Capital Markets Tribunal
Tribunal des marchés financiers
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Citation: *Marrone (Re)*, 2022 ONCMT 13
Date: 2022-06-13
File No. 2020-16

**IN THE MATTER OF**

**AURELIO MARRONE**

**REASONS AND DECISION**

**(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

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| **Adjudicators**: | Lawrence P. Haber (chair of the panel)<br>Mary Anne De Monte-Whelan<br>Craig Hayman | |
| **Hearing**: | By videoconference, May 31, 2021, June 3, 7, 9, 11, 16, 17, 2021, July 22, 2021, September 2, 24, 2021, October 5, 2021; final written submissions received December 15, 2021 | |
| **Appearances**: | Michael Brown<br>Francis Roy<br>Michelle Vaillancourt | For Staff of the Ontario Securities Commission |
| | Murray Stieber<br>Christopher Afonso | For Aurelio Marrone |

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## REASONS AND DECISION

### 1. OVERVIEW

[1] The duty of any registrant, including any individual registrant, to act fairly, honestly and in good faith to their client, is a fundamental obligation under Ontario securities law and is a cornerstone of the relationship between an individual registrant and their client. This duty is engaged and of particular importance when an actual conflict of interest or the potential for conflict of interest presents in the context of the relationship between a registrant and their client. When the client is a vulnerable client, the duty to act fairly, honestly and in good faith is of even greater importance and needs to be front and centre in the registrant's thoughts and actions in relation to the client.

[2] The manner in which this duty is to be addressed with respect to actual or potential conflicts by Mutual Fund Dealers Association of Canada (**MFDA**) members and their Approved Persons, is set forth in the MFDA Rules and member firm policies and procedures. These Rules, policies and procedures require an individual registrant to engage with their firm at the earliest moment when an issue arises that raises a conflict of interest or the potential for conflict of interest. The MFDA Rules set out a tripartite test, requiring the registrant to engage as soon as they know or reasonably ought to know, that there is an actual or potential conflict of interest. The test is well designed to ensure that such issues are resolved objectively in dialogue with the firm and not subjectively by the registrant who has an actual or potential conflict. This is to ensure that the firm's resources and objectivity are brought into these circumstances and to ensure the client's interests are protected in accordance with the duty owed to the client by the individual registrant and the firm.

[3] The respondent in this matter is Aurelio Marrone (**Marrone**), a mutual fund registrant for over 20 years, and the individual responsible for the accounts of client "MU" at IPC Investment Corporation (**IPC**), an MFDA member firm.

[4] During the material time, approximately March 2017 until her death on May 19, 2017, MU was an elderly widow, inexperienced and unsophisticated financially,

and she was dying of pancreatic cancer. Marrone was her financial adviser and close friend.

[5] Marrone was named the sole beneficiary of MU's estate 10 days before she passed away. Marrone also accepted appointments as her powers of attorney for personal care and property. The will and powers of attorney were executed at MU's bedside in a palliative care unit in hospital.

[6] At the time of her death, MU's estate was valued at more than $2 million, including approximately $1.7 million in investments that were managed by Marrone.

[7] Staff of the Ontario Securities Commission (**OSC**) alleges that Marrone:

a. failed to comply with MFDA Rules and IPC's policies and procedures; and

b. breached his obligation under subsection 2.1(2) of OSC Rule 31-505 to deal with clients fairly, honestly and in good faith;

both of which are contrary to the public interest.

[8] For the reasons set out below, we find that Staff has proven its case and Marrone failed to comply with MFDA Rules and IPC policies and procedures and his obligation to deal with his client fairly, honestly, and in good faith, pursuant to OSC Rule 31-505.

## 2. FACTUAL BACKGROUND

[9] Marrone was registered as a mutual fund salesperson (now known as a dealing representative) for 20 years with IPC and its predecessor firm, Associated Financial Planners Limited, which amalgamated with IPC in May 2001.

[10] On May 13, 2001, Marrone signed an Agreement of Approved Person whereby he submitted to the MFDA's jurisdiction to regulate his conduct and activities as a registrant in the mutual fund industry. He was terminated by IPC in December 2017 for the events at issue in this proceeding.

[11] Marrone managed a total of approximately $6 million in mutual fund investments on behalf of approximately 150 clients. One of his clients was MU. MU immigrated to Canada from Spain in the late 1960s or early 1970s. She had a grade school education and worked as a housekeeper.

[12] Marrone first met MU in 1986 after her husband responded to Marrone's advertisement for tax preparation services. Marrone assisted MU and her husband with their personal income taxes commencing in 1986, which he continued to prepare up until both of their deaths. Marrone testified that he formed a close friendship with MU's husband after the two bonded over sports and the stock market. Over the years they became close friends, and both MU and her husband attended Marrone's wedding in 2003.

[13] Marrone testified that following her husband's death in 2004, he would speak with MU on a weekly basis and would assist her with activities such as driving her to cataract surgery and arranging her travel to Spain.

[14] Marrone became MU's financial advisor in April 2008 when she transferred her spousal RRSP valued at $373,594.50 from CIBC Wood Gundy to IPC. Later that year she transferred an additional $900,000 from CIBC to IPC. By December 2017, when Marrone was terminated by IPC, the aggregate value of MU's accounts with Marrone at IPC was $1,710,527.06.

[15] In February 2017 MU was diagnosed with terminal pancreatic cancer. Following her diagnosis, her long-time friend MA moved into MU's condominium to assist with her care. MA testified that she called Marrone on either March 10 or March 11, 2017, and informed him that MU had pancreatic cancer and was given only three months to live. MA, with assistance from her daughter SC, cared for MU in her home until she was admitted to palliative care on May 1, 2017.

[16] In late-March or early-April 2017, MU asked for Marrone's assistance with her estate. Marrone provided her with the names of three different lawyers, and MU selected Romeo D'Ambrosio, an experienced wills and estates lawyer, from the list. Marrone arranged for D'Ambrosio to be retained, and scheduled meetings between D'Ambrosio and MU to enable D'Ambrosio to prepare the estate documents, which included a new will, and powers of attorney for personal care and property.

[17] The estate documents were ultimately executed by MU on May 9, 2017. MU passed away ten days later, on May 19, 2017. In the estate documents, Marrone was named as Power of Attorney for Property and Power of Attorney for Personal Care, as well as alternate executor. Marrone was also named in MU's will as the

sole beneficiary of her estate. At the time of her death, the value of MU's estate was over $2 million.

[18] On September 28, 2017, IPC opened an investigation into Marrone upon receiving a complaint letter from MA's son-in-law (SC's husband) FC. FC, who is also a mutual fund registrant, advised IPC that Marrone had been named as a beneficiary under MU's will. The MFDA subsequently began investigating Marrone on October 6, 2017, after IPC filed a Member Event Tracking System report in response to the complaint.

[19] Marrone was terminated by IPC on December 12, 2017, on 30 days' notice, effective January 11, 2018.

[20] The Commission's involvement in this case arose at the request of the MFDA as a result of the MFDA's lack of subpoena power to compel production of records or attendance at regulatory interviews of individuals or entities not registered with or through MFDA Members. Specifically, the MFDA required the Commission's assistance to compel D'Ambrosio, the estates lawyer who drafted MU's estate documents, to produce MU's client file.

### 2.1 Relevancy of evidence

[21] There was a substantial amount of evidence put forward by the parties in this proceeding, some of which was relevant to the issues we are to decide, which are set out below, and some of which was not. MU's legal capacity to make a will is not an issue before us in this proceeding, although, at least inferentially, a great deal of evidence was led to this effect. While we will not be deciding the issue of MU's capacity to make a will, whether MU was a vulnerable investor, is a relevant issue for us.[1] Evidence before us in this proceeding, including evidence relating to the making of her will and powers of attorney may be relevant to our determination as to her vulnerability as a client.

[22] In these reasons for our decision, we will not address evidence that was lead that is not relevant to the issues that we must decide. Evidence that we did not find relevant to the proceeding includes:

[1] *Tonnies (Re),* 2005 CanLII 77675 (CA MFDAC) (***Tonnies***).

a. *MU's 2008 RRSP designation*. In 2008 when MU transferred her RRSP to IPC Marrone was named as the beneficiary of the account on the RRSP application form. Although the application was approved and the RRSP account was opened, the designation of Marrone as beneficiary was never implemented. Instead, MU's deceased husband was named as the designated beneficiary on the spousal RRSP account by the fund company. Marrone took no steps to correct this error. Staff says this is "compelling circumstantial evidence" that Marrone knew as early as 2008 that it was, "against IPC policies and procedures and the MFDA Rules for him to be named as a designated beneficiary on a client account."[2] We respectfully disagree and find that this incident is unrelated to the allegations we must decide in this proceeding.

b. *The extent of MU's friendship with MA and her daughter SC*. We accept that MA and SC supported and cared for MU in her final days. They treated her with kindness and acted in her best interest. We find any supposed "gaps" in their friendship prior to 2004 and their lack of knowledge relating to MU's relationship with Marrone to be completely irrelevant to the issues before us.

c. *Issues relating to the custody of MU's ashes and her funeral*. MA and SC testified regarding the custody of MU's ashes and the fact that MU did not have a funeral. While no doubt important to MU's family and loved ones, these issues have no bearing on the issues we are to decide in this proceeding.

