Re Spooner

IN THE MATTER OF:

The Investment Dealer and Partially Consolidated Rules

and

Dominic Spooner

2023 CIRO 07

Canadian Investment Regulatory Organization
Hearing Panel (Pacific District)

Heard: January 31 and February 1, 2023 in Vancouver, British Columbia
Decision: July 23, 2023

Hearing Panel:
Linda J. Murray (Chair), William Wright and Brian Worth
Appearances:
Stacy Robertson, Senior Enforcement Counsel
Owais Ahmed, for Dominic Spooner
Yana Konakh, for Dominic Spooner
Dominic Spooner (present via videoconference)

DECISION ON LIABILITY AND PENALTY

INTRODUCTION

¶ 1 These proceedings were commenced by a Notice of Hearing and Statement of Allegations issued October 31, 2022, under the Investment Industry Regulatory Organization of Canada (**IIROC**) Rules 8200 (sections 8203 and 8205), for the following contraventions:

Contravention #1

¶ 2 Between February and April 2018, the Respondent, Dominic Spooner, accepted monies from a person other than his Dealer Member, for the securities related activities conducted on behalf of the Dealer Member contrary to Dealer Member Rule 18.15.

Contravention #2

¶ 3 Between February and April 2018, the Respondent, Dominic Spooner, proceeded with a private placement for individuals and entities that were not clients of his firm in contravention of his firm's policies and procedures and without his firm's knowledge and/or approval. To facilitate those transactions, the Respondent signed the firm's Finder's Fee and Non-Circumvention Agreement, which he was not authorized to sign on behalf of the firm, which conduct was contrary to IIROC Rule 1400.

¶ 4 The Panel convened by Webex link on November 23, 2022 for an initial appearance. The parties filed an undated Agreed Statement of Facts attached as Schedule A. The parties advised the Panel that they were unable to reach an agreement regarding sanctions and requested a penalty hearing. The Panel set dates in 2023 for a penalty hearing.

¶ 5 Mr. Spooner filed a Response dated January 28, 2023, in which he admitted the contraventions, repeating and relying upon the Agreed Statement of Facts but reserving the right to lead evidence, not inconsistent with the

Agreed Statement of Facts, relevant to penalties and costs at the penalty hearing.

¶ 6 As of January 1, 2023, IIROC and the Mutual Fund Dealers Association of Canada amalgamated to form the New Self-Regulatory Organization of Canada (**New SRO**). The Investment Dealer and Partially Consolidated Rules, effective January 1, 2023, provided transitional provisions for existing hearings. Transition Rule 1105(5)(I) provides that any proceedings commenced prior to January 1, 2023, will proceed according to the IIROC Rules in place at the time the hearing was commenced and be heard by the same panel which retains jurisdiction. The New SRO's name was subsequently changed to the Canadian Investment Regulatory Organization (**CIRO**) effective June 1, 2023.

PRELIMINARY MATTERS

¶ 7 The parties made written requests and applications by email on January 30, 2023 to strike paragraphs of affidavits filed and to hear additional witnesses. The Panel considered the requests and determined that these matters should be addressed by Counsel with the Panel at the commencement of the hearing. These matters are discussed in more detail below.

¶ 8 At the outset of the hearing, the Panel clarified with the parties the nature of the hearing, i.e., that the parties were proceeding with a penalty hearing on the basis of an agreed statement of facts (not a settlement agreement), with additional evidence to be led regarding penalty. The Panel clarified that the issues raised by the parties in their January 30, 2023, communications did not negate the Agreed Statement of Facts, and this was not a contested hearing. Mr. Spooner's Counsel confirmed that the evidence sought to be led was for the purpose of providing context regarding penalty submissions as the breaches had already been admitted by Mr. Spooner.

¶ 9 The hearing proceeded in two phases: (1) decision on liability and (2) hearing on penalty. IIROC Rule 8210 requires that before determining an appropriate penalty, the Panel must first determine that Mr. Spooner contravened IIROC requirements, a securities legislation requirement, or other requirement relating to trading or advising in respect of securities, commodities contracts, or derivatives.

LIABILITY DECISION

¶ 10 In the Agreed Statement of Facts, confirmed by his Response, Mr. Spooner admitted:

a. Mr. Spooner was a registrant in the securities industry since 1988. From 2014 to April 2020, Mr. Spooner was a registered representative with the IIROC Dealer Member (the **firm**) related to the issues in this matter. From May 22, 2020, to April 12, 2021, Mr. Spooner was registered as an Exempt Market Dealing Representative by the British Columbia and Alberta Securities Commissions. Mr. Spooner has not since been registered with IIROC (now CIRO) or any securities regulator. He has no discipline history.

b. Mr. Spooner was involved in a non-brokered private placement of an issuer that issued a news release on January 29, 2018. On February 22, 2018, Mr. Spooner provided the firm with documents for 11 clients and five non-clients to participate in the private placement, for which he wanted to receive commissions through the firm's Investment Banking Department grid system.

c. On February 22, 2018, Mr. Spooner emailed JB, Manager of the firm's Investment Banking Department, requesting a copy of the firm's standard Finder's Fee Agreement for the five non-clients' participation. JB advised Mr. Spooner that his department could not be involved since the issuer had already published a news release regarding the financing.

d. Mr. Spooner was frustrated by the refusal by the Investment Banking Department to permit the five non-clients to participate in the financing. Despite his communications with JB, Mr. Spooner altered the firm's standard Finder's Fee Agreement by changing the required two signatures by authorized firm representatives to his signature alone, adding his title and firm contact information, and signing the altered agreement (the **Amended Agreement**). Mr. Spooner was not authorized by the firm to sign the Amended Agreement, nor did he disclose the Amended Agreement to anyone at the firm.

e. Mr. Spooner admitted that he signed the Amended Agreement to facilitate payment to his private company of commissions for the five non-clients, despite the firm's requirement that commissions were to be paid to the firm. He did not tell the firm he received commissions of $35,500 for the participation of non-clients.

f. The firm discovered the Amended Agreement and commission payment in November 2018 while conducting due diligence for a subsequent financing for that issuer. None of the five non-clients made complaints to Mr. Spooner, the firm, or IIROC regarding the financing.

g. In June 2019, Mr. Spooner was subject to internal discipline by the firm including a payment of $30,000 regarding the unauthorized payment of commissions. Mr. Spooner agreed to make early admissions prior to issuance of the IIROC Notice of Hearing.

¶ 11 The Panel heard brief opening submissions from both Counsel and then adjourned briefly to consider its position on liability.

¶ 12 **Decision:** The Panel reconvened the hearing to provide our decision on liability. The Panel determined that the facts and admissions agreed by the parties and as set out in the Agreed Statement of Facts were sufficient to conclude that Mr. Spooner contravened Dealer Member Rule 18.15 and IIROC Rule 1400.

PENALTY DECISION

¶ 13 After the Panel delivered its decision on liability, we proceeded with the Penalty Hearing under IIROC Rule 8400. The Panel dealt with preliminary matters and heard evidence and submissions by the parties regarding appropriate penalties.

Preliminary Application Rulings

¶ 14 The Panel heard submissions from the parties regarding the two issues raised in their January 30, 2023, emails:

1) calling witnesses and cross-examination of JB and Mr. Spooner; and

2) excluding certain paragraphs in the filed affidavits.

¶ 15 Enforcement Counsel was concerned that some of the statements in Mr. Spooner's Affidavit filed January 17, 2023 (the **Spooner Affidavit**):

1) appeared inconsistent with his admissions and the Agreed Statement of Facts; and

2) were irrelevant or only marginally relevant, given his admissions and his Response in which he said he would not lead evidence inconsistent with the Agreed Statement of Facts. Enforcement Counsel sought to cross-examine Mr. Spooner and to strike paragraphs 9 to 11, and 17 of the Spooner Affidavit. Enforcement Counsel was further concerned that the addition of these statements by Mr. Spooner needlessly added to the length and complexity of the penalty hearing.

¶ 16 Mr. Spooner's Counsel was concerned about the timeliness of filings by Enforcement Staff and requested the ability to cross-examine JB regarding statements in an affidavit by JB filed on January 27, 2023 (the **JB Affidavit**).

