BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Stanley Clayton Niekras Syracuse, NY, Respondent.	DECISION Complaint No. 2013037401001 Dated: October 4, 2018

The Department of Enforcement failed to prove that the respondent made misrepresentations of material fact in violation of FINRA Rule 2010. Held, findings affirmed and complaint dismissed.

Appearances

For the Complainant: Stuart Feldman, Esq., Jeff Fauci, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Timothy J. O'Connor, Esq.

Decision

FINRA's Department of Enforcement ("Enforcement") alleged that Stanley Clayton Niekras made misrepresentations to an elderly married couple and their three adult children, in violation of FINRA Rule 2010. The couple, DP, a retired real estate lawyer, and his wife, VP (collectively, the "Ps"), were wealthy, long-time customers and friends of Niekras. After DP gifted each of his children approximately $450,000, Niekras recommended that the children, CLP, DDP, and DVP, each purchase a particular variable annuity. When the children declined to purchase the annuity, Niekras sought payment for his prior services to the Ps, in lieu of the commissions Niekras would have received if the children had purchased the annuity. Although Niekras did not have an investment advisory or financial planning agreement with the Ps, Niekras prepared for them written billing estimates and a draft billing statement for his services.

Niekras's actions to seek payment underlie Enforcement's allegations that Niekras made misrepresentations to the P family. The Hearing Panel found that Enforcement failed to prove that Niekras made misrepresentations in violation of FINRA Rule 2010. Notably, in the Hearing

Panel's view, Enforcement chose not to have either DP or VP testify at the hearing or otherwise participate in the underlying investigation, despite the availability of both. We, like the Hearing Panel, find that the absence of witnesses—especially DP—impacts our assessment of the evidence in this case. Based on this record, and the lack of evidence about the surrounding circumstances with respect to the alleged misrepresentations, we find that Enforcement failed to prove its case. Accordingly, we affirm the Hearing Panel's findings and dismiss the underlying complaint.

I. Facts

A. Background

Niekras entered the securities industry in 1993 and registered with numerous member firms during his career in the securities industry. From May 2005 through January 2014, Niekras was registered as a general securities representative at MML Investors Services, LLC ("MML Investors Services"). MML Investors Services terminated Niekras "due to change in production requirements." From May 2014 to October 2015, Niekras was associated with another FINRA member. He is not currently working in the securities industry. While registered in the industry, a substantial portion of Niekras's business consisted of selling variable annuities, and he was considered an expert among his peers about the intricacies of this type of investment.

In 2002, Niekras inherited the Ps as customers when another broker left his firm. Niekras and DP quickly developed a friendship and socialized regularly. Among other things, they ate lunch together every Wednesday, each taking turns paying, went to car shows, and traveled together, including overnight trips to various states for football games. Niekras also went to DP's summer residence twice a year and often performed various handyman chores. Niekras also was a guest at some of DP's family events.

When Niekras inherited the Ps' accounts, their assets were comprised of money market accounts and annuities. According to Niekras, DP had purchased various annuities from Niekras's predecessor, and DP liked annuities because they gave him some control over his assets over the long term and enabled him to protect his children from inheriting too much money when he passed away.

During the course of their friendship and professional relationship, Niekras spent considerable time ascertaining and gathering an accounting of all of the Ps' assets. According to Niekras, after he presented DP with documentation showing the Ps' assets, current value, and beneficiaries, DP became concerned that the ultimate distribution of his assets would not be balanced among his children.

By the summer of 2012, Niekras was concerned that DP and VP, aged 90 and 91 respectively, were in declining health. In August, Niekras wrote a memo to file "expressing, once again, [his] concerns for the Ps." He continued, "[DP] is still capable but appears to be slowing down. During some of our lunches, he is very sharp. During other lunches he appears to have lessened his comprehension of daily events." Niekras also noted in the memo that VP, who was an unsophisticated investor for whom DP handled all financial matters, had no

comprehension of the Ps' wealth and had "forbidden [Niekras] from making any more money for them as it only causes taxes and causes [DP] to be concerned for the future." According to Niekras, he drafted the memo and presented it to MML Investors Services because he wanted to see if the firm could, or should, take any action to help protect DP. The MML Investors Services compliance officer concluded that DP was "under control" and took no action.

In the fall of 2012, the Ps' daughter, CLP, became more involved with the Ps' finances.[1] According to CLP, DP "became distressed" in the fall of 2012 that his children would not share equally in their inheritance. At the time, the Ps' estate favored their eldest child, DVP, because she was the only named beneficiary or contingent beneficiary in many of the assets that the Ps had acquired when DVP was their only child.

B. DP's Transfer of Wealth to His Children

To assist her parents, CLP met Niekras and DP in the fall of 2012 to learn more about her parents' financial situation.[2] At this meeting, Niekras provided DP and CLP a detailed spreadsheet that listed the Ps' assets, which totaled approximately $4.5 million, and their beneficiaries.[3] Some weeks later, CLP and Niekras had a telephone call during which Niekras told CLP that he had encouraged the Ps to put some of their money in trusts for their children, but he had not been successful in convincing the Ps. Niekras was concerned that the government was going to lower the limit on assets exempt from the estate tax, thus making it advantageous, in his view, to transfer assets before the end of the year. Niekras said that he had tried to have DP meet with Niekras's recommended estate planning and tax lawyer to create the trusts, but DP had not done so.[4]

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[1] The Ps also named CLP executor of their will and granted her power of attorney with respect to each of her parents if the other parent was unable or unwilling to serve.

[2] CLP had previously met Niekras socially, including going out to dinner on a date with Niekras. It is unclear from the record whether the date was a set up by DP or whether Niekras asked DP's permission to take CLP out to dinner. After dinner, Niekras sent CLP several small gifts, but CLP did no pursue the relationship.