## 3. ISSUES

### 3.1 Issues raised by Staff's allegations

[23] As stated above, Staff alleges that Marrone:

a. failed to comply with MFDA Rules and IPC's policies and procedures; and

b. breached his obligation under subsection 2.1(2) of OSC Rule 31-505 to deal with clients fairly, honestly and in good faith;

both of which are contrary to the public interest.

[24] The issues that we must decide are:

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[2] Written Submissions of Staff of the Ontario Securities Commission, dated November 8, 2021 at para 46.

a. Did Marrone fail to comply with MFDA Rules and IPC policies and procedures? And,

b. Did Marrone breach his obligation under OSC Rule 31-505 to deal with clients fairly, honestly and in good faith?

[25] In conducting our analysis of these two issues we will review the specific MFDA Rules and the IPC policies and procedures Marrone is alleged to have breached, and the aggravating factors we considered in our analysis of Commission Rule 31-505.

[26] Before we conduct that analysis, we will conduct an analysis of several preliminary issues related to the proper forum for these proceedings, witness credibility, the MFDA investigation, and the IPC investigation, all of which inform our decisions on the issues raised by Staff in the Statement of Allegations.

## 3.2 Is the Commission the proper forum for these proceedings?

### 3.2.1 Introduction

[27] The first preliminary issue we will address was first raised by Marrone in his closing submissions: is the Commission the proper forum to adjudicate this matter? Marrone submits that it is not.

[28] Having reviewed Marrone's and Staff's submissions on this issue, including additional sur-reply submissions from Marrone, we conclude that the Commission has jurisdiction to decide this proceeding, and therefore it is the proper forum.

### 3.2.2 Analysis

[29] As noted above, this issue was first raised in Marrone's closing submissions. Marrone argues that the MFDA is the proper forum to adjudicate his compliance with MFDA Rules and IPC policies and procedures. As a self-regulatory organization under the *Securities Act*[3] (the **Act**), the MFDA is responsible for enforcing its own Rules, which arises from the contractual relationship between Marrone and the MFDA, as the MFDA Rules are not empowered by statute.

[30] Marrone submits that the jurisdiction of the Commission is limited to enforcing Ontario "securities law", which is a term defined in the Act. He submits that that

[3] *Securities Act*, RSO 1990, c S.5.

definition does not include either the MFDA Rules or the policies of employers like IPC. Therefore, as the MFDA Rules are not included in "Ontario securities law" the Commission cannot properly make findings with respect to whether he complied with MFDA Rules or IPC Policies.

[31] Marrone also argues that this Panel must rule on whether his conduct was "unfair", "dishonest" or "bad faith" based on the meaning of those terms and it is insufficient to point to a breach of IPC Policies or MFDA Rules as a shortcut to meeting this high threshold required by section 2.1(2) of Commission Rule 31-505.

[32] Staff disagrees with Marrone's analysis of the Act and takes the position that the MFDA does not have exclusive jurisdiction to determine MFDA Rules. Staff submits that nothing in the wording of subsections 2.1(4) or 21.1(3) of the Act suggests that the MFDA has exclusive jurisdiction to determine breaches of MFDA Rules. We agree with this submission and find that the MFDA does not have exclusive jurisdiction to determine breaches of MFDA Rules.

[33] Staff also submits that any assessment of the potential breach by an MFDA Approved Person of s. 2.1(2) of Commission Rule 31-505 must necessarily be made in the context of the MFDA Rules governing the Approved Person's conduct in relation to their clients. Such an assessment will often require a determination of whether those MFDA Rules have been complied with. We agree with this submission and consider the breaches of MFDA Rules and IPC policies and procedures as one factor in our analysis of Commission Rule 31-505.

[34] In support of their position, Staff relies on the Commission's Order, as amended, recognizing the MFDA as a self-regulatory organization in accordance with ss. 21.1(1) and (2) of the Act (the **MFDA Recognition Order**), which governs the specific regulatory functions of the MFDA.

[35] The MFDA Recognition Order states:

> **7. Compliance by Members with MFDA Rules**
>
> (A) The MFDA shall enforce, as a matter of contract between itself and its members, compliance by its members and their Approved Persons with the rules of the MFDA and, to assist the Commission with carrying out its regulatory mandate, the MFDA shall cooperate with the Commission in ensuring

compliance with applicable securities legislation relating to the operations, standards of practice and business conduct of members and Approved Persons, without prejudice to any action that may be taken by the Commission under securities legislation.

…

**8. Discipline of Members and Approved Persons**

(A) The MFDA shall, as a matter of contract, have the right to and shall appropriately discipline its members and their Approved Persons for violations of the rules of the MFDA and, to assist the Commission with carrying out its regulatory mandate, shall cooperate with the Commission in the enforcement of applicable securities legislation relating to the operations, standards of practice and business conduct of the members and Approved Persons, without prejudice to any action that may be taken by the Commission under securities legislation.[4]

[36] Staff submits that these sections of the MFDA Recognition Order clearly contemplate that the MFDA and the Commission have concurrent and overlapping jurisdiction with respect to the MFDA's regulatory functions. Notably, both s. 7(A) and s. 8(A) of the Recognition Order conclude with the words: "without prejudice to any action that may be taken by the Commission under securities legislation."

[37] In his sur-reply submissions Marrone interprets the MFDA Recognition Order differently, arguing that it does not create a concurrent jurisdiction, but rather sets out a bifurcated jurisdiction whereby enforcement steps may be taken by both regulators separately. We reject this interpretation of the MFDA Recognition Order and adopt Staff's interpretation.

### 3.2.2.a Case Law

[38] In his submissions Marrone warns that there is no example in the past of the Commission ever making independent findings of breaches of the MFDA Rules and/or of employer policies and using such findings to satisfy Rule 31-505. Any findings of this nature, he submits, ought to have been before the MFDA. Any

[4] MFDA Recognition Order, April 1, 2021.

findings of this nature by the Commission "would be supplanting the jurisdiction given to the MFDA."[5]

[39] Staff cites two cases where the Commission has independently determined breaches of SRO Rules: *Re Argosy Securities Inc*[6] and *Re Christopher Reaney*.[7]

[40] In *Argosy* the Commission upheld a Director's decision that found that Argosy, an investment dealer, and Keybase Financial Group Inc., a mutual fund dealer and exempt market dealer, had failed to comply with various provisions of Ontario securities law. Argosy and Keybase subsequently requested a hearing and review of the Director's Decision.[8]

[41] In reviewing the evidence gathered in review of the respondents' conduct by the SROs, the OSC Hearing and Review Panel found that the respondents were in breach of National Instruments 31-105 and 31-505, specifically noting that they:

> failed substantially to comply with applicable SRO rules, thereby contravening the requirement in subsection 2.1(1) of NI 31-505 that the firms deal with their clients fairly, honestly and in good faith.[9]

[42] In *Reaney*, another Hearing and Review of a Director's Decision, the OSC Panel ruled on compliance with MFDA Rules and Member policies and procedures in a situation where the SRO had explicitly elected not to pursue any enforcement in relation to the conduct at issue.

[43] Christopher Reaney was a mutual fund registrant who had been investigated by the MFDA for a breach of MFDA Rules. Although MFDA Staff was of the view that there was evidence to support a finding of a breach of MFDA Rule 2.1.1(b), MFDA Staff elected not to commence disciplinary proceedings before an MFDA Panel and instead sent him a warning letter, copied to Staff of the Commission[10]. OSC Staff then conducted its own investigation and decided to seek a suspension

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[5] Written Submissions of the Respondent, dated November 23, 2021 at para 6.
[6] *Argosy Securities Inc. and Keybase Financial Group Inc (Re)*, 2016 ONSEC 11 (***Argosy***).
[7] *Reaney (Re)*, 2015 ONSEC 23 (***Reaney***).
[8] *Argosy* at paras 1, 3.
[9] *Argosy* at para 180.
[10] *Reaney* at paras 9–10.

of Reaney's registration, notwithstanding the MFDA's decision not to take any enforcement action.[11]

[44] At a hearing attended by Reaney, the Director suspended his registration.[12] He subsequently sought a Hearing and Review of the Directors Decision.

