Re Fridgant

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

Mark Fridgant

2014 IIROC 47

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: August 26, 2014, in Toronto, Ontario
Decision: August 26, 2014
Reasons: October 10, 2014

Hearing Panel:
Julia Dublin, Chair, Philip Norris and Colleen Wright
Appearances:
Robert DelFrate, Enforcement Counsel
Mark Fridgant (absent)

REASONS FOR DECISION

Background

¶ 1 The Respondent was employed as a registered representative at PI Financial Corp from December 16, 2011 to January 24, 2013. Previously he was employed in the same capacity at various dealer members including Canaccord Capital Corporation from April 1999 to September 2006 and at Jennings Capital Inc. from September 2006 to December 2011.

¶ 2 In July 2000 IDA discipline penalties were imposed on the Respondent in Re Fridgant, 2000 I.D.A.C.D. No. 27:

> "The District Council found that Mr. Fridgant contravened Association By-laws as follows:
>
> 1. In or about March 1990 to July 1996, Mr. Fridgant effected 56 transactions in a client's RRIF on a deferred sales charge basis in order to generate excessive commissions, contrary to By-law 29.1;
> 2. In or about December 1991 to July 1996, Mr. Fridgant effected transactions in a client's RRIF account that created or increased a debit balance and created a potential tax liability for the client, contrary to Regulation 1300.1(b); and
> 3. In or about March 1990 to July 1996, Mr. Fridgant failed to exercise due diligence to ensure the recommendations for a client's RRIF account were appropriate, contrary to Regulation 1300.1(c)."

¶ 3 The Respondent was fined $55,000 and suspended for one month followed by strict supervision of his activities for a period of two years. He was required to re-write the Conduct and Practices Exam within 90 days

of the date of the hearing panel's decision and to pay $7,000 towards the Association's costs.

Allegations

¶ 4 The current allegations are that:

a) Between November 2005 and November 2012, the Respondent, Mr. Fridgant, provided fictitious portfolio statements to two sets of clients which misrepresented the total value of their account holdings, contrary to IIROC Dealer Member Rule 29.1 (IDA By-law 29.1 prior to June 1, 2008); and

b) In November 2012, the Respondent made inaccurate statements and misrepresented the holdings of these clients when questioned by representatives of his Dealer Member firm, contrary to IIROC Dealer Member Rule 29.1 (IDA By-law 29.1 prior to June 1, 2008).

Effectiveness of Service

¶ 5 There was a preliminary issue of the effectiveness of service of the Notice of Hearing on the Respondent. Rule 5.1 of the IIROC Rules of Practice and Procedure requires that:

"A Notice of Hearing shall be served by one of the following methods:

(a) by personal service on the Respondent;

(b) by delivering a copy of the Notice of Hearing by registered mail to the Respondent's last known address as recorded in the Organization's Registration file; or

(c) where a Respondent is represented by counsel, by delivering a copy of the Notice of Hearing to the Respondent's counsel with the consent of counsel."

¶ 6 IIROC staff attempted to serve notice of this hearing on the Respondent on June 4, 2014 by sending a copy by registered mail to his last recorded National Registration Database (NRD) address, and by personal service at the same address on June 11 and 12, 2014. The registered letter was not picked up from the post office. The process server was advised at the door on June 11th that the Respondent did not live at that address. He received no answer on the second visit. A next door neighbour advised the process server on June 12th that he did not recognise the Respondent's name. The process server did not leave a copy of the Notice of Hearing at the house on either visit.

¶ 7 Mr. Fridgant did not appear at the hearing and the evidence adduced by IIROC staff showed he did not participate in either his employer dealer's internal investigation or in the subsequent IIROC staff investigation that led to the allegations. His branch manager, Mr. DS, along with two colleagues, met with him on November 21, 2012 to discuss among other matters the RM, MM complaint about an investment in a Paris Bank and discretionary short term trading in the RM and MM accounts. According to Mr. DS's note of the meeting, the Respondent's answers about the complainants' accounts were confusing and he appeared shaken. Mr. DS advised the Respondent by internal office email on November 22, 2012 that he had been placed under strict supervision pending the outcome of an internal investigation. The Respondent faxed a doctor's note to Mr. DS on November 22, 2012 stating that he would be absent from work until November 30, 2012 for an unspecified medical reason.

¶ 8 The Respondent provided a second medical note on November 28, 2012 stating he would be absent until December 12, 2012. PI Financial advised the Respondent by email and letter on November 30, 2012, that he was suspended pending an internal investigation into unauthorised discretionary trading. On December 7, 2012 Mr. T, the CCO of PI Financial sent a letter by courier to the Respondent's address in Richmond Hill advising the Respondent that RM's and MM's complaint of unauthorised trading had been referred to IIROC for investigation and requiring the Respondent to attend an interview with him. The Respondent did not reply directly but faxed a third medical note to Mr. DS on December 11, 2012 stating that he would not be able to return to work until January 2, 2013.

¶ 9 On December 19th, Mr. T once again demanded the Respondent attend an interview to discuss

unauthorised discretionary trading. The Respondent did not return to work or respond directly to any communications from PI Financial. On January 15, 2013 Mr. T advised the Respondent that if he did not respond by January 23, 2013, he would be terminated for unauthorised discretionary trading and refusal to respond to the requests of his employer. He did not reply. He was terminated for cause on January 24, 2013 in letter delivered by courier to his address in Richmond Hill that also advised of a complaint from EP and CP about falsified portfolio updates. On June 5, 2013, IIROC sent a registered letter to the Respondent at an address in Ajax, which remains his last recorded NRD address, informing him that they had begun an investigation that included a complaint by EP and CP about his handling of their accounts at Canaccord, Jennings, and PI Financial. The letter was not collected.

¶ 10 Given the elapse of time since the Respondent was last heard from and the Respondent's NRD record of frequent home address changes, it was not clear to us from the affidavits of service filed whether the Respondent was actively evading service (abetted by housemates and neighbours) or had simply moved away at some point and was passively ignoring the IIROC investigation and these proceedings. Although attempts had been made to serve him in Ajax, and Richmond Hill, his second last recorded NRD address, no copy of the Notice of Hearing had been actually left at either house, so we were concerned that on a strict reading, neither the "personal service" test of s. 5.2 (a) nor the "delivery" test of s. 5.2 (b) had been met. We had a secondary concern that the misconduct originally put to the Respondent at the meeting with his branch manager had been unauthorised trading in RM's and MM's accounts, not providing false account information to them or to EP and CP as alleged later in the Notice of Hearing. This was first communicated to the Respondent on January 24, 2013 by a letter which was delivered by courier to his Richmond Hill address. The respondent did not reply or acknowledge delivery.

¶ 11 We decided we should proceed with the hearing rather than adjourning until staff had left a copy of the Notice of Hearing at the doorstep at the Respondent's last recorded NRD address. We noted the power of a court under the *Rules of Civil Procedure* (Ontario) to dispense with service in the interests of justice. While this discretion is not provided us in the IIROC rules, we did not consider that more heroic efforts on the part of IIROC staff to trace and serve the Respondent would be effective.

¶ 12 Nor did we consider such efforts necessary to ensure fairness to the Respondent on the basis that (1) at a very early stage he chose not to provide information or explanation or to participate in his employer's inquiries relating to his treatment of RM and MM; (2) PI made reasonable efforts to advise him the EP and CP complaint in January 2013; (3) the Respondent could not be expected to be surprised by the conduct implications of his own signed communications with CP and EP should they be scrutinised, or that CP and EP would conclude from this correspondence that funds they owned were missing and complain to his employer; (4) having been the subject to IIROC disciplinary proceedings in the past, the Respondent must have known the likely outcome of the formal inquiries would be a hearing; (5) the Notice of Hearing and the present allegations were published on the Internet; (6) the Respondent could be expected to be aware of Section 13.5 of the IIROC hearing procedures, which provides that where a Respondent fails to attend a disciplinary hearing, the facts alleged may be deemed proven; and (7) the decision in this proceeding and any penalties imposed are enforceable only through the IIROC membership structure which the Respondent has clearly abandoned.

¶ 13 We did, however, consider that in fairness to the Respondent we should not deem the allegations proven by virtue of the Respondent's absence under Section 13.5 of the IIROC Rules of Practice and Procedure, but rather should hear IIROC staff's argument. In the affidavits and supporting documents submitted by staff we should look for clear, cogent and convincing evidence of the facts alleged and staff should establish on the balance of probabilities that the alleged misconduct occurred as described in the Statement of Allegations.

¶ 14 With respect to the evidence, we relied on Dealer Member Rule 20.2 and Rule 13.4 of the IIROC Rules of Practice and Procedure. These allow us to admit anything that that is relevant as evidence in the proceedings and to accept evidence by sworn statement. We had no reason to question the veracity of any of the affidavit evidence provided in support of the allegations, or to question the provenance of any of the documents adduced in evidence. We considered the hearsay evidence of the clients' experiences to be relevant and therefore admissible.

The First Allegation

EP and CP

¶ 15 The first set of clients, EP and CP, were retirees. They had their accounts transferred to the Respondent in the early 1980s and followed him to as he transferred from dealer to dealer, including to Canaccord in 1999, to Jennings Capital in 2006 and finally to PI Financial in 2009. They had been his clients for 20 years. According to EP, the Respondent played racquetball with EP regularly on Sundays and visited EP and CP regularly to discuss their accounts. The clients received the standard account statements from the dealer members throughout this period. The Respondent also provided EP and CP periodically with his own letters on firm letterhead setting out account information. The clients had retained eight of these, dated July 23, 2012, November 12, 2010, December 21, 2009, April 21, 2009, September 22, 2008, December 17, 2007, April 10, 2007, November 9, 2005, which we reviewed. They all had similar format. They were entitled "Portfolio Update" and listed the numbers of securities as held in the accounts and gave dollar values designated "account totals" and "portfolio totals". These considerably exceeded the market value reported for the accounts in the firm account statements for the same periods. These are summarised as follows:

Date	Total (Respondent Portfolio Update)	Market Value (Firm Account Statement)	Book Value (Firm Account Statement)
Nov 2005	242,784	30,347	Not shown
April 2007	266,617	33,185	172,213
Dec 2007	310,213	28,170	170,012
Sept 2008	334,400	21,492	170,001
April 2009	356,788	23,272	135,151
Dec 2009	383,652	31,300	134,480
Nov 2010	439,642	27,651	105,383
July 2012	465,825	26,461	Not shown

¶ 16 The source of the Respondent's values is obscure. For example, the Respondent's September 22, 2008 letter reported combined "totals" of $334,400 while the September 30, 2008 portfolio statement showed a combined book value of $170,001 and combined market value of $21,492. The derivation of the figures in the Respondent's letters was not indicated. The Respondent's figures in those letters vastly exceeded even the book values of the securities reported in the firm account statements. There were also some discrepancies between the securities listed in the letters and those identified in the account statements. The date of the snapshot of holdings relied on by the Respondent was not indicated, preventing a true comparison.

¶ 17 EP told IIROC staff that he and CP questioned the Respondent from time to time about the various discrepancies. He would advise them that the firm records were inaccurate for various administrative reasons. Accordingly the clients relied on his letters and believed the market value of their accounts was in excess of the true value. When they were apprised of the market value of their accounts, their first conclusion was that the Respondent had misappropriated their funds. CP died in June 2013, early on in the investigation, so IIROC was unable to interview her.

RM and MM

¶ 18 The second set of clients, RM and MM had used the Respondent as their adviser since at least 2001 and also transferred with him from firm to firm. The Respondent did not provide them with his own account statement letters. They received regular accurate account statements from the dealer members. However, in the fall of 2012 the clients began asking the Respondent about the status of a principal protected note (PPN) guaranteed by BNP Paribas which they had purchased while they were at Canaccord and which did not appear on their account statements. The Respondent said that this investment was still held but the record had not been

transferred to their PI Financial accounts. The clients asked for written confirmation of this but the Respondent did not respond. In fact two PPNs guaranteed by BNP Paribas and offered by ONE Financial Corporation, with book values of $460,000 and $416,000 respectively, had been bought and then liquidated while at Canaccord to purchase other securities at a loss of $163,000. At the time of the clients' inquiry, they did not hold the investments.

¶ 19 The Respondent sent an email to RM and MM on November 20, 2012 in response to a request for a summary of where their assets were invested. It purported to summarise the "types of securities held in all their accounts" with "supporting paperwork to follow". This list did not ascribe values. It included one of the BNP Paribas PPNs which had been sold in 2009. Five of the eight securities listed were included in RM's and MM's November 30, 2012 joint firm account statement; three were not. The firm's statement refers to four securities not included in the Respondent's list. RM and MM appear to have had only one account at PI Financial so the Respondent's reference to "accounts" is incorrect.

The Second Allegation

¶ 20 The Respondent advised his branch manager, Mr. DS, at a meeting on November 21, 2012 in response to a complaint by RM and MM, that they still held the PPNs guaranteed by BNP Paribas but that the account record had not been transferred from Canaccord to PI Financial. This was incorrect. He denied short term or discretionary trading, and this has not been alleged here. The meeting notes state that the Respondent appeared shaken by the interview, and the Respondent's first doctor's note was sent to Mr. DS the next day. Mr. DS' meeting notes do not refer to any discussion about the EP and CP complaints or account letters. These did not come to light until EP complained about what he perceived as misappropriated funds in a letter to PI Financial dated January 22, 2013, after the Respondent had stopped communicating with PI Financial. In December 2012 and January 2013 PI made a number of attempts to contact the Respondent to arrange a follow-up interview. He did not reply. On June 5, 2013 IIROC advised the Respondent by registered letter sent to his last known address recorded on the NRD that it had opened an investigation in into his conduct. The letter was not collected.

Analysis

¶ 21 We found that the Respondent clearly provided fictitious account statements in the form of "portfolio updates" to EP and CP. We did not consider that Respondent could be said to have provided fictitious account statements to RM and MM as alleged. However we found that the Respondent did provide them with false information about their accounts and actual misinformation about their former investment with BNP Paribas that had the effect of exaggerating their holdings by about $400,000. He repeated this misrepresentation to his employer.

¶ 22 It was not alleged that the Respondent forged PI Financial account statements, misappropriated funds, engaged in discretionary trading, or that the investments were unsuitable. There was no apparent motive for the Respondent to create fictitious account reports or exaggerate holdings, other than to lull his clients into a false sense of the value of their accounts. While accurate account statements were regularly provided to them, EP and CP relied on the Respondent's explanation of discrepancies. Account statements differ from firm to firm and are supplemented by issuer statements which seem to have been responsible for RM's and MM's confusion about their transactions. This was exacerbated by what the Respondent told them.

¶ 23 We do not have the benefit of any explanation from the Respondent of his conduct. The Respondent was not a novice and had been subject to disciplinary measures in the past so we cannot attribute a course of conduct that, in the case of EP and CP, went on for many years, simply to isolated sloppiness or inexperience on his part, or to health issues. The Respondent stated several times that RM and MM owned at least one of the sold PPNs; it was not an isolated mistake. We draw a negative inference as to the Respondent's sense of his conduct from his abrupt termination of contact with his employer after the November 2012 meeting regarding the RM and MM complaint and his failure to respond to further communications from PI Financial or IIROC.

Applicable Rules

¶ 24 Staff submits that for both allegations the Respondent's conduct contravenes Rule 29.1 of the IIROC Dealer Member Rules which provides:

> "Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board."

We considered the sanction guidelines highlighted in staff's submission, in particular harm to client, employer or the securities markets, blameworthiness, benefit to Respondent, prior disciplinary record, acceptance of responsibility and remorse, multiple incidents over time, and effect and circumstances of misrepresentations.

¶ 25 In the first place, the Respondent has a serious disciplinary history, basically for churning redemptions and purchases of DSC mutual funds to his benefit and his client's detriment. The penalties imposed were intended to deter subsequent misconduct on his part. They apparently did not do so.

¶ 26 Particularly in these days of dematerialised securities and book-based entry systems, keeping and providing an accurate record of the nature and value of clients' securities is a fundamental responsibility of a dealer member. The Respondent put his own self-interest in creating a fantasy world of investment success for EP and CP ahead of the clients' need to have an accurate record of their property. Perhaps he hoped to be redeemed by market forces. This did not occur, and it can be inferred from his conduct that the Respondent sensed the writing was on the wall when he was required to respond to the RM and MM complaint of missing funds. The Respondent must have known that, just as with EP and CP, he had misled RM and MM as to the status of their PPN investments, leading them to believe that they still held a $400,000 investment that in fact had been disposed of at a loss.

¶ 27 The Respondent was indifferent to the potential harm he was doing to RM, MM, CP and EP in the conduct of their affairs by inflating their sense of their assets, in the case of CP and EP, all of their investments. This kind of misinformation is particularly reprehensible given the harm it can do to an individual's financial decision-making. The belated discovery of reduced assets when it is too late to trim expenditures can be as devastating as being the victim of a Ponzi scheme.

¶ 28 The Respondent's employers provided regular account statements to EP, CP, RM and MM. Dealer members consider such account statements to be to an important form of communication with clients, and clients are held contractually to have accepted the statements' accuracy if they do not question them. The Respondent betrayed the interests of employers and confused his clients by encouraging his clients to disregard and distrust their monthly account statements. Rather than directing clients' attention to their account statements and helping to elucidate them when clients enquired about transactions, he created confusion and obfuscation. The Respondent took advantage of this confusion to mislead his clients.

¶ 29 The Respondent made his living as a registered representative of IIROC members for nearly 30 years. The day after a client complaint he must have anticipated was brought to his attention, rather than helping his employer to explain or correct problems, the Respondent abruptly abandoned all his clients and disappeared. This is conduct worthy of a boiler room operation, not the standard expected of an employee of an IIROC member firm.

¶ 30 As the panel noted in *Re Morrison* [2009] IIROC No.4, at paragraph 51, registered representatives:

> "have agreed to abide by and comply with the Association's By-laws, and that includes a duty to cooperate in any investigation. As was said in Re Stewart (supra), there is a general principle that the requirement to cooperate in any investigation is fundamental to maintaining an efficient competitive market environment, and also to maintain the integrity of the securities system and

protect the public interest."

¶ 31 We find that the Respondent did not conform to the high standards of ethics and conduct required of him under IIROC Dealer Member Rule 29.1 in transacting business. We also find that he engaged in business conduct that was unbecoming and detrimental to the public interest.

Penalty

¶ 32 Staff sought the following sanctions:

i. a permanent bar on the Respondent's approval; with IIROC

ii. a global fine in the amount of $75,000

iii. costs of $10,000

¶ 33 We considered that the penalty proposed by staff of a permanent ban on Respondent's approval with IIROC and a fine of $75,000 is warranted by the Respondent's conduct. It is in line with penalties imposed for similar transgressions. This was not the Respondent's first offence. He had been disciplined previously for abusing a client and the penalty on this occasion should certainly be no less, despite the fact that collection seems unlikely.

¶ 34 We reviewed IIROC staff's Costs Submissions and determined that an award of full costs of $50,000 was warranted. The Respondent's complete lack of cooperation with PI Financial's and IIROC's inquiry and disciplinary processes showed disrespect for the compliance systems that serve to maintain public confidence in the industry. It impaired the investigation and enforcement processes making them much more costly and time consuming than necessary. We consider it important to deter this behaviour and encourage co-operation.

Dated at Toronto, Ontario this 10th day of October, 2014.

Julia Dublin, Chair

Philip Norris

Colleen Wright