[3] Niekras prepared multiple spreadsheets for the Ps, which contained at least 15 different categories of information about the Ps' assets. The spreadsheets enumerated the Ps' various banking account relationships and set forth their IRA accounts, 401(k) accounts, life insurance policies, variable annuities, fixed annuities, and real estate holdings.

[4] The estate planning and tax lawyer was recommended by Niekras and his co-workers at a prior firm. DP met the same lawyer in 2002. According to Niekras, he recommended the lawyer because he was "product neutral" and his "entire practice was built around doing prudent things for estates."

At the end of November 2012, Niekras, CLP, and the recommended lawyer had a meeting to discuss Niekras's recommendation that the Ps set up trusts for the children. At the meeting, Niekras stressed that the Ps should put their money in trusts. According to Niekras, the lawyer discussed the expected change in the tax laws and advised Niekras and CLP that too little time remained in the year to set up trusts; therefore, the only option was for the Ps to gift funds directly to their children if the Ps wanted to transfer assets to them in 2012. CLP recalled the meeting differently; she said the purpose of the meeting was solely to discuss trusts, as recommended by Niekras.

Meanwhile, Niekras also discussed with the Ps the subject of gifting assets. According to Niekras, DP wanted to transfer assets to the children in a way that would keep the children from spending their gifted assets too quickly, but would also provide them with income for the rest of their lives. Niekras testified that DP also wanted the gifted assets to exclude the children's spouses and instead pass directly from his children to their heirs and ultimately to charity upon the death of the last heir. DP instructed Niekras to prepare a proposal that accomplished these goals. Niekras chose a product for the children to purchase with the gifted assets: the Lincoln ChoicePlusVariable Annuity B-Share with i4LIFE. Niekras contends that only this product contained the structure that implemented DP's objectives.

In December 2012, when the Ps ultimately decided to gift assets to their children, Niekras established brokerage accounts for each child. The Ps funded each account with a $446,012 gift on December 28, 2012. Niekras was the broker of record for the children's accounts.

C. The Ps' Children Do Not Accept Niekras's Proposal to Purchase the i4LIFE Variable Annuity

On March 5, 2013, Niekras sent identical proposals to the children (with a copy to DP) recommending they purchase the i4LIFE variable annuity with the assets they had received from their parents.[5] Niekras's cover letter accompanying the proposal informed the children that the proposal "resolves your parents[']] concerns and provides certain unique income and tax benefits for each of the children if the proposal is adopted by all three." The cover letter also stated that Niekras had reviewed the proposal with DP. Two bullet points on the proposal referred to commissions: "No Commissions Charged to Purchaser" and "Investment Not Reduced By Commissions."

Niekras expected, and testified that DP expected, that the Ps' children would adopt Niekras's recommendation. If all of the children purchased the i4LIFE variable annuity, Niekras anticipated receiving about $75,000 in total commissions.[6]

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[5] According to Niekras, DP previously reviewed and approved the proposal, and he expected his children to accept the proposal.

[6] Prior to the end 2012, Niekras began receiving letters from the IRS threatening him with the seizure of his assets. And, on March 5, 2013—the same day he sent his proposal to the Ps'

[Footnote continued on next page]

Niekras testified that he understood he had no right to payment if the children did not accept the proposal: "In this case I proposed. It was not accepted. I'm out of luck. No bill was going to flow." In the event the children did not follow his recommendation, however, Niekras wanted, and felt he deserved, to be paid for the services he had previously provided to the Ps.

D. Niekras Seeks Fees for His Prior Work After the Children Decline to Purchase the i4LIFE Variable Annuity

After the Ps children did not respond to Niekras's i4LIFE variable annuity proposal, Niekras became concerned that they would not purchase it and his expected commissions would not materialize. Niekras therefore devised an alternative plan through which he would request that the Ps (and/or their children) pay him fees for services he previously had rendered to the Ps.

At this time, however, MML Investors Services had written procedures governing advisory fee arrangements with customers. The procedures required registered representatives who wanted to have an advisory fee arrangement with a customer to: (1) disclose up front the fee the broker intended to charge the customer and (2) have a signed contract, approved by a supervisor, in place. Niekras admitted that he was aware at the time that MML Investors Services' procedures generally capped financial planning fees at $15,000. He also admitted that he knew he did not have an investment advisory or financial planning agreement with the Ps and was not entitled to estate planning or financial planning fees from them.

Despite not having an investment advisory or financial planning agreement, Niekras prepared several billing documents related to the P family. These documents, along with the oral statements Niekras made to the Ps about the fees and billing estimate, serve as the basis for Enforcement's charge that Niekras made material misrepresentations to the Ps.

1. Niekras Prepares a Preliminary Billing Estimate

Niekras prepared a one-page, undated document titled "[DP] and [VP] Preliminary Billing Estimate." Niekras wrote that "[he had] expended a major amount of time and resources for [the P] family and its financial future from 2010 to date and even prior to 2010." He continued:

> You have always made sure that I was paid commissions in lieu of any fees and I have been satisfied with that compensation. As always, I will

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children—the IRS filed a $27,845 lien against him. Niekras thought the commissions generated from the sale of the i4LIFE variable annuity would satisfy his IRS debt. After his firm compliance officer emailed him on March 18, 2013, about the lien, Niekras responded that he had "business cooking that will more than settle the IRS debt." Niekras also owed money to the State of New York, which imposed a tax lien against him on August 6, 2013, for $3,505.

> accept commissions in lieu of fees and expenses. The commissions are not payable by any [P] Family Member. Thus the total billing exposure for the [P] Family Members will be $0.00 if all participate.
>
> If fees in lieu off [sic] commissions:
> 264.11 hours at $250.00/hr $66,028.73
> Expenses, office supplies shipping, $3,301.44
> Total $69,330.17

After the total, the billing estimate included a "[p]ossible distribution of fees," whereby (1) each child would contribute $23,110.05; or (2) each child would contribute $11,555.03, and DP and VP would contribute $34,665.09.