[45] The OSC Hearing and Review Panel upheld the suspension imposed by the Director. The Hearing and Review Panel's decision was based, in part, on its finding that Reaney's conduct was a breach of MFDA Rules and his dealer's policies and procedures relating to the use of pre-signed forms. The panel also held that Reaney's conduct constituted a breach of Commission Rule 31-505.[13]

[46] In Reaney, the Panel specifically considered the Commission's decision-making authority in relation to SRO regulated conduct in circumstances where no SRO proceeding had been commenced and rejected his submission that the Panel should defer to the MFDA's decision not to commence enforcement proceedings.[14]

[47] We acknowledge that these decisions are not enforcement merits hearings, however we find that the principles articulated by the Panels in these matters are instructive in deciding the issue before us and we rely on them in coming to our decision that this panel has jurisdiction to hear this proceeding.

#### 3.2.2.b Cooperation between the MFDA and OSC

[48] MFDA Investigator Mike Ford testified that the Commission's involvement in this case arose as result of the MFDA's lack of subpoena power to compel production of records or attendance at regulatory interviews of individuals or entities not registered with the MFDA. Specifically, the MFDA required the Commission's assistance to compel D'Ambrosio, the estates lawyer who drafted MU's will, to produce MU's client file.

[49] In this proceeding the MFDA and Commission worked together. The Commission "used the enforcement capability and regulatory expertise" of the MFDA as contemplated by subsection 2.1(4) of the Act. The investigation into Marrone's

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[11] *Reaney* at paras 11-13.
[12] *Reaney* at para 16.
[13] *Reaney* at paras 155-156.
[14] *Reaney* at paras 160-161.

conduct was commenced by the MFDA, MFDA investigators remained involved in the investigation throughout and MFDA senior litigation counsel acted as co-counsel to OSC litigation counsel.

[50] This was clearly an efficient and effective use of both MFDA and Commission resources, and resulted in a more efficient investigation, which is in accordance with the purposes of the Act.

### 3.2.2.c Issues in this proceeding are not a private dispute

[51] In his submissions Marrone characterizes the case before us as a "private dispute" and as such, this Panel lacks the public interest jurisdiction to decide this matter. He relies on *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*[15] in support of this assertion.

[52] In *Asbestos* the Commission declined to exercise its public interest jurisdiction under s. 127(1) to impose sanctions on the Québec government and SNA, a crown corporation fully owned by the province, as requested by the minority shareholders of SNA. One of the issues considered by the Commission was whether the OSC should exercise its public interest jurisdiction under s. 124(1) (now s. 127(1), para. 3) of the *Securities Act* and take away Québec's trading exemptions in the Ontario capital markets.

[53] In its analysis of the Commission's public interest jurisdiction under what is now section 127(1) of the Act, the Supreme Court of Canada describes the Commission as having "wide"[16] but not "unlimited"[17] discretion in the exercise of its public interest jurisdiction. It also recognized:

> [T]hat s. 127 is a regulatory provision. In this regard, I agree with Laskin J.A. that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). This interpretation of s. 127 powers is consistent with the previous jurisprudence of the OSC in cases such as *Canadian Tire* … in which it was held that no breach of the Act is required to trigger s. 127. It is also

[15] 2001 SCC 37 (***Asbestos***).
[16] *Asbestos* at para 39.
[17] *Asbestos* at para 41.

> consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults: see *R. v. Wholesale Travel Group Inc*.
>
> …
>
> Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.[18]

[54] Marrone argues that the issues in this case arise from his close relationship with MU and that any issues regarding MU's will are more properly the subject of civil litigation before the Ontario Superior Court.

[55] We disagree. The issues we must decide in this matter are not analogous to the issues in *Asbestos*, which was a dispute between two parties relating to the price of shares. While Marrone may view this as dispute between himself and MU's friends and family, or even between himself and MU's lawyer D'Ambrosio, this proceeding relates to his alleged breaches of MFDA and Commission Rules, which engages the Commission's public interest jurisdiction.

#### 3.2.3 Conclusion

[56] We are persuaded that the Commission has jurisdiction to hear this matter based upon our reading of the Act, the MFDA Recognition Order and the case law put before us. We do not find that the MFDA and Commission cooperated inappropriately, nor are we persuaded by Marrone's submission that the matters before us are related to a private dispute. We will now move on to consider the issues raised by Staff's allegations in this proceeding.

### 3.3 Credibility

#### 3.3.1 Marrone

[57] Broadly speaking, there are two stories in this proceeding. The one told by Marrone, and the one told by nearly everyone else. We do not find Marrone to be a credible witness regarding much of his key evidence in this proceeding. We do

[18] *Asbestos* at paras 42, 45.

not believe the story he is telling, and the only person who could corroborate his evidence is MU, who is no longer with us.

[58] Marrone attempted to support his story by having his wife MM testify. While we have no reason to doubt MM's testimony about her husband's close relationship with MU, it is not useful evidence to us in determining whether her husband breached MFDA Rules, IPC policies and procedures, and Commission Rule 31-505. In fact, we accept Marrone's evidence that he had a close relationship with MU, but as we note below in [174], we view this as an aggravating factor and not as an exculpatory factor.

#### 3.3.2 D'Ambrosio

[59] We found D'Ambrosio to be a credible and reliable witness, especially when his evidence was supported by contemporaneous notes or memoranda.

#### 3.3.3 Bartolini

[60] Similarly to D'Ambrosio, we found his law clerk Nancy Bartolini to be a credible and reliable witness, whose evidence was supported by contemporaneous notes.

#### 3.3.4 Staff's other witnesses

[61] We found the MFDA Investigator Mike Ford, the IPC Compliance Officer Jens Scharge and MU's employer CR to be credible and reliable witnesses. We place less weight on the evidence of MA and SC as it relates to the legal issues before us, however, we found their testimony relating to MU's past, her character, and her last days to be reliable and helpful evidence to us in determining MU's vulnerability.

### 3.4 MFDA Investigation

[62] Mike Ford is a manager with the MFDA and the person responsible for investigating Marrone's conduct. The MFDA investigation began on October 11, 2017, after the MFDA was informed of IPC's investigation. Ford has been employed by the MFDA since 2005, working in an investigative capacity for sixteen years. Staff filed an affidavit sworn by Ford in this proceeding on April 20, 2021. Ford also testified in the Merits Hearing.

[63] In his submissions Marrone argued that the MFDA's investigation and the evidence obtained through that investigation was tainted with procedural errors during the course of the investigation that resulted in the tainting of evidence from witnesses. Specifically, he took issue with the joint interviews of MA and SC.

[64] Ford admitted under cross-examination that it is preferable to interview witnesses separately to avoid the possibility of collusion, and to record the entirety of any interviews conducted. During the joint interviews of MA and SC those procedures were not followed.

[65] While it is not ideal that these interview procedures were not followed in this one instance, we do not find it to be a material error. We have relied very little on the evidence of MA and SC in coming to our decision on the legal issues in this case, and the minor irregularities in this aspect of the investigation do not impact our decision.

### 3.5 IPC Investigation

[66] Jens Scharge is a senior complaints and investigations officer with IPC, responsible for resolving client complaints and conducting investigations on behalf of IPC. Scharge testified to the investigation he conducted of Marrone on behalf of IPC following a complaint it received in October 2017 with respect to Marrone's conduct with MU.

[67] In late November 2017, IPC concluded its investigation. Scharge prepared an investigation report dated November 20, 2017, and concluded that Marrone should be terminated without cause for rule violations and for becoming the sole beneficiary of MU's estate.

[68] Marrone's submissions detail numerous issues with the IPC investigation that he submits should lead us to the conclusion that Scharge's evidence and the conclusions reached in his November 20, 2017 report are not accurate or reliable. We will address several of these issues below.

[69] First, Marrone submits that Scharge was close-minded to exculpatory explanations for Marrone's behaviour, such as failing to include language in his report to reflect that Marrone stated that he was unaware of previous wills made

by MU in 2012, that Marrone's nephew didn't take possession of MU's condominium, and that Marrone was unaware he had been named as sole beneficiary until after MU's passing.

[70] The first two issues relating to previous wills and possession of MU's condominium are irrelevant to our decision in this proceeding. However, we heard a great deal of evidence relating to the issue of when Marrone became aware of his designation as sole beneficiary of MU's estate. Scharge's failure to include this information in his report does not impact our analysis of this issue, which is based on documentary and oral evidence put before us in this proceeding.

[71] Second, Marrone submits that Scharge's interview techniques were inconsistent. He failed to record a call with Marrone on October 3, 2017, and his notes were not verbatim. No evidence was lead that would inform us as to the required standard to be met for an internal compliance examination at a mutual fund dealer such as IPC. In our view, while some of the investigation techniques used by Scharge could have been improved, the evidence before us does not point to an ineffective or unfair investigation.

[72] Finally, Marrone submits that Scharge's investigation failed to consider the close relationship between MU and Marrone. As we conclude later on in our decision at [174], the personal relationship between MU and Marrone is irrelevant to the issue of whether Marrone breached IPC policies and MFDA and Commission rules. Similarly, Scharge's failure to consider this issue was irrelevant to the issue he was investigating, namely, a breach of IPC policies and procedures and MFDA Rules.

