**FINANCIAL INDUSTRY REGULATORY AUTHORITY**
**OFFICE OF HEARING OFFICERS**

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| DEPARTMENT OF ENFORCEMENT,<br><br>Complainant,<br><br>v.<br><br>STANLEY CLAYTON NIEKRAS<br>(CRD No. 2417486),<br><br>Respondent. | Disciplinary Proceeding<br>No. 2013037401001<br><br>Hearing Officer–DRS<br><br>**HEARING PANEL DECISION**<br><br>October 2, 2017 |

**The Department of Enforcement failed to prove that Stanley Clayton Niekras made misrepresentations in violation of FINRA Rule 2010. The Complaint is dismissed.**

*Appearances*

For the Complainant: Stuart Feldman, Esq., Christopher Kelly, Esq., and Michael J. Watling, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

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

## DECISION

## I. Introduction

FINRA's Department of Enforcement filed a one-count complaint against Stanley Clayton Niekras, formerly a registered representative, charging him with making misrepresentations to an elderly married couple and their three adult children. The couple, DP, a retired real estate lawyer, and his wife, VP (collectively, the "Ps"), were wealthy, long-time customers and friends of Niekras. In approximately 2002, Niekras became the Ps' registered representative.[1] Over the ensuing years, he sold them various products, including annuities.[2]

[1] Complaint ("Compl.") ¶ 4; Amended/Supplemental Answer ("Ans.") ¶ 4. *See* Hearing Transcript ("Tr.") 62, 795–96.

[2] Tr. 64.

Niekras and DP became friends, participated in many recreational activities together,[3] and met at least once a week.[4] The Ps trusted Niekras[5] and treated him like a family member.[6]

According to Enforcement, DP and Niekras discussed various approaches by which the Ps could transfer a portion of their assets to their adult children. Based on those discussions, Niekras opened a brokerage account for each child, and the Ps gifted to the children cash and securities, which were then deposited into the brokerage accounts. Then, allegedly with DP's knowledge and approval, Niekras recommended the children use the gifted assets to purchase a particular variable annuity. Enforcement contends Niekras expected to receive $75,000 in commissions if they adopted his proposal to purchase the annuity but told the children they would not pay any commissions.

The children balked at buying the annuity. This, according to Enforcement, prompted Niekras to develop a contingency plan to replace the expected commissions: he would try to convince the Ps and/or their children to pay him fees in lieu of commissions for past services rendered to the Ps. Specifically, Niekras allegedly told the Ps that if the children did not follow his recommendation to purchase the annuity, he would have to bill the Ps and/or their children for the time he had spent working on the family's behalf because his firm had to be compensated for the time it kept him on the "payroll." To that end, Enforcement alleges, he created and presented "billing estimates" to the Ps totaling approximately $70,000 based on estate and financial planning services he had already rendered to the family over the course of several years. But, as Niekras later admitted, he did not have an investment advisory or financial planning agreement with the Ps; therefore, he was not entitled to bill them for estate or financial planning services he may have provided. Also, his reference to his firm's "payroll" was not literally true; he was an independent contractor and was not on his firm's payroll.

Based on his alleged misrepresentations to the Ps and their children, Enforcement charged Niekras with violating FINRA's ethical conduct rule. Niekras denied the charge, maintaining that his statements to the children about not paying commissions were accurate. As for requesting fee payment, he asserted that DP was adamant that if the children did not adopt his proposal, Niekras should be paid for the services he had previously rendered; that DP instructed him to prepare draft billing estimates reflecting an amount comparable to the $75,000 in commissions he expected from the recommended transactions; that his statements to the Ps were mere "musings" intended to justify requesting payment; and that his "payroll" comment was not meant literally. Finally, Niekras accused the children of having a vendetta against him and instigating this proceeding by making false accusations in a complaint letter to FINRA.

[3] Tr. 796–97.

[4] Tr. 796.

[5] Tr. 63.

[6] Tr. 62–63, 160. Niekras described DP as "perhaps" his "dearest friend." Tr. 622.

A three-day hearing was held before a FINRA hearing panel. Niekras, a FINRA examiner, and two of the Ps' children testified. The Ps, however, did not testify or otherwise provide evidence. For the reasons explained below, the Hearing Panel finds that Enforcement did not establish that Niekras made misrepresentations in violation of FINRA's ethical conduct rule as charged; therefore, we dismiss the Complaint.

## II. Findings of Fact

### A. Respondent Stanley Clayton Niekras

Niekras first became registered with FINRA in October 1993 as a General Securities Representative.[7] He was registered in that capacity through MML Investors Services, LLC ("MML" or the "Firm") from May 2005 until January 2014.[8] Later, Niekras was registered as a General Securities Representative and Operations Professional through another FINRA member firm from May 2014 until October 1, 2015.[9] Niekras has not been registered or associated with a member firm since that time.[10] A large part of his business consisted of selling variable annuities.[11]

### B. Events Leading to This Disciplinary Proceeding

#### 1. Niekras Opens Brokerage Accounts for the Ps' Children and Recommends They Purchase a Variable Annuity Using Gifted Assets

By the summer of 2012, Niekras became concerned that DP and VP, aged 90 and 91 respectively,[12] were starting to decline.[13] So, in August, Niekras wrote a memo to file noting that DP "is still capable but appears to be slowing down. During some of our lunches, he is very sharp." But, the memo continues, "[d]uring other lunches he appears to have lessened

[7] Compl. ¶ 2; Ans. ¶ 2.

[8] Compl. ¶ 2; Ans. ¶ 2.

[9] Compl. ¶ 2; Ans. ¶ 2; CX-28, at 3.

[10] CX-28, at 3. Although Niekras is not currently registered or associated with a member firm, he remains subject to FINRA's jurisdiction for the purposes of this proceeding under Article V, Section 4 of FINRA's By-Laws because (1) the Complaint was filed within two years of the effective date of termination of his registration with the Firm; and (2) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member firm.

[11] Tr. 105.

[12] CX-7, at 1; *see also* Tr. 836 (as to DP).

[13] Tr. 643.

comprehension" of current events.[14] At that time Niekras also observed that VP was deteriorating mentally.[15]

The circumstances leading to this disciplinary proceeding were set in motion in late 2012, when the Ps decided to transfer a portion of their assets to their adult children: a son (DDP) and two daughters (DPK and CLP).[16] The Ps asked one of the adult daughters, CLP, to become more involved in their finances, given their advanced age.[17] CLP became the executor of their wills,[18] received a power of attorney for them,[19] and met with Niekras to obtain an overview of their finances.[20]

Additional meetings with Niekras followed, including one in November 2012[21] with an estates and trusts lawyer Niekras had recommended.[22] The purpose of the meeting was to discuss Niekras's recommendation that the Ps set up trusts for the children.[23] Niekras was concerned that the government was about to lower the limit on assets exempt from estate tax, thus making it advantageous, in his view, to transfer assets before the end of the year.[24] At that meeting, the lawyer discussed this upcoming expected change in the tax laws.[25] He also advised Niekras and CLP that too little time remained in the year to set up trusts, and the only option was for the Ps to try and gift funds directly to the three adult children by year end.[26]

Meanwhile, Niekras also discussed with the Ps the subject of gifting assets versus establishing trusts. Based on his conversations with DP, Niekras understood that rather than simply gifting assets to the children, DP wanted to retain control over the long- and short-term use of the assets. This goal, Niekras explained, stemmed from DP's concern that his children would spend the gifted assets too rapidly.[27] According to Niekras, DP wanted to transfer assets to

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[14] CX-7. At the hearing, Niekras clarified his observations, noting that what he meant by "slowing down" was "[n]ot so much mentally as physically." Tr. 80. His concerns about DP continued to grow, and in March 2013, he notified the Firm that DP may have diminished capacity. CX-8, at 7; Tr. 84–85.

[15] Tr. 82–83.

[16] The Ps' net worth at that time was approximately $4.5 million. Tr. 188.

[17] Tr. 162–63; *see also* Tr. 252, 412–13.

[18] Tr. 185, 412; *see also* Tr. 252, 257.

[19] CX-26; Tr. 318–19.