The preliminary billing estimate concluded: "The parents and any child accepting my [i4LIFE variable annuity] proposal or a version thereof will be relieved of any billing exposure. The proposal is sound. I will be pleased to debate its merits versus any other investment that would satisfy your desires at any time."

2. The March 27, 2013 Meeting

After preparing the preliminary billing estimate, Niekras met with the Ps at their home on March 27, 2013 to discuss and show it to them. At that meeting, which Niekras recorded, he made certain statements that Enforcement alleged were false. We address these oral statements in detail.[7]

The meeting began with some small talk between Niekras and the Ps and a brief discussion of financial matters unrelated to the events relevant to this proceeding. Then Niekras turned the conversation with DP to the issue of compensation. Niekras began: "Now, I want to show you a little bit about and chat with you about whether I'm worth what I do or not. And I think you might agree that I've been a lot of service to you and your family for just about 10 years." Niekras then told DP, "[A]lthough I'm entitled to ask for fees, I've never asked for a fee, except once, and that was on the [XX] Trust situation, where I was doing a lot of work for nothing."

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[7] It was Niekras's general practice to record all telephone calls and some of his in-person meetings, especially when he anticipated they would be controversial or used against him. Niekras testified that he taped the March 27, 2013 meeting because he "wanted it to be crystal clear of what was going on." According to Niekras, DP was aware Niekras was taping the meeting because Niekras "told him many times that I was recording things," and DP "knew that I was recording things because I have a very special pencil, okay, that records everything that I do for as much as 30 hours . . . And when that's out, he knows I'm recording. Everyone knows. I don't hide it."

Niekras stressed that he had "put in an unbelievable amount of time over the years . . . particularly over the last three years," gathering and assembling information about the status of the Ps' assets and helping them implement the distribution of their estate. Niekras then stated it was difficult that the children did not want to speak with him about the i4LIFE variable proposal, and he said "if nobody wants to do anything, then I've got to bill it out," referring to the time he spent on the Ps' financial matters.

Niekras told DP he wanted to give the Ps "an idea, which is going to be shocking, of the impact from billing versus just . . . doing it for commissions." He characterized his preliminary billing estimate as a "shocker, because of the number of hours, my rate per hour, the expenses, the total amount." He then said that "[i]t would have to be paid by somebody." If the children did not follow his recommendation, Niekras continued, then he has "got to charge something, because my company has to . . . ." Niekras stopped, and DP interjected, "I can't argue." Niekras continued, "My company has to be compensated for the time that they keep me on the payroll, and as much as I love you like a father, I can't afford to work for nothing. I think I have . . . ." Niekras again stopped, as DP reassured him, "I'm not asking."

Niekras then changed the subject and pointed out the benefits of his annuity proposal, claiming that it met DP's "requirements and does some very good things for each of your children." DP commented that he would have to "get to" DDP, although he was "reticent to push him to make up his mind" because he did not want DDP "to blow up and say to hell with it." DP said, "But maybe that's what it's going to take, and either he's in or he's out, and we either have two people or we have three. Okay."

Niekras explained the impact of DDP not participating: "If he's not in, then the billing will be one third of that, and it'll be for him, because I'm saying each one of them that signs up takes one third off that bill. Okay?" DP responded, "Okay." DP waivered, telling Niekras, "I guess I can't force him." Niekras disagreed: "Oh, you can. Look at it this way . . . if you and I hadn't worked together, if [CLP] hadn't ultimately come in to the loop, and looked things over and decided we really need to do something here as family, [DDP] wouldn't even have that money." Niekras added, "If I hadn't of [sic] killed myself [to facilitate the gifting to the children] by December 31st, he wouldn't have that money." Niekras continued that DDP should "at least acknowledge" that Niekras's efforts "made it possible."

Niekras concluded: "That's all I've got to say . . . . I hope you're not angry with me." DP assured him, "No, no, no." The conversation then ended with a discussion of the logistics for a meeting between Niekras and DDP to discuss the annuity proposal.

3. Niekras Prepares Two Additional Billing Documents

After the March 27, 2013 meeting, Niekras revised the preliminary billing estimate. According to Niekras, DP asked him to keep the bill up to date, so he made revisions to reflect additional work he performed after completing the first estimate. This revised version increased slightly both Niekras's hours and the amount of expenses, and it was dated April 4, 2013. The billing estimate totaled $72,636.18 in fees and expenses and contained a "Possible distribution of

fees" section similar to the Preliminary Billing Estimate. It also included an additional payment option for the Ps to pay the entire sum themselves and then "reduce inheritances accordingly."

A few weeks later, Niekras prepared a third billing document on MML Investors Services letterhead titled "Statement (Draft)" and dated April 30, 2013. It reflected the same "Total Balance Due" as the updated preliminary billing estimate.

4. CLP and DDP Discuss with DP the Preliminary Billing Estimates and the Variable Annuity Proposal

Soon after his March meeting with Niekras, DP discussed the preliminary billing estimates, and the i4LIFE variable annuity proposal, with CLP and DDP. According to CLP, DP was "very upset" and "agitated" when he showed her the preliminary and updated preliminary billing estimates. DP told CLP that "he had a bill from [Niekras] that he was going to have to pay" if she and her two siblings did not buy the annuity. More specifically, CLP recalled DP telling her that the children "had to sign up for this 'cause, if we didn't, he had to find a lot of money to pay Niekras." CLP also testified, though, that when she told her father that the i4LIFE variable annuity proposal may not be in her best interests, DP did not pressure her to buy the annuity.