¶ 17 In his submissions, Enforcement Counsel noted:

a. Mr. Spooner's belief that he could somehow still process the non-client transactions through the Syndication Department was irrelevant given his admission that he was told by the firm's Syndication Manager that she could not assist him, referring him to the firm's CCO who told Mr. Spooner he could not do so.

b. JB advised Mr. Spooner of the firm's strict policy that non-clients could not participate after a news release was issued. Mr. Spooner was advised that the non-client transactions could not be processed through the Syndication Department. He was then advised by the CCO that the firm would not process the non-client transactions. The Spooner Affidavit paragraphs in question seemed to present alternate facts which were not accurate and

appeared to justify his feeling that he was treated unjustly or unfairly or that he was somehow mistaken and that therefore he should have been allowed to continue with the non-client transactions despite the firm's policy.

c. The JB Affidavit was filed by Enforcement Counsel to correct statements made in the Spooner Affidavit which incorrectly described the functioning of the firm's Investment Banking and Syndication Departments, and to provide context to the discussions among JB, the Syndication Manager and Mr. Spooner regarding the firm's financing policies.

d. Enforcement Counsel acknowledged that Mr. Spooner said he was upset and frustrated as noted in paragraph 13 of the Spooner Affidavit. That, however, did not excuse or justify Mr. Spooner's conduct, further demonstrated the seriousness of Mr. Spooner's conduct, and illustrated that he continued to be a risk to the public interest and capital markets.

e. It would not be appropriate to go behind the firm's policy-setting process or consider whether or not the policy was reasonable.

¶ 18 In his submissions, Mr. Spooner's Counsel noted:

a. The comments in the Spooner Affidavit, specifically paragraphs 9 to 13, were not inconsistent with the Agreed Statement of Facts. Mr. Spooner thought non-clients still could participate given his past experience as reflected in his emails to JB and the Syndication Manager. Mr. Spooner asked for an explanation but was only told no by the CCO. Although Mr. Spooner now acknowledged that this situation was different from past situations, he thought it was the same at that time. Mr. Spooner did not resile from the agreed fact that he was told not to proceed but did so anyway. However, his reason for doing so, although not an excuse, was relevant context regarding his actions which were out of character during a long career and explained why he was so frustrated.

b. With regard to admissibility of some of Enforcement Staff's evidence, the Syndication Manager could not recall a conversation with Mr. Spooner but did not provide sworn testimony, nor did the CCO whose unsworn interview transcript was provided by Enforcement Counsel. He submitted that their evidence should be struck or given little weight and he felt it necessary to provide fulsome responses as a matter of fairness.

c. The firm's policy or rule was unwritten, and he submitted it was a nonsensical rule with no rationale. The firm was aware that these types of transactions were fundamental to Mr. Spooner's business practice at the firm, and he had done them before.

d. His time with JB would be short and would not create lengthy delay or complexity for the hearing.

¶ 19 The Panel asked Enforcement Counsel to determine if JB could be available to attend the hearing electronically. The Panel then adjourned briefly to consider the issues and submissions by Counsel.

¶ 20 **Rulings**: The Panel has leeway in conducting the hearing and in the evidence it accepts (Rule 8403). After considering the emails and submissions by both Counsel, the Panel made the following rulings regarding the two issues raised by Counsel:

Calling Additional Witnesses - IIROC Rule 8421

¶ 21 Any party may ask at any stage for the Panel to compel a witness under Rule 8208. The Panel determined that the parties should be free to call such witnesses as they felt appropriate to support their position and submissions. The Panel would then determine the weight to be given to the testimony of each witness in light of the potential sanctions.

¶ 22 Enforcement Counsel confirmed that JB was available to testify by electronic link and had the opportunity to consult with in-house counsel. Mr. Spooner was present at the hearing by electronic link. As JB and Mr. Spooner voluntarily attended the hearing, there was no need for the Panel to summons them.

Striking Paragraphs of Affidavits

¶ 23 The Panel determined not to strike any paragraphs from any of the affidavits filed by either party but rather to consider the weight as with all other evidence. We provided Counsel with the opportunity to make submissions regarding consistency, relevance and weight. We determined that there was no prejudice to the parties in keeping the affidavits as filed and considering their relevance and weight in the normal course.

REVIEW OF EVIDENCE FOR PENALTY ASSESSMENT

Additional Facts Not at Issue

¶ 24 In addition to the Agreed Statement of Facts, the Panel heard testimony from Mr. Spooner and JB during the hearing. The Panel also received additional information in affidavits filed by Counsel including the Spooner Affidavit, the JB Affidavit, two affidavits by IIROC Staff (Mr. Aly Ismail) and the affidavit of Mr. Spooner's assistant (the **Assistant Affidavit**). The filed affidavits contained additional facts and a number of attachments including:

a. the Agreed Statement of Facts,

b. February 22, 2018 emails between Mr. Spooner and JB,

c. the firm's standard Finder's Fee Agreements for other financings,

d. the firm's Finder's Fee Agreement for the private issuer referred to in paragraph 10 of the Spooner Affidavit,

e. the Amended Agreement signed by Mr. Spooner for this financing, and

f. excerpts from IIROC's sworn interview of Mr. Spooner on January 14, 2021, and the unsworn interview of the firm's CCO on February 8, 2022.

¶ 25 Much of the evidence presented in the filed affidavits and during the hearing was not contested, did not require clarification or submissions from Counsel, and was not inconsistent with the Agreed Statement of Facts. This included portions of the Spooner Affidavit, which were not at issue, i.e., paragraphs 1 to 8, 12, 18, 20, 21. For matters with potential issues, including the other paragraphs of the Spooner Affidavit and portions of the JB Affidavit, the Panel received submissions from Counsel. These are discussed below.

¶ 26 The Panel noted the following additional uncontroverted facts as relevant to our deliberations regarding penalty in this case.

¶ 27 Mr. Spooner's long-time primary business and career passion was assisting microcap and venture companies to raise funds and that was his primary role at the firm. His title at the firm was Managing Director – Special Situations Group. Mr. Spooner worked closely with JB on a number of financings.

¶ 28 JB, a registrant since 2005, was with the firm since 2009. He was very familiar with industry practices and the firm's processes and policies regarding financings. JB worked with the firm's Syndication Manager and was also familiar with that department's functions regarding private placements.

¶ 29 JB explained the firm's policies and processes regarding financings. JB described the different application of the firm's policy for public v. private issuers. Private issuers are not required to issue news releases. Public issuers must issue news releases disclosing a financing, its closing, and commissions paid. The firm had a long-standing policy (verbal, not written) that once an issuer (typically a listed or public issuer) issued a news release announcing a financing, non-clients could not participate in the financing through the firm. The only way for the non-clients to participate in the financing after issuance of a news release by an issuer was for them to become clients of the firm, who would then be processed through the Syndication Department. Any commissions earned would be handled by the Investment Banking Department based on a grid system. JB referred Mr. Spooner to the Syndication Department. There was no ability through either the Investment Banking or Syndication Departments for non-clients to participate in a private placement after a news release was issued.

¶ 30 The firm's policy, put in place by the CCO, was in place since JB started at the firm and no exceptions were made. The policy remained in place after the departure of that CCO and is still in place. JB was not aware

of the rationale for the policy, only that it was enacted by the firm's senior executives, and he was required to follow it.

¶ 31 In his communications with Mr. Spooner and the Syndication Manager on February 22, 2018, JB advised Mr. Spooner of the firm's policy.

¶ 32 **Evidentiary Ruling**: Enforcement Counsel raised objections, based on relevance, to several areas of questioning of JB by Mr. Spooner's Counsel, including the firm's rationale behind the policy, whether the CCO could have approved an exception to the policy, and whether JB could have completed the transactions in time had the requirements been waived. The Panel concurred with Enforcement Counsel that it would not be appropriate for us to look behind the reasons for the firm's policy, nor should we engage in speculation as to what could have happened if the circumstances had been different. We ruled that these issues were irrelevant to Mr. Spooner's admitted misconduct.

¶ 33 JB assisted Mr. Spooner with the financing for the other unrelated private issuer referenced in paragraph 10 of the Spooner Affidavit. As a news release was not required or issued in that case, the firm's policy did not apply to prevent non-client participation, unlike the situation with the public issuer which was the subject of the financing in this matter. During cross-examination, Mr. Spooner said he understood the difference between public and private issuers. He conceded that the subject financing involved a public issuer while the other past financing referred to in paragraph 10 of the Spooner Affidavit was for a private issuer.