[20] Tr. 185–89.

[21] Tr. 255, 260.

[22] Tr. 90, 191–92, 253, 839.

[23] Tr. 256, 281–82.

[24] Tr. 641.

[25] Tr. 839–41.

[26] Tr. 91, 841.

[27] Tr. 653.

the children in a way that would keep the children from doing this,[28] but which would also provide them with income for the rest of their lives.[29] Niekras testified that DP also wanted the gifted assets to flow from child to child—not to their spouses, if any—and ultimately to charity, upon the death of the last child.[30] So, according to Niekras, DP instructed him to prepare a proposal that accomplished these goals.[31] Based on his understanding of DP's intentions, Niekras chose a product for the children to purchase with the gifted assets: the Lincoln ChoicePlus Variable Annuity B-Share with i4LIFE.[32] Only this product, Niekras asserted, contained the structure that implemented DP's objectives.[33]

Putting the plan into action required several steps. First, Niekras established brokerage accounts for each child in December 2012.[34] Next, the Ps immediately funded each account with approximately $500,000 in cash and securities.[35] Then, Niekras drafted and, on March 5, 2013, sent identical proposals to the children (with a copy to DP) recommending they purchase the variable annuity with the assets they had already received from their parents.[36] The 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."[37] The cover letter also stated that Niekras had reviewed the proposal with DP.[38] Two bullet points on the proposal referred to commissions: "No Commissions Charged to Purchaser"[39] and "Investment Not Reduced By Commissions."[40]

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[28] Tr. 672.

[29] Tr. 653–54.

[30] Tr. 647–48, 672.

[31] Tr. 804–05.

[32] Tr. 807; CX-10, at 19. "I wasn't asking them to do anything," Niekras explained at the hearing. "Their father was asking them to do something, and I was the vehicle, if you will, for articulating his wishes." Tr. 673.

[33] Tr. 673.

[34] Tr. 95–96; CX-9, at 7 (CLP); CX-9, at 25 (DDP); and CX-9, at 43 (DPK, then known as DVP); *see also* Tr. 99.

[35] Tr. 95, 328; Compl. ¶ 6; Ans. ¶ 6. The December 2012 account statements reflect a total account value of $446,011.75 for the Ps' two daughters, CLP and DPK (CX-9, at 10, 47), and $446,011.74 for their son, DDP (CX-9, at 29).

[36] Compl. ¶ 7; Ans. ¶ 7; Tr. 101–03, 107, 198–99, 402, 646; CX-10; *see also* Tr. 328. While Niekras did not show his proposal to the Firm, he claimed he discussed it with his compliance officer, who approved it, as purportedly evidenced by a confirming letter. Tr. 624–25. But no such letter was ever offered into evidence.

[37] CX-10, at 1, 3, 5.

[38] CX-10, at 2, 4, 6.

[39] CX-10, at 19; Tr. 812, 815.

[40] CX-10, at 21, 59; *see also* Tr. 107.

Nevertheless, Niekras anticipated receiving about $75,000 in total commissions if each child adopted his proposal.[41]

### 2. The Ps' Children Do Not Accept Niekras's Proposal and Niekras Creates a Plan by which He Would Receive Fees in Lieu of Commissions

Niekras expected the children to adopt his recommendation.[42] But when they did not respond to his proposal,[43] it signaled to Niekras that they might not purchase the annuity, or might purchase it from someone else.[44] Worried that his expected commissions were now at risk, Niekras devised a back-up plan: he would request that the Ps (and/or their children) pay him fees for services he had previously rendered to the P family.

At this time, however, the Firm had 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 in place, approved by a supervisor.[45] Niekras admitted being aware during the relevant time that the Firm's procedures generally capped financial planning fees at $15,000.[46] Moreover, as Niekras also admitted, 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.[47]

Still, he pressed ahead with his plan and prepared several billing documents. These documents, coupled with oral statements Niekras made to the Ps about fee payment, serve as the basis for Enforcement's charge that he made material misrepresentations to the Ps. So next we turn to the billing documents and Niekras's discussions about them with the Ps and their children.

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[41] Compl. ¶ 9; Ans. ¶ 9. Had these commissions materialized, they would have come at a most opportune time for Niekras. Before the end of 2012, Niekras had begun receiving letters from the IRS threatening him with the seizure of his assets. CX-12, at 4; Tr. 115–16. And, on March 5, 2013—the same day he sent his proposal to the children—the IRS placed a lien against him for $27, 845.35. Tr. 107, 114; CX-28, at 38; *see also* CX-11, at 1. Niekras thought the commissions generated from the variable annuities sales would satisfy his IRS debt; indeed, he was counting on it. Tr. 135–36; CX-13, at 1 (email from Niekras to his compliance officer predicting that he had "business cooking that will more than settle the IRS debt," referring to the commissions from the expected sale of the variable annuities to the children). Niekras also owed money to the State of New York, which later imposed a tax lien against him on August 6, 2013, for $3,505. Tr. 114–15; CX-28, at 39.

[42] Tr. 104.

[43] Tr. 817.

[44] Tr. 136.

[45] Tr. 585–86.

[46] CX-22, at 30; Tr. 588–91; *see also* Tr. 605–08, 762–65.

[47] Compl. ¶ 17; Ans. ¶ 17; *see also* Tr. 584–85, 609–10 (Niekras conceding that without a signed advisory agreement approved by the Firm he could not charge fees to his customer).

### a. Niekras Prepares a Preliminary Billing Estimate

Niekras prepared a one-page, undated document[48] entitled "[DP] and [VP] Preliminary Billing Estimate" ("Preliminary Billing Estimate").[49] The Preliminary Billing Estimate contained two alternative methods of payment to Niekras: (1) fees and expenses for "Estate Planning and record keeping" services rendered to the P family during the period 2010–2013; or (2) commissions in connection with his annuity proposal to the children. In a preface, Niekras noted 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." And, he continued, "[y]ou have always made sure that I was paid commissions in lieu of any fees and I have been satisfied with that compensation." In this instance, he would, "[a]s always, . . . accept commissions in lieu of fees and expenses," referring to the commissions he hoped to earn if the children accepted his annuity proposal. And, he emphasized, if each child bought the annuity, they would benefit because "the total billing exposure for [t]he [P] Family Members will be $0.00." In other words, he explained, "[t]he parents and any child accepting" the "proposal [to purchase the variable annuities] or a version thereof will be relieved of any billing exposure."[50] The Preliminary Billing Estimate also touted an additional advantage to the P family if Niekras were compensated by commissions rather than fees: commissions "are not payable by any [P] Family Member."

But if none of the children adopted his recommendation, the Preliminary Billing Estimate sought payment of fees and expenses (in lieu of commissions) in the amount of $69,330.17, the fee component of which was calculated on the basis of "264.11 hours at $250.00/hour." As to who should pay the fees and expenses, it contained 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.

After preparing the Preliminary Billing Estimate, Niekras met with the Ps at their home on March 27, 2013.[51] At that meeting, which he recorded,[52] Niekras made certain statements that

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[48] Tr. 137–38.

[49] Tr. 136–38, 141; CX-6, at 1.

[50] Niekras testified he anticipated that if the children bought the variable annuities, neither they nor their parents would owe him fees. But if they did not buy the annuities, then he considered them to have "billing exposure." Tr. 140.

[51] Tr. 136, 141.

[52] Tr. 142. It was Niekras's general practice to record all his telephone calls with clients and some of his in-person meetings with clients, especially when he anticipated they would be controversial or used against him. Tr. 668–69. Niekras testified that he taped the March 27 meeting because he "wanted it to be crystal clear of what was going on." Tr. 142. He maintained that DP was aware Niekras was taping the meeting because Niekras had "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." Tr. 149–50; Compl. ¶ 14; Ans. ¶ 14. The audio tape was played at the hearing, and a transcript was introduced as well. Tr.146–48; CX-15; CX-15A.

Enforcement alleges were false and which violated FINRA's ethical conduct rule. We address that pivotal meeting in detail below.

