidson (Re), MFDA File No. 202071, Hearing Panel of the Prairie Regional Council, Settlement Agreement approved July 8, 2021, Reasons for Decision dated August 24, 2021

162. The Respondent argued that his actions in processing the trades could not be construed as placing his own interest before the interest of the client, in part because at the time he processed the trades he said he did not believe he would earn commissions although he did concede he knew that the trades would generate trailing commissions.

163. Further, he submitted that if this conduct were construed as placing his interests ahead of those of the client, in breach of the MFDA Rules, then every time an Approved Person submits a trade which generates commissions, they would be guilty of breaching the conflict of interest rule.

164. The Panel finds that the Respondent's argument on this point ignores the fundamental aspect that underlies the conflict of interest rule which is the prohibition on an Approved Person placing their own interests ahead of those of the client - to the client's detriment.

165. In this case, KM's death changed who the client was - from KM herself - to her estate. As of March 23, 2018, SE no longer had authority to provide instructions on KM or her estate's behalf. The Respondent was aware of this.

166. The Panel agrees with Staff's submission that by placing the trades without authority, the Respondent put the client's estate at risk. As soon as he submitted the trades for processing, he put his own interests ahead of those of the client.

167. Rule 2.1.4 has two aspects to it. That is, not only must Approved Persons be aware of the possibility of conflicts of interest arising between their interests and the interests of their client, where an Approved Person becomes aware of any such conflict, the Approved Person must immediately disclose the conflict or potential conflict to the Member and ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client.

168. Subrule 2.1.4(c) also requires that any conflict or potential conflict of interest must be immediately disclosed in writing to the client prior to proceeding with the proposed transaction.

169. The Panel finds that the Respondent's conduct in processing the trades in this case failed to disclose the exercise of responsible business judgment that is required by the Rule.

170. We agree with Staff's submission that at a minimum, responsible business judgment would have required the Respondent to follow up and confirm the information that the client had died, if in fact he had any doubt about the accuracy of that information, prior to processing the trades.

171. The Respondent's evidence was that he thought the guardian was playing a prank on him when he advised that the client had died – that the whole thing was a “farce”. In support of that position, he said that the guardian had played a similar prank on two previous occasions.

172. Whether or not that was true, the evidence is clear that after March 23, 2018 the Respondent was not certain whether KM had died. He was sufficiently concerned about whether that was true, that he immediately raised the concern with his Branch Manager.

173. All of the Respondent's actions, including going to the care facility where he thought the client last resided, confirmed that he was not certain whether she was alive at the time he processed the trades and, therefore, whether the Power of Attorney's authority was still in place.

174. By processing trades despite being told by his Branch Manager that the trades could not be made because of the information he had received that the client had passed away and despite his own uncertainty about whether the information was true, we find that the Respondent failed to exercise responsible business judgment influenced only by the best interests of the client.

175. For all of these reasons, we find the Responded breached Rule 2.1.4.

MDFA Rule 2.1.1

176. The Rule states:

2.1.1 Standard of Conduct.

Each Member and each Approved Person of a Member shall:

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

177. As Staff identified in its written submissions, Rule 2.1.1 prescribes the general standard of conduct applicable to registrants in the mutual fund industry. It is a broad Rule that encompasses a variety of misconduct that may not necessarily be caught by other, more specific Rules.

178. Although the terms “business conduct or practice which is unbecoming”, “good faith” and “high standards of ethics” are not defined in the Rules, the case law is clear that those terms are concepts which fall within the Hearing Panel’s specialized knowledge.

179. As Cory J. (as he then was) stated in *Re Milstein and Ontario College of Pharmacy et al* (No. 2):

One of the essential indicia 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 and 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.

Given such unique qualifications for judgment and discipline of fellow members, the decisions and penalties of professional discipline committees ought not to be lightly interfered with.

Re Milstein and Ontario College of Pharmacy et al (No. 2) (1977), 13 OR (2d) 700 Div. CT. at page 7, varied on other grounds 20 OR (2d) 283 (CA), leave to appeal to the SCC dismissed, [1992 SCCA No. 85]

180. And, as Roscoe J. stated in *Ripley v. Investment Dealers Association (Business Conduct Committee)*:

... to require that evidence be given in proof of such issues of basic ethics and honesty would be an affront to the common sense, experience and intelligence of the members of every professional Disciplinary Committee.

Ripley v. Investment Dealers Association (Business Conduct Committee), [1990]
N.S.J. No. 295 [NSSC] at page 16, affirmed [1991] NSJ No. 452 (NSCA)

181. We find that the Respondent deliberately acted contrary to the advice of his Branch Manager and did so despite having full knowledge and understanding as to why the Branch Manager said the trades should not be processed.

182. In doing so, his conduct clearly fell below the standard of conduct which Rule 2.1.1 expects Members to uphold.

183. The Panel agrees with Staff's submission that in addition to breaching Rule 2.1.4, the Respondent's conduct constitutes a breach of the standard of conduct Rule 2.1.1.

V. CONCLUSION

184. In light of the fact that the Panel was able to make a determination which is consistent with the wording of the charging paragraph in the Notice of Hearing, we did not need to consider the parties' arguments on the issue of whether Staff is strictly confined to the wording of that charging paragraph in establishing its case. Nonetheless, the Panel appreciated receiving counsels' submissions on this point.

185. For all of the reasons set out above, we find that the totality of the evidence establishes on a balance of probabilities that Allegation #1 set out in the Notice of Hearing, has been proven.

DATED this 20th day of January, 2022.

“Sherri Walsh”

Sherri Walsh
Chair

“Birju Shah”

Birju Shah
Industry Representative

“Annette Stephens”

Annette Stephens
Industry Representative

DM 862567