DDP testified he, too, had a similar conversation with DP, during which DP told him that the three children needed to buy the annuity or else DP would have to pay Niekras's bill.[8] According to DDP, his father did not explain why he felt obligated to pay the bill.

5. CLP and Niekras Discuss the i4LIFE Variable Annuity Proposal and the Fee Payment Request

After her discussion with her father, CLP met with Niekras at her father's house on or about April 30, 2013, to discuss Niekras's i4LIFE variable annuity proposal. CLP testified that Niekras said he had discussed the product with DP, and this product was what DP wanted his children to purchase. CLP testified that she asked Niekras at this meeting "what commissions or what income he would earn from [the i4LIFE variable annuity], and he repeatedly told me there would be none." She continued that, although she was "not so clear" about the exact wording of her questions, she "kept trying to ascertain how [Niekras] would benefit financially from selling these to the three of us." According to CLP, Niekras responded that "[h]e would not be receiving any commissions."

According to CLP, she pressed Niekras about what would happen if the children did not adopt the proposal, and he responded by showing her the draft billing statement on MML Investor Services letterhead and pointing out all the reasons why it should be paid. CLP said she

[8] DDP did not have a discussion with his mother, VP, about this subject because she "pretty much deferred all financial . . . and continues to defer all financial matters to my father."

challenged his reasoning, causing Niekras to tell her that her "parents had been too conservative in their investments and he hadn't made enough money off the account." CLP testified that her meeting with Niekras left her feeling that she and her siblings "were getting [their] arms twisted," were "being played," or were being "blackmailed into either paying a bill or signing up for some annuities that, frankly, were not necessarily something that was appropriate for my brother and sister and I."

In his testimony, Niekras did not address directly whether he told CLP he would not receive a benefit or commission if the children bought the annuity. Niekras, however, denied that he told the children they would not pay a commission, labelling it a "misinterpretation." He explained that the bullet point "No Commissions Charged to Purchaser" meant "that the full amount that they invested in this product went to work for them. In other words, the way we have in the mutual fund world today, if you're selling A shares or whatever the case may be, you put a certain amount of money in and a percentage comes off the top for commissions." Niekras continued that with the i4LIFE variable annuity, "everything went to work for the client from day number one, and there was no commission deduction on the front end."[9]

According to CLP, during their meeting, Niekras presented CLP with draft billing statement and asked her to return it.[10] CLP refused, saying that she "was keeping it and . . . was going to look into it." Niekras, on the other hand, denied showing CLP the billing documents. Instead, Niekras claims that he briefly left the room after they reviewed the annuity proposal and, while he was gone, CLP "snatched" the billing documents from his working file. Upon his return, she refused his request to put them back. The Hearing Panel explicitly stated it did not make a credibility determination as to whether CLP snatched the billing documents or simply

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[9] While there were surrender charges associated with the purchase of the annuity, Niekras's presentation materials to CLP did not address them. Niekras contends, however, that those charges were addressed in the prospectus he sent the children. The record is silent as to whether the children received the prospectus.

The Hearing Panel found that CLP was not credible when she testified that Niekras told her he would not benefit from the children's purchase of the i4LIFE annuity. The Hearing Panel's credibility determinations are entitled to deference and can only be overturned by substantial evidence. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *15 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, 58 S.E.C. 846 (2005). We agree with the Hearing Panel that CLP must have realized that Niekras expected to receive commissions or compensation of some sort related to the sale of the i4LIFE variable annuity. Otherwise, there was no reason for Niekras to alternatively seek payment of fees through the billing estimates and billing statement if the children did not buy the annuity. The billing estimates reflect on their face that Niekras was expecting to receive commissions in connection with his proposal.

[10] CLP testified that DP had previously given her the billing estimates.

refused to return them. The Hearing Panel did, however, find that CLP credibly testified that CLP and Niekras, at the very least, discussed the billing documents.

At the conclusion of their meeting, CLP told Niekras not to contact her parents again until the situation was resolved.

E. CLP Reports Niekras to MML Investors Services and FINRA

After meeting with Niekras, CLP met with Niekras's supervisor at MML Investors Services. According to CLP, she asked Niekras's supervisor to write a letter to DP, copying her, confirming that DP did not owe Niekras "this amount and that we were not responsible to pay it." CLP never received the requested letter. CLP also requested that Niekras's supervisor direct Niekras not to contact the Ps because her parents "were very agitated and very upset at this stage of the game."

On May 10, 2013, Niekras's supervisor directed Niekras to not speak with anyone in the P household.[11] Nevertheless, Niekras admitted that he tried to call the P household after that date. On May 22, after trying unsuccessfully to telephone DP, he spoke with VP briefly and, without telling her, recorded their conversation. The next day, Niekras's supervisor emailed Niekras asking if he had contacted DP. Niekras did not disclose his attempt to speak with DP the prior day.

In June 2013, CLP sent FINRA a five-page letter complaining about Niekras's dealings with the P family, including the events at issue. CLP drafted the letter herself and asked her siblings for their comments prior to submitting it. In the letter, CLP accused Niekras of "elder harassment" by pressuring DP and presenting bills "designed to blackmail us into signing up for the annuity." She signed the letter with her name, noting the letter was "[s]ubmitted on behalf of the members of the DP family." CLP never showed the letter to her parents or told them she was filing a complaint on their behalf.[12]

F. FINRA's and MML Investors Services's Investigation

CLP's complaint letter triggered the underlying investigation. After the FINRA examiner assigned to the investigation reviewed CLP's complaint letter, he requested permission from CLP to interview the Ps by telephone or visit them in their home. According to the examiner, however, CLP was "not comfortable having them talk with me" because of the "stress it would cause." The examiner discussed the issue with other FINRA employees, including management,

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[11] This prohibition expired July 21, 2013.