### b. The March 27, 2013 Meeting

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. Niekras then abruptly turned to the subject of getting paid for the services he had rendered to the P family: "Now, I want to show you a little bit about and chat with about whether I'm worth what I do or not," he began. "And," he continued, "I think you might agree that I've been a lot of service to you and your family for just about 10 years."[53] Supporting his argument for payment, he first reminded the Ps that only once in the past had he requested a fee.[54] Moving on, he 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 their holdings and helping them implement the distribution of their estate.[55] After bemoaning that the Ps' children did not want to speak with him about his annuity proposal, Niekras made it clear what the consequences would be "if nobody wants to do anything": he would have "to bill it out," referring to the time he spent on the Ps' financial matters.[56]

This set the stage for Niekras to make his specific payment request, explaining that 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."[57] He characterized this Preliminary Billing Estimate as a "shocker, because of the number of hours, my rate per hour, the expenses, the total amount." He then told them directly that "[i]t would have to be paid by somebody."[58] And, if the children did not follow his recommendation, Niekras went on to say, then he has "got to charge something, because my company has to . . . ." Niekras stopped at that point, as DP interjected: "I can't argue." Continuing, Niekras finished his thought: "[m]y company has to be compensated for the time that they keep me on the payroll," adding that "as much as I love you like a father, I can't afford to work for nothing. I think I have--"[59] And again he stopped, as DP reassured him: "I'm not asking."[60]

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

[53] CX-15, at 9.

[54] CX-15, at 9.

[55] CX-15, at 9–10.

[56] CX-15, at 10.

[57] CX-15, at 11.

[58] CX-15, at 11.

[59] CX-15, at 12; Compl. ¶ 14; Ans. ¶ 14.

[60] CX-15, at 12.

children."[61] 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. But," he went on, "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."[62] This prompted Niekras to address the impact of DDP not choosing to participate: "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?"[63] And DP responded, "Okay."

Still, DP waivered, telling Niekras "I guess I can't force him."[64] But Niekras disagreed: "Oh, you can," he told DP. "Look at it this way," Niekras began, "[i]f 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."[65] Then, emphasizing his role in the gifting process, Niekras added: "If I hadn't of killed myself to" facilitate the gifting to the children "by December 31st, he wouldn't have that money." DDP should "at least acknowledge" that Niekras's efforts "made it possible," Niekras said.[66] And, on that note, Niekras announced "[t]hat's all I've got to say … I hope you're not angry with me." DP assured him, "No, no, no."[67] The discussion then ended with a discussion of the logistics for a meeting between Niekras and DDP to discuss the annuity proposal.

### c. Niekras Prepares Two Additional Billing Documents

Shortly after the March 27, 2013 meeting, Niekras revised the Preliminary Billing Estimate. According to Niekras, DP had asked him to keep the bill up to date, so he made revisions to reflect additional work he claims he performed after completing the first estimate.[68] This revised version ("Updated Preliminary Billing Estimate") increased slightly both the hours of services Niekras purportedly rendered and the amount of expenses he purportedly incurred. The Updated Preliminary Billing Estimate, reflecting an "updated" date of "04/04/2013," totaled $72,636.18 in fees and expenses.[69] It contained a "Possible distribution of fees" section similar to the one in the Preliminary Billing Estimate. But it also included as an additional payment option that the Ps pay the entire sum themselves and then "reduce inheritances accordingly."[70]

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[61] CX-15, at 12.

[62] CX-15, at 14.

[63] CX-15, at 14.

[64] CX-15, at 14.

[65] CX-15, at 14–15.

[66] CX-15, at 15.

[67] CX-15, at 15.

[68] Tr. 623.

[69] Tr. 204–05, 290–91; CX-6, at 2.

[70] CX-6, at 2.

Later, Niekras prepared a third billing document: a one-page document on MML Investor Services letterhead titled "Statement (Draft)," dated April 30, 2013 ("Draft Statement"). It reflected the same "Total Balance Due" as the Updated Preliminary Billing Estimate, i.e., $72,636.18.[71]

### d. CLP and DDP Speak with Their Father about the Preliminary Billing Estimates and the Variable Annuity Proposal

After DP saw the billing estimates, he discussed them (along with the variable annuity proposal) with CLP and DDP. According to CLP, when she met with her father, he showed her the Preliminary and Updated Preliminary Billing Estimates,[72] and was "very upset" and "agitated." She recalled DP telling her "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.[73] Stated another way, she remembers 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," namely, $72,636.18.[74] On the other hand, she testified that when she told DP the proposal might not be worthwhile for her, he did not pressure her to buy the annuity.[75] DDP testified to having had a similar discussion with DP, during which DP told him that the three children needed to buy the annuity or else he, i.e., DP, would have to pay Niekras's bill.[76] (According to DDP, his father did not explain why he felt obligated to pay the bill).[77]

### e. CLP and Niekras Discuss the Variable Annuity Proposal and the Fee Payment Request

After these conversations with her father, CLP met with Niekras on or about April 30, 2013, to discuss the annuity proposal.[78] CLP testified that during the meeting, she and Niekras discussed whether there were any commissions associated with the product.[79] CLP recalled asking him "what commissions or what income he would earn from it, and he repeatedly told me there would be none."[80] More generally, she claims to have "asked him a series of questions that basically got to the 'how do you benefit from selling this product' kinds of questions."[81] While

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[71] CX-6, at 3.

[72] Tr. 204–05, 290–91; CX-6, at 1, 2.

[73] Tr. 202, 204, 289.

[74] Tr. 201–02, 206.

[75] Tr. 197, 213, 284–86.

[76] Tr. 398, 409. 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." Tr. 505–06, 515.

[77] Tr. 513–14.

[78] Tr. 196, 213–14, 289–91, 711.

[79] Tr. 197.

[80] Tr. 197.

[81] Tr. 199.

conceding she was "not so clear" about the exact wording of her questions to Niekras, she "kept trying to ascertain how he would benefit financially from selling these to the three of us."[82] And, she maintained, Niekras responded that "[h]e would not be receiving any commissions. He would not be receiving any."[83]

According to CLP, she then pressed Niekras about what would happen if the children did not adopt the proposal, and he responded by showing her the Draft Statement and pointing out "all the reasons why it should be paid."[84] Unsatisfied with his explanation, CLP said she challenged his entitlement to payment, causing Niekras to tell her bluntly that her "parents had been too conservative in their investments and he hadn't made enough money off the account."[85]

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. Still, he denied the accusation that he told the children they would not pay a commission, labelling it a "misinterpretation."[86] He explained that bullet point "No Commissions Charged to Purchaser"[87] meant "that the full amount that they invested in this product went to work for them. In other words," he continued, "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." But in connection with "[t]his product," Niekras said, "everything went to work for the client from day number one, and there was no commission deduction on the front end."[88]

Although Niekras did not directly rebut CLP's testimony concerning their commission discussions, we do not find it credible that he told her he would not benefit from the children's annuity purchase. As CLP testified, she and Niekras discussed his fees-in-lieu-of-commissions request, and he told her he expected his fees to be paid if the children did not buy the annuities.

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[82] Tr. 199.

[83] Tr. 199; *see also* Tr. 284–85.

[84] Tr. 307. In her "mind . . . it was an estimate of what my father was going to owe him . . . Niekras was presenting this or planning to present this as a bill to be paid if we three children did not sign up for the annuity." Tr. 307–08.

[85] Tr. 220–21.

[86] Tr. 105.

[87] CX-10, at 19; Tr. 812.

[88] Tr. 815. While there were surrender charges associated with the purchase of the annuity, these charges were not explained in the slides. Niekras contends, however, that those charges were addressed in the prospectus he sent the children. Tr. 887. The record is silent as to whether the children received the prospectus. Niekras's testimony that he sent them the prospectus is unrebutted. It is also uncorroborated by any other evidence. (For example, neither the cover letter to the proposal nor the proposal itself mentions that a prospectus was included.). We did not find Niekras's testimony in this case either generally credible or not credible; our credibility determinations depended on the testimony he gave on a particular subject. Nevertheless, we find his testimony that he sent the children the prospectus too conveniently self-serving for us to credit it absent corroboration. Moreover, even if he sent the children the prospectus, it would not cure a misrepresentation. *See, e.g.*, *Dep't of Enforcement v. Brookstone Sec., Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *81 (NAC Apr. 16, 2015) (rejecting argument that a broker's misrepresentations are rendered immaterial when written risk disclosures are made available to customers).

