

Re Jones

IN THE MATTER OF:

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

and

Catherine Deborah Jones

2013 IIROC 58

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

Heard: October 7-10 and October 15-17, 2013

Decision: December 16, 2013

Hearing Panel:

The Honourable Thomas R. Braidwood, Mr. Chris Lay and Ms. Barbara Fraser

Appearances:

Mr. Paul Smith – Counsel for IIROC

Catherine Deborah Jones - Unrepresented

DECISION AND REASONS

¶ 1 The purpose of this hearing is to determine whether Catherine Deborah Jones (“Ms. Jones”) who was at all material times a registered representative at the Vancouver office of Leede Financial Markets Inc. (“Leede”), has committed the following contraventions that are alleged by the staff of IIROC (the “Staff”):

- (a) between March 2009 and March 2010, Ms. Jones engaged in discretionary trading in client SW’s accounts without first having the accounts approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4 and 1300.5;
- (b) between March 2009 and July 2010, Ms. Jones failed to ensure that the use of margin in client SW’s account was suitable for SW and in keeping with SW’s investment objectives and personal circumstances; contrary to IIROC Dealer Member Rule 1300.1(q);
- (c) between January 2009 and May 2010, Ms. Jones misrepresented the nature of certain solicited order by marking them as unsolicited; contrary to IIROC Dealer Member Rule 29.1;
- (d) between September and November 2009, Ms. Jones breached her firm’s internal policy by communicating with SW regarding her account by way of an email address not approved by the firm, contrary to IIROC Dealer Member Rule 29.1; and
- (e) between February and March 2012, Ms. Jones provided misleading information to the Staff during the Staff’s investigation, contrary to IIROC Dealer Member Rule 29.1.

Overview

¶ 2 It is alleged that during the material time, Ms. Jones set up and made use of a margin facility in the accounts of her client, SW, without ensuring that SW understood that she was borrowing against her investment or that it was appropriate to use a margin account to attain the investment objective set by her client and that

during the same period, Ms. Jones also engaged in discretionary trading in SW's accounts without the written approval of SW or Leede, and falsely marked some of the discretionary trades as unsolicited trades.

¶ 3 It is further alleged that during the Staff's investigation into her conduct, Ms. Jones provided the Staff with client contact notes she purported to have maintained contemporaneously to her interaction with SW and that the notes record certain in person meetings with W that did not actually take place.

¶ 4 Ms. Jones is currently employed as a registered representative and has been since March 2001. From August 17, 2007 to October 8, 2010, she worked at Leede's Vancouver office.

Standard of Proof

Re Floyd & McDonald 2013 IIROC 04

¶ 5 The standard of proof is succinctly set out and summarized in this case at paragraph 10 as follows:

10. The parties do not dispute and this panel accepts that the standard of proof in these proceedings is the civil standard of a balance of probabilities. (Law Society of Upper Canada v. Neinstein [2007] O.J. No. 958 (Ont. Div. Ct) at paragraph 54. As was stated in Re Boulieris (2004) 27 OSCB, affirmed [2005] O.J. No. 1984 (Ont. Div. Ct):

“[33] The degree of proof required...is such that before a tribunal reaches a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred; and whether the tribunal is so satisfied depends on the totality of the circumstances including the nature and consequences of the facts to be proved, the seriousness of an allegation made, and the gravity of consequences that will flow from a particular find. See Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R. (2d) 447 at 470 (Ont. Div. Ct.); and Re Coates et al. and Registrar of Motor Vehicle Dealers and Salesmen (1988), 65 O.R. (2d) 526 at 536 (Ont. Div. Ct.)

[34] Bernstein stands for the proposition that grave charges against a person cannot be established to the reasonable satisfaction of a discipline committee by fragile or suspect testimony. The evidence to establish the charges have to be of such quality and quantity as to lead a discipline committee acting with care and caution to the fair and reasonable conclusion that the person is guilty of those charges. The degree of proof must be nothing short of clear and convincing and based on cogent evidence which is acceptable by the tribunal. See Bernstein at 485 and Coates at 536.”