[12] CLP testified that her mother, VP, was aware of the complaint letter as of the hearing, but her father was not.

and "decided to comply with [CLP's] wishes." As a result, the examiner never interviewed or contacted either DP or VP.

On November 19, 2013—more than six months after CLP met with Niekras's supervisor and four months after CLP sent her letter to FINRA—Niekras's supervisor wrote a letter to Niekras about recording conversations with clients and the March 27, 2013 meeting.[13] The supervisor wrote, "We have learned that you routinely record conversations with your clients and others, including me, without knowledge and consent of the other party or parties." The supervisor acknowledged that while New York law does not require consent, the practice gives the firm "great cause for concern" and violates the spirit of FINRA's and the firm's expectations for ethical behavior. He forbade Niekras from recording any further conversations with any clients or firm associates. The supervisor continued that he listened to the audio of Niekras's March 27, 2013 meeting with the Ps and determined that "[Niekras] made a series of inaccurate, false and misleading statements to the [Ps]" that were "unacceptable." The supervisor told Niekras that he would be setting up a meeting to further address his concerns and "outline a plan of special supervision for immediate implementation and determine what action will be taken with your business and relationship as a registered representative of the [firm]." Niekras acknowledged receiving the letter on November 29, 2013.[14] On December 31, 2013, MML Investors Services terminated Niekras "due to change in production requirements."

In July 2014 and November 2014, FINRA conducted on-the-record interviews of Niekras.

II. Procedural History

On November 7, 2016, Enforcement filed a one-cause expedited complaint against Niekras, alleging that Niekras made material misrepresentations of fact in violation of FINRA Rule 2010.[15] The five-page complaint alleged only the following misrepresentations:

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[13] While FINRA requested some documents from MML Investors Services related to this matter, it is not clear whether FINRA's requests were sent before or after the supervisor's letter to Niekras.

[14] At the hearing, Niekras testified that his supervisor knew he recorded communications, and Niekras believed the supervisor was lying when he said he had "learned" in November 2013 that Niekras did so. Niekras testified that he acknowledged the letter because "[he] didn't have a choice" and "[i]t's an acknowledgment that [he] received the letter."

[15] The complaint also alleged that Niekras omitted material facts, in violation of FINRA Rule 2010, but Enforcement acknowledged prior to the hearing below that it was seeking a liability finding only on the basis of misrepresentations.

- That Niekras misrepresented to DP and VP that he was entitled to more than $70,000 in fees that he knew he was not entitled to for purported estate planning and financial planning services.

- That Niekras misrepresented to DP at their March 27, 2013 meeting that "[Niekras's] company needs to be compensated for the time they keep [him] on the payroll," when in fact Niekras was not on the "payroll" of MML Investors Services.

- That Niekras misrepresented to DP and VP's children that they would not pay commissions if they purchased the variable annuities that Niekras recommended.

The parties participated in a three-day hearing. Neither DP nor VP testified at the hearing.

The Hearing Panel issued its decision on October 2, 2017. The Hearing Panel found that Enforcement failed to prove that Niekras made the alleged misrepresentations in violation of FINRA Rule 2010, and it therefore dismissed the complaint. The Hearing Panel found that the billing documents and Niekras's March 27, 2013 oral statements to DP were not statements of fact, but rather "expressions of opinion." The Hearing Panel continued that these statements were "expressions of [Niekras's] belief, view or sentiment that under the circumstances, fairness required that he be paid if the children did not adopt his annuity proposal." In a footnote, the Hearing Panel noted that, even if Niekras's statements were misrepresentations of fact, Enforcement failed to show that they were material due to the lack of testimony by DP. The Hearing Panel further found that the "payroll" statement was not meant to be taken literally. Finally, the Hearing Panel found that Enforcement failed to prove that Niekras made material misrepresentations to the children about commissions because Enforcement did not allege, nor prove, that the children would be paying Niekras's commissions, and the record did not reflect what charges, fees, or expenses—including commissions—the children would pay under the proposal.[16]

Enforcement appealed the decision to the National Adjudicatory Council ("NAC"). Specifically, Enforcement appealed "the [Hearing] Panel's conclusion that the alleged misrepresentations constituted 'expressions of opinion' that could not form the basis of a misrepresentation violation, and its conclusion that it was unable to assess the materiality of the alleged misrepresentations without testimony from [DP], the customer to whom the alleged misrepresentations were made." Niekras thereafter filed a cross-notice of appeal, "out of an abundance of caution," in support of the findings of the Hearing Panel. We therefore do not address on appeal the allegation in the complaint that Niekras misrepresented to the children that they would not pay commissions if they purchased the i4LIFE variable annuity.

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[16] The Hearing Panel explicitly stated that it "[made] no finding . . . as to whether Niekras's overall course of conduct was ethical and violated FINRA Rule 2010; that theory of liability was not asserted in the case."

III. Discussion

After an independent review of the record, we affirm the Hearing Panel's findings that Enforcement did not establish that Niekras made misrepresentations in violation of FINRA Rule 2010. We therefore dismiss the complaint.

On appeal, Enforcement argues that the Hearing Panel erred in not finding Niekras liable for the misrepresentations that he allegedly made to DP and VP—not to their children—that they owed him fees for estate planning and financial planning services he performed for them and to which he knew he was not entitled. Enforcement does not dispute that Niekras performed various services for the Ps, and the record supports that he did.[17] Enforcement's theory is that, irrespective of the amount or nature of the services that Niekras rendered, Niekras misrepresented to the Ps that they had an obligation to pay him fees for these services if their children did not purchase the i4LIFE variable annuity.

Neither DP or VP testified, and Enforcement did not seek to introduce declarations or affidavits into evidence on their behalf. Enforcement contends that the preliminary billing estimate, revised billing estimate, and draft statement, along with the audio recording of the March 27, 2013 meeting between Niekras and the Ps, establish that Niekras made misrepresentations to the Ps, in violation of FINRA 2010.