She also claimed her meeting with Niekras left her feeling that she and her siblings "were getting [their] arms twisted,"[89] were "being played,"[90] or "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."[91] CLP must have realized that Niekras expected to receive commissions or compensation of some sort related to those purchases; otherwise, there was no reason for Niekras to alternatively seek payment of fees if they did not buy the annuity. Also, the billing estimates reflect on their face that Niekras was expecting to receive commissions in connection with his proposal.[92]

### 3. Niekras Disregards Instructions Not to Contact the Ps or to Record Customers Without Permission

At the conclusion of their meeting, CLP told Niekras that he should no longer deal with her parents or contact them until the situation was resolved.[93] Later, she met with a person whom she understood was Niekras's supervisor and compliance officer,[94] and repeated that request to him because her parents "were very agitated and very upset at this stage of the game."[95]

Afterward, MML management prohibited Niekras from contacting DP from the end of April 2013 until July 21, 2013. Niekras disregarded this prohibition, however; he contacted and spoke with DP during this period.[96] Also, on May 10, 2013, Niekras's supervisor directed Niekras not to speak with anyone in the P household. Nevertheless, he admitted trying to call the P household after that date.[97] On May 22, after trying unsuccessfully to telephone DP, he spoke

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[89] Tr. 285–86.

[90] Tr. 286.

[91] Tr. 346. According to CLP, during their meeting, Niekras asked her to return the billing document to him, but she refused, saying that she "was keeping it and . . . was going to look into it." Tr. 222. Niekras recalled certain aspects of this meeting a bit differently. He denies showing CLP the billing estimates at the meeting; he claims that he briefly left the room while they reviewed the annuity proposal and, while he was gone, CLP "snatched" the billing estimates from his working file. Upon his return, she refused his request to put them back. Tr. 665–66, 710, 712. We make no finding as to whether CLP snatched the billing estimates or simply refused to return them. But we find it likely CLP and Niekras at least discussed the billing estimates, as CLP testified. Her recollection was detailed and not undercut by cross examination. It was also credible: given that the estimates contained a provision for fee payment by the children, we find it more likely than not that Niekras at least discussed the billing estimates with her, even if he did not show them to her.

[92] CLP may have simply misinterpreted Niekras's statement that the children would not be charged commissions as meaning he would not receive any commissions.

[93] Tr. 223, 333.

[94] Tr. 223, 306.

[95] Tr. 223–24. CLP also 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." She never received the requested letter. Tr. 224, 305–06.

[96] Tr. 562–67. CX-18; CX-18A. *See also* CX-25 and Tr. 570, 572 (referencing the prohibition).

[97] Tr. 572–74, 576–77.

with VP briefly[98] and, without telling her, he recorded their conversation.[99] The next day, Niekras's supervisor emailed Niekras asking if he had contacted DP.[100] Niekras, however, did not disclose his attempt to speak with DP the prior day.[101] Six months later, on November 19, 2013, Niekras's supervisor instructed Niekras not to record customers without their permission, a directive which, by Niekras's own admission, he has violated "[t]o this day."[102]

#### 4. CLP Sends a Complaint Letter to FINRA then Blocks the Parties from Contacting the Ps

Ultimately the children declined to purchase the variable annuity that Niekras recommended.[103] In June 2013, CLP sent FINRA a letter "on behalf of the members of the [DP] family"[104] complaining about Niekras's dealings with them, including the events at issue in this disciplinary proceeding.[105] The letter, which CLP did not show to her parents before completing it,[106] accused Niekras of "elder harassment" by pressuring DP and presenting bills "designed to blackmail us into signing up for the annuity."[107]

CLP's complaint letter triggered the investigation that led to this proceeding. But her involvement in critical events did not end there. Intent on shielding her parents from FINRA's investigation and the ensuing disciplinary action, CLP blocked efforts by Enforcement and Niekras to contact her parents. CLP's actions, which Enforcement acquiesced in, resulted in neither party presenting direct evidence from the Ps at the hearing and thwarted Niekras's ability to present his defense. The absence of DP and VP—and especially DP—impacted our assessment of the evidence in this case, as we discuss below.

### C. The Investigation and Resulting Disciplinary Proceeding

#### 1. The Absent Witnesses: DP and VP

"[DP and VP] are 94 and 95 years old," Enforcement announced in its opening statement, "and, unfortunately, they will not be appearing at this hearing. However," Enforcement reassured the Hearing Panel, "you will hear today from [CLP]" who will "testify about conversations she

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[98] Tr. 574; CX-19; CX-19A.

[99] Tr. 575. Niekras proclaimed that he "absolutely" made the call and was "very proud of it." Tr. 576.

[100] CX-20, at 1.

[101] Tr. 583.

[102] CX-16, at 2; Tr. 628–30.

[103] Compl. ¶ 11; Ans. ¶ 11; Tr. 200.

[104] CX-17, at 6.

[105] Tr. 163; CX-17. CLP prepared the letter with input from her brother and sister. Tr. 165.

[106] Tr. 165, 170. CLP testified that her mother, but not her father, is now aware of the complaint letter. Tr. 331–32.

[107] CX-17, at 4.

had with her father,"[108] thus suggesting that, but for their advanced years, the Ps would have testified and Enforcement would not have needed to offer evidence through a surrogate.[109] The circumstances leading to their absence, however, told a more complex story—one that began early in the investigation and did not end until the last day of the hearing.

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.[110] But, according to the examiner, CLP was "not comfortable having them talk with me" because of the "stress it would cause" DP.[111] The examiner then discussed the issue with other FINRA employees in his office, including management, and "decided to comply with her wishes."[112] As a result, the examiner never attempted to contact either DP or VP directly[113] and never interviewed them.[114]

While CLP and DDP offered differing views about the Ps' current state of health,[115] the record does not reflect that they suffered from mental or physical health problems preventing them from having provided evidence, in some form, at least during the investigation. More specifically, (1) the Ps have not been judged incompetent by any tribunal and no guardian or conservator has been appointed for them;[116] (2) they did not consult with any mental health

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[108] Tr. 32.

[109] Enforcement apparently planned to leave its suggestion unsupported: "Does Enforcement intend to put on evidence in this case as to why these witnesses are not here?" the Hearing Officer asked Enforcement counsel at the end of his opening statement. Tr. 56. "No, Hearing Officer," counsel responded. Tr. 56.

[110] Tr. 773.

[111] Tr. 766. CLP's recollection differs slightly. She claims that she did not specifically request Enforcement not to ask her parents to testify but acknowledged that, in discussions with Enforcement, she "would certainly have implied that it would not be something I was comfortable -- that we would be comfortable with." Tr. 338.

[112] Tr. 769–71.

[113] Tr. 772–73.

[114] Tr. 765–66.

[115] CLP testified that the Ps are "relatively alert and watch the news and all those kinds of things and have opinions about the world" and are "doing really very well." Tr. 157. She said DP, in particular, was in "moderately good health for someone who is 95 years old," except "that he has had prostate cancer for 24 years and now is declining in terms of health from an energy point of view." Tr. 157. CLP opined that he has some physical infirmities, has little energy, is "not sharp," is "no longer good with financial things of any sort, and he misplaces things," and it would have been "highly upsetting to him" to have testified. Notably, CLP did not claim he was physically or mentally incapable of testifying. Tr. 338–39. VP is "also in relatively good health for her age," according to CLP, and while she "suffers from a lack of energy," she "has no physical impairments, and would not have difficulty testifying." Tr. 157, 339. By contrast, DDP testified that the Ps' mental state "varies based on how they're feeling," and both are hard of hearing and need to be near bathrooms. Tr. 507–09. DP, in particular, is "not in good health and he doesn't really want to be upset with things," DDP said, Tr. 502, adding that he did not believe his father's health would have enabled him to testify at the hearing. Tr. 514. Although his mother would have held up better than DP in terms of being able to testify, for the most part, she was not involved in discussions with Niekras, according to DDP. Tr. 515.

[116] Tr. 347.

professional about how participating in this proceeding would have impacted their health;[117] (3) they presently live independently, in a townhouse, eight miles away from the hearing location, and not in a nursing home or assisted living facility;[118] (4) they live with minimal assistance (someone comes in for two hours a week to help out with cleaning);[119] (5) they still drive (although only about a mile or so from their home);[120] and (6) they would likely have been capable of signing a declaration or affidavit, especially if someone else prepared it for them.[121]

For his part, Niekras tried to call DP as a witness but CLP obstructed his attempt. Niekras listed DP and VP on his witness list. On the last day of the hearing, Niekras testified that the previous evening, he and his attorney drove unannounced to the Ps' home and met with DP for about an hour.[122] Niekras proclaimed DP "very sharp . . . sharp as a tack,"[123] and no worse than he was in August 2012 when he had characterized DP as having "less comprehension" of daily events.[124] Continuing, Niekras claimed that when he asked DP to testify, DP told him he was unaware of this proceeding,[125] but "would do anything he could to help," including testifying,[126] because Niekras had been loyal to him and had never cheated him or presented him with a bill.[127] DP and Niekras arranged for Niekras to pick up DP the next day to take him to the hearing.[128]

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[117] Tr. 347–48.

[118] Tr. 156, 348.

[119] Tr. 156, 348.

[120] Tr. 349, 519–20.

[121] While CLP testified that it would have been emotionally difficult and painful for her parents to have provided a written statement or declaration, she did not point to any physical or mental infirmity that would have prevented them from doing so. Tr. 340–41. Likewise, DDP acknowledged, if someone else prepared the affidavit or declaration, DP might have been able to review it for accuracy. Tr. 510, 522. Declarations, affidavits, and video depositions, although hearsay, can be admissible in FINRA disciplinary proceedings. *Harry Gliksman*, 54 S.E.C. 471, 480–81 (1999) (finding affidavit corroborated by other record evidence was admissible because it was probative and reliable), *aff'd*, 24 F. App'x 702 (9th Cir. 2001); *Dep't of Market Regulation v. Imbruc*e, No. 2008012137601, 2012 FINRA Discip. LEXIS 41, at *33 (NAC Mar. 7, 2012) ("[I]n circumstances where a witness is unavailable, his or her videotaped hearsay statement not only may be admitted into evidence, but also may constitute the sole basis for findings of fact.").

[122] Tr. 818–19, 904. Neither Niekras nor his counsel tried to contact the Ps about being witnesses until the night before the last day of the hearing. Niekras explained why he had not reached out to DP earlier: "I was told [DP] hated me," adding that he saw something CLP wrote to that effect to FINRA. Tr. 903. *See also* Pre-Hrg. Conf. (May 16, 2017) Tr. 27 (statement by counsel that as of the date of the Pre-Hearing conference "we have had no contact with them.").

[123] Tr. 819–20, 881.

[124] Tr. 881–82.

[125] Tr. 820.

[126] Tr. 820.

[127] Tr. 900.

[128] Tr. 821.

But when Niekras and his counsel arrived at the Ps' home the next morning, CLP and DDP were there and CLP told him not to get out of his vehicle, so he left.[129]

When the hearing reconvened later that morning, Niekras and his counsel informed the Panel of these events. This prompted Enforcement counsel to respond: "I have not said this on the record before," he began, "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," he explained, "we respected that because that's part of what we do as FINRA Enforcement lawyers. We don't wave around a heavy hand like we may have if we were federal or state prosecutors."[130] Enforcement counsel added that the previous night, Enforcement 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.[131] Enforcement counsel also confirmed that the children had stopped Niekras from contacting DP that morning[132] and conveyed the children's "wishes" that Niekras "stay away" from the Ps.[133] No later attempts appear to have been made by either party to obtain DP's testimony.

In sum, CLP impeded the investigation and Niekras's defense by shielding the Ps from contact with the parties. Enforcement acceded to CLP's wishes, even though her objectivity was questionable—she was openly hostile toward Niekras[134]—and there was no evidence the Ps did not want to cooperate with the investigation. Thus, the record is bereft of any evidence from the

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[129] Tr. 821. Although Niekras's testimony about what transpired was not corroborated by another witness, his counsel represented the following: On the day before last day of the hearing, he and Niekras drove to the Ps' home to try to speak with DP; DP told them he was unaware of this proceeding but agreed to testify at the hearing the next day; however, when Niekras arrived at the Ps' home the next morning to pick up DP and take him to the hearing, Niekras was chased away. Tr. 741–44. We credit counsel's statements. Although not under oath, counsel was bound by the New York State Rules of Professional Conduct Rule 3.3 requiring that a lawyer refrain from making "a false statement of fact or law to a tribunal" and his statements were corroborated by Niekras's testimony. Also, neither of the children rebutted this version of events; rather, they at least partially corroborated it (via Enforcement counsel's representations to the Hearing Panel).

[130] Tr. 746. During closing arguments, one of Enforcement's attorneys explained DP's absence to the Panel: "You know, I think, from a legal perspective, is [DP] swearable and capable of testifying? Yes, he is. But," he added, "because we are in a forum that we are in, he can't be compelled to do so." Tr. 1008. Unlike his co-counsel's suggestion in opening statement that the infirmities of age prevented the Ps' appearance, this explanation suggested that Enforcement wanted DP to testify, but could not obtain his testimony voluntarily, and was without further recourse. But, as noted above, Enforcement never contacted DP directly to find out if he would agree to appear voluntarily at the hearing or would provide evidence in another form, either before or at the hearing.

[131] Tr. 747.

[132] Tr. 748.

[133] Enforcement's counsel then turned to Niekras' attorney and asked him to "please instruct [Niekras] not to contact this family anymore. It's totally against their wishes." Tr. 749. The evidence, however, showed that DP was pleased by Niekras's surprise visit and, most importantly, had agreed to testify on Niekras's behalf. Tr. 895, 898–99. Thus, at least as to contacting DP, we find no basis for Enforcement's request.

[134] In addition to the hostility that permeated the complaint letter, CLP testified that, based on her dealings with Niekras, she concluded he could not be trusted. Tr. 288–89, 293.

Ps, and Niekras was forced to defend himself without the benefit of evidence from DP about their dealings—evidence that was central to his defense. We turn next to that defense.

### 2. Niekras Denies Making Material Misrepresentations to the Ps

Niekras does not dispute that he prepared billing estimates, showed them to at least DP, and made the statements appearing in the transcript of the March 27 meeting. He further acknowledges that DP did not owe him any payment for the services he previously rendered, but denies demanding payment in a specific amount,[135] seeking financial planning fees from the Ps,[136] or trying to coerce DP to pay any bill.[137] And, more to the point, he denies making material misrepresentations to the Ps.

The nub of Niekras's defense is that his statements are non-actionable when viewed in context: he felt entitled to be paid if the children did not adopt his proposal because he had provided valuable services to the P family over a period of several years; DP also wanted him to be paid; and he was only following DP's instructions when he created the billing estimates. He was not trying to mislead anyone at the March 27 meeting, he maintains, but "shame on" him if he "used the wrong words."[138]

According to Niekras, he drafted the variable annuity proposal at the direction of DP,[139] who reviewed and approved it,[140] and expected his children to accept it.[141] 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."[142] Still, in the event they did not follow his recommendation, he wanted—and felt he deserved—to be paid for the services he had previously rendered to the family.[143]

So, when it appeared the children might not adopt the proposal, Niekras voiced his concerns to DP. This, according to Niekras, prompted DP to say he wanted Niekras to be paid for the services he had performed in connection with managing and gathering information about the Ps' assets.[144] Indeed, Niekras recalled, DP was "adamant" that he be paid[145] and asked: how can

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[135] Tr. 825.

[136] Tr. 593.

[137] Tr. 821–22.

[138] Tr. 826.

[139] Tr. 284, 646.

[140] Tr. 811, 890.

[141] Tr. 657.

[142] Tr. 679–81.

[143] Niekras admitted that he "would have liked to have been compensated one way or another" because he "needed food, clothing and shelter the same as every other human being for the efforts that I put forward." Tr. 141, 656–57.

[144] Tr. 616–17, 822, 891–92.

"we get you compensated if the kids don't buy something?" (although DP made it clear he did not want to pay the whole amount himself).[146] Niekras testified that DP then instructed him to prepare "something" that would generate the same amount as the commissions Niekras would receive on the annuities.[147] DP gave additional directions about how to prepare the document, Niekras recalled, telling him 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.[148] Niekras also claimed that DP, based on his own experience as a practicing attorney, suggested Niekras use the rate of $250 per hour upon which to compute the bill.[149] Niekras asserts that he complied with the request and prepared the billing estimates.[150]

Niekras admits showing the Preliminary Billing Estimate to DP and discussing it with him, but claims he took it back and did not leave it with DP.[151] He denied that any of the billing estimates constituted bills, and certainly not final bills, because he did not have a contract with DP.[152] Had he reached an agreement with DP for payment, Niekras added, he would then, at that time, have entered into a contract for payment.[153] Instead, 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."[154]

Niekras used similar words to describe the March 27 meeting, calling it "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."[155] He disputed Enforcement's characterization of his statements as misrepresentations. Niekras contends he did not literally mean DP or someone else

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[145] Tr. 646.

[146] Tr. 656.

[147] Tr. 622, 822. Specifically, according to Niekras, DP asked him to "prepare it in a way that backed into the commissions that I would get if the kids had done . . . or had purchased the annuities that were recommended." Tr. 653, 671–72, 822.

[148] Tr. 622–23.

[149] Tr. 706.

[150] Tr.138, 141–42, 616, 621, 671, 822.

[151] Tr. 141, 665, 667. There was conflicting and inconclusive evidence about whether Niekras gave, or just showed, the billing estimates and the Draft Statement to the P family. Niekras testified he never tendered these documents to DP, but only showed them to him. Tr. 667, 824. As discussed above, however, CLP testified that DP had the estimates in his possession when they met. We find that, at a minimum, Niekras showed the billing documents to DP. By contrast, Niekras did not show any of the billing documents to his Firm. Tr. 593–94, 624; *see also* Tr. 708 (Niekras testifying that he did not show the estimates to the Firm's compliance department).

[152] Tr. 822–23.

[153] Tr. 824–25.

[154] Tr. 708, 826.

[155] Tr. 681.

had to pay his bill; in his view, he and DP were just "discussing things," and, again, he was just musing.[156] He testified that what he meant—indeed, what he should have said—was, "I really would like to get paid for my efforts."[157] As to his "payroll" remark, Niekras admitted that it was "a bit of a fabrication"[158]—his firm did not literally keep him on a payroll.[159] But, he maintains, he did not intend the comment to be taken literally. "You have to produce enough to pay the fees to keep your office, your phones and everything else," he explained. "That is considered part of your pay package. "So," he added, "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. Is that kind of a payroll issue?"[160]

### 3. Discussion of Niekras's Defense

We did not find certain aspects of Niekras's version of events credible. He insists that DP was adamant he be paid and engineered the approach of having him draft billing statements reflecting fee payments equal to the commissions he expected to receive under the proposal. But the weight of the credible evidence did not support these assertions. The billing documents do not contain any language suggesting that Niekras prepared them at DP's request. Instead, they include prefatory language attempting to justify why Niekras should be paid a fee in lieu of commissions.

Nor does the audio recording and transcript of the March 27 meeting support Niekras's claim. Even though Niekras testified he recorded his conversations with clients to protect himself, he did not put on the record at the meeting that DP wanted him to be paid and had directed him to prepare billing statements. Nor did DP say anything at the meeting to that effect, only that he was "not asking" Niekras to work for nothing. DP's statement fell far short of Niekras's recollection that DP was "adamant" about it. Also, at the meeting, Niekras said the total amount reflected on the estimate was a real "shocker." It could not have been a "shocker," however, if, as Niekras testified, both he and DP knew, in advance, that the amount reflected on the estimate would approximate the amount of expected commissions.

Moreover, taken as a whole, the recording and transcript show Niekras attempting to persuade DP that it was only fair for Niekras to be paid given the services he had rendered over the years. His attempts went far beyond mere "musings," as he portrayed them. During the

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[156] Tr. 693, 825.

[157] Tr. 692–93.

[158] Compl. ¶ 14; Ans. ¶ 14; Tr. 602, 628.

[159] Compl. ¶ 14; Ans. ¶ 14. Niekras never received a salary at MML; he was paid solely in commissions. Tr. 827–28. He described his relationship with MML as that of an independent contractor who received a Form 1099, not a Form W-2. Tr. 613.

[160] Tr. 694. Niekras testified he was required to meet certain product-specific production requirements, and if he did not meet them, he could be terminated. Niekras claims that is what later happened to him. Tr. 828–30, 883. According to FINRA's Central Registration Depository, MML terminated Niekras due to a change in production requirements. CX-28, at 3.

course of the meeting, Niekras tried a variety of heavy-handed tactics to convince DP to pay him—including guilt-tripping DP and making borderline threats. It is unlikely Niekras would have resorted to these approaches if, before the meeting, DP had not only agreed Niekras should be paid but had also directed him to create billing estimates for that purpose.

Finally, no witnesses supported Niekras's assertions. Instead, he related statements purportedly made to him by DP, some of which were hearsay evidence because they were not made at the hearing and were "being used to establish the truth of the statements that they contain."[161] While it is well established that hearsay evidence is admissible in FINRA disciplinary proceedings,[162] the Hearing Panel must decide whether to rely on that evidence. "When considering whether to rely on hearsay evidence," adjudicators must "evaluate its probative value, reliability, and the fairness of its use."[163] As part of this evaluation, the adjudicators should consider "any possible bias of the declarant; the type of hearsay at issue; whether the hearsay statements are signed and sworn to or anonymous, oral, or unsworn; whether direct testimony contradicts the hearsay statements; whether the declarant was available to testify; and whether the hearsay is corroborated."[164] Although DP was unavailable to testify (because CLP prevented him from appearing) and the purported statements were probative, we did not rely on them because they (1) were oral (i.e., not signed or sworn); (2) were proffered by Niekras, who has an obvious motive or bias in this case; and (3) were not only uncorroborated by other witnesses or documents,[165] but were contradicted by the documentary record, as discussed above.

Niekras made other arguments, however, that are well taken and undercut Enforcement's charge that he engaged in material misrepresentations. As discussed in the Conclusions of Law Section below, we must evaluate Niekras's statements in the context in which they were made.

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[161] *Dist. Bus. Conduct Comm. v. Gallison*, No. C02960001, 1999 NASD Discip. LEXIS 8, at *11 (NAC Feb. 5, 1999), *aff'd*, 54 S.E.C. 275 (1999) (finding that certain statements constituted "hearsay evidence because they are out of court statements that are being used to establish the truth of the statements that they contain.").

[162] *See, e.g.*, *Dep't of Enforcement v. McGuire*, No. 2011027350301, 2015 FINRA Discip. LEXIS 53, at *23 (NAC Dec. 17, 2015); *Dep't of Enforcement v. Padilla*, No. 2006005786501, 2012 FINRA Discip. LEXIS 46, at *36–37 (NAC Aug. 1, 2012) (quoting *Otto v. SEC*, 253 F.3d 960, 966 (7th Cir. 2001)) ("it is well established that hearsay evidence is admissible in administrative proceedings, if it is deemed relevant and material"); *Dep't of Enforcement v. Lakewood*, No. 2005001729501, 2010 FINRA Discip. LEXIS 2, at *29 n.31 (NAC Feb. 26, 2010) ("Hearsay is allowable evidence in FINRA proceedings").

[163] *McGuire*, 2015 FINRA Discip. LEXIS 53, at *23–24 (citing *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *47 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010)).

[164] *Id*.