[73] As stated above at [61], we found Scharge to be a credible witness and his investigation into the issues before for us was adequate.

## 4. ANALYSIS

### 4.1 Did Marrone fail to comply with MFDA Rules and IPC policies and procedures?

#### 4.1.1 Introduction

[74] Marrone has spent his entire career as a mutual fund salesperson with the same company, IPC, and its predecessor Associated Financial Planners Limited. During the material time he was also a licenced insurance agent and had a tax preparation business. On May 13, 2001, Marrone signed his Agreement of Approved Person whereby he submitted to the MFDA's jurisdiction to regulate his conduct and activities as a registrant in the mutual fund industry. In particular, Marrone agreed to be bound by and to observe and comply with MFDA Rules as they are amended from time to time.

[75] As a registrant working with IPC, Marrone was also bound to comply with IPC rules, policies and procedures. Each year he was registered with IPC, Marrone completed an IPC compliance questionnaire in which he affirmed that he had read and understood IPC rules, policies, and procedures, and that he agreed to abide by those rules, policies, and procedures. In December 2016, Marrone completed an IPC compliance questionnaire affirming that he had "read, fully understood, and will comply with" the requirements in IPC's National Policies and Procedures Manual 4.2 (**IPC Manual 4.2**) and the Compliance Bulletins issued by IPC from time to time.

[76] IPC Manual 4.2 was the governing policy manual at IPC from April 2015 through to June 2017, which encompassed the material time. The IPC Manual 4.2 included policies and procedures relating to integrity, discretionary trading, powers of attorney, executor of a client's estate, conflicts of interest, monetary or non-monetary benefits, and gratuities, all of which are relevant to this proceeding.

#### 4.1.2 Did Marrone breach MFDA Rule 2.3.1(a)?

[77] Staff has alleged that Marrone failed to comply with MFDA Rule 2.3.1 (a) "Control or Authority" This Rule states,

> No Member or Approved Person shall have full or partial control or authority over the financial affairs of a client, including: (i) accepting or acting upon a power of attorney from a client; (ii) accepting an appointment to act as a trustee or executor of a client; or (iii) acting as a trustee or executor in respect of the estate of a client.[19]

[78] On consideration of the facts set out below, we find that Marrone breached MFDA Rule 2.3.1 (a) by accepting a power of attorney for property from his client MU and by failing to renounce an appointment to act as alternate executor in her will. We will address each of these breaches in detail below.

#### 4.1.2.a Facts

#### 4.1.2.a.i MU's employers offer estate planning assistance

[79] In February 2017, MA informed CR, MU's employer, of MU's terminal pancreatic cancer. CR and her husband IR (the **Rs**) had employed MU as their housekeeper for over 30 years and like MU, CR immigrated to Canada from Spain. IR, CR's late husband and a former senior executive at CIBC, knew MU's husband from his role as the maître-d' at the CIBC executive dining room. After MU's husband passed away in 2004, the Rs helped MU arrange his affairs, with the assistance of their personal financial manager, GS. They wanted to assist MU in arranging her affairs as well, as they were concerned MU would be unable to do it herself. CR testified that she felt MU did not understand how sick she was, nor the process involved in putting her affairs in order. The Rs contacted GS and arranged a meeting with MU at their home on March 10, 2017, to offer assistance and advice to her regarding her estate.

[80] CR testified that at the March 10 meeting, GS recommended to MU that she have a will and powers of attorney prepared, but MU responded that she did not need her own will because she had her husband's. GS also suggested that MA be MU's power of attorney for health with CR as an alternate, which MU agreed to at the meeting. According to CR, MU stated that she wanted her estate to go to her niece who lived in New York.

[19] MFDA Rule 2.3.1 (a) "Control or Authority".

[81] Following the March 10 meeting, GS emailed and telephoned Marrone in relation to MU's estate planning.

[82] An email from GS to Marrone dated March 17, 2017, describes a phone call he had with Marrone on March 16, 2017, as well as his understanding of the "facts". In the email GS mentions that during the phone call Marrone advised that contrary to what MU had told GS and the Rs at their meeting on March 10, he was under the impression that MU did have a new will and Powers of Attorney for Property and Personal Care drafted after her husband passed away. GS thanks Marrone in his email for, "agreeing to "tactfully" do some checking to see if these documents do exist, and that they are up to date before getting back to me. The most important thing that I got from the meeting last Friday was that [MU] wants the bulk of her Estate to go to her niece so if this is not the case, then she will need to give instructions for a new Will."

[83] Initially Marrone testified that his call with GS was in relation to a request from GS for information about MU's investments, which he says MU instructed him not to provide to him, and not estate planning matters. Marrone later admitted on cross-examination that in the call with GS in March he had indicated to GS he thought MU had a new will and powers of property and personal care drafted after her husband passed away.

[84] Ultimately Marrone did not assist GS with his request, testifying that MU instructed him not to respond.

[85] CR testified that she also called Marrone after the March 10 meeting to advise him that MU had given her permission to ask him to relay details of her assets, and that MU had agreed to allow the Rs and GS to arrange her affairs. She testified that Marrone cut the conversation short, did not provide the requested information, and CR never spoke to him again.

[86] Shortly after CR's call with Marrone, MU advised CR that she had changed her mind regarding her estate planning, without providing any further details. She advised CR that she would rather Marrone organize her affairs.

#### 4.1.2.a.ii Romeo D'Ambrosio Retained to Draft Estate Documents

[87] According to Marrone's testimony, sometime in April 2017 MU called Marrone to ask for the name of a lawyer who could prepare her will. Marrone provided three names for lawyers and MU selected Romeo D'Ambrosio.

[88] Marrone and D'Ambrosio corresponded by email to set up a meeting with MU to discuss a new will and powers of attorney. The meeting was scheduled to take place on April 28 in her apartment, as she was confined to a hospital bed there by this time.

[89] D'Ambrosio testified that when he attended at MU's apartment on April 28, he asked her about her intentions for her will and powers of attorney. MU advised him that she wanted Marrone to be the sole beneficiary of her estate and hold powers of attorney over her personal care and property. She informed D'Ambrosio that she had no previous wills. MU also authorized D'Ambrosio to disclose details of her estate planning with Marrone.

[90] During their meeting on April 28th, D'Ambrosio came to believe MU was not capable of giving him instructions on the will and powers of attorney as she was unable to provide him the value of her assets.

[91] Near the end of their meeting, Marrone arrived at MU's home. D'Ambrosio advised Marrone that he had determined that MU was not capable of giving instructions due to her inability to provide the value of her assets. In response, Marrone enquired about whether MU could refer to an account statement to improve her answers, to which D'Ambrosio agreed. However, even with this assistance MU was unable to provide the value of her assets to the lawyer.

[92] After the April 28 meeting at MU's home, D'Ambrosio informed Marrone that he would not be accepting MU's retainer as she appeared either "incapable or unwilling" to provide him instructions

[93] He went on to advise Marrone that he should get an Ontario Capacity Assessment done of MU, and if in the Ontario Capacity Assessment Officer's opinion she was competent, then he could proceed with the will. Ontario Capacity Assessment Officers are medical professionals trained in assessing testamentary capacity with respect to wills and powers of attorney. D'Ambrosio

memorialized his discussion with Marrone regarding the capacity assessment in a handwritten note dated May 1, 2017, as well as in his memo to file dated May 4, 2017.

[94] Subsequently, on the morning of May 1, 2017, MU was taken by ambulance to hospital and was admitted into the palliative care unit later that night. She remained there until her death on May 19, 2017.

#### 4.1.2.a.iii Simkovitch Capacity Letter

[95] Marrone testified that on May 1, while he was waiting with MA for MU to be admitted to the hospital, Marrone and MA were approached by a woman who identified herself as a social worker. She asked them about their relationship to MU, and whether or not MU had Powers of Attorney or a will. Marrone says that he advised the social worker that MU was "having those done". The social worker then advised him that she would prepare a letter for them to take to "who ever is preparing those documents." The social worker later provided Marrone with a letter signed by Dr. Simkovitch, one of MU's doctors. The letter referred to Dr. Simkovitch's meeting with MU on April 13, 2017, and noted that Dr. Simkovitch found MU to be "lucid and capable of making decisions regarding her care" at that time. Marrone hand delivered the Simkovitch letter to D'Ambrosio's office later that day.

[96] Having received the Simkovitch letter, D'Ambrosio proceeded to instruct his assistant Nancy Bartolini to prepare drafts of MU's will and powers of attorney, based on the instructions he received from MU at the April 28, 2017, meeting. It is worth noting that the letter did not identify Dr. Simkovitch as an Ontario Capacity Assessment officer, and the letter was silent as to her capacity to draft a will or powers of attorney, addressing only her capacity to make "decisions relating to her care".

#### 4.1.2.a.iv Draft Estate Documents emailed to Marrone

[97] On May 3, 2017, D'Ambrosio emailed the drafts to Marrone, asking him to review the drafts for "spelling, etc." and inquired as to the best time for meeting with MU for execution of the documents. The documents he emailed were:

a. A draft Continuing Power of Attorney for Property of MU, naming Marrone as the attorney for property;

b. A draft Continuing Power of Attorney for Personal Care of MU, naming Marrone as the attorney for personal care;

c. A draft Last Will and Testament of MU, naming Marrone as sole beneficiary of the estate and as alternate executor.

[98] Marrone replied to the email within 30 minutes of it being sent and proposed times for D'Ambrosio to meet with MU in the hospital the following day, May 4, 2017. Despite this quick reply, Marrone denies having opened the attachments to the email at that time.

[99] He acknowledged under cross-examination that he knew at the time that there were attachments to the email, and that he read the body of the email, including the words "Attached is a draft of her estate planning documents. Please have a look and review for spelling, etc.". He also agreed that assisting MU with her will and powers of attorney was important to him, and he considered the estate documents D'Ambrosio had asked him to review to be important documents.

[100] Marrone submits that Staff has provided no direct evidence that he opened and reviewed the attachments on May 3. Conversely, Marrone has provided no evidence that he did not open it, beyond his testimony that he did not open the attachments, which we do not find credible.

#### 4.1.2.a.v May 4, 2017, Meeting with MU

[101] On May 4, 2017, D'Ambrosio and his assistant Nancy Bartolini attended at Mackenzie Health Centre in order for MU to sign her will and powers of attorney.

[102] D'Ambrosio and Bartolini's evidence in relation to this meeting, supported by memorandums drafted on May 4 and placed in D'Ambrosio's client file for MU, differ in several important ways from Marrone's testimony relating to the event.

[103] D'Ambrosio and Bartolini describe a meeting at the hospital, the purpose of which was to have MU sign her powers of attorney and will. They say they were met by Marrone outside of MU's hospital room, and they allowed him to go in to visit with MU briefly before they visited. After Marrone exited the room, they entered, and advised MU that they were there for her to sign her will and powers of attorney. MU immediately advised them that she was not ready to sign her will as she wasn't feeling well and did not want to "mess it up." D'Ambrosio advised that he could return another time and would leave his card with her so she could call him when she felt up to it. Before leaving D'Ambrosio confirmed her instructions and advised how the will was drafted, leaving all of her estate to Marrone. Both D'Ambrosio and Bartolini stated that at this point MU seemed puzzled and stated, "Why would I leave everything to Aurelio if I have family?"

[104] At that, D'Ambrosio and Bartolini left the hospital room and reconvened with Marrone in the hospital parking lot. D'Ambrosio advised Marrone that he was unable to execute the will and advised him of MU's question regarding leaving her estate to Marrone. Both D'Ambrosio and Bartolini testified that in response Marrone said something to the effect that "she has done a complete 360."

[105] D'Ambrosio's memo to file states that Marrone then asked him why he didn't have MU sign the documents at the first meeting on April 28, at MU's home. D'Ambrosio explained to him that he could not have already prepared the will at that time because he hadn't yet received instructions from MU, which was the purpose of the April 28 meeting. He also stated the additional issue of his belief that she lacked capacity to give those instructions at that time.

[106] Marrone gives a different account of the May 4, 2017, meeting. He testified that on May 4 he arrived at the hospital to visit with MU, and about an hour later D'Ambrosio and Bartolini showed up to have MU execute her Powers of Attorney and Will. He waited outside MU's hospital room while D'Ambrosio and Bartolini were inside. Approximately 15-20 minutes later they exited the room and informed him that MU had told them that she was not prepared to sign the will.

[107] He says the conversation took place in the hallway outside MU's room, denied using the phrase, "360 degree turn" in his conversation with D'Ambrosio and

Bartolini, and denied asking D'Ambrosio why he didn't have the will executed at the April meeting.

[108] On this issue we find that D'Ambrosio and Bartolini's account of the May 4 meeting is more reliable and credible than Marrone's account. Their accounts were consistent, and the memos were made contemporaneously to the events.

[109] Marrone's version of events is not supported by evidence and is in contradiction to the statement he provided to the MFDA in 2019, which is that he had no recollection of a discussion with D'Ambrosio and Bartolini on May 4, 2017.

[110] We prefer the evidence of D'Ambrosio and Bartolini where it conflicts with the evidence provided by Marrone regarding the events of May 4.

#### 4.1.2.a.vi May 9, 2017, Signing of the Estate Documents

[111] On May 9, 2017, D'Ambrosio attended once again at MU's hospital room to execute her estate documents. This meeting was scheduled with Marrone via email. This time he was joined by his wife Emilia D'Ambrosio to act as witness, as Ms. Bartolini was unavailable.

[112] Marrone was in the room with MU when D'Ambrosio arrived. MU wanted Marrone to stay in the room while the documents were being signed and executed, but D'Ambrosio advised her this was inappropriate. Once Marrone had left the room, D'Ambrosio went through the powers of attorney. MU asked for Marrone to re-enter the room so she could ask him to accept the power of attorney designations. Marrone agreed to be both the power of attorney for personal care and for property. After Marrone left the room once more, MU signed the powers of attorney and the will.

[113] The May 9 will named Marrone as the sole beneficiary of MU's estate, which at that time was worth over $2 million. D'Ambrosio was named as Executor and Marrone was named as the alternate executor. The powers of attorney for personal care and for property named Marrone as the attorney for each. MA was the back-up attorney for personal care and D'Ambrosio was the back-up attorney for property.

[114] MU instructed D'Ambrosio to give the original copies of the will and powers of attorney to Marrone, which he did at that time. Marrone testified that D'Ambrosio

advised him at that time that he been named as the powers of attorney for health and property. He testified that D'Ambrosio never discussed the will with him.

[115] We therefore conclude that Marrone was aware that he was named as power of attorney for property and for health on May 9, 2017.

[116] Marrone claims he did not open the folder containing the will until after MU passed away, ten days later on May 19, 2017, at which point he discovered that he was the sole beneficiary and alternate executor.

[117] In our view it is more likely than not, that Marrone knew he was going to be named as the sole beneficiary and alternate executor of MU's estate as early as May 3, 2017, when Mr. D'Ambrosio emailed him the draft estate documents for his review. We believe he opened it and saw that he was beneficiary, and alternate executor at that time. By not doing anything at that time, prior to MU's death, it aggravates the breach. However, and in any event, there is no doubt that he was aware by May 19, 2017, when MU passed.

[118] Although Marrone admits having known about the Powers of Attorney by May 9, 2017, and about being named sole beneficiary on May 19, 2017, Marrone did not report or disclose this to IPC until after an IPC internal investigation was commenced against him on October 3, 2017, following the complaint received from FC.

#### 4.1.2.b Accepting powers of attorney from a client

[119] Until his termination from IPC became effective in January 2018, Marrone was a registered dealing representative with IPC, which was at all material times a "Member" of the MFDA. As such, Marrone was an "Approved Person" as defined in MFDA By-law No. 1 and was required to comply with the MFDA Rules governing Approved Persons and Members.[20]

[120] In accordance with the MFDA Rules, Approved Persons may only engage in transactions on behalf of clients based on express instructions for each transaction. Approved Persons are similarly prohibited from having any control or

[20] MFDA By-Law No 1, s 1.

authority over a client account, even with the client's consent. This prohibition specifically includes powers of attorney and executorships. When we refer to a power of attorney in these reasons, unless specified, we are referring to a power of attorney for property. The MFDA and IPC do not have restrictions around Approved Persons acting as a power of attorney for personal care for clients.

[121] The prohibition in MFDA Rule 2.3.1(a)(i) on powers of attorney is unambiguous and, subject to a limited exception for family members, absolute. It bars any Approved Person from accepting or acting on any power of attorney that would give the Approved Person full or partial control or authority over the financial affairs of a client. In a number of MFDA proceedings, MFDA Hearing Panels have considered the acceptance by an Approved Person of a Power of Attorney for a client to be a contravention of MFDA Rule 2.3.1.[21]

[122] MFDA Rule 2.3.1(a)(i) on its face clearly prohibits the acceptance of a power of attorney by an Approved Person, whether or not it is ever acted upon. In *Re Sukman*, the Approved Person accepted and held a Power of Attorney for property for a client for a period of less than 10 months, and never exercised his authority under it. Nevertheless, the Hearing Panel found the Approved Person's acceptance of the power of attorney to be "a clear and flagrant breach of Rule 2.3.1(a)."[22]

[123] IPC's policies and procedures in 2017 also included an express prohibition on the acceptance of a Power of Attorney by an IPC Advisor that would allow the Advisor to trade on behalf of an IPC client.