Based on this record, we lack the context to evaluate the materiality of Niekras's representations in the billing documents and his discussion with the Ps. Therefore, we find that Enforcement failed to prove its case. Because Enforcement alleged only that Niekras made misrepresentations, we are unable to make findings regarding what may have been other

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[17] Although the Hearing Officer denied Niekras's request to introduce his spreadsheets into evidence at the hearing, the undisputed record provides that Niekras performed considerable work for the Ps. To prepare his 15-category spreadsheets detailing the Ps' assets, Niekras first had to ascertain the scope of the Ps' estate. According to Niekras, the Ps did not know the full extent of their wealth and had forgotten about many of their assets. Niekras worked with the Ps to find forgotten life insurance policies by going through old checkbooks to find debits for insurance policy premiums. According to Niekras, the Ps were amazed at the number of insurance policies they had. The Ps also found various old stock certificates around their home, and they brought them to Niekras to investigate. Niekras testified that, in most cases, the stock certificates were splits that resulted in unclaimed dividends that had gone to the New York state unclaimed property office. Niekras said he spent months working with the office to procure the Ps' unclaimed dividends or shares. Niekras also worked with the Depository Trust Corporation on behalf of the Ps to track down other assets. Niekras testified that, while he had fee arrangements with approximately five percent of his clients, the process he went through to pull together all the records for the Ps was unusual. Even CLP testified that Niekras was the Ps' only financial professional within the past 15 years assisting them with their $4.5 million estate and that he "did a lovely job" creating the spreadsheets that detailed the Ps' holding and assets.

violations by Niekras, including violating his firm's requirement to have a written and approved advisory fee agreement for financial planning services and using pressure tactics in dealing with clients in an attempt to get paid.

A. DP's and VP's Availability

We first address the circumstances surrounding the Ps' absence at the hearing, and how CLP shielded her parents, and in particular DP, from the underlying investigation, disciplinary action, and contact by either party.

Enforcement did not list DP or VP on its witness list, and neither DP nor VP testified at the hearing. During its opening statement, Enforcement told the Hearing Panel, "[DP and VP] are 94 and 95 years old and, unfortunately, they will not be appearing at this hearing. However, you will hear today from [CLP]" who will "testify about conversations she had with her father." In fact, DP and VP were available witnesses. DP or VP resided within eight miles from the hearing location, and the record does not reflect that either of them suffered from mental or physical health problems that would have prevented them from providing evidence in some form. The Hearing Panel found that they were, at the very least, capable of signing a declaration or affidavit, especially if someone else prepared it for them.[18]

Niekras, on the other hand, listed both DP and VP on his witness list. Neither Niekras nor his counsel tried to contact the Ps about being witnesses until the night before the last day of the hearing.[19] On the last day of the hearing, Niekras's counsel represented that, the previous evening, he and Niekras drove unannounced to the Ps' home and met with DP for about an hour. Niekras's counsel represented that DP had agreed to testify, that he knew nothing about the case, and that DP wanted to know why Niekras had stopped communicating with him and disappeared. DP and Niekras arranged for Niekras to pick up DP the next day to take him to the hearing. But when Niekras arrived at the Ps' home, CLP and DDP were there. Before Niekras could get out of the car, CLP came across the driveway and told him, "Leave this property immediately. Don't you ever talk to any member of my family again ever." Niekras then left.

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[18] CLP testified that it would have been emotionally difficult and painful for her parents to provide a written statement or declaration, but she did not point to any physical or mental infirmity that would have prevented them from doing so. Likewise, DDP acknowledged, that if someone else prepared the affidavit or declaration, DP might have been able to review it for accuracy.

[19] According to Niekras, he did not reach out to DP sooner because "[he] was told [DP] hated me," adding that he saw something CLP wrote to that effect to FINRA. At the pre-trial conference, Niekras's counsel acknowledged that, while the Ps were listed as witnesses, he did not think the Ps would appear at the hearing. He continued that he would like them to voluntarily appear, but he had not contacted them out of fear of allegations of elder abuse or harassment.

Niekras also testified about the same events. He testified that, when he and his counsel met with DP the evening prior, DP was "very sharp . . . sharp as a tack," and no worse than he was in August 2012. Niekras also testified that, when he asked DP to appear at the hearing, DP told him he was unaware of the proceeding, but "would do anything he could to help," including testifying, because Niekras had been loyal to him and had never cheated him or presented him with a bill.

In response to Niekras's counsel's representation, Enforcement counsel told the Hearing Panel:

> I have not said this on the record before but we were specifically requested not to call [DP] to testify because the perception by his children is that it would not be good for him, good for his health. And we respected that because that's part of what we do as FINRA Enforcement lawyers.

Enforcement counsel also represented that, the previous evening, Enforcement had received a phone call from "an extremely upset" CLP and "an even more upset" DDP, who, along with VP, were disturbed by Niekras's visit to the Ps that day. Enforcement counsel confirmed that CLP and DDP had "prevented [Niekras] from contacting [DP] [that] morning."

The Hearing Panel explicitly credited Niekras's counsel's statements that DP was unware of the proceeding and had agreed to testify, and that Niekras was "chased away" the next morning when he arrived to pick up DP and take him to the hearing. The Hearing Panel also noted that the evidence showed that "DP was pleased by Niekras's surprise visit and, most importantly, had agreed to testify on Niekras's behalf."