[165] Niekras stated that in February 2013, he had conducted unrecorded in-person conversations with DP in which DP expressed his desire for Niekras to be paid for the services he had previously rendered. Tr. 655, 685, 893. He also testified he had recorded similar conversations with DP before the March 27 meeting. Tr. 687, 889–94. Niekras provided no explanation for why he did not offer any of those purported recordings into evidence. Tr. 688–89. We find it unlikely that such conversations occurred. Given that Niekras claimed it was his practice to record important conversations with customers, we would expect that, if such conversations had occurred, he would have recorded them and offered the recordings and transcripts into evidence.

But as discussed above, the record does not contain direct evidence from DP about his discussions with Niekras. And, while CLP and DDP testified that their father told them he would have to pay Niekras if they did not buy the annuity,[166] this statement is ambiguous and we did not rely on it.[167] The statement could reasonably be viewed as DP expressing a feeling of moral or ethical obligation to pay a trusted broker for valuable services rendered, rather than as evidence that Niekras had told DP he was obligated to pay him.[168] Or, DP may have been trying to pressure his children to buy the annuities because DP wanted to control the use they made of the gifted assets and seized on the billing estimates to help him implement that goal. In any event, without DP's testimony, the record 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.

Moreover, even without this contextual evidence, it appears Niekras was merely expressing his belief—rather than stating as fact—that under the circumstances, it was only fair that he be paid if the children did not buy the annuity. The distinction between statements of fact and opinion is important because, as we discuss below in the Conclusions of Law Section, sincerely held statements of opinion are generally not actionable. Also, it does not appear that Niekras meant his "payroll" comment literally or that a reasonable person would have taken it literally. Nor do the Billing Estimates falsely state that payment was due, as Enforcement argues. Rather, they reflect that they were only estimates and drafts, consistent with Niekras's explanation that their purpose was merely to guide fee-payment discussions.

## III. Conclusions of Law

"[T]he very narrow question for this panel to determine," according to Enforcement,"is whether or not Niekras made misrepresentations to the [P] family and whether those

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[166] Although this statement is hearsay, it is admissible because, as discussed above, hearsay is admissible in FINRA proceedings. *See also Brookstone Sec., Inc.*, 2015 FINRA Discip. LEXIS 3, at *115–17 (finding that customers were unavailable due to physical and cognitive infirmities and hearsay testimony of customers' sons was probative because it related to the charges against respondents). Also, this statement falls within an exception to the hearsay rule because it is a statement of intent or plan. *See* Fed. R. Ev. 803(e) (providing an exception for, among other things, "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan)"). While "the formal rules of evidence do not apply in FINRA proceedings, . . . FINRA adjudicators may look to the Federal Rules of Evidence for guidance." *Dep't of Enforcement v. North*, No. 2010025087302, 2017 FINRA Discip. LEXIS 7, at *35 (NAC Mar. 15, 2017), *appeal docketed*, No. 3-17909 (SEC Apr. 6, 2017).

[167] We also did not rely on the statement for an additional reason: it would be unfair to Niekras for us to do so. Although hearsay evidence is admissible in FINRA proceedings, the Hearing Panel must evaluate whether to rely on it, using the factors set forth above. While each child's testimony corroborated the other's testimony, thereby enhancing its reliability, both DDP and CLP thwarted DP's appearance—i.e., they are responsible for his unavailability—thus making it unfair for the statement to be used against Niekras. Even if we had relied on it, as discussed above, it did not prove Niekras made a misrepresentation of fact.

[168] Indeed, it is unlikely that, as a lawyer, DP would have believed that without an advisory fee agreement he was contractually obligated to pay Niekras the requested fees.

misrepresentations constituted a violation of FINRA Rule 2010."[169] We agree. To make this determination, we begin with the legal standards applicable to misrepresentation-based Rule 2010 actions.

FINRA Rule 2010 requires "[a] member, in the conduct of its business" to "observe high standards of commercial honor and just and equitable principles of trade."[170] It is well established that "[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 NASD Rule 2110 [the precursor to FINRA Rule 2010]."[171] "[W]hether a statement is 'misleading' depends on the perspective of a reasonable investor: The inquiry (like the one into materiality) is objective."[172] Materiality depends "upon the significance the reasonable investor would place upon the representation"[173] and "is not judged in the abstract, but in light of the surrounding circumstances."[174] More specifically, the test for materiality is whether "there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision, and disclosure of the omitted fact would have significantly

[169] Tr. 919–20; *see also* Tr. 992–93 (Enforcement counsel asserting that "[w]hether or not there is a violation of Rule 2010 based upon the facts articulated in this complaint, I think, practically falls upon whether or not we have proved the misrepresentations."). The Complaint also alleged that Niekras omitted material facts. Compl. ¶ 22. But Enforcement abandoned that allegation at a pre-hearing conference. Pre-Hearing Conference Transcript (Pre-Hr'g Conf. Tr.") 17 (May 16, 2017).

[170] The Rule also applies to associated persons. *See* FINRA Rule 0140(a) (providing that the rules "shall apply to all members and persons associated with a member" and that "[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules."). *See also Dep't of Enforcement v. Merrimac Corp. Sec., Inc*., No. 2011027666902, 2017 FINRA Discip. LEXIS 16, at *13 n.7 (NAC May 26, 2017) (citing FINRA Rule 0140(a)), *appeal docketed*, No. 3-18045 (SEC June 26, 2017).

[171] *Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *80 (NAC July 23, 2015); *Dep't of Enforcement v. Kapara*, No. C10030110, 2005 NASD Discip. LEXIS 41, at *20–21 (NAC May 25, 2005) (citing *Dep't of Enforcement v. Timberlake*, No. C07010099, 2004 NASD Discip. LEXIS 11, at *16 (NAC Aug. 6, 2004) ("It is axiomatic that a broker who makes material misrepresentations and omissions to customers is engaging in unethical conduct.")).

[172] *Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, 2015 U.S. LEXIS 2120, at *4 (Mar. 24, 2015).

[173] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *81 (citing *Kapara*, 2005 NASD Discip. LEXIS 41, at *19) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988))). *See also Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2017 FINRA Discip. LEXIS 10, at *15 (NAC Mar. 15, 2017), *appeal docketed*, No. 3-17930 (SEC Apr. 14, 2017) (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) ("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.").

[174] *Rosenzweig v. Azurix Corp*., 332 F.3d 854, 866 (5th Cir. 2003) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1448 (5th Cir. 1993)); *Rubinstein v. Collins*, 20 F.3d 160, 167–68 (5th Cir. 1994) ("materiality is judged in light of the surrounding circumstances").

altered the total mix of information available."[175] In short, when analyzing alleged misrepresentations, they must be viewed in the context in which they are made.[176]

Applying these legal standards to our findings of fact, we conclude that Enforcement failed to prove by a preponderance of the evidence that Niekras violated FINRA Rule 2010, as charged.[177] As a threshold matter, Enforcement did not show that Niekras's alleged misrepresentations to the Ps constituted statements of fact. Rather, his statements were expressions of opinion. As the United States Supreme Court held in the context of liability for misstatements of fact in registration statements, expressions of pure opinion generally do not constitute statements of fact that can serve as a basis for a misrepresentation charge.[178] That said, the Court further held that liability can still attach based on an opinion if the speaker did not honestly hold the belief expressed or if a supporting fact supplied for the opinion was untrue.[179] In so holding, the Court explained the difference between facts and opinions: "A fact is a 'thing done or existing'" or "'[a]n actual happening.'" On the other hand, "[a]n opinion is 'a belief[,] a view,' or a 'sentiment which the mind forms of persons or things.'"[180] Continuing, the Court

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[175] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *81 (citing *Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334, at *30–31 (Feb. 20, 2007)).

[176] *See, e.g., U.S. v. Rigas*, 490 F.3d 208, 231 (2nd Cir. 2007) ("Analysis of the misrepresentations must be in the context in which they were made."); *ZPR Inv. Mgmt. v. SEC*, 2017 U.S. App. LEXIS 11761, at *20 (11th Cir. June 30, 2017) (citing *SEC v. Merch. Capital*, 483 F.3d 747, 767 (11th Cir. 2007) for the "well-established principle that a statement or omission must be considered in context"); *see also Dep't. of Enforcement v. Cantone*, No. 2013035130101, 2017 FINRA Discip. LEXIS 20, at *72 (OHO May 12, 2017) ("Facts weighed for materiality must be viewed in context."), *appeal docketed* (NAC June 6, 2017).

[177] *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *16 (June 2, 2016) (applying a preponderance of the evidence standard in FINRA disciplinary proceedings).

[178] *Omnicare*, 2015 U.S. LEXIS 2120 (holding that an issuer's statement in a registration statement that it believed its contracts were legal did not give rise to liability under the false-statement provision of Section 11 of the Securities Act of 1933 (15 U.S.C.S. § 77k) because, among other things, a sincere statement of pure opinion is not an "untrue statement of material fact," regardless of whether the belief could be proved wrong.). The test for whether a statement is materially misleading under Section 11 is the same as the test under Section 10(b) of the Securities Exchange Act of 1934. *See Rombach*, 355 F.3d 164, 178 n.11 (2d Cir. 2004). *See generally Laurie Bebo and John Buono, CPA*, Initial Decision Release No. 893, 2015 SEC LEXIS 4045, at *154 (Oct. 2, 2015), *pet. for review granted*, 2015 SEC LEXIS 5046 (Dec. 8, 2015) (finding that although *Omnicare* involved a claim involving Section 11, "*Omnicare*'s analysis applies to Section 10(b) because of the similarity in language between the two statutes"). We found *Omnicare's* analysis instructive, although we recognize that this proceeding involves a misrepresentations charge under FINRA Rule 2010, and the language of Section 11 and Section 10(b) differs from that FINRA rule. This language difference, however, does not impact the applicability of the analysis.

[179] *Omnicare*, 2015 U.S. LEXIS 2120, at *18–19; *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (quoting *Omnicare*, 135 S. Ct. at 1327); *City of Dearborn Hgts. v. Alighn Technology, Inc*., 856 F.3d 605, 615 (9th Cir. 2017) (finding that *Omnicare* "recognized that some opinion statements 'contain embedded statements of fact,' which 'may be read to affirm not only the speaker's state of mind . . . but also an underlying fact.' . . . [and that] [f]or such statements, falsity could be established 'not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue.'") (quoting *Omnicare*, 135 S. Ct. at 1327) (internal citations and quotations omitted).

[180] *Omnicare*, 2015 U.S. LEXIS 2120, at *13 (quoting *Webster's New International Dictionary* 782 (1927)).

wrote: "Most important, a statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not."[181]

We found, above, that Niekras's statements to the Ps at the March 27 meeting, together with the billing estimates, were not statements of fact; they were expressions of his belief, view, or sentiment that under the circumstances, fairness required that he be paid if the children did not adopt his annuity proposal. And that is how a reasonable person would have viewed his statements.[182] Further, Enforcement failed to prove that Niekras did not believe the views he expressed.[183] Enforcement also failed to prove that any facts he supplied to support his opinions were false,[184] other than the "payroll" statement, which, as we found above, was not meant to be taken literally.[185] Therefore, we find Niekras's "inherently subjective and uncertain assessment[]"[186] that he was entitled to fees (if the children rejected his proposal) was not a misrepresentation of fact that violated FINRA Rule 2010.[187]

Finally, Enforcement failed to prove that Niekras violated FINRA Rule 2010 by making material misstatements to the children about commissions. This part of the FINRA Rule 2010 charge consists primarily of two allegations: first, "Niekras misrepresented to DP and VP's children that they would not pay commissions if they purchased the variable annuities he recommended," and second, "Niekras anticipated that the sales of variable annuities to DP and VP's children would result in about $75,000 in commissions to Niekras." Given the juxtaposition

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[181] *Omnicare*, 2015 U.S. LEXIS 2120, at *13–14 (quoting *Webster's New International Dictionary* 782 (1927)) ("An opinion, in ordinary usage . . . does not imply . . . definiteness . . . or certainty"); *see also Retail Wholesale & Dep't Store Local Union v. Hewlett-Packard Co*., 845 F.3d 1268, 1275 (9th Cir. 2017) ("To be misleading, a statement must be 'capable of objective verification.'") (quoting *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc*., 774 F.3d 598, 606 (9th Cir. 2014)).

[182] *See Omnicare*, 2015 U.S. LEXIS 2120, at *21–22 ("A reasonable person understands, and takes into account, the difference . . . between a statement of fact and one of opinion.").

[183] Niekras did concede he could not charge the Ps fees and was not entitled to receive payment of fees (*see supra* n.47 and accompanying text). But a reasonable interpretation of those concessions is that while Niekras recognized he did not have an enforceable legal right to fee payment, he genuinely felt that fairness compelled payment.

[184] Enforcement did not allege that Niekras misrepresented the nature and extent of the services for which he sought payment. Tr. 861–63.

[185] Also, whether Niekras was literally on the Firm's payroll or was instead compensated solely by commissions is an immaterial distinction under the circumstances of this case.

[186] *Omnicare*, 2015 U.S. LEXIS 2120, at *19.

[187] Even if the statements were misrepresentations of fact, Enforcement failed to show they were material. We recognize that because materiality is an objective—not subjective—test, a finding of materiality does not depend on whether DP believed any of the alleged misstatements. *Cf. Dep't of Enforcement v. Jordan*, No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at *18 n.7 (NAC Aug. 21, 2009) (rejecting argument "that a finding of materiality must be grounded in evidence that customers 'actually believed' that the omissions altered the total mix of information . . . . '[T]he reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective.'"). Still, as we have explained, to assess materiality we must view the alleged misrepresentations in light of the surrounding circumstances (i.e., in context). And without evidence from DP, we were unable to do so.

of these two allegations, it appears that Enforcement is asserting that Niekras's statement is false because he anticipated receiving commissions. But this is a non-sequitur; Niekras's expectation that he would receive commissions is not inconsistent with his statement that the children would not pay commissions. To render his statement false, Enforcement needed to allege and prove that, in fact, the children would be paying Niekras's commissions; Enforcement did not do so. Indeed, the record does not reflect what charges, fees, or expenses—including commissions—the children would pay under the proposal.[188]

Accordingly, Enforcement failed to prove by a preponderance of the evidence that Niekras made the alleged material misrepresentations of fact charged in the Complaint; therefore, we conclude that Enforcement failed to prove he violated FINRA Rule 2010.[189]

## IV. Order

Because Enforcement failed to establish that Niekras violated FINRA Rule 2010 by making material misrepresentations, as alleged, the Complaint is dismissed.[190]

David R. Sonnenberg
Hearing Officer
for the Hearing Panel

[188] Enforcement presented evidence (CLP's testimony) that Niekras told CLP he would not benefit from the children's purchase of the annuity. But as discussed above, we did not find that evidence credible. In any event, the Complaint did not charge Niekras with falsely telling the children he would not benefit or receive commissions under the proposal—only that they would not pay commissions.

[189] This conclusion, however, is not an endorsement of Niekras's conduct. To the contrary, his interactions with the P family were inappropriate in a number of ways: (1) although he did not have an advisory fee agreement in place with the Ps, he tried to convince them to pay him fees for services he had previously rendered, violating Firm policy in the process; (2) he urged DP to "make" his son adopt the proposal, suggesting arguments DP could employ to accomplish that result; (3) using his fee payment request as leverage, he tried to manipulate the children into adopting his proposal; (4) he disregarded a Firm directive not to contact the Ps; and (5) he had conversations with the Ps (and other customers) without disclosing he was recording them. Worse, Niekras did all this against the backdrop of a long-term relationship of trust and friendship with two elderly customers in declining health. As a seasoned securities professional with two decades of experience, Niekras should have known better than to have engaged in such conduct. We make no finding, however, as to whether Niekras's overall course of conduct was unethical and violated FINRA Rule 2010; that theory of liability was not asserted in this case. Instead, as Enforcement counsel confirmed, the case was based on Niekras's alleged misrepresentations to the Ps that he was entitled to payment for past services rendered and his alleged misrepresentation to the children that they would not pay commissions if they purchased the annuity. Tr. 861, 986–93.

[190] The Hearing Panel considered and rejected without discussion all other arguments by the parties.

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