¶ 34 Mr. Spooner contacted the Syndication Manager, who referred him to the CCO. Mr. Spooner then had an admittedly heated discussion with the CCO who advised him that the firm would not permit the non-clients to participate in the issuer's private placement. After his discussion with the CCO, Mr. Spooner spoke with JB and another firm employee to express his frustration at the CCO's denial of his request for the non-clients to participate in the financing. JB advised Mr. Spooner he could not deviate from the firm's policy.

¶ 35 Mr. Spooner's assistant was privy to Mr. Spooner's call with the CCO, which she confirmed became heated, and with the Syndication Manager who told him she was not able to assist him. The assistant noted that Mr. Spooner was quite distressed and told her that he was being treated unfairly.

¶ 36 During his testimony at the hearing and in his January 14, 2021 IIROC interview, Mr. Spooner acknowledged that the firm's refusal (which he felt was unjustified) to allow the non-clients to participate in the financing created a significant problem for him. He feared he could be sued and wanted to make sure that everyone got shares in what he described as a very heated cannabis market where everyone wanted stock. He acknowledged that if the non-clients were not allowed to participate in the financing through the firm, those shares would have been quickly taken up by others. Mr. Spooner said he was very frustrated and decided to proceed anyway, despite being told he could not do so.

¶ 37 Mr. Spooner said that the investigation and proceedings have been very stressful for him, including uncertainty of the outcome. The public nature of the proceedings has already had a significant impact on his reputation. He expressed deep remorse for his conduct.

Additional Facts at Issue and Panel Findings

¶ 38 Most of the submissions regarding facts at issue related to information contained in the Spooner Affidavit paragraphs 9 to 11, 13 to 17 and 19 and portions of the JB Affidavit dealing with those paragraphs of the Spooner Affidavit. The issue was whether those paragraphs were inconsistent with Mr. Spooner's admissions in the Agreed Statement of Facts. Mr. Spooner's Counsel emphasized that the additional facts and testimony were tendered for the purpose of providing context for the Panel's deliberations regarding penalty and not to contradict the admissions made by Mr. Spooner in the Agreed Statement of Facts. Enforcement Counsel was concerned that some of the additional information provided contradicted the Agreed Statement of Facts.

¶ 39 Mr. Spooner initially said he did not feel that the statements in those paragraphs of the Spooner Affidavit were inconsistent with his admissions in the Agreed Statement of Facts. He interpreted JB's email about referring him to the Syndication Department as obtaining a Finder's Fee Agreement, not that the non-clients had to open accounts at the firm to participate in the financing or that they could otherwise not participate in the financing. Mr. Spooner said that his comments in paragraph 11 of the Spooner Affidavit that the Investment Banking

Department could not be involved after issuance of the news release meant that non-clients could still participate through the Syndication Department and in the context of paragraph 9 of the Spooner Affidavit, that commissions would still be paid through the Investment Banking Department.

¶ 40 During cross-examination, Enforcement Counsel asked Mr. Spooner about the apparent inconsistency of his testimony and statements in the Spooner Affidavit, with the admissions in paragraph 11 of the Agreed Statement of Facts. Mr. Spooner confirmed that paragraph 11 of the Agreed Statement of Facts was correct. Mr. Spooner conceded that the statements made in the Spooner Affidavit did not appear consistent with those in the Agreed Statement of Facts. Mr. Spooner and his Counsel again confirmed that the additional information provided was not meant to detract from his admissions in the Agreed Statement of Facts.

¶ 41 Mr. Spooner said that he might have been confused at the time about the fact that the five non-clients had to become clients to participate in the financing through the Syndication Department. However, during cross-examination by Enforcement Counsel, Mr. Spooner said he was aware that non-clients were treated differently by the firm and that only clients participated in financings through the Syndication Department.

¶ 42 Mr. Spooner said that he thought he had done similar transactions previously and provided an example in paragraph 10 of the Spooner Affidavit. As noted by JB's testimony, and later conceded by Mr. Spooner during cross-examination, that financing related to a private issuer and no news release was issued or required. The firm's policy did not apply to that other private issuer's financing. Mr. Spooner admitted that he was aware of the difference between public and private issuers.

¶ 43 The Panel clarified, and Mr. Spooner acknowledged, that it was clear to him at the time that the Investment Banking Department could not get involved with non-clients. He agreed that the firm's CCO also told him that the firm would not permit the non-clients to participate in the financing. The Panel clarified, and all parties agreed, that the non-clients could not participate in this particular issuer's financing at this firm given the issuance of the news release and the firm's policy.

¶ 44 In paragraph 14 of the Spooner Affidavit, Mr. Spooner said he did not know about the firm's policy that commissions or finder's fees could not be paid for non-clients. Mr. Spooner testified that he was not aware of the firm's policy until he read the JB Affidavit filed in these proceedings in January 2023. He said none of the firm's managers with whom he spoke at the time of the financing in February 2018 provided a copy of the policy or a firm manual. Mr. Spooner said he never saw anything in writing about the policy, and he had to check each time as the situation seemed to change a lot.

¶ 45 However, the Panel clarified, and Mr. Spooner acknowledged, that he was aware of the firm's policy through JB's February 22, 2018 email at the time he signed the Amended Agreement and accepted the commissions for the non-client participation in the financing. Mr. Spooner acknowledged that it was not unclear in any way that the firm had not given its approval to proceed with the non-client transactions.

¶ 46 Mr. Spooner said there was tension with another firm department which he felt was unfairly impacting his business at the firm and that the firm's refusal might relate to those issues. He felt he was being treated unfairly and had been refused not for any *bona fide* reason, but simply because the success of his business model was not appreciated by the firm. Mr. Spooner did not present any evidence to support this contention.

¶ 47 Mr. Spooner felt he had not been provided with an adequate reason or explanation for the firm's policy and he felt the refusal was unjustified given past experience and his interpretation of the communications with JB and the Syndication Manager. Mr. Spooner said he made the decision to go ahead despite the firm's refusal as he was highly frustrated. It was in this context that he made the mistake of deciding to proceed to collect the finder's fees despite that he was told he could not do so. His high level of frustration about the refusal led to his lapse in judgment and the misconduct.

¶ 48 Mr. Spooner did not concede Enforcement Counsel's submission that he was given a reason for the firm policy at the time but he would not accept it. Enforcement Counsel noted that there was no need for Mr. Spooner to know the reason behind the policy, only to follow it as required. Mr. Spooner said he still felt that firm's policy made no sense. The Panel clarified that Mr. Spooner now understands the firm's policy.

¶ 49 Mr. Spooner noted that the five non-clients were sophisticated, high-net worth, and there were no

suitability issues.

¶ 50 Mr. Spooner said that any other firm would have allowed him to receive finder's fees for the non-client participation in the financing. He conceded Enforcement Counsel's suggestion that if he did not agree with the firm's policy he could have gone to another firm.

¶ 51 He said he consistently acknowledged his mistake and throughout the process did his best to address the matter in a proactive and positive way.

¶ 52 In his January 14, 2021 IIROC interview, Mr. Spooner said: "The way I would sum it up would be I wasn't dishonest; I disclosed what I was going to do, but I was disobedient" [PEC48]. However, during the hearing, Mr. Spooner admitted that he did not tell anyone at the firm that he planned to go ahead, or that he had done so until the firm discovered the misconduct several months later. Mr. Spooner admitted that he should have, he felt bad, it was a mistake, but he just wanted it to go away. He knew it was wrong but was very frustrated at the time and he was deeply remorseful.

¶ 53 **Ruling**: As a result of the clarification received from the witness testimony at the hearing and information in the other filed affidavits, the Panel accepted Mr. Spooner's admissions made in the Agreed Statement of Facts and placed little or no weight on the Spooner Affidavit paragraphs 9 to 11, 13, 17 and 19 and Mr. Spooner's testimony regarding those specific paragraphs where they differed from the Agreed Statement of Facts.

Submissions by Counsel

¶ 54 The main point of submissions by Enforcement Counsel was that Mr. Spooner's admitted misconduct was serious, intentional, deceptive, and was likely to diminish confidence in the integrity of the securities markets. Therefore, significant sanctions were required for specific and general deterrence to protect the securities markets and the ability of IIROC and member firms to properly perform their regulatory functions.