[124] The fact that Marrone did not exercise the Power of Attorney for property to conduct trades on MU's behalf is not relevant. The prohibition in both the MFDA Rules and IPC policies and procedures applies to the acceptance of a Power of Attorney from a client.

[125] Marrone submits that as MU signed her powers of attorney for property and health on May 9, 2017, and a power of attorney for property expires on the date

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[21] *Beckford, (Re)*, 2015 CanLII 27979 (CA MFDAC) at paras 3-4 (***Beckford 27979***); *Brauns, (Re)*, 2013 CanLII 75282 (CA MFDAC) at para 72 (***Brauns***); *Karasick, (Re)*, 2015 CanLII 39865 (CA MFDAC) at para 6 (***Karasick 39865***); *Ryan, (Re)*, 2011 CanLII 30215 (CA MFDAC) at para 12 (***Ryan***); *Sukman, (Re)*, 2016 CanLII 29420 (CA MFDAC) at para 15 (***Sukman 29420***).

[22] *Sukman 29420* at para 15.

the grantor dies, that Marrone had only had the theoretical ability to act as MU's power for attorney for the 10 days between May 9 and her death on May 19, 2017, which he characterizes as a "minor technical breach."

[126] He also submits that he did not report to IPC that he had been named as power of attorney for MU during the 10 days because he did not believe he would ever act on it. He further testified that he would have complied with IPC protocols in the event that a trade would have been required, while affirming his belief that the prospect of ever having to act on the power of attorney was "incredibly remote".

[127] We find that Marrone was aware of the prohibition on accepting Powers of Attorney for property on behalf of a client. He signed IPC's Compliance Questionnaire in December of 2016, and he acknowledged IPC's policy prohibiting such acceptance on behalf of non-family member clients in an email exchange with his supervisor in February 2017.

[128] We also find that he did not advise MU that he was prohibited from accepting her Power of Attorney for Property, though he had the opportunity to do so when she called him into her hospital room before she executed the documents.

[129] Marrone's submissions that his conduct amounted to a technical non-compliance with MFDA Rules for a period of ten days and did not cause any harm is not relevant to the issue before us, which is whether or not he complied with MFDA Rule 2.3.1(a), and therefore is a submission more properly reserved for a sanctions and costs hearing panel.

[130] We conclude that Marrone knew about and accepted the Power of Attorney for Property bestowed upon him by his client MU, and therefore breached MFDA Rule 2.3.1(a)(i).

#### 4.1.2.c Accepting an appointment to act as alternate executor of a client's estate

[131] MFDA Rule 2.3.1(a)(ii) prohibits an Approved Person from accepting an appointment to act as a trustee or executor of a client. The prohibition is on the acceptance of the position, regardless of whether it is acted upon. A separate

sub-rule, MFDA Rule 2.3.1(a)(iii), prohibits an Approved Person from acting as executor or trustee for a client's estate.

[132] Hearing Panels in a number of MFDA proceedings have considered the acceptance of an executorship for a client's will to be a breach of MFDA Rules.[23] As the prohibition is on acceptance of the position, it applies equally to all forms of executorships, including "back-up" or "alternate" executorships which are contingent on the primary executor failing or refusing to take on the role. In *Re Lambros*, the MFDA Hearing Panel found that the respondent had breached MFDA Rules in accepting the role as alternate executrix even though the primary executrix never relinquished the role.[24]

[133] Marrone knew he was alternate executor, as early as May 3, but in any event no later than May 19 when he admits to reviewing MU's will. MU was Marrone's client until the day of her death, following which her estate became his client, and he continued to manage the investments held by MU's estate after her death. Marrone never refused or renounced his position as back-up executor and he failed to notify IPC that he had been named an alternate executor of a client's estate, an estate whose finances he now managed.

[134] Marrone submits that as he did not "accept" or "act" as an alternate executor of MU's estate, he cannot be in breach of MFDA Rule 2.3.1(a).

[135] He submits that as he was not consulted about being named as alternate executor, he cannot be found to be in breach of the rule. And in any event, all a registrant could do if named as an alternate executor is renounce the appointment. As the executor took up the role, Marrone never even had the opportunity to do so as the alternate executor role was never activated.

[136] We reject these submissions. As we found above at [117], Marrone knew of his appointment as alternate executor May 3, 2017, but in any event by no later than May 19, 2017, when MU passed away and he admitted to reviewing the will. Yet he failed to report the appointment to IPC and took no steps to renounce the appointment.

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[23] *Beckford 27979* at Schedule "A", paras 24, 32; *Brauns* at para 72; *Taylor 96764, (Re)* 2019 CanLII 96764 (CA MFDAC) at para a.
[24] *Lambros, (Re)*, 2011 CanLII 30213 (CA MFDAC) at para 14 (***Lambros***).

[137] For our analysis of this breach, it does not matter that Marrone did not become the executor and act on the appointment.

[138] We conclude that Marrone knew of his appointment as alternate executor in his client's will by no later than May 19, 2017, and by failing to renounce the appointment, he was in breach of MFDA Rule 2.3.1(a)(ii).

### 4.1.3 Did Marrone breach MFDA Rule 2.1.4?

[139] MFDA Rule 2.1.4 mandates a multi-step process for the identification, reporting, assessment, and management of conflicts of interest:

> 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).

[140] The steps required by the Rule are clear:

a. Disclose the conflict or potential conflict to the Member when the Approved Person becomes aware of it;

b. Work with their Member firm to ensure the conflict is addressed in the best interest of the client; and

c. Disclose the conflict or potential conflict to the client.

[141] If the Approved Person fails to disclose the conflict or potential conflict to their Member firm, then the rest of the Rule cannot be followed or complied with, as it requires the Member to implement the required compliance procedures in (b) and (c).

[142] IPC's policies and procedures in 2017 relating to reporting conflicts of interest mirrored the reporting requirements of MFDA Rule 2.1.4(a). Pursuant to IPC Manual 4.2, Marrone was required to immediately disclose to IPC full and complete details if he was in, or could reasonably be perceived to be in, a conflict of interest position.

[143] In the present case, there were at least three sources of actual or potential conflicts of interest that arose from Marrone's conduct which Marrone failed to report or address at all, let alone in a timely fashion: (i) Marrone's acceptance of a Power of Attorney for Property for MU; (ii) Marrone's awareness and acceptance of the role of alternate executor for MU's estate; and (iii) Marrone's awareness and acceptance of being named sole beneficiary under MU's will.

[144] We find that Marrone breached MFDA Rule 2.1.4 by failing to report the three sources of actual or potential conflicts of interest relating to MU's estate. We explain our finding in more detail below.

### 4.1.3.b Powers of attorney

[145] The acceptance by an Approved Person of a Power of Attorney for a client that authorizes the Approved Person to conduct trades in the client's account on the client's behalf puts the Approved Person in an actual or potential conflict of interest with the client.

[146] MFDA Hearing Panels have held that the acceptance by an Approved Person of a Power of Attorney for a client gives rise to an actual or potential conflict of interest. In *Re Ryan*, the MFDA Hearing Panel found that MFDA Rule 2.3.1 prohibiting Powers of Attorney was itself "designed to help eliminate conflicts of interest." [25]

[25] *Brauns* at para 73; *Ryan* at para 8.

[147] The conflict arises when the Power of Attorney is accepted and remains for as long as it is held, regardless of whether the Approved Person acts on the Power of Attorney to trade on the client's behalf or at all.[26]

[148] Marrone submits that if there were any breaches of IPC Policies or MFDA Rules arising from his relationship with MU, they are limited to minor, isolated, technical non-compliance and therefore are not sufficient to support a finding that Marrone breached his duties under the Act.

[149] We disagree. By accepting MU's appointment as power of attorney for property, Marrone was put into a conflict of interest with his client. The fact that Marrone did not act upon it is not a defence to his breach of MFDA Rule 2.1.4. The conflict or potential conflict arose when Marrone accepted the Power of Attorney and continued as long as he held it, regardless of whether he acted upon it. As an Approved Person with 20 years of industry experience, he should have known that this action put him into a conflict of interest or at least a potential conflict of interest with his client. Marrone did not take any of the required steps in Rule 2.1.4 to notify IPC of the appointment, he did not disclose to MU that appointing him as a power of attorney for property was a conflict of interest, and he otherwise failed to take any steps to ensure the conflict was addressed. In fact, he did not disclose the existence of the Power of Attorney for Property to his Member until after the investigation into his conduct was commenced in October 2017. In failing to disclose he also breached IPC's policies and procedures.

#### 4.1.3.c Alternate executor of a client's estate

[150] The role of executor for a client raises similar conflicts of interest to that of power of attorney for property. The primary difference is that with an executor, the conflict or potential conflict exists between the Approved Person and the client's estate. As with a power of attorney for property, an Approved Person as executor is able to conduct trading in the client estate's account.

[151] A number of MFDA decisions have considered the acceptance of an executorship of a client's estate as an actual or potential conflict of interest, including some cases in which the executorship was never acted upon because the Approved

[26] *Karasick 39865* at para 15; *Karasick (Re),* 2015 CanLII 39881 (CA MFDAC) at para i; *Ryan* at paras 11-12; *Sukman 29420* at paras 6(29), 15.

Person was the alternate executor or because the client was still alive at the time of the hearing.[27]

[152] As an experienced Approved Person, he should have known that his appointment put him into a conflict of interest his client, MU, and later on, with her estate, which continued to be his client. Marrone did not take any of the required steps in Rule 2.1.4 to notify IPC of the appointment, he did not disclose the conflict to MU before her death and he otherwise failed to take any steps to ensure the conflict was addressed. He did not renounce his role as alternate executor, and at the time of this hearing, retained that role. Similarly to the Power of Attorney for Property, he did not disclose the existence of the appointment as alternate executor to his Member until after the investigation into his conduct was commenced in October 2017. In failing to disclose he also breached IPC's policies and procedures.

#### 4.1.3.d Being named sole beneficiary of a client's estate

[153] An Approved Person who is named as a beneficiary of a client's estate or on a client's account is in an actual or potential conflict of interest, particularly when the beneficial entitlement includes the investment assets being managed by the Approved Person.

[154] MFDA Hearing Panels have found that an Approved Person who becomes a named beneficiary of a client's estate or account is in a conflict of interest that must be reported and addressed in accordance with MFDA Rule 2.1.4.[28]

[155] In addition to Rule 2.1.4 the MFDA has released guidance on accepting monetary benefits from clients in the form of a Member Regulation Notice issued on October 3, 2005. The Notice stated, among other things:

> All monetary and non-monetary benefits provided directly or indirectly to or from clients must flow through the Member. The Member must be notified of any such arrangements, so that the Member is in a position to determine the significance of the benefit and to monitor the activity.

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[27] *Brauns* at para 73; *Beckford (Re),* 2015 CanLII 27963 (CA MFDAC) at para a; *Lambros* at para 14; *Sukman 29420* at para 6(11); *Sukman (Re),* 2016 CanLII 29418 (CA MFDAC) at para a.

[28] *Beckford 27979* at paras 3-4, 11; *Taylor (Re), 2019 CanLII 96741 (CA MFDAC)* at paras 16, 21, 42; *Taylor 96764* at para b; *Levine (Re),* 2013 CanLII 27372 (CA MFDAC) at para c.

[156] Although MFDA Member Regulation Notices are not binding, they do provide guidance to the industry, and equally important, place Members and Approved Persons on notice respecting the issues which they must direct their attention to and appropriately address.

[157] Marrone submits that being a beneficiary of a client's estate is not a breach of MFDA Rules or IPC Policies and Procedures. He argues that since he has yet to receive any monetary benefit from MU's estate, and the IPC manual states that monetary benefits provided from clients are not banned, but must, "flow through IPC" he is not in contravention of IPC policies.

[158] We earlier found that Marrone was more likely than not aware of his appointment as alternate executor as early as May 3, 2017, but in any event no later than May 19, 2017. The same analysis applies to his becoming aware of the testamentary gift in MU's will. We find that he was aware of the gift on May 3, 2017, but in any event, by no later than May 19, 2017, and he took no steps to advise IPC of the gift until after IPC had commenced the investigation into his conduct in October 2017.

[159] By failing to report to his Member firm that he was named as the sole beneficiary of his client's estate, Marrone breached MFDA Rule 2.1.4. His simultaneous roles as the Approved Person managing MU's estate, and the sole beneficiary of that estate put him into a conflict of interest with his client. As an experienced Approved Person, he should have known that he was at least in a potential conflict of interest with his client (the estate), and he should have reported this to IPC in accordance with MFDA Rule 2.1.4.

### 4.1.4 Did Marrone breach MFDA Rule 2.1.1?

[160] MFDA Rule 2.1.1 set out the general standard of conduct required by Approved Persons:

> 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.

[161] The language in MFDA Rule 2.1.1(a) mirrors that in OSC Rule 31-505, which we review in depth in section 4.2 below. For the reasons articulated below, We find that Marrone breached MFDA Rule 2.1.1.by failing to deal fairly, honestly and in good faith with his client MU.

### 4.1.5 Did Marrone breach MFDA Rule 1.1.2?

[162] MFDA Rule 1.1.2 provides that:

> Each Approved Person who conducts or participates in any securities related business in respect of a Member in accordance with Rule 1.1.1.(c)(i) or (ii) shall comply with the By-laws and Rules as they relate to the Member or such Approved Person.

[163] MFDA Hearing Panels have clarified that MFDA Rule 1.1.2 should be read in conjunction with MFDA Rule 2.5.1. As the MFDA Hearing Panel in *Frank (Re)* held with respect to the interaction between MFDA Rules 2.5.1 and 1.1.2, the requirements in Rule 2.5.1 that Members establish policies and procedures:

> …are meaningless and cannot achieve their intended objectives if Approved Persons are not required to comply with them. MFDA Rule 1.1.2 is clear that Approved Persons share the responsibility of ensuring that obligations set out in the MFDA Rules are followed and must do their part to support the Member's obligations to be compliant with its regulatory obligations.
>
> In the context of policies and procedures of a Member, and especially policies designed to facilitate regulatory supervision by the Member, the failure of an Approved Person to comply with the Member's policies constitutes a regulatory violation.[29]

[29] *Frank (Re)*, 2015 CanLII 57851 (CA MFDAC) at paras 57-58.

[164] Our analysis below addresses whether Marrone failed to follow IPC policies and procedures. Our finding in that regard that Marrone failed to follow IPC policies and procedures necessarily leads us to conclude that Marrone has also breached MFDA Rule 1.1.2.

#### 4.1.6 Did Marrone fail to follow IPC policies and procedures?

[165] As a registrant working with IPC, Marrone was bound to comply with IPC rules, policies and procedures. Each year he was with IPC, Marrone completed an IPC compliance questionnaire in which he affirmed that he had read and understood IPC rules, policies, and procedures, and that he agreed to abide by those rules, policies, and procedures.

[166] In December 2016, Marrone completed an IPC compliance questionnaire affirming that he had "read, fully understood, and will comply with" the requirements in IPC's National Policies and Procedures Manual 4.2 and the Compliance Bulletins issued by IPC from time to time.

[167] We find that Marrone was aware of the IPC policies and procedures throughout his many years as an IPC approved person. As demonstrated in our analysis above of the corresponding MFDA Rules, Marrone failed to follow IPC policies and procedures .

#### 4.1.7 Conclusion

[168] We conclude that Staff has successfully proved on a balance of probabilities that Marrone failed to comply with MFDA Rules and IPC policies and procedures.

### 4.2 Did Marrone breach his obligation under OSC Rule 31-505 to deal with clients fairly, honestly and in good faith?

#### 4.2.1 Introduction

[169] As an MFDA registrant, Marrone was at all material times bound by the statutory obligation under Rule 31-505 to deal fairly, honestly and in good faith with his clients. Staff submits that as an Approved Person regulated by the MFDA, his obligations under Rule 31-505 are informed by the MFDA Rules and IPC's policies and procedures designed to give effect to the MFDA Rules. As we stated above in [33], it is our view that it is appropriate to consider Marrone's breaches of MFDA and IPC Rules in our determination of this issue.

[170] We have already determined that Marrone breached the MFDA Rules relating to powers of attorney, executorship and conflicts of interest, but we agree with Marrone's submission that that finding alone is not sufficient to also amount to a breach of Commission Rule 31-505. The circumstances of any particular non-compliance must be examined to determine whether the standards set out in Rule 31-505 have been breached.

[171] In considering the vulnerability of MU, the materiality of the amounts at stake, Marrone's failure to place his client's interests above his own and the seriousness of the breaches of the MFDA Rules and IPC policies and procedures, we find that Marrone has failed to act fairly, honestly, and in good faith in his actions towards his client, MU.

### 4.2.2 Was MU a vulnerable client?

[172] On the evidence before us we have no difficulty concluding that MU was a vulnerable client throughout the material time.

[173] MU was diagnosed with terminal cancer in February of 2017. We heard from witnesses about her inconsistent memory, that she had "good days and bad days", and that she was unable to identify or quantify her investments when presented with her account statement. We also heard that it was MU's late husband who managed their financial affairs, and when he passed the Rs assisted her with managing his estate. We heard about how MU relied on Marrone to assist her with her finances, as well as other tasks like booking her travel and driving her to the airport. We also consider MU's age (74), lack of formal education, the fact that she advised the Rs that she didn't need a will because she could use her deceased husband's will and the fact that D'Ambrosio wanted a capacity assessment performed, and yet a formal capacity assessment was never obtained, to be factors that point to MU's vulnerability.

[174] Much evidence was led relating to the close relationship between Marrone and MU. We are not here to comment on that friendship. We must view Marrone's actions through the lens of the relationship between a registrant and his client. She relied on him as a trusted advisor and close friend, and never appeared to question that he put her best interests first. Having said that, we accept Marrone's evidence that he was a close friend of MU, but it is our view that their

close friendship actually increased her vulnerability. This is why the MFDA and IPC have rules against accepting the designations at issue in this proceeding.

[175] It is also an important consideration for us in determining MU's vulnerability that the conduct at issue in this proceeding occurred during the last few weeks of her life when she was bedridden and in palliative care with terminal cancer.

### 4.2.3 The materiality of the amounts

[176] The materiality of the amounts at issue is an aggravating factor. The funds managed by Marrone at IPC, approximately $1.7 million, were all of MU's financial assets, with the exception of her condominium, and it was approximately one third of Marrone's entire book of business, which was approximately $6 million. These were material amounts to both MU and Marrone.

### 4.2.4 Marrone's failure to place his client's interests above his own

[177] IPC Manual 4.2, which was in place at the material time, included the following requirement:

> Integrity: We act with the highest level of integrity and in the best interests of our clients, placing their interests above our own.

[178] We agree with Staff's submission that if Marrone was truly placing his client's interests above his own, he could have reported the power of attorney for property, the alternate executorship, and his designation as sole beneficiary to IPC. If he was solely concerned with MU's interests, there would have been no reason for him not to report this to IPC. Indeed, the purpose of reporting a conflict of interest is to allow the conflict to be addressed by the Member in a manner that is consistent with the interests of the client.

[179] However, reporting these designations to IPC would have disclosed the fact that Marrone was the sole beneficiary under MU's will, which may have put his significant inheritance at risk. In failing to report the designations to IPC Marrone placed his own interests above those of his client. We find that to be an aggravating factor when conducting our analysis of Commission Rule 31-505 below.

### 4.2.5 Analysis of Commission Rule 31-505

[180] Section 2.1 of OSC Rule 31-505 provides that every registered dealer or adviser, or a representative of such, has a statutory obligation to deal fairly, honestly and in good faith with clients.

[181] In *Re Norshield Asset Management (Canada) Ltd*, the Commission held that "[t]he duty to deal fairly, honestly and in good faith goes to the heart of what securities regulation is about and a breach of this obligation is especially serious."[30]

[182] In *Re Phillips* the Commission noted this obligation was key to a registrant's role as a gatekeeper of integrity of the capital markets.[31]

[183] The Commission has applied the lay meanings of "fairly", "honestly", and "good faith" when determining whether conduct amounts to breaches of section 2.1 of Rule 31-505:

a. Fairly: in a just and equitable manner

b. Honest: never deceiving, stealing or taking advantage of the trust of others; sincere, truthful; and

c. Good Faith: a state of mind consisting in (1) honesty in belief or purpose; (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.[32]

[184] We adopt these definitions of the terms for the purpose of our analysis.

[185] Marrone submits that the evidence demonstrates that he acted fairly, honestly, and in MU's best interests from the time she first asked him to help her find an estates lawyer, until the day of her death, and that there is no evidence of undue influence or coercion on his part.

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[30] 2010 ONSEC 16 at para 79 (***Norshield***).
[31] 2015 ONSEC 24 at para 252.
[32] *Quadrexx (Re)*, 2017 ONSEC 3 at paras 359, 364, 366.

[186] We disagree. In *Argosy Securities* the Commission held that firms or representatives who fail to substantially comply with their SRO rules cannot be said it to be dealing "fairly" with their clients.[33]

[187] In addition, Commission hearing panels have found that compliance with rules relating to the management and prevention of conflicts of interest is also essential to fulfilling the obligations under Rule 31-505. A failure to appropriately identify and disclose conflicts of interest amounts to a failure to deal fairly, honestly and in good faith with clients.[34]

[188] Marrone submits that Staff must prove more than a technical non-compliance with MFDA Rules or IPC Policies in order for the Commission to find a breach of Commission Rule 31-505. He relied on *Norshield* for the premise that breaches of Rule 31-505 must be "especially serious", which would not include a "technical" breach, which is how he characterizes the breaches alleged in this matter.[35] The panel in *Norshield* stated that,

> The seriousness of a breach of securities law depends on the context and the consequences of that breach. An inability to properly account for funds undermines confidence in the market. This was not merely a technical breach.[36]

[189] Marrone goes on to give an example of a technical breach, such as a failure to include the telephone number of the Member on a financial account statement, which is a breach of MFDA Rule 5.3.2(a). He says that Staff's submission that any breach of MFDA Rules amounts to bad faith would mean that an advisor who has failed to include their telephone number on an account statement would have engaged in conduct that was unfair, dishonest, and acting in bad faith towards their client.

[190] We agree that the example given by Marrone is a proper example of a technical breach, and a finding that an advisor who failed to include their telephone

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[33] *Argosy* at para 53.
[34] *Sterling Grace & Co, (Re)*, 2014 ONSEC 24 at para 188 ; *Acker Finley Asset Management Inc, (Re)*, 2017 CarswellOnt 15313 at paras 80-84.
[35] *Norshield* at paras 79, 82.
[36] *Norshield* at para 82.

number on an account statement would not likely meet the standard for a finding of unfair, dishonest and bad faith conduct towards a client under Rule 31-505.

[191] However, this is not that situation. The breaches of the MFDA Rules and IPC policies and procedures that we have found are serious issues, relating to conflicts of interest, a vulnerable client, and the failure of Marrone, over a protracted period of time, to report these issues to IPC, all of which go to the heart of the relationship with a client, which is fundamental to the purpose of 31-505. We follow the reasoning in *Norshield* and conclude that the context and consequences of Marrone's breaches of MFDA Rules and IPC Policies and Procedures are significant. This was not a technical breach.

[192] In *Tonnies*, the MFDA hearing Panel held that exercise of "responsible business judgment" required to address conflicts of interest in accordance with MFDA Rule 2.1.4 will vary depending not only on the nature of the conflict but also on the characteristics of the client, including the client's level of sophistication. Staff submits, and we agree, that the assessment of whether a registrant such as Marrone has fulfilled his obligation to deal with a client fairly, honestly and in good faith must take into account the characteristics and circumstances of the client, including whether they are a vulnerable client.[37]

[193] Marrone's failure to identify the conflicts or potential conflicts of interest in being named power of attorney for property over his vulnerable client's affairs, being named alternate executor of his client's estate, and being named as the sole beneficiary of her account are significant breaches of his responsibilities as a registrant.

[194] As we explained above, the conflict of interest analysis that must be undertaken by a Member pursuant to MFDA Rule 2.1.4 relies on the Approved Person reporting conflicts or potential conflicts to their Member "immediately". If the Approved Person does not report the conflict, there is no opportunity for the Member to "ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client." In failing to report

[37] *Tonnies*.

the appointments and the testamentary gift to IPC Marrone acted unfairly, dishonestly, and in bad faith.

### 4.2.6 Conclusion

[195] During the material time we conclude that Marrone acted unfairly, dishonestly and in bad faith towards his vulnerable client by failing to follow the required procedures for dealing with conflicts or potential conflicts of interest, which was a significant breach of the MFDA Rules and IPC policies and procedures, and this constituted a breach of OSC Rule 31-505.

## 4.3 Was Marrone's conduct contrary to the public interest?

[196] Given the findings we have made regarding a breach of MFDA Rules and IPC Policies and Procedures, and a breach of Commission Rule 31-505, we decline to make an additional finding that the conduct was contrary to the public interest.

[197] The activities alleged by Staff for this allegation are the same activities relied upon for the breaches of the MFDA Rules, IPC Policies and Procedures and Commission Rule 31-505.

# 5. CONCLUSION

[198] Staff has established that:

a. Marrone's conduct was contrary to MFDA rules and IPC policies and procedures; and

b. Marrone failed to deal fairly, honestly and in good faith with a client contrary to subsection 2.1(2) of Commission Rule 31-505.

[199] The parties shall contact the Registrar on or before July 8, 2022, to arrange an attendance for a hearing regarding sanctions and costs. That attendance is to take place on a date that is mutually convenient, that is fixed by the Secretary, and that is no later than August 12, 2022.

[200] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Commission, a one-page written submission regarding a date for an attendance. Any such submission shall be submitted by 4:30 pm on or before July 8, 2022.

Dated at Toronto this 13th day of June, 2022

"*Lawrence P. Haber*"

Lawrence P. Haber

"*Mary Anne De Monte-Whelan*"

Mary Anne De Monte-Whelan

"*Craig Hayman*"

Craig Hayman