¶ 6 On the issue of credibility, an outstanding feature of this case before us is that Ms. Jones decided not to give testimony. Accordingly, we are left with the uncontradicted testimony of various witnesses called on behalf of IIROC.

The Client: SW

¶ 7 SW obtained her Bachelor of Science and Music and, then in the year 2001, obtained her Doctorate of Dentistry. She spent one year in Newfoundland practicing dentistry. Then in the years 2002 to 2006, she practiced dentistry in Burnaby, BC.

¶ 8 Thereafter, for the sum of \$100,000.00, she purchased what she referred to as a “right to practice” with a group of dentists in Vancouver, BC. She paid a facilitating fee to them in order to provide her with the necessary services for her to run her own dentistry practice. She paid about \$6,600.00 to \$8,000.00 per year for the fee and would pay her own staff.

¶ 9 During this period of time, she billed between \$30,000.00 and \$40,000.00 a month, and paid from these funds a loan of \$125,000.00.

¶ 10 She was born in the year 1975. She married in Vancouver, BC on the August 7, 2008.

¶ 11 SW met her broker Ms. Jones in 2006 after she bought her practice. Ms. Jones was her patient and later she met her when they both attended a business network organization which they both engaged in as methods of attracting clients through “networking”.

¶ 12 She also had a life/business coach.

¶ 13 She testified that she began to interview a few brokers in order to determine which one to choose to assist her in some investments. She anticipated that shortly after her marriage, her husband who was involved in a business that required him to move from time to time and, might necessitate a move to California, and so she anticipated selling her practice to continue to live with him.

¶ 14 In her first meeting with Ms. Jones, which was arranged to determine whether or not she would be her broker, she indicated that Ms. Jones told her that she could obtain some 10% to 15% return on her capital per month. Accordingly, she invested at that early stage \$10,000.00 with Ms. Jones.

¶ 15 SW said that in the interview, she explained that she wanted a return of passive income and to maintain the security of her capital.

¶ 16 Although we are of the opinion that SW firmly believed that she was told that she could get a 10% to 15% per month return on her capital investment, it seems more likely to us that although Ms. Jones told her the return could be 10% or 15%, the meaning of this would have been per annum.

¶ 17 It is difficult for the Panel to ascertain exactly what SW meant when she said to Ms. Jones that she wanted a return of 'passive income'. It is apparent from the totality of SW's testimony that she seemed to have a closed mind despite her intelligence and other investments to understand what she is being told at various interviews with Ms. Jones. There is, however, no question that she told Ms. Jones that she desired to keep her capital safe.

¶ 18 She maintained that she did not know what the term "margin account" meant or the word "margin". She found it difficult, if not impossible, to understand any of the financial statements that were sent to her and on one occasion when pressed, she said that she was really more interested in music and acting, and simply trusted Ms. Jones to follow what was said in their original interview.

¶ 19 An example of the above, was when Ms. Jones recommended a potash stock. SW testified that she thought potash was a source of energy and a renewal resource. This description of course is totally inaccurate.

¶ 20 We do not doubt SW's voracity concerning the events to which she testified but are perplexed in the early stages by her lack of attention to her own investments.

¶ 21 A new client application form dated April 11, 2008, was produced before us and SW testified that she indeed did sign this document, but that it was in blank when she signed it. She points out that the only handwriting on the document that belongs to her is her signature. Further, the address on the original document is an old address and she would have noticed it at the time she signed the document if it had been written there when she signed it.

¶ 22 The document indicates under "Assets" that her estimated liquid assets are \$165,000.00. Her estimated fixed assets are \$500,000.00. Her estimated net worth is \$665,000.00 and that her estimated annual income is \$75,000.00. Her investment knowledge has been ticked as good on the document and her investment experience is noted at 8 years. There is nothing opposite risk tolerance, but opposite objectives it is long term growth - 50%, short term speculation - 25% and venture speculation - 25%. The document is dated April 11/08. