



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: Clinton P. Wayne

Heard: October 25, 2016 in Toronto, Ontario
Reasons for Decision (Motion): January 13, 2017

**REASONS FOR DECISION
(Motion)**

Hearing Panel of the Central Regional Council:

Frederick H. Webber	Chair
Brigitte J. Geisler	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

Maria L. Abate)	Counsel for the Mutual Fund Dealers
)	Association of Canada
)	
Thomas Matthews)	Counsel for the Respondent
)	
)	

A. OVERVIEW

1. By Notice of Motion dated April 28, 2016, the Respondent sought an order:
 - a) excluding all evidence and testimony obtained by Stephen Davis, MFDA Investigator (“Davis”), during his interview of the Respondent conducted on March 27, 2014 (the “Interview”) or any evidence obtained due to "what was learned from this interview”;
 - b) excluding all evidence provided by the Respondent to his Member, Olympian Financial Inc. (“Olympian”); and
 - c) that this disciplinary proceeding against the Respondent be withdrawn or stayed.

2. The basis for the order sought by the Respondent is his claim that he was denied procedural fairness and fundamental justice during the MFDA's investigation into his conduct in that:
 - a) when called in for the Interview, the Respondent was not notified, and did not know, that he was under investigation by the MFDA, that the process could result in a disciplinary hearing and that what he said in the Interview would be used against him in a disciplinary hearing;
 - b) the Respondent was not informed, and did not know he was under investigation at the time he provided documents in response to requests from Olympian and from MFDA Staff; and
 - c) had the Respondent known he was under investigation by the MFDA, he would have consulted legal counsel prior to producing any documents or attending the Interview with MFDA.

3. In his Notice of Motion, the Respondent had asserted an additional basis for the order sought, viz. that the MFDA investigation violated his right against self-incrimination. This ground was abandoned by Respondent’s counsel at the hearing of the motion.

4. MFDA submitted that the Respondent's motion should be dismissed for the following reasons:

- a) the duty of procedural fairness owed to a respondent during a regulatory securities investigation is “minimal” and is “clearly distinguishable from the duty of procedural fairness requirements owed at a hearing”;
- b) Respondent’s right to procedural fairness during the MFDA investigation was not breached in regard to his disclosure of documents, his testimony at the Interview or in regard to his right to counsel. To the contrary, the Respondent was repeatedly advised by the MFDA and Olympian that he was the subject of a review and investigation by MFDA and that information or documents collected by Olympian would be forwarded to the MFDA; and
- c) Approved Persons ("APs") do not have the right to remain silent or to refuse to provide statements or documents on the basis of a right against self-incrimination in response to MFDA examinations or investigations; this ground became moot because the Respondent’s counsel abandoned the right against self-incrimination assertion at the hearing.

5. The motion was originally scheduled to be heard on August 18, 2016, but was adjourned on consent until October 25, 2016.

B. PROCEDURAL FAIRNESS DURING AN INVESTIGATION

6. Before dealing with the facts of this case, the Panel reviewed the requirements of procedural fairness during the investigation stage of the legal process compared with the requirements during the hearing stage.

7. Respondent’s counsel asserted that “some case law has argued that the fairness requirements during an investigative stage are less...than at a disciplinary hearing, while others

discussed below have held regulators to a higher standard” and that due to the facts of this case “the MFDA...should be held to a high standard.”

8. The MFDA took the position that “the duty of fairness owed to a respondent during a regulatory securities investigation is ‘minimal’ and ‘is clearly distinguishable from the duty of procedural fairness requirements owed at a hearing’”, citing Re Agueci, 2013 LNONOSC 1005 and Re Azeff, 2012 LNONOSC 383.

9. The general principles applicable to determining the content of the duty of procedural fairness were stated in the seminal case of Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. The Supreme Court of Canada (the “SCC”) stated:

“...the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. All of the circumstances must be considered...”

10. Before listing the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances, the court emphasized that:

“underlying all these factors is that the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”

11. The factors identified by the SCC to determine the content of the duty of fairness were:

- a) the nature of the decision being made and the process followed in making it;
- b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c) the importance of the decision to the...individuals affected;
- d) the legitimate expectations of the person challenging the decision;
- e) the choice of procedures made by the agency itself.

This list was not exhaustive.