¶ 55 The main point of submissions by Mr. Spooner's Counsel was the gulf between the position of the parties due to Enforcement Counsel's submissions that the misconduct was tantamount to fraudulent misrepresentation or forgery. He said that at the time Mr. Spooner held a mistaken belief that he could process the transactions for non-clients through the firm, that the rationale for the policy was not explained to him, and that he felt unjustly treated by the firm. The resulting high level of frustration was understandable and, while not an excuse for his behaviour, was relevant as context for determination of sanctions for his resulting conduct. The conduct did not amount to misrepresentation or forgery. While there was an element of seriousness to Mr. Spooner's conduct, penalties imposed should not be crushing or career-ending and there was no need for specific deterrence.

Seriousness of Conduct

¶ 56 Enforcement Counsel noted that Mr. Spooner's admitted misconduct as set out in Contraventions #1 and 2 involved key elements of intentional and deceptive conduct, and a willful disregard for the firm's policies and specific directions. Enforcement Counsel noted that Mr. Spooner's characterization of his conduct as disobedient but not dishonest since he told the firm what he planned to do, was contrary to his admissions and the facts in evidence. He improperly altered and signed the Amended Agreement and accepted commissions without the firm's knowledge or approval. He did not tell anyone at the firm that he had done so. He submitted that in considering appropriate sanctions, Mr. Spooner's conduct could be likened to misrepresentation or forgery. It was not careless inattention or a mistake, which downplayed the intentional and serious nature of the misconduct. It was a serious error in judgment. There was harm to the market and the firm as a result of his misconduct.

¶ 57 Mr. Spooner's counsel conceded that the conduct had a level of deliberateness and was serious but said the circumstances, given the context provided, were less serious than other cases resulting in lengthy suspensions. He argued that this was an error in judgment resulting from understandable frustration. He disagreed that the conduct was akin to forgery or misrepresentation or that other cases involving fraud, forgery or misrepresentation were analogous to Mr. Spooner's conduct. He noted that Mr. Spooner did not forge signatures on the Amended Agreement, but rather signed his own name. Mr. Spooner did not use his private holding company address in the Amended Agreement and he did not contract directly with the issuer. Although this did not make his conduct right, he was not surreptitious. He submitted that the interpretation of Mr. Spooner's conduct for purposes of Contravention #2 was that he was not authorized to sign the document, not

that he forged the document or signatures to it. He conceded that did not diminish the seriousness of Mr. Spooner's misconduct but submitted there was no resulting harm to anyone.

Pattern/Ongoing Conduct

¶ 58 Mr. Spooner's Counsel noted that the conduct occurred on one day and the two contraventions were part of the same ongoing conduct. The conduct was not a deliberate pattern or scheme over a long period of time and he did not mislead the firm to prevent discovery.

¶ 59 Enforcement Counsel noted that Mr. Spooner's conduct amounted to two separate contraventions, and it did not matter if the conduct occurred on only one day. It involved a series of emails and telephone calls, then preparing and signing the Amended Agreement, then a separate commission payment, and then it carried on for nine months during which Mr. Spooner had the opportunity to disclose his misconduct, but did not do so until the firm discovered it and confronted him. It was a pattern of conduct involving multiple events over a period of months. It was open to the Panel to consider the points in time as reminders or opportunities for Mr. Spooner to disclose and take responsibility for his conduct.

Proactive/Exceptional Cooperation

¶ 60 Mr. Spooner's Counsel said that Mr. Spooner did what he could to proactively address the matter. Although he did not acknowledge his conduct prior to detection, Mr. Spooner took proactive steps to address it in a positive and efficient manner after. Short of self-reporting (which he said there was no need for him to do) there was not much else Mr. Spooner could have done. The firm did not terminate him but imposed internal discipline measures which he completed, including a payment for the commissions he received. Mr. Spooner cooperated with the firm and the IIROC investigation. He noted the mitigating factor in paragraph 17(b) of the Agreed Statement of Facts that Mr. Spooner agreed to make early admissions before the Notice of Hearing was issued. This short penalty hearing was not contested. Therefore, there was a significant saving of time and resources.

¶ 61 Enforcement Counsel noted that Mr. Spooner did not deal with the matter in a proactive manner. He could have come forward at any time but chose not to do so. He continued to conceal his misconduct from the firm hoping that neither the firm nor IIROC would discover it. He concealed the personal benefit he received and did not voluntarily turn over the commissions, of which the firm was entitled to a portion. Once the firm discovered it, there was nowhere to hide, so it was difficult to see how admissions at that point represented any meaningful mitigating circumstance. Had Mr. Spooner self-reported, it would have been a mitigating factor. Mr. Spooner did not cooperate above and beyond, he just cooperated as required so should not receive additional credit as a mitigating factor.

Harm/Impact to Markets

¶ 62 Mr. Spooner's Counsel submitted that there was no evidence of actual harm to the firm, issuer, non-clients, clients or the securities markets in this case. He noted that the firm may have been harmed in the context of Mr. Spooner's disobedience, but it was not exposed to any liability or serious jeopardy as a result of his actions. The Amended Agreement was a simple contract and did not require the firm to do anything and there were representations that protected the firm. He argued that perhaps there was only a civil breach of warranty claim and exposure to some liability due to reliance upon the agreement and Mr. Spooner's signature. Mr. Spooner's Counsel noted that the issuer knew it was paying the commissions directly to Mr. Spooner and not to the firm. The non-clients were highly sophisticated so there were no suitability issues and no complaints from them. He noted that any misconduct may involve harm to the markets in a general way and there was no evidence of harm to the markets in this case.

¶ 63 In his submissions, Enforcement Counsel noted that Mr. Spooner's conduct caused actual harm and was likely to diminish investor confidence in the integrity of the securities markets. In any event, based on other cases, where there is deceit or dishonesty there was no need for actual harm as the dishonest conduct harmed the integrity and reputation of the markets. Therefore, Mr. Spooner's behaviour could not be justified by lack of harm.

¶ 64 Enforcement Counsel provided a number of case references to support his submissions.

¶ 65 In *Re Eley* 2019 IIROC 35, the respondent altered documents after they were signed by the clients and

knowingly misrepresented that the clients signed them. The panel noted (paragraphs 94-96) that egregious cases causing harm are obvious but that then Rule 29.1 (now Rule 1400) did not speak of harm but rather of ethics and public interest, and that no actual harm was required. The panel noted:

> How does the conduct of the Respondent stand up to scrutiny? Creating, altering or knowingly leaving misleading documents on record is certainly not a practice to be encouraged. It may be due to careless inattention or taking "short-cuts" at the very least and, at the other end of the scale, willful deception or fraud.
>
> The fact that no client complained of misbehavior does not diminish the risk...

¶ 66 The *Eley* panel found (paragraphs 101 & 103) that willful departure from standards of behaviour "results in a crack in the edifice which has earned public trust and respect. It decreases the value of self-regulation in the perception of the public generally, and specifically of the clients."

¶ 67 The subsequent *Re Eley* penalty decision (2020 IIROC 35), the panel noted at paragraph 46:

> [...] the proper functioning of the investment industry, and protection of public investors, depends on each registered representative executing his or her duties with honesty. [...] Others using the document must be able to have total confidence that the document was signed by the person whose signature apparently appears on the document and that the document is being used properly. It is these fundamental principles underlying the investment industry that [the Respondent] abused.

¶ 68 The panel in *Re Ber* 2022 IIROC 08 noted that activities such as receiving consulting fees without firm knowledge are a threat to market integrity and the reputation of the marketplace as their core element, deceit, cannot coexist with the high standards of ethics or integrity in the industry.

¶ 69 Enforcement Counsel submitted that Mr. Spooner's conduct was not careless inattention but was at the willful deception end of the severity scale. His intentional dishonest conduct for Contravention #2 was signing the Amended Agreement without the knowledge of the firm, and despite his knowledge that he did not have the firm's authorization. He then used the Amended Agreement knowingly misrepresenting that he had authority to sign the Amended Agreement and bind the firm to its terms. In addition, he altered the Amended Agreement to direct the commissions be paid outside the firm to his private holding company, thereby depriving the firm of its portion of commissions for his own benefit. His actions deprived the firm's right to negotiate the amount of the commission, as it did in other financings.

¶ 70 Mr. Spooner deprived the firm of the opportunity to review the agreement and to provide oversight by the responsible firm officers and of its ability to meet its supervision obligations including potential conflicts of interest and ensuring market integrity and effective regulation.

¶ 71 Mr. Spooner admitted that the financing involved a 'hot issue' for which there was much demand. By preferring the non-clients Mr. Spooner prejudiced other potential investors, including other firm clients and other members of the public who did not have opportunity to participate in the financing. This caused harm to the reputation and integrity of the markets. Mr. Spooner's submission that the non-clients were not harmed as they were highly sophisticated and there was no question of suitability was irrelevant. As they were not clients Mr. Spooner was not in a position to assess suitability.

¶ 72 Enforcement Counsel noted that the firm was part of the regulatory framework and could not effectively carry out its self-regulatory role if individual registrants could decide whether to follow the firm's policies or rules based on whether they appeared to make sense. Enforcement Counsel referred to the *Re Papp* 2016 IIROC 51 decision in which the panel noted that the respondent had multiple opportunities to reconsider non-disclosure and chose not to do so and also noted the importance of honesty to the regulation of the industry (paragraph 19):

> It cannot be overemphasized that adequate regulation is the lifeblood of the industry. It is the means by which the investing public's confidence in the integrity of the industry is maintained. There is not room for those, like [the Respondent], who choose not to follow the rules **and especially, to hide that fact**. He had a choice; it was between joining the industry or staying out. Once he elected to become a part of it, he was bound by all the prevailing rules. **It is necessary to**

make it clear to him, and all others who might be similarly inclined to be selective, that the rules are not optional." [emphasis added]

¶ 73 Enforcement Counsel noted that the reason behind the firm's policy was not relevant, only that he was required to follow it to protect the firm and the integrity of the markets. He knew about the policy and that it applied to him, but he chose not to follow it. His submission that the policy did not apply in other circumstances, that it did not appear to make sense to him, or that other firms at other times might allow it, are irrelevant.

¶ 74 Enforcement Counsel argued that this was not a civil liability issue but rather a professional conduct issue involving dishonesty by a registrant to which different rules and standards apply as part of an effective regulatory framework. He argued that the firm likely had cause to terminate Mr. Spooner for his dishonest conduct, despite the fact that the firm chose not to do so and only imposed internal disciplinary action.

¶ 75 He noted that the fact that the issuer knew it was paying the commissions to his private holding company is not mitigating. There was no evidence led regarding the issuer's understanding or potential harm to the issuer, so this is not relevant.

¶ 76 Enforcement Counsel noted that Mr. Spooner's behaviour was not "high level theoretical harm" but actual harm and prejudicial to the firm. This intentional, deceptive conduct significantly impacted and caused harm to investors generally and to the integrity and reputation of the marketplace as a whole. Accordingly, a strong message must be sent in the circumstances of this case.

Specific and/or General Deterrence

¶ 77 Mr. Spooner's Counsel noted that the Agreed Statement of Facts demonstrated Mr. Spooner's understanding of the nature and gravity of his misconduct. Mr. Spooner never took the position that the reason for his frustration served as justification for his conduct. There was admittedly no excuse. The additional evidence was provided as context regarding the nature and level of his frustration. He understood that the Panel may feel the evidence was not relevant, but the Panel should not conclude that the contextual evidence provided was an attempt to justify the conduct. Mr. Spooner was truly remorseful. There was no need for specific deterrence as the evidence demonstrated that there was no reasonable risk that Mr. Spooner will engage in similar conduct or fail to comply with regulatory requirements in the future. He was not ungovernable.

¶ 78 Enforcement Counsel noted that significant sanctions are required for specific deterrence as it appears Mr. Spooner did not take the rules seriously. Significant sanctions are also required for general deterrence to send a message to others and to ensure that IIROC is able to properly perform its regulatory functions.

¶ 79 Even if he were initially unsure of the firm's policy and its application, Mr. Spooner could not rely on a claim of mistaken belief or misunderstanding. He was an experienced registrant, a manager at the firm, and his business was concentrated in this area. Given his experience with these types of transactions, he should have known why the policy applied due to the different issuers, or he should have asked for clarification of the policy, not just acted on his own. JB's email clearly gave him a reason for the firm's policy. He certainly could not claim mistake or misunderstanding after the CCO told him he could not process the non-client transactions and the Investment Banking and Syndication Departments advised that they could not assist him.

¶ 80 Mr. Spooner's stated belief that he was being unreasonably treated by the firm for some reason was not supported by any evidence and appeared to be an attempt to justify his conduct to minimize sanctions. The firm's policy applied to everyone, and Mr. Spooner was not singled out.

¶ 81 Although Mr. Spooner said he was remorseful and the conduct will not recur, he continued in attempts to justify and rationalize his conduct. He continued to say that the policy was nonsensical, that he should not be required to follow the policy, and that he could have done the transactions at another firm. He did not seem to understand the underlying issues, which is problematic and demonstrates that Mr. Spooner does not appreciate the true nature of his serious misconduct. The facts suggest that Mr. Spooner does not take regulation seriously, does not appreciate that following the rules is not optional, and cannot be trusted to act in a fair and honest manner. There is some future risk that he will not follow all the rules including those he does not like or appear to understand.

¶ 82 Enforcement Counsel submitted that he understood that Mr. Spooner was very frustrated but that was

not an explanation or excuse, nor did it provide context to his misconduct for purposes of determining an appropriate sanction. Mr. Spooner conceded that some of the statements made in the Spooner Affidavit and in his testimony at the hearing were inconsistent with his admissions in the Agreed Statement of Facts. The Agreed Statement of Facts did not demonstrate his understanding, given his testimony, and so there were continuing concerns regarding his ability to comply in the future. This raised the question of whether Mr. Spooner was governable.

Disgorgement

¶ 83 Enforcement Counsel noted that Mr. Spooner received a personal benefit, including payment of commissions and avoiding issues regarding the five non-clients. As part of the regulatory rules, he must disgorge the full amount of all profits gained through his misconduct.

¶ 84 Mr. Spooner's Counsel admitted that Mr. Spooner received a personal benefit with the payment of commissions but that he repaid the 'vast majority' to the firm as part of the internal discipline.

Suspension or Permanent Bar

¶ 85 Enforcement Counsel submitted that there was no question that a suspension was warranted in his case, but that the real issue was whether a permanent ban was appropriate and should be considered given the following factors:

a. the contraventions involved significant harm to the investing public and integrity of the markets;

b. the misconduct had an element of criminal or quasi-criminal behaviour; and

c. there was reason to believe that Mr. Spooner cannot be trusted to act in an honest and fair manner in dealings with clients, the public, and the industry.

¶ 86 Mr. Spooner's acceptance of commissions without knowledge and approval of firm was a serious contravention, especially after he was told he could not process the non-client transactions. He committed a second serious contravention by his willful and deceptive conduct in altering and using the Amended Agreement without the knowledge or authorization of the firm, which constituted a misrepresentation to the issuer that he had the authority to do so. This conduct can be considered akin to forgery or misrepresentation. Mr. Spooner's misconduct goes to the heart of trust relationship among the registrant, firm and regulator which is fundamental to the securities industry, especially given the firm's self-regulatory obligations.

¶ 87 Enforcement Counsel submitted that the Panel must send a strong message that the willful breach of the rules and the standard of conduct is a serious offence deserving of a lengthy suspension or permanent ban from registration. Even though he has not been registered for two years, as he is not currently registered, a short suspension would have a negligible effect on him. There may be some impact to Mr. Spooner from significant sanctions, but this would not prevent all employment (so would not be a career-ender) and need to be long enough to achieve general and specific deterrence.

¶ 88 Mr. Spooner's Counsel noted that almost every off-book transaction case was serious but not all require a lengthy suspension. Although Mr. Spooner was not then a registrant, and there was no evidence that he planned to be re-registered, it could not be said that the sanctions were any less important. Even if Mr. Spooner decided not to seek re-registration with IIROC, a lengthy suspension would have an impact on his ability to participate in the markets in other capacities (e.g., through securities commission registrations, with exchange-listed issuers, etc.) as these others would gauge the seriousness of the penalty.

