Re Tersigni

IN THE MATTER OF:

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

and

Dominic Tersigni

2016 IIROC 19

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

Heard: April 6, 2016, in Toronto, Ontario
Decision: April 6, 2016
Written Decision: May 16, 2016

Hearing Panel:
Julia Dublin, Chair, Zahra Bhutani, Charles Macfarlane
Appearances:
Kathryn Andrews, Enforcement Counsel
Michelle Bernardi, IIROC Investigator
Christopher Parker, IIROC Investigator
Dominic Tersigni

REASONS FOR DECISION RENDERED AT THE CONCLUSION OF THE HEARING

Background

¶ 1 The Respondent, Dominic Tersigni, was employed as a registered representative of CIBC World Markets Inc. ("CIBCWM") in St. Catherine's, Ontario from March 2004 to May 2014. He has not been registered with IIROC since his termination from CIBCWM. He was first registered with an IIROC member firm in 1998.

¶ 2 Mr. Tersigni was responsible for approximately 1000 client accounts at CIBCWM.

¶ 3 On December 18, 2015, IIROC investigator Michelle Bernardi provided the Respondent with a detailed list of questions regarding the accounts of two clients, DH and VW, to be answered as an interview in writing pursuant to IIROC Dealer Member Rule 19.5. Mr. Tersigni responded incompletely with several explanatory emails on January 15, 2016.

Allegations

¶ 4 The current allegations are that:

Count 1

Between February 2009 and May 2014, the respondent effected unauthorised trades in the accounts of two clients contrary to Dealer Member Rule 29.1.

Adequate Notice of Hearing

¶ 5 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 On February 8, 2106, a Notice of Hearing was served on Mt. Tersigni by registered mail, by delivery to his residence and by regular mail. Mr. Tersigni confirmed receipt by email on February 12, 2016.

¶ 7 The Staff Compendium of documents was provided to Mr. Tersigni on March 16, 2016. Mr. Tersigni did not communicate further with IIROC staff. However, Mr. Tersigni appeared at the hearing and represented himself. He did not dispute that he had reasonable notice of the hearing. He admitted making unauthorised trades. He did not submit any documents or call any witnesses.

DH Account

¶ 8 DH retired as a government property manager in Pickering in 1999. He originally contacted the Respondent in 1994 after hearing him discuss financial matters on a radio show. DW hoped the Respondent would be able to improve the performance of his investment portfolio. In 1995, DW transferred his prior account to the Respondent. He transferred $25,000 initially as a joint account with his spouse and made three subsequent contributions of $10,000. DW hoped to achieve a 10% annual return on the account. The Respondent said that his management could produce a 10-15% annual return, depending on the markets.

¶ 9 DH did not want to travel to meet the Respondent in St. Catherine's. He expected the Respondent to meet with him at his home. The Respondent met DW there once. They mainly communicated by telephone and email. DW relied on his understanding, fostered by the Respondent, that the Respondent was an expert who would make trades in his portfolio to achieve a certain return. DW did not pay much attention to the entries on the KYC form as to his investment knowledge and risk profile. DW did not consider his investment knowledge to be excellent as stated on the form. DW did understand that he had a margin account with a Canadian and US dollar component.

¶ 10 The Respondent did not indentify each trade to DW and get his prior consent. The Respondent would call DH for time to time to advise him something was looking good, about an IPO or that he was going to rebalance the portfolio by buying and selling. The Respondent would make a lot of suggestions in his calls, some of which he executed and some of which he did not. DH did not have any independent views on the individual securities discussed. DH wanted and expected to rely on the Respondent to achieve a satisfactory return and the Respondent encouraged him to so rely. DH contacted the Respondent regularly about the performance of his portfolio. DH remained the Respondent's client even though at times he was dissatisfied with his account's performance because the Respondent assured him he would make trades to bring about an improvement.

¶ 11 There was some disagreement between the Respondent and DW as to how much cash DH withdrew from his account. DH recalled $5000 in total; the Respondent recalled a total of $17,000. It is unlikely the unauthorised trades would have come to light if DH and VW had not complained about their accounts' performance. However, suitability and account losses were not raised in the allegations in this matter, so calculating the performance of the accounts is not necessary. The precise figure for DW's cash withdrawals is not material to our decision.

¶ 12 It did not occur to DH that the Respondent was not licensed or authorised by his employer to provide the services he was offering,

VW Accounts

¶ 13 VW was introduced to the Respondent in 2011 by mutual friend at the AGM of Bioniche, a small cap public issuer. VW was an affluent, experienced investor who was interested in small cap stocks. The Respondent represented to VW that he had a network of contacts in different sectors on whom he relied as resources in developing a strategy for profitable investing in small cap securities with low risk. He made this strategy available to interested clients as a group. VW could open an account and join this group.

¶ 14 After reviewing a period of sample performance provided by the Respondent, in 2011 VW transferred $282,000 from his discount brokerage account invested in small cap stocks to an RRSP account to join the Respondent's group. VW understood that the contacts in the Respondent's network performed due diligence on all aspects of the small cap companies inducing management, capitalisation, competition and so on. In 2013, a RIF account was set up for VW as required by CRA.

¶ 15 As VW lived in Toronto, he communicated with the Respondent mainly by telephone. He did not discuss each trade with the Respondent. The Respondent would advise DH of the trades he planned to make for the client group.

¶ 16 VW contemplated opening another account in 2012 as a repository for approximately $1,000,000, proceeds of the sale of his house. VW wanted to preserve capital and would require the funds in three to five years to purchase another house. He drove to St. Catherine's in order to discuss his objectives with the Respondent. The Respondent advised him that he had another client group with compatible account objectives, which VW could join. The Respondent indicated that he would look to CIBCWM's internal portfolio management expertise for advice as to generating income and preserving capital.

¶ 17 VW felt he knew enough about trading to assess the strategy but did not want to take responsibility for making decisions himself. The Respondent indicated he had been using this particular strategy for years and showed some sample returns on portfolio statements. Between 2012 and 2014, the Respondent did not call VW for trade authorisations. The Respondent contacted VW from time to time on aspects of his accounts, for example when call options were expiring, to discuss VW's suggestions, or about some proposed purchases. They also communicated by email, as the Respondent was not always available for phone calls. However, the Respondent did not confirm each trade as VW had experienced in other brokerage accounts. VW drove to St. Catherine's twice to discuss his portfolio.

¶ 18 After two years, VW was dissatisfied with the performance of his RRSP, RIF and house accounts. He consulted a close friend at TD Waterhouse who questioned the wisdom of the Respondent's trading strategies and the existence of his network of small cap experts.

¶ 19 The Respondent presented to VW as very professional but did not actually claim to be a "portfolio manager". The significance of the phrase would have been lost on VW in any event. It did not occur to VW that the Respondent was not licensed or authorised by his employer to provide the services he was offering.

Dominic Tersigni

¶ 20 The Respondent testified that the precise number of unauthorised trades submitted by IIROC staff could not be derived from the portfolio statements alone as in some cases a single trading decision would be executed in several stages and appear on the statements as multiple trades. He noted that some trades required the prior execution of a subscription agreement by the client. In our view, any uncertainty as to the actual number of unauthorised trades had little significance as the Respondent acknowledged that he habitually engaged in many unauthorised trades. DH and VW confirmed that this was the service he offered and the service that they expected from him.

¶ 21 Mr. Tersigni freely admitted that he had engaged in discretionary trading. He did not dispute DH or VW's testimony, which he described as fair and honest. He stated he did not dispute IIROC staff's allegations and took responsibility for all the unauthorised trading. He testified that after 21 years in the industry he was unable to sell his book of business to fund his retirement, he has had health problems, especially hearing loss,

has sold his house due to financial constraints and is currently subsisting on his wife's income.

¶ 22 Although the witnesses expressed dissatisfaction with the performance of their accounts and queried their KYC forms, there was no allegation before us that the unauthorised trades were unsuitable.

¶ 23 DH's accounts were commission-based, VW's accounts were fee-based. There were no allegations before us of churning or similar self-serving misconduct.

Analysis

¶ 24 The Respondent admitted that he routinely engaged in unauthorised trading in DH's and VW's accounts and did not dispute their testimony in this regard. The witnesses confirmed that the Respondent did not describe himself as a "portfolio manager". However, the services he offered DH and VW necessarily involved unauthorised discretionary trading. There was no issue of proof on the balance of probabilities to consider.

¶ 25 Staff submits 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."

Dealer Member Rule 18.2 prohibits a person from engaging in discretionary portfolio management on behalf of a member without prior approval as follows:

> "(b) A Dealer Member must notify the Corporation of the types of businesses which a Registered Representative or Investment Representative will conduct, as follows:
>
> …
>
> (iii) Portfolio Management: whether the Registered Representative will engage in discretionary portfolio management under the provisions of Rule 1300.
>
> (c) A person may not conduct on behalf of a Dealer Member and a Dealer Member may not permit a person to conduct on its behalf a type of business described in (b) unless the Dealer Member has notified the Corporation:
>
> (i) that the person will conduct the type of business; and
>
> (ii) that the person has successfully completed the proficiencies required to conduct the type of business as specified in Rule 2900, Part I within the proficiency time limits specified in Rule 2900, Part II"

CIBCWM did not authorise Mr. Tersigni to engage in discretionary portfolio management on its behalf, and Mr. Tersigni did not meet the proficiency requirements of Rule 2900.

¶ 26 As the IIROC hearing 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."

¶ 27 In *Re Janiewicz,* [1] the IIROC panel noted at para. 69:

> "In *Bruce Templeton* v. *RBC Dominion Securities Inc*., 2005 NLTD 130, August 5 2005, Mr. Justice Osborn of the Supreme Court of Newfoundland and Labrador observed at page 24 of his judgment that "discretionary trading is regarded as a fundamental breach of the investment adviser's duty to his or her client."

¶ 28 The Respondent failed to comply with the restrictions on his trading activities set by IIROC Rules and his employer. While his clients welcomed the discretionary trading, the Respondent was offering them a service that he was not entitled or qualified to provide. He was operating outside his firm's supervisory and support systems set up for the employees they expected to manage client portfolios, placing the clients at risk. The Respondent's cooperation in the investigation was limited, given he was well aware of his unauthorised trading.

¶ 29 We find, accordingly, 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

¶ 30 Staff sought the following sanctions:

i. a one year suspension from registration on the Respondent's approval with IIROC;

ii. a global fine in the amount of $50,000;

iii. rewriting the CPH examination with 12 months of any re-registration with an IIROC member firm and close supervision for six months on re-registration; and

iv. costs of $25,000.

¶ 31 We agree that a suspension, a fine and remedial measures are all necessary to achieve the objectives of general and specific deterrence. Investors of all levels of sophistication trust and rely on their IIROC members' registered representatives to deal with them fairly, honestly and in good faith. This includes the registered representatives not exaggerating or disregarding the scope and nature of the activities authorised by their employers. Registered representatives operate within a regulatory and supervisory structure, which they must respect and to which they must conform, regardless of convenience, the preferences of their clients or their own sense of their capabilities.

¶ 32 Mindful that we should not unduly fetter our discretion to decide each matter on its own merits, we reviewed the precedents cited by IIROC staff in support of the proposed sanctions. In assessing the appropriate penalty, we took into account the IIROC Sanction Guidelines regarding mitigating and aggravating factors. We noted that there were no allegations of any other form of misconduct. No evidence was presented that the Respondent profited as a result of the trades being unauthorised. Mr. Tersigni testified that he has not worked since 2014 and would like to return to the financial services industry. We considered that the penalty proposed by staff of a suspension and conditions on re-registration to be fair and reasonable.

¶ 33 Regarding the appropriate fine, we noted that the unauthorised trading precedents cited by IIROC staff reflected a range of $20,000 to $150,000 with significantly varying facts. In the *Janiewicz* decision[2], (50,000 fine, $20,000 costs) there was a concurrent finding of unsuitable trades and a refusal to participate in the hearing. In *Armstrong*[3] ($50,000 fine), the respondent did not participate in the hearing or accept responsibility, and fabricated client notes. In *Harding*[4] ($125,000 fine, $17,861 costs) the client was a trusting elderly widow with no investment knowledge, there was a finding that the unauthorised trades were for the purpose of making

[1] {2006] I.D.A.C.D. No. 3

[2] *Supra*

[3] 2015 IIROC 34

[4] 2011 IIROC 65

unsuitable and excessive trades. The Respondent did not attend the hearing. *Biron*[5] was a settlement ($30,000 fine, $3,000 costs) where the respondent admitted discretionary trading without registration as a portfolio manager but no other misconduct. The hearing panel in *Biron* cited a number of cases where fines were imposed for unauthorised trading, specifically: *Bardsley*[6], (fine $25,000, costs $5,000 costs) where a $50,000 fine had already been imposed by the firm; *Shamseer* [7]($50,000 fine, $5000 costs) where there had been a previous offence; *Osman*[8] ($40,000, $1000 costs) where there were unauthorised trades over 15 months; and *Karcz*[9] ($20,000 fine, $15,000 costs) where there were unauthorised trades over eight months. We considered that a lesser fine of $25,000 was more in line with the seriousness of the Respondent's misconduct viewed against all these precedents than the sum sought by IIROC staff, particularly when the total penalty including costs was taken into account. We considered that a total payment of $50,000 to IIROC including fine and costs was reasonable.

Costs Submissions

¶ 34 Staff reported actual costs $74,949 and we considered the lesser award of costs sought by staff of $25,000 to be fair and reasonable. The Respondent did not fully comply with the IIROC investigation and enforcement process, and waited until the hearing to acknowledge his misconduct, making the process somewhat more costly and time consuming than necessary. However, he did respond to IIROC staff's original request for information and accepted service of the Notice of Hearing. He appeared at the hearing, made submissions, responded to questions and acknowledged his misconduct in the presence of his former clients. We consider it important to encourage co-operation and acceptance of the disciplinary process in both the fines imposed and the costs awarded.

Order

¶ 35 Based in the foregoing, the Panel orders the following:

i. a one year suspension on the Respondent's approval as a registrant with an IIROC member firm;

ii. a global fine in the amount of $25,000

iii. rewriting the CPH examination within 12 months of any re-registration with an IIROC member firm and close supervision for six months upon re-registration; and

iv. costs of $25,000.

Dated at Toronto, Ontario this 16th day of May, 2016.

Julia Dublin, Chair

Zahra Bhutani

Charles Macfarlane

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[5] 2012 IIROC 4

[6] 2010 IIROC 15

[7] 2011 IIROC 5

[8] 2006 IDA, December 19

[9] 2010 IROC 22