In sum, there is no evidence in the record that DP did not want to cooperate with the investigation or did not want to participate in the hearing below. Based on the record, we also agree with the Hearing Panel's assessment that CLP's objectivity was questionable and that she was openly hostile toward Niekras.[20]

B. Niekras's Defenses

Niekras does not dispute that he prepared the billing estimates and draft statement, showed them to at least DP, and made the March 27, 2013 oral statements. Niekras also acknowledged that the Ps were not obligated to pay him fees for estate planning and financial planning services he performed for them in prior years. Niekras nonetheless asserts that he never

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[20] We defer to the Hearing Panel's credibility determinations on these points, as they are supported by the record and there is not substantial evidence to overturn the determinations. *See Dep't of Enforcement v. Mizenko*, 2004 NASD Discip. LEXIS 20, at *15 n.11.

made a demand for payment from DP, and the billing documents, when viewed in context, were drafts to facilitate a negotiation and not misrepresentations.

According to Niekras, when it appeared that the Ps' children would not adopt the i4LIFE variable annuity proposal, Niekras raised his concerns to DP, and DP was "adamant" that Niekras be paid for the services he had performed on behalf of the Ps in connection with managing and gathering information about their assets.[21] Niekras testified that he and DP had conversations prior to the March 27, 2013 meeting about "how can we get you compensated [assuming that the children do not purchase the i4LIFE variable annuity] without me having to write the whole check?"[22] According to Niekras, DP instructed him to prepare "something" that would generate the same amount as the commissions Niekras would receive if the children purchased the i4LIFE variable annuity. DP allegedly also instructed Niekras to "put together a list of various ways that it could be paid by" DP and his children, so that DP did not have to pay the whole amount himself. DP also allegedly told Niekras to use a rate of $250 per hour on his bill.

The Hearing Panel did not find Niekras's testimony "generally credible or not credible" but instead made credibility determinations based on Niekras's testimony on a particular subject. Specifically, the Hearing Panel found the weight of credible evidence did not support Niekras's assertions that DP was adamant that Niekras be paid and that DP engineered the approach of Niekras drafting billing documents equal to the i4LIFE commissions.[23] When Niekras presented the preliminary billing estimate to DP at their March 27 meeting, Niekras did not make any statements about how DP previously had said that Niekras should be paid or that DP had directed him to prepare a billing estimate. In fact, when presenting the preliminary billing estimate, Niekras said it was a "shocker," which implies that DP did not engineer the approach of billing estimates, as claimed by Niekras. Likewise, other than DP's statement that he was "not asking" Niekras to work for nothing, DP made no other statements about wanting Niekras to be paid or about how he directed Niekras to prepare the billing estimate.

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[21] At an on-the-record interview, Niekras testified that he and DP discussed Niekras billing DP for financial planning on an hourly basis over the years going back to at least 2010, but Niekras previously chose not to bill him.

[22] Niekras testified that, if the children had purchased anything with their assets in their MML Investor Services accounts, "regardless of what the commission level was," Niekras never would have sought fees for his past services to the Ps.

[23] We find the record supports the Hearing Panel's credibility determination on this point. *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *30 n.45 (Mar. 31, 2016) ("[Credibility] determinations, based on hearing the witness's testimony and observing demeanor, are entitled to considerable deference."), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. Oct. 25, 2017).

Niekras also claims that he never prepared, or presented to the Ps, a final bill. He characterized the preliminary billing estimate as a "discussion document between two individuals who understand each other very well after having worked together for over ten years." Niekras testified that while he discussed the billing documents with DP, he never tendered a bill to anyone. Niekras also characterized the March 27, 2013 meeting as "a discussion, a musing, . . . between two people who were good friends . . . about how somebody who had contributed materially to the financial success of [DP and VP] could get some kind of compensation for what he had done."

Niekras contends he did not literally mean DP or someone else had to pay his bill. In his view, he and DP were just "discussing things," and what he should have said was "I really would like to get paid for my efforts." Niekras admitted that his "payroll" remark was "a bit of a fabrication" because his firm did not technically keep him on a payroll, but he did not intend the comment to be taken literally.[24]

C. Enforcement Failed to Establish that Niekras Violated Rule 2010

We now turn to the allegations that Niekras made misrepresentations to the Ps that were violative of FINRA Rule 2010.

"A broker who makes material misrepresentations to customers engages in unethical conduct that is inconsistent with just and equitable principles of trade, in violation of FINRA Rule 2010."[25] *Dep't of Enforcement v. Rooney*, Complaint No. Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *80 (FINRA NAC July 23, 2015). "The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Carriba Air*, 681 F.2d 1318, 1323 (11th Cir. 1982); *see also Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *30-31 (Feb. 20, 2007) ("A fact is material if there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision."). "Materiality is not judged in the abstract, but in light of the surrounding circumstances." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 866 (5th Cir. 2003).

To find Niekras liable, we must find that there was a substantial likelihood that a reasonable investor would have attached importance to the representations in Niekras's billing documents and his March 27, 2013 oral statements to the Ps. While materiality is an objective

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[24] Niekras testified, "You have to produce enough to pay the fees to keep your office, your phones and everything else. That is considered part of your pay package. So if you don't deliver enough, right, then you're going to have to start paying $3,000 a month, okay, for your office space and your telephone."

[25] Rule 2010 also applies to associated persons. *See* FINRA Rule 0140(a).

standard, it cannot be judged in the abstract.[26] *See, e.g.*, *ZPR Inv. Mgmt. v. SEC*, 861 F.3d 1239, 1251-52 (11th Cir. 2017) (stating that it is "well-established principle that a statement or omission must be considered in context"), *cert. denied*, 138 S. Ct. 756 (2018); *United States v. Rigas*, 490 F.3d 208, 231 (2d Cir. 2007) ("Analysis of the misrepresentations must be in the context in which they were made."). The record here is devoid of sufficient credible evidence to place the alleged misrepresentations into context, resulting in a failure by Enforcement to prove that the statements constituted material misrepresentations.