12. The Respondent alleged that the denial of procedural fairness occurred at the investigative stage of the proceedings, i.e. at and prior to the Interview and before the Notice of Hearing. The MFDA has characterized the procedural fairness requirements at the investigative stage (as opposed to the hearing stage) as “minimal”. The Respondent has asserted that the standard required in this case is “high”. Whether described as minimal or high, it is clear from all the material submitted by both parties that the requirements at the investigative stage are less onerous than at the hearing stage (see e.g. the Swanson case and others referred to in paragraph 17 below). In fact, the requirements will likely be different at different parts of the investigation stage (e.g. at the initial intake stage vs. the respondent interview stage which is at issue in this case.) Therefore, following the Baker case, this Panel made its decision by examining the facts presented, the cases cited and the arguments made by the parties, and having regard to the principle that the requirements for procedural fairness are less at the investigative stage than at the hearing stage.

C. FACTS

13. The following are the facts which are pertinent to the Respondent’s motion, in particular the procedures followed by the MFDA in developing its case against the Respondent, up to and including the Interview on March 27, 2014. These facts are contained in the affidavit of Davis, (the MFDA investigator in this case), sworn August 12, 2016 and the Respondent’s affidavit sworn April 28, 2016 and supplementary affidavit sworn October 13, 2016:

- a) On April 25, 2013, the MFDA’s Case Assessment group received an events report on its Member Event Tracking System (“METS Report”), stating that the Respondent, his business partner and a corporation they operated had been named as defendants in a civil claim by an investor named EM in a failed real estate deal (the “Civil Claim”). EM was not a client of Olympian at any time relevant to this motion.

- b) The METS Report raised concerns within the MFDA with respect to whether the Respondent had, among other things, complied with his obligations regarding outside business activities and personal financial dealings with clients. Therefore, on April 30, 2013, MFDA opened a file to review the METS Report and obtain further facts in order to assess whether there were grounds to believe that a breach of MFDA By-laws, Rules, Policies or securities legislation had occurred.
- c) On May 2, 2013, the MFDA case assessment officer, Ms. Astrid Iral (“Iral”), wrote to Olympian advising that she had commenced a review of the METS Report review and requesting certain information and materials to assist with the review, including a statement from the Respondent regarding the failed real estate deal and other potential outside business activities, and confirmation that the Respondent had been advised of the commencement of the MFDA review of the matter.
- d) On May 15, 2013, Olympian’s Chief Compliance Officer, Alexander Mitonidis (“Mitonidis”), emailed the Respondent regarding the May 2, 2013 letter from Iral, advising the Respondent that the MFDA was “investigating” the Civil Claim and requesting a detailed written statement in response to the questions raised in Iral’s letter. The email also advised the Respondent that his response would be included in Olympian’s response to the MFDA.
- e) On May 22, 2013, Mitonidis sent a follow-up email to the Respondent again asking for a response to the questions and advising him that his answers would be included in Olympian’s report to the MFDA.
- f) On May 31, 2013, Olympian wrote to Iral confirming that it had advised the Respondent that the MFDA had commenced a review of his activities and included the Respondent’s written answers to Iral’s questions in the May 2, 2013 letter.
- g) On August 1, 2013, Iral wrote to Olympian and copied the Respondent, advising that she had completed her review, that she had referred the matter to the MFDA Investigations group and that Davis was the investigator assigned to the file.
- h) On August 2, 2013, Mitonidis advised the Respondent by email that the matter had been referred to the MFDA’s “Investigations Department”. Mitonidis’s email

also stated that “The MFDA don’t have a complaint against you. The Plaintiff filed a notice with the OSC and they notified the MFDA”.

- i) On or about October 10, 2013, Davis requested a copy of the Respondent’s Statement of Defence in the Civil Claim and other related material. This request was made through Olympian in accordance with MFDA’s standard practice.
- j) On October 16, 2013, Mitonidis wrote to the Respondent seeking the materials requested by Davis and advising the Respondent that the materials would be forwarded to the MFDA.
- k) On January 8, 2014, Davis sent an interview request letter by registered and regular mail to the Respondent. The letter was sent to the Respondents address of employment. Mitonidis was copied on the letter. The letter advised the Respondent that the MFDA was conducting an investigation into the Civil Claim, his outside business activities, his know-your-client and trading practices, and other potential violations of the MFDA By-laws, Rules or Policies or securities law. The letter expressly advised the Respondent that “if you wish, you may have legal counsel represent your interests”. The letter asked the Respondent to contact Davis to schedule a suitable date for the interview to be held at the MFDA offices.
- l) The Respondent claimed that he did not receive the Interview Letter and that it was sent to Olympian’s address notwithstanding that Davis “was well aware that [the Respondent] maintained an outside office”. He further claimed that Davis never confirmed with the Respondent that he had received the Interview Letter, until the interview on March 27, 2014 and also that Olympian never forwarded the Interview Letter to the Respondent. At the hearing of this motion, the Respondent’s counsel confirmed to the Panel that there was no problem with the content of the letter, but the issue was that it was sent in such a manner by the MFDA that the Respondent did not receive it.
- m) On January 9, 2014, Mitonidis emailed the Respondent, advising that he (Mitonidis) had been copied on the Interview Letter and requesting that the Respondent contact him to discuss its contents.
- n) On January 30, 2014, following a conversation with Davis earlier that day, Mitonidis emailed the Respondent reminding him that he had not yet responded to

Davis's request for an interview, advising that Davis had told Mitonidis that the MFDA would proceed with a "failure to cooperate" allegation and asking the Respondent to contact Davis. The Respondent replied to the Mitonidis email, saying he would contact Davis and advising Mitonidis that he had not received an email from Davis regarding the interview request. Mitonidis emailed back to the Respondent telling him that Davis "sent a formal letter to you and I e-mailed you on January 9th referencing that letter and my desire to discuss the contents of the letter".

- o) On February 3, 2014, Davis and the Respondent spoke by phone, Davis stating that he was trying to set up an interview as part of the MFDA's investigation into the Civil Suit and his outside business activities. An interview was scheduled for March 25, 2014. Davis stated in his affidavit that he does not specifically recall the February 3 phone conversation, but that it is his standard practice, when scheduling an interview, to ask whether the Approved Person will be attending with counsel.
- p) On February 18, 2014, following correspondence among Davis, Mitonidis and the Respondent about documents that Davis had requested but not yet received, Davis and the Respondent spoke by phone and the Respondent advised Davis that he would contact his lawyer to obtain copies of the requested documents.
- q) Through an exchange of emails between Davis and The Respondent, the date for the interview was changed to March 27, 2014.
- r) On March 27, 2014, Davis conducted the Interview with the Respondent. Ms. Maria Abate, MFDA counsel was also present. At the outset of the interview, Davis advised the Respondent that he was conducting an investigation into the Respondent's activities as a mutual fund sales person, that the investigation was being conducted pursuant to section 22.1 of MFDA By-law No. 1, that the investigation could result in disciplinary action against him and asking the Respondent whether he had any questions. Davis asked the Respondent whether he had received the Interview Letter and the Respondent stated that he had not. The transcript does not indicate that the Respondent was advised that he could have counsel, although that is the MFDA standard practice.

- s) On March 28, 2014, Davis wrote to the Respondent regarding undertakings the Respondent had given at the interview and reiterating that the MFDA was investigating the Respondent's activities as a mutual fund sales person.
- t) On or about July 24, 2014, Davis completed his investigation and presented his file for discussion before a committee of MFDA Enforcement management who made a decision to escalate the matter to the Litigation group for consideration as to whether disciplinary proceedings should be commenced against the Respondent.
- u) On or about July 25, 2014, Davis wrote the Respondent by registered and regular mail, advising that the matter had been escalated to MFDA's Litigation group. The registered mail was not claimed and the regular mail was not returned.
- v) Subsequently, the MFDA commenced formal disciplinary proceedings against the Respondent by Notice of Hearing dated May 20, 2015 (the "NOH").
- w) The Respondent issued a Notice of Hearing Response which was not dated, but the Panel was advised that it was received by the MFDA in June 2015 (the "NOH Response").
- x) The Notice of Motion which gave rise to this hearing was dated April 28, 2016.

D. ISSUES

14. As outlined in paragraph 2 above, the Respondent asserts three bases for his claim of procedural unfairness:

- a) lack of proper notice by the MFDA, at and prior to the Interview, that he was under investigation regarding a potential disciplinary hearing, in particular that he did not receive the Interview Letter and that the information given at the Interview was obtained and used improperly to bring disciplinary proceedings against him;
- b) he was misled by Olympian into providing documents which would be used by the MFDA in this case and Olympian misled him to conclude that the MFDA were not investigating a potential MFDA complaint against him; and

- c) because he was not properly notified that the MFDA was pursuing a disciplinary case against him, he was denied his right to counsel.

15. The MFDA asserts that the Respondent was not denied procedural fairness because he was properly notified at and prior to the Interview that he was under investigation by the MFDA in regard to potential disciplinary proceedings regarding his outside business activities and personal financial dealings with clients, that he was not misled into providing documentation to the MFDA and in fact was obliged to do so pursuant to section 22.1 of MFDA By-law No.1, was not misled regarding the nature of the MFDA investigation and that he was properly notified of his right to counsel.

16. Proper Notice

- a) The Respondent's position is that he did not receive the Interview Letter and that Davis sent the Interview Letter to Olympian's address notwithstanding that he knew that the Respondent "maintained an outside office". The Panel finds that, even if Davis knew that the Respondent maintained an outside office, the Interview Letter was properly sent and that the Respondent had ample opportunity to obtain the Interview Letter prior to the Interview. The MFDA sent the Interview Letter to Olympian's address because that was the Respondent's address for service shown on his National Registration Database ("NRD") which was an exhibit to Davis' affidavit in support of the MFDA's position in this hearing. Therefore the MFDA properly sent the Interview Letter to the Respondent's address for service on their records. Even if Davis knew of another address where the Respondent carried on an outside business, he had no reason to think the Respondent would not receive the Interview Letter at Olympia's address.
- b) In addition, the procedural steps taken by the MFDA, as outlined in paragraph 12, show that the Respondent had many opportunities to obtain the Interview Letter well in advance of the Interview, but did not do so through his own neglect or inadvertence. For example, in the email dated January 9, 2013 (one day after the

Interview Letter was sent), Mitonidis advised the Respondent that he had been copied on the Interview Letter and requested that the Respondent contact him to discuss its contents (paragraph 12(l)); on January 30, 2013, Mitonidis emailed the Respondent advising that “you have failed to respond to [Davis’s] request for an interview.” In another email the same day, in response to the Respondent telling Mitonidis that he had not received an email from Davis, Mitonidis replied that “[Davis] sent a formal letter to you and I emailed you on January 9th referencing that letter and my desire to discuss the contents of the letter.” (paragraph 12(m)); On February 3rd, Davis and the Respondent spoke by phone regarding a date for the Interview and this phone call was followed by emails from Davis regarding the Interview (paragraph 12(n)). On none of these occasions did the Respondent ask to see the Interview Letter. Furthermore, at the outset of the Interview, the Respondent said that he had not received the Interview Letter, but did not ask to see a copy (paragraph 12(q)). It is important to note that, at the hearing, Respondent’s counsel told the Panel that there was no problem with the content of the Interview Letter, i.e. that it contained proper notice to the Respondent of the potential disciplinary matters being investigated by the MFDA, but the issue was simply the manner in which it was sent.

- c) The Panel’s conclusion is that the Interview Letter properly notified the Respondent about the investigation and its purpose.

17. Deception Regarding the Investigation

- a) In addition to his position regarding his failure to receive the Interview Letter, the Respondent also claims that he was misled into thinking he was not under investigation for potential discipline. The Respondent claims that he was misled into thinking that the MFDA simply wanted to clarify the situation regarding the Civil Claim, a matter which the Respondent claims was not under MFDA’s jurisdiction, but, as stated in the Respondent’s written submissions in support of the motion, the MFDA was “really fishing for matters in which the MFDA had

authority over dealer client violations. In a certain sense, this was a ‘bait and switch’.”

- b) Among other authorities, the Respondent cited Swanson v. Institute of Chartered Accountants of Saskatchewan [2007] S.J. No. 701 in support of his position. The Respondent stated that the court in Swanson “concluded that the Investigation Committee was required to advise the member at the investigative stage of the matters being investigated”, in addition to the initial complaint which gave rise to the investigation. It is the Panel’s conclusion that the Swanson case does not support the Respondent’s position; to the contrary, it supports the position of the MFDA. The Swanson court first concluded that the professional conduct committee had the power to decide that there would be a hearing before a disciplinary committee, but that the adverse effect of that decision is less than the adverse effect of a decision of the discipline committee. Therefore the professional conduct committee “owes a limited duty of fairness to the member...being investigated. It is not the broad duty of fairness ...associated with rights to complete disclosure and to a full hearing. It is a limited duty to act fairly.” It then stated that “as a matter of its limited duty of fairness, the professional conduct committee owed a duty... to advise [Swanson] of the matters being investigated... based on the principle that the ...limited duty of fairness requires giving [Swanson] an opportunity to respond.” The court found as a matter of fact that the committee investigated matters that were not in the initial complaint from a member of the public. The court then asked whether the complaint of the professional conduct committee may be broader than the initial public complaint. Referring to its mandate to protect the public interest (which is also the mandate of the MFDA), the Swanson court concluded that the “investigation of the complaint ...can include matters that, while not specified in the initial complaint, are related to the initial complaint. How closely related the matters must be is dictated... by the statutory provisions...and the circumstances of the case.” This conclusion was supported by other case cited in Swanson such as Stolen v. British Columbia College of Teachers (1995), 128 D.L.R. (4th) 453

(C.A.) The only limit specified by the court was that the investigator could not “root around for something to investigate”, unrelated to the initial complaint.

- c) In determining Davis’s disclosure obligation, the Panel noted Davis’s role in the MFDA investigation process. According to Davis’s affidavit, the role of the Investigations Department (of which Davis was a part) of the MFDA is to conduct in-depth examinations of cases including gathering documentation, conducting interviews, analyzing the information collected and preparing recommendations, all with the aim of determining whether a violation of the MFDA By-laws, Rules, Policies, or applicable securities legislation has occurred. This may lead to the file being escalated to the MFDA’s Litigation Department to consider whether to commence a disciplinary proceeding. Investigators do not determine whether a violation has occurred and do not determine whether a file should be escalated to the Litigation Department; these decisions are made by a committee of MFDA Enforcement management. Davis did not make the decision to refer the case for a hearing as did the professional conduct committee in Swanson. That decision was made by a committee of MFDA Enforcement management. Therefore, without minimizing the importance of Davis’s role in the investigation process, if anything, the obligation of Davis to disclose details of the matters he was investigating would be less than the obligation of the professional conduct committee in Swanson. However, in coming to its decision, the Panel did not make a distinction between Davis’s duty of fairness and the duty of fairness of the committee in Swanson; it is clear on the facts, that Davis and the MFDA complied fully with the limited duty of procedural fairness duty in accordance with Swanson (and other cases cited to the Panel) by disclosing that the MFDA was investigating the Respondent’s outside business activities and personal financial dealings with clients in sufficient detail that the Respondent could fairly respond. As in Swanson, this case was not at the hearing stage and the NOH had not been issued. There would be ample disclosure of further details of the MFDA case against the Respondent at these later stages of the proceedings for the Respondent to know and respond to the full case against him, which he did in fact by issuing his NOH Response.

- d) All of the correspondence among the MFDA, Mitonidis and the Respondent and the discussions at the Interview, referred to in paragraph 12, make it clear that the MFDA was investigating the Respondent's outside business activities and personal financial dealings with clients. This is so as early as the correspondence on May 2, 2013, May 15, 2013, May 22, 2013 and May 31, 2013 including the Respondent's answers to the MFDA inquiries. While the focus of that correspondence, particularly early in the investigation, was on the Civil Claim, that claim itself was based on the Respondent's outside business activities and personal financial dealings with clients and was the first such matter brought to the attention of the MFDA. The rest of the MFDA investigation was also about the Respondent's outside business activities and personal financial dealings with clients. The whole MFDA investigation, including the Civil Claim was about the Respondent's outside business activities and personal financial dealings with clients. Therefore the MFDA investigation, including the actions of Davis did not involve a "bait and switch" as claimed by the Respondent and did not involve rooting around looking for something to investigate unrelated to the initial METS Event, in accordance with the conclusions in Swanson.
- e) Furthermore, as an Approved Person within the MFDA, especially one with a number of years in the industry, the Respondent must know the MFDA rules, regulations, policies and procedures. He should have known that the MFDA gets many complaints from various sources which it investigates to determine which fall within their jurisdiction and continues to investigate those which do so. They were investigating the Civil Claim because it was within their jurisdiction (contrary to the assertion by the respondent's counsel) and raised a matter which potentially was a breach of the MFDA regulations, not because they were interested in it per se. Section 21 of MFDA By-law No.1 instructs the MFDA to "make such...investigations into the conduct, business or affairs of any...Approved Person in connection with any matter relating to compliance by such person with" the By-laws. Rules or Policies of the MFDA or any applicable securities legislation. Section 22.1 of MFDA By-law No.1 compels such Approved Person to submit a written report and produce documents in connection

with the matters being investigated. Far from being a “bait-and-switch”, the Civil Claim and other matters being investigated all related to the Respondent’s outside business activities and personal financial dealings with clients, all matters within the jurisdiction of the MFDA, and this would have been clear to the Respondent if he had paid proper attention to all the correspondence and discussions with the MFDA staff.

- f) As part of his claim that he was misled about the nature of the MFDA investigation, the Respondent pointed out that the email from Mitonidis dated August 2, 2013 which advised him that the matter had been elevated to the Investigations Department, stated that “The MFDA doesn’t have a complaint against you” and then refers to the Civil Claim. The Respondent takes the position that Mitonidis was relaying information “on behalf of the MFDA, and should be held to be acting as an agent” of the MFDA. The Respondent cited no authority to support a conclusion that Mitonidis was acting “on behalf of” or was the “agent of” the MFDA. This Panel rejects the Respondent’s position and concludes that the MFDA was properly communicating with Olympian as the Member responsible for the activities of the Respondent. The MFDA was not bound by anything stated by Mitonidis in his correspondence with the Respondent. Furthermore, at the time of the August 2nd email, the statement that “The MFDA doesn’t have a complaint against you” was literally true. The matter was still at the investigation stage as stated in the same email. An MFDA allegation against the Respondent would not arise, if at all, until much later in the proceedings when the investigation was complete and the NOH issued. If the Respondent had been paying proper attention to all the correspondence regarding an ongoing MFDA investigation involving him, he would not have been misled into thinking that the MFDA were simply looking into a matter which was outside their jurisdiction (which it was not) and into thinking that he was not being investigated in relation to potential disciplinary proceedings.
- g) The Panel also carefully reviewed all the other authorities cited by the Respondent’s counsel in support of his position. Without doing a detailed analysis in these reasons, the Panel concluded that all the cases can be distinguished on

their facts from this case. In Samatar v. Canada (Attorney General) [2012] F.C.J. 1357, the investigator actively hid from Samatar that she was under investigation before she was interviewed. In Tanaka v. Certified General Accountants' Assn of the Northwest Territories [1996] N.W.T.J. No.25, the investigator failed to inform Tanaka of the complaint and get his side of the story before deciding to refer the matter for a hearing. In McIntosh v. College of Physicians and Surgeons of Ontario [1998] O.J. No. 5222, the investigator deprived McIntosh of a statutory right to have a complaint dismissed by not informing him of the complaint until the time for his doing so had long passed. These cases do not alter the Panel's conclusion, based on all the correspondence referred to above, that Davis and the MFDA made proper disclosure to the Respondent that it was investigating his outside business activities and personal financial dealings with clients, with the potential for disciplinary proceedings against him, in sufficient detail that he had an opportunity to respond to the allegations.

18. Denial of Right to Counsel

- a) The Respondent asserted that, as part of its obligation to act fairly during the investigation, the MFDA had an obligation to explain to the Respondent that he had a right to counsel. The Respondent's written submissions state, "[the Respondent] did not receive [the Interview Letter] and therefore did not receive adequate explanation of his right to counsel. Furthermore, as admitted by the MFDA Staff, they did not advise [the Respondent] of his right to counsel at the {interview}... despite [the Respondent] informing them that he had not received [the Interview Letter]."
- b) The written submissions of the Respondent do not cite any authorities in support of his position that the MFDA violated the Respondent's right to counsel. In addition, the Respondent made no submissions about the nature of the right to counsel, the consequences of its breach or even whether such a right was an intrinsic part of the Respondent's right to procedural fairness. Respondent's counsel simply assumed that the Respondent had a right to counsel during the

investigation and argued that his right was violated by the failure of the MFDA to advise him of the right or by misleading the Respondent into concluding that he had no need for counsel. On the other hand, the MFDA counsel did not dispute that the Respondent had a right to counsel, only that the MFDA did not breach that right.

- c) Therefore, the Panel proceeded on the basis that the Respondent had a right to counsel during the investigation. The case of Findlay v. College of Dental Surgeons of British Columbia [1997] B.C.J. No. 2040, contained in the Respondent's Book of Authorities appears to support the existence of the right to counsel during the investigation portion of administrative proceedings and that the refusal of the administrative body to allow the participation of counsel was a breach of that right. Rosiek v. British Columbia (Securities Commission), 2010 BCCA 257, contained in the MFDA Book of Authorities, appears to support the same conclusion. This case will be referred to again below.
- d) Assuming that the Respondent had a right to counsel during the investigation, the issue is whether the MFDA breached that right. There is no evidence whatsoever that anyone connected with the MFDA actively refused to allow the Respondent to be represented by counsel as in the Findlay and Rosiek cases. The Respondent's case therefore rests on establishing that the MFDA misled him to reasonably believe that they were not pursuing disciplinary proceedings against him and that therefore there was no need for him to get legal counsel. The reasons of the Panel in relation to the adequacy of notice discussed above, also support the Panel's conclusion that the MFDA did not violate the Respondent's right to counsel. No one from the MFDA did anything to mislead the Respondent into concluding on any reasonable basis that they were not investigating matters which could result in disciplinary proceedings against him. To the contrary, it is clear from the correspondence outlined in paragraph 12 that the MFDA was doing so and that he was specifically told that he had the right to counsel, including in the Interview Letter. The MFDA could reasonably conclude that the Respondent had counsel since this matter arose out of a civil law suit against him and the fact that he told Davis on February 18, 2013 (paragraph 12(o)) that he would contact his

lawyer to obtain documents being requested. The right to counsel is that of the Respondent; MFDA's only obligation in relation to that right is to not deny the Respondent access to counsel or mislead him into thinking counsel was not necessary; it is not the obligation of the MFDA to advise him of that right and the failure of the MFDA to so advise the Respondent at the Interview does not violate the Respondent's right to counsel, particularly since they had previously advised him that he had the right to counsel.

- e) It is clear to the Panel that the Respondent's understanding that the MFDA was not investigating matters which could result in disciplinary proceedings against him, resulted from his own failure to pay adequate attention to the correspondence. As stated by both the Respondent and his counsel at the hearing of this motion, all of the Respondent's attention was on the Civil Claim and the MFDA was not his first priority.

E. DECISION

19. For the reasons stated above, it was the Panel's decision, given orally at the hearing on October 25, 2016, that the Respondent's motion be denied and that the case proceed to a hearing on the merits.

20. The Panel also wants to state that even if it had decided that the MFDA had breached the Respondent's right to procedural fairness, it would not have granted the relief sought by the Respondent. This Panel agrees with the decision in Rosiek on this point. In Rosiek, the applicant was required to attend an interview, but on the morning of the interview she was given an amended order which included two additional parties. She immediately and repetitively indicated that she wished an adjournment to consult with counsel but was denied the right to do so by the investigator and the interview proceeded without counsel. The court stated that:

“Not every breach of procedural fairness requires a remedy. The question for the Court would, in the end, be whether the procedural deficiencies resulted in an unfair hearing.”

and denied Rosiek’s claim for relief. This conclusion is supported by the other cases cited by MFDA counsel, in particular Re YBM Magnex International 2001 LNONOSC 233 and Re Azeff (supra) on whether a stay of proceedings should be granted

21. In this case, the Respondent objected to matters which took place at the investigation stage of the proceedings where a lesser degree of procedural fairness is required than at the hearing stage. If the MFDA decided to proceed with a disciplinary hearing, further details of their complaints would be, and were, disclosed to the Respondent, with full opportunity to respond to the MFDA complaints which he did in his NOH Response in June 2015. At this point the Respondent has the full range of procedural fairness rights. Even if there were procedural unfairness at the investigation level as claimed by the Respondent, and which the Panel decided there was not, that would not result in an unfair hearing.

DATED this 13th day of January, 2017.

“Frederick H. Webber”

Frederick H. Webber
Chair

“Brigitte J. Geisler”

Brigitte J. Geisler
Industry Representative

“Guenther W. K. Kleberg”

Guenther W. K. Kleberg
Industry Representative

DM 516447 v1