Penalty Range Cases

¶ 89 Counsel referred the Panel to a number of cases to support their respective submissions regarding appropriate penalties in this case. Cases included both settlement agreements and hearing decisions and covered a period from 2009 to 2022 from various regulatory jurisdictions.

¶ 90 Misconduct in the cases ranged from one contravention regarding a few off-book transactions to cases with added contraventions for misleading the firm and/or IIROC, forging client signatures, and losses to clients.

Most respondents had no previous disciplinary history. Panels imposed sanctions ranging from short suspensions of one month, to longer suspensions of up to three years, to permanent bans. Fines ranged from $10,000 to $200,000, with a demonstrated financial hardship or inability to pay in some cases. The sanctions also included disgorgement, rewriting industry exams, costs, and periods of close or strict supervision ranging from six to 18 months. Penalties were higher in cases where there was deceit, misrepresentations, or client losses.

¶ 91 The two cases involving one-month suspensions (*Re Paziuk* 2009 IIROC 47 and *Re Poirier* 2017 IIROC 12) were settlements. *Re Paziuk* involved two contraventions, off-book transactions and misleading documents provided to the firm during an inventory. The size of the transactions in *Re Paziuk* was smaller ($3,525 in fees), included a fine of $20,000 and strict supervision for one year, and it was issued in 2009 therefore somewhat dated. *Re Poirier* involved one off-book contravention, a 'gift' payment from a client, the panel accepted a one-month suspension, a $100,000 fine (although the transactions totaled $150,000) and close supervision for one year based upon a demonstrated inability to pay and inability to find work in the industry for the previous two years.

¶ 92 Cases involving longer suspensions included:

a. *Re Cuthbertson* 2021 IIROC 24 was a settlement agreement involving off-book transactions, discretionary trading and misrepresentations to the firm and resulting in a 18-month suspension, a fine of $35,000, six months of close supervision, and rewrite of the Conduct and Practices Handbook (**CPH**) exam;

b. *Re Ricci* 2014 IIROC 24 (who was supervised by Mr. Eley) was a hearing in 2014 involving inflated net worth clients to participate, adding client signatures after the fact and misrepresentations to the firm and resulting in a two-year suspension, a $200,000 fine, one year of strict supervision, and costs of $15,000 which the hearing panel pointed out were not crushing penalties;

c. *Re Blackmore* 2014 IIROC 43 was a settlement agreement in 2014 involving off-book transactions for five client transactions in the amount of $780,000 and resulting in a 45-day suspension, a $30,000 fine and $2,500 in costs;

d. *Re Papp* 2016 IIROC 41 and 2016 IIROC 51 was a hearing in 2016 involving an account at other firm and misrepresentations to the firm and continuing failure to cooperate and resulted in a two-year suspension (already out of the industry for two years), a fine of $20,000, rewrite of the CPH exam, and costs of $10,000;

e. *Re Rudensky* 2018 IIROC 28 and 2018 IIROC 38 was a hearing in 2018 involving off-book transactions and misrepresentations to the firm and resulting in a two-year suspension (out of industry for two years), a fine of $30,000 and rewrite of the CPH exam;

f. *Re Eley* 2019 IIROC 35 #2 was a hearing in 2019 involving altered signed client documents and resulting in a 12-month suspension, a $50,000 fine, 18 months of close supervision, $50,000 in costs given the respondent's previous discipline history in 2014; and

g. *Re Ber* 2022 IIROC 08 was a settlement in 2022 involving off-book transactions for 55 clients in the amount of $104,500 and resulting in a three-year suspension, a fine $70,000, costs of $5,000, and the panel noted that it accepted evidence of inability to pay or the fine would have been higher.

¶ 93 The cases involving permanent bans included:

a. *Re Pan* 2012 IIROC 22 was a hearing in 2012 involving large off-book client loans in the amount of $761,000, $3million client losses and ongoing deceit and resulting in a permanent ban with a fine of $50,000;

b. *Re Prior* 2013 IIROC 1 was a hearing in 2013 involving criminal forgery and resulting in a permanent ban with costs of $25,000;

c. *Re Jenkins* 2021 IIROC 5 was a settlement in 2021 involving large off-book transactions for

clients in the amount of $980,000 and some non-clients, with concurrent MFDA proceedings, and resulting in a permanent ban, disgorgement of $55,450, a fine of $30,000 and costs $2,500; and

d. *Re Movassaghi* 2022 IIROC 2 involved forging client signatures, misrepresentations to IIROC, and previous discipline history for similar conduct and resulting in a hearing decision involving two members of this panel (Murray/Wright) with a permanent ban from the industry, fines totaling $100,000 and costs of $60,000.

¶ 94 Some cases involving off-book transactions resulted in fines and disgorgement but not suspensions including:

a. *Re Arapis* 2011 IIROC 27 was a hearing in 2011 resulting in a fine of $10,000, disgorgement of $25,000 for 12 clients;

b. *Re Raby* 2013 IIROC 30 was a settlement in 2013 involving off-book transactions and resulting in disgorgement of $14,000, a fine of $10,000, close supervision and a requirement to rewrite the CPH exam;

c. *Re Eley* 2014 IIROC 52 #1 was a hearing in 2014 involving inflating client net worth to participate and resulting in a fine of $50,000, six months of strict supervision and $15,000 in costs; and

d. *Re Matthews & Francis* 2018 IIROC 16 was a settlement in 2018 involving off-book transactions for 22 clients totaling $940,000 and resulting in disgorgement of $84,600, a fine of $15,000, costs of $5,000 with penalties split between the two respondents. The panel noted its concern that these sanctions were at the low end of the scale.

¶ 95 Counsel agreed that there were no cases directly on point with the particular facts of this case, although the cases set a reasonable range. Many of the cases with similar facts involved settlement agreements. Counsel acknowledged that this was serious misconduct warranting at least a period of suspension and agreed that a global approach to sanctions was appropriate.

¶ 96 Enforcement Counsel noted that the Panel had wide latitude to determine what penalties were appropriate. The Panel's role in a penalty hearing is to determine the correct sanction and is fact specific process versus the role in a settlement agreement where the panel is bound by previous cases to determine the reasonableness of the agreed sanctions.

¶ 97 Enforcement Counsel referred to *Re Clark*, [1999] I.D.A.C.D. No. 40 (confirmed in *Re Ahrens* 2014 IIROC 46), which caution against using settlement agreement sanctions to determine appropriate penalties for hearings as settlements generally involve lower penalties than those imposed at hearings for various reasons. In addition, the role of a panel in a hearing is to determine an appropriate penalty and not just accept penalties agreed in a settlement agreement.

¶ 98 Enforcement Counsel noted that a number of the cases dealt only with misconduct similar to that in Contravention #1. This case is significantly different given the intentional and deceptive conduct involved in the conduct in Contravention #2, which is a separate violation and not simply an aggravating factor for Contravention #1.

¶ 99 Enforcement Counsel noted that Mr. Spooner's conduct was serious, intentional, deceptive and ongoing for a period of months. Past cases found that a deceit or a lack of honesty harms the integrity of the market, breaches fundamental the principle of trust required for the investment business, and that no actual harm need be proven for serious sanctions to result. In this case, Mr. Spooner's conduct caused harm to the firm and to the integrity and reputation of the markets. Therefore, his conduct warrants sanctions at the mid to high end of the range, i.e., *Re Cuthbertson, Re Rudensky, Re Papp, Re Eley* #2, *Re Ricci* and *Re Matthews & Francis*. Re Blackmore 2014 IIROC 43 only involved one contravention for off-book transactions with no other contraventions for deceptive conduct. *Re Poirier* admitted misconduct before discovered, had a demonstrated inability to pay substantial fine, was terminated by the firm and could not find employment after two years due to misconduct, none of which applied to Mr. Spooner.

¶ 100 Enforcement Counsel noted that the fact that the non-clients were sophisticated was irrelevant and cannot be a mitigating factor. Mr. Spooner would have no idea of the degree of their sophistication or net worth as they cannot be assessed properly unless they are clients. That is why the Agreed Statement of Facts speaks only to a lack of complaints by the non-clients.

¶ 101 Enforcement Counsel suggested the following penalties were warranted in this case:

a. bar from registration for two to three years;

b. a fine of $20,000 (taking into account the $30,000 paid to the firm);

c. disgorgement of commissions of $35,500;

d. succession completion of the CPH course;

e. a 12-month strict supervision upon registration; and

f. costs to be determined in a subsequent application.

¶ 102 Mr. Spooner's Counsel submitted that Mr. Spooner understood that there must be consequences to his actions, but it should not be a career-ender. He noted that sanctions were meant to be preventive and that the Panel must consider the evidence and public interest in determining the need for specific and general deterrence. Mr. Spooner's Counsel referenced *Walton v. Alberta (Securities Commission),* 2014 ABCA 273 (a 2014 decision of the Alberta Court of Appeal) quoted with approval in the B.C. Court of Appeal decision in *Davis v. British Columbia (Securities Commission),* 2018 ABCA 149, at paragraph 154:

> [A]t the end of the day the sanction must be proportionate and reasonable for each appellant. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction on any individual appellant.

¶ 103 He conceded that Mr. Spooner's conduct involved a level of seriousness and his decision to proceed despite the firm's refusal involved an element of wilfulness and deliberate conduct. However, he said that the other elements of serious misconduct found in other cases were not present in Mr. Spooner's case. He said that sanctions, including any suspension, must be tailored to this case, analogous other cases, and not crushing.

¶ 104 He submitted that Mr. Spooner's conduct involved a one-time event which was not planned, resulting understandably from his high level of frustration that day. He did not cover up his conduct but signed his own name to the Amended Agreement. Initially, he did not understand JB's email and then just told no so did not receive a full reason. The transaction numbers were "relatively modest". Although Mr. Spooner obtained a financial benefit, he already repaid the vast majority of funds received to the firm as part of the internal discipline. It was not necessary for Mr. Spooner to rewrite industry exams since there was no evidence of ongoing issues.

¶ 105 Mr. Spooner's Counsel provided cases to support his submissions, as well as a summary (his Schedule A) reviewing the cases presented by Enforcement Counsel. He noted that IIROC's cases were not comparable as they involved more serious conduct with lesser penalties, even in cases where deceitful conduct was found. In *Re Paziuk,* in addition to the off-book transactions, the respondent provided misleading information to the firm which resulted in a one-month suspension. He agreed that *Re Matthews & Francis*, *Re Arapis* and *Re Raby* were somewhat comparable or at least provided the Panel with some guidance, particularly regarding Contravention #1. He noted that although *Re Matthews & Francis* was a settlement and the panel noted concern about the size of the fine in relation to the amount of the enrichment, the conduct had an element of willfulness with similar mitigating factors to those in this case (no suitability issues, no complaints), with higher commission amounts resulting in a fine of $15,000 and no suspension. *Re Raby*, although a settlement, resulted in no suspension and a fine of $10,000. *Re Blackmore*, a settlement, involving off-book transactions with an additional element of a personal interest, resulted in a 45-day suspension and a $30,00 fine, and the panel noting deceit as a serious issue.

¶ 106 Mr. Spooner's Counsel argued that the sanctions proposed by Enforcement Counsel would be crushing and disregard the uniqueness of Mr. Spooner's personal circumstances. Mr. Spooner's Counsel suggested the following penalties were warranted in this case:

a. a prohibition from registration for no more than 30 days;

b. a fine of not more than $10,000;

c. disgorgement of $5,500 (taking into account the $30,000 paid to the firm); and

d. costs to be considered at a subsequent proceeding.

ANALYSIS

Factual Inconsistencies and Credibility

¶ 107 Given his admission that the facts set out in the Agreed Statement of Facts were correct, where Mr. Spooner's statements in the Spooner Affidavit or his testimony appeared to conflict with those in the Agreed Statements of Facts, the Panel preferred the Agreed Statement of Facts.

¶ 108 Regarding the issue of credibility, the panel in *Re Matthews* referred to the decision of the BC Court of Appeal in *Faryna v. Chorny*, 1951 CanLii 252 (BC CA), [1952] 2 D.L.R. 354 at 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

¶ 109 The Panel compared the information provided by Mr. Spooner in the Spooner Affidavit and during his testimony at the hearing with the other information provided in the JB Affidavit and JB's testimony at the hearing.

¶ 110 We found JB to be forthright, responsive, and his information regarding the firm's policies and procedures was of assistance to us in assessing this matter. Given his position as the Managing Director of the Investment Banking Department, and his many years of management experience at the firm, JB knew the functioning of other firm departments including the Syndication Department. His explanation regarding the policy and its application by the firm was supported by the other documents and affidavit evidence. Where JB's evidence differed from Mr. Spooner's evidence regarding those issues, we accept JB's evidence to be more in keeping with the other documentary evidence.

¶ 111 We did not feel that JB's failure to recall a conversation with the Syndication Manager to have much weight given that Mr. Spooner and his assistant were privy to the conversation.

¶ 112 We did not feel that the CCO's failure to recall the issue or his discussions with Mr. Spooner in detail to have much weight. The CCO's recollections during his unsworn IIROC interview were consistent with Mr. Spooner's testimony and the recollections of the assistant as set out in the Assistant Affidavit.

Sanction Guidelines and General Principles

¶ 113 The Panel received and considered extensive submissions from Counsel regarding facts at issue and appropriate penalties for the admitted misconduct in this case. We considered the *General Principles* in IIROC's Disciplinary Sanction Guidelines (the **Guidelines**). Although the Guidelines are not binding on the Panel, they describe the principles to be applied and illustrate how case-specific factors must be considered in determine the appropriate sanctions in each particular case.

¶ 114 Sanction Guidelines, Principle 1:

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).\
>
> General deterrence can be achieved if a sanction strikes an appropriate balance by addressing

Regulated Person's specific misconduct but is also in line with industry expectations [referencing *Re Mills*]. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors.

¶ 115 The panel in *Re Mills,* 2001 IDACD 7 (April 2001) (p. 3) noted:

> Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.

¶ 116 We determined that the following Sanction Guidelines principles were most applicable to this case, taking into account Principles 1, 5 and 6 (suspension or permanent ban), 7 (demonstrated inability to pay), 8 (exceptional assistance by the respondent), and 9 (tailoring remedial sanctions to the specific conduct).

¶ 117 With the evidence, submissions, Sanction Guidelines and previous cases in mind, the Panel made the following findings regarding the appropriate sanctions in this case.

Mitigating and Aggravating Factors

¶ 118 We found the following factors to be mitigating:

a. Mr. Spooner had no previous disciplinary history.

b. The non-clients did not file any complaints.

c. Mr. Spooner agreed to early admissions before the Notice of Hearing was issued.

d. The firm did not terminate him, and he completed internal discipline including a payment of $30,000 regarding the unauthorized commissions and six months' strict supervision.

e. Mr. Spooner did not make misrepresentations to the firm or to IIROC during its investigation, and he cooperated with the IIROC investigation.

f. He expressed remorse.

g. There was no evidence of losses to any clients or the non-clients.

h. The unauthorized commissions related to five non-clients totaling $35,500.

¶ 119 We found the following factors to be aggravating:

a. The conduct was serious. It was not the result of careless inattention but rather was intentional, willful and deceptive (not just disobedient as characterized by Mr. Spooner). It was a severe lapse of professional judgment.

b. Mr. Spooner's conduct was deceptive on three levels: (1) he signed the Amended Agreement using his managerial title purportedly on behalf of the firm, knowing he did not have the authority to do so, thereby clothing himself with apparent corporate authority to parties outside the firm and binding the firm to obligations without the ability for effective oversight; (2) he had the fees paid to his personal holding company without advising the firm or paying to the firm its share of the fees until the conduct was later discovered; and (3) he did not disclose his conduct to the firm until the firm found out during a further due diligence review some nine months after the fact.

c. He clearly placed his interests ahead of those of the firm and others for which he received a personal benefit of $35,500 and he avoided potential issues with the non-clients if they failed to receive shares in the financing.

d. He did not self-report the conduct or make a voluntary payment to the firm of commissions owed to it, but rather he awaited detection and internal discipline. When asked why he did not bring the issue to his firm sooner, he said that he felt bad and just wanted the issue to go away.

e. Mr. Spooner was not a new registrant or one unfamiliar with these transactions. He had more than 30 years' experience, he was a Manager at the firm, and this was his self-proclaimed area of expertise. He is expected to know the rules and regulatory requirements which impact his business and if he had questions to seek clarification prior to taking action.

f. During his testimony, the Panel noted that Mr. Spooner continued to be very frustrated by the firm's refusal, said the policy made no sense to him, and he did not feel he was given a proper reason by the firm for denying participation by the non-clients in the financing. This was somewhat at odds with the admissions in the Agreed Statement of Facts and the unqualified acceptance of responsibility by Mr. Spooner for the nature and consequences of his wrongful conduct.

g. Although the conduct related to one series of transactions, the contraventions carried on for nine months until they were discovered by the firm. There were many opportunities for him to self-report and pay the firm the commissions owed but he chose not to do so. Mr. Spooner had a period of nine months for reflection and sober second thought. He ought to have self-reported his conduct to the firm and to IIROC. He consciously chose not to do so.

h. There was demonstrated harm to the firm. Although not required for cases involving deceit, there was demonstrated harm to the integrity and reputation of the markets.

i. He betrayed the trust of the firm as a member of its senior management. He undermined his, and put at risk the firm's, level of trust with the securities markets and with the regulator.

Additional factors

¶ 120 Mr. Spooner did not provide exceptional cooperation over and above usual expectations of a registrant, he was reactive and responded to the firm and IIROC once the conduct was discovered and the investigation began.

¶ 121 Mr. Spooner's comment that the five non-clients were very sophisticated and there were no suitability issues is not relevant as there was no determination of suitability since they were non-clients.

¶ 122 The fact that he signed his own name to the Amended Agreement is not mitigating.

¶ 123 Mr. Spooner did not present any evidence of financial hardship or inability to find work in the industry. He was employed in the industry for a period after his employment with the firm ended.

¶ 124 He is not currently involved in the industry. However, there are consequences to any regulatory action including an impact upon the person's reputation.

¶ 125 His high level of frustration in no way excuses or mitigates his conduct. We accept that Mr. Spooner was very frustrated by the situation. But, as he conceded, this did not excuse his behaviour which he knew at the time to be wrong. We accept that he now deeply regrets his conduct and is remorseful.

¶ 126 Mr. Spooner's belief that other internal firm issues impacted the firm's refusal to approve the non-client transactions was not supported by any other evidence. There was no evidence that Mr. Spooner was singled out as the long-standing policy applied to everyone at the firm and no exceptions were made to the policy for anyone.

¶ 127 The fact that he might have been able to do so at another firm is irrelevant, he was aware he could not do so at that firm, for that financing, at that time, given the firm's policy.

CONCLUSIONS

¶ 128 Mr. Spooner owed a duty of loyalty to the firm which had entrusted him with a very senior, responsible position. He also owed a duty to the firm's clients, the issuer, IIROC, and the public to ensure the integrity of the capital markets through ethical and responsible conduct. He failed in those duties.

¶ 129 Mr. Spooner failed to comply, and in fact chose not to comply with rules, policies and regulatory requirements. His actions represent a marked departure from his professional obligation to observe the high standards of ethics and conduct required for just and equitable principles of trade. His behaviour was unbecoming, detrimental to the public interest, and likely to diminish investor confidence in the integrity of the capital markets.

¶ 130 This was serious, deliberate, willful and deceptive conduct resulting in misrepresentation. Although the conduct might not amount to forgery, the manner in which he revised the Amended Agreement and accepted payment of the commissions through his private company outside of the firm had an element of dishonesty. The fact that he signed his own name to the Amended Agreement does not reduce the wilfulness or gravity of his misconduct, only that it did not elevate his conduct to a potential criminal sanction level. It still amounted to a misrepresentation that he had the authority of the firm to enter into the Amended Agreement, which he clearly knew he did not at the time he signed it. There was potential harm to the issuer and demonstrated harm to the firm and the integrity and reputation of the markets.

¶ 131 Although he may have been initially confused or mistaken about the nature of his emails with JB, it was clear by the time he spoke with the CCO that he was prohibited from doing so. He took it upon himself to decide that the firm's policy should not apply to him. The firm provided a reason for the policy to him, he just did not like the answer. Mr. Spooner's steadfast belief that the policy was unreasonable is irrelevant, but troubling. Once he was aware of the policy, he had to comply with it. As a result, the Panel was concerned that he did not fully understand the ramifications of his conduct or accept the extent of the seriousness of his lack of judgment.

¶ 132 We did not delve into the reasons for the firm's policy, nor the reasonableness of the policy. Firms are entitled to put in place policies and procedures to deal with the effective and efficient function of their business so long as they comply with other regulatory requirements. He was required to follow the firm's rules and policies, and was not singled out.

¶ 133 The Panel expects registrants to know the regulatory and firm requirements for all transactions. We expected more of a registrant with Mr. Spooner's expertise and experience in the industry. We expected that if he had concerns or was uncertain about the firm's policy or the procedures that he would ask for clarification. In the Panel's view, this causes concerns regarding his overall competency and his willingness to follow policies or directions which appear averse to his personal interests.

¶ 134 We feel there is still some risk to the marketplace given his apparent lack of full appreciation for the nature and consequences of his misconduct. Future issues may result unless we intervene to ensure proper education and appropriate sanctions to deal with his admitted misconduct. There is a need for both specific and general deterrence.

¶ 135 We agree that a strong message is required to ensure general deterrence for the industry in general and to ensure specific deterrence for Mr. Spooner. Mr. Spooner made a choice to become a registrant in an industry which is heavily regulated to protect the public interest. As a registrant, he was required to comply with all of the rules all of the time, not just some of the rules or for some of the time at his choosing. It is necessary to make it clear to Mr. Spooner and to others who might make similar choices that following the rules is not optional and that serious penalties will result for breaches of the rules.

¶ 136 Although there were two separate contraventions, we agree with Counsel that a global penalty is appropriate.

¶ 137 The sanctions proposed by Mr. Spooner's Counsel would be wholly inadequate to address the conduct and harm in this case. On the other hand, we do not feel that this is a case where a permanent ban is appropriate. We did not feel that Mr. Spooner was ungovernable, but we feel that the sanctions we imposed will impress upon him the need to carefully reflect upon his behaviour to ensure that he takes steps to fully comply with all requirements and regain the trust of any future employer firm, the markets, and the regulator.

¶ 138 We felt that a period of suspension in the mid-range to be appropriate in this case. We felt that a rewrite of industry exams and a period of supervision as conditions or re-registration are required to address what we saw as potential competency and compliance issues.

¶ 139 There was no evidence of financial hardship to Mr. Spooner by a suspension. The only issue raised was his reputation and a possible impact to him of being unregisterable as a result of the Panel's sanctions. Any regulatory action will have some consequences for a respondent's reputation.

¶ 140 We agree with the principle in *Walton* and *Re Raby* that penalties should not be crushing and are meant to be remedial rather than punitive. However, the penalties must be sufficient to ensure confidence in the regulatory system and public markets. The penalties we impose are not crushing or unfit. They are remedial, not punitive, and are meant to protect the public interest while sufficient enough to punish Mr. Spooner and deter others.

¶ 141 As noted by Enforcement Counsel, as this was not a settlement case, the Panel has wide latitude to determine appropriate penalties and to set current and future industry expectations. However, the Panel was somewhat constrained in this case by the Agreed Statement of Facts and the limited nature of the hearing, which was called to address the issue of appropriate sanctions. We decided this case based upon its unique facts and Mr. Spooner's particular circumstances. Caution should be exercised in relying upon our decision in future cases given its unique facts.

ORDER

¶ 142 The Panel orders the following sanctions as appropriate in this case:

a. bar from registration with CIRO for two years;

b. a fine of $20,000 (taking into account the $30,000 paid to the firm);

c. disgorgement of commissions of $35,500;

d. successful completion of the Conduct and Practices Handbook course;

e. a 12-month strict supervision upon registration with CIRO; and

f. costs to be determined in a subsequent application.

COSTS SUBMISSIONS

¶ 143 The parties agreed to make cost submissions upon receipt of the Panel's decision on penalty. We ask that the parties advise the Panel, through the National Hearing Officer, if they wish to convene a hearing to speak to costs or whether they wish to proceed by way of written submissions.

¶ 144 The Panel thanks Counsel for their helpful submissions and those who assisted with the hearing process.

Dated at Vancouver, British Columbia on July23, 2023.

Linda J. Murray, Chair

William Wright

Brian Worth