In this case, the billing documents and Niekras's March 27, 2013 oral statements alone are insufficient to assess the materiality of the statements therein. Niekras and DP's prior dealings serve as the backdrop for Niekras's billing documents and oral statements and the potential meaning behind the terms established during Niekras and DP's course of dealing necessary to evaluate the materiality of Niekras's representations. Although we agree with the Hearing Panel that the weight of credible evidence did not support Niekras's assertions that DP was adamant that Niekras be paid and that DP engineered the approach of Niekras drafting billing documents, we nonetheless are deprived of the context of Niekras and DP's prior dealings necessary to assess the impact of the words Niekras used and to determine whether they constitute a material misrepresentation. Therefore, due to the limitations in the record, and given the unique facts of the relationship between Niekras, the Ps, and their children, we are unable to ascertain whether there was a substantial likelihood that a reasonable investor, in these circumstances, would have attached importance to Niekras's representations.

Relying on the NAC's decision in *Rooney*, Enforcement asserts that DP's testimony has no bearing on whether Niekras's misrepresentations were material. In *Rooney*, the NAC found that the absence of an unavailable witness did not preclude its finding that the respondent used misleading sales materials, when the respondent admitted that he used the sales literature when

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[26] A finding of materiality is necessary in order to find that a respondent made a misrepresentation of fact in violation of FINRA Rule 2010. On appeal, Enforcement contends that a finding of materiality is unnecessary for liability under FINRA Rule 2010 for a misrepresentation, citing our prior decision in *DBCC v. Euripides*, Complaint No. C9B950014, 1997 NASD Discip. LEXIS 45 (FINRA NAC July 28, 1997). In other words, Enforcement contends a respondent who makes an immaterial misrepresentation can be liable under FINRA Rule 2010. We disagree. When we said in *Euripides* that "there was no need for a finding of materiality or harm to investors" for a misrepresentation under the predecessor rule to FINRA Rule 2010, we were incorrect with respect to materiality. We repeatedly have evaluated materiality in other negligent misrepresentation cases before us brought pursuant to FINRA Rule 2010. *See, e.g.*, *Rooney*, 2015 FINRA Discip. LEXIS 19, at *93; *Dep't of Enforcement v. Timberlake*, Complaint No. C0701009, 2004 NASD Discip. LEXIS 11, at *22-23 (NASD NAC Aug. 6, 2004). Just as we have evaluated materiality in other misrepresentation cases under FINRA Rule 2010, we hold that Enforcement must prove materiality for liability under FINRA Rule 2010 for misrepresentations. Moreover, Enforcement alleged the Niekras made *material* misrepresentations.

soliciting the customer. 2015 FINRA Discip. LEXIS 19, at *93. In the sales literature, the respondent falsely represented that an investment entity was a tax-exempt charitable organization and the customer would be able to take a tax deduction. *Id.* at 81-82. The NAC found that the question of whether an investment is tax deductible is a material fact. *Id.* at 82.

We find that Enforcement failed to meet its burden in this particular case because we cannot judge Niekras's representations without more information. Unlike Rooney, rather than evaluating alleged misrepresentations in sales literature, we instead are attempting to ascertain the materiality of representations by Niekras in billing documents and in his discussion with DP. We lack the context to evaluate the representations in and about billing documents between two people with a decade-long business and personal relationship.[27] *Cf. Rooney*, 2015 FINRA Discip. LEXIS 19, at *93.

The Hearing Panel did not rely on the testimony of CLP and DDP that DP told them he would have to pay Niekras if the children did not purchase the i4LIFE variable annuity. Neither do we. Assuming DP made such a statement, we are unable to ascertain DP's motivation behind it based on the record and specifically DP's absence. DP could have been trying to pressure his children to buy the annuities because he thought the annuity would prevent them from quickly spending their inheritance. Or DP could have been expressing his conception of a business obligation to pay a long-standing broker for valuable services rendered, rather than as evidence that Niekras had told DP he was obligated to pay him. In addition, any money that DP paid to Niekras would have resulted in less money for his children to inherit. Therefore, we do not find the testimony of CLP and DDP, who had motive and bias to be untruthful, persuasive to establish the allegations that the billing documents and March 27, 2013 oral statements were material misstatements.

Finally, the parties on appeal do not focus on the allegation in the complaint that Niekras misrepresented to DP at their March 27, 2013 meeting that "[Niekras's] company needs to be compensated for the time they keep [him] on the payroll," when in fact Niekras was not on the "payroll" of MML Investors Services. We agree with the Hearing Panel that the record does not support that Niekras meant his "payroll" statement literally.

In sum, due to the limitations in the record and the unique relationship among Niekras, the Ps, and their children, we find that Enforcement failed to prove by a preponderance of the evidence that the alleged statements made by Niekras in the billing documents and during the March 27, 2013 meeting were material. Therefore, we conclude that Enforcement failed to prove that Niekras violated FINRA Rule 2010.

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[27] We also are unable to evaluate whether the amount in Niekras's billing documents was commensurate with the work he performed. Enforcement did not dispute that Niekras performed services for the Ps, and the record supports that Niekras performed considerable services for the Ps.

Our dismissal of this matter is not an endorsement of Niekras's conduct. Among other things, Niekras violated his firm's procedures about advisory fee agreements; used pressure tactics with clients, including an elderly couple, in an attempt to get paid; and disregarded his firm's directive not to contact his clients during a firm investigation and not to tape conversations without the consent of the other party. We find his conduct problematic. We do not have before us, however, the question of whether Niekras's overall course of conduct was unethical and violated FINRA Rule 2010 because that theory of liability was not alleged.

IV. Conclusion

Enforcement failed to prove by a preponderance of the evidence that Niekras made misrepresentations of material fact in violation of FINRA Rule 2010. Accordingly, we dismiss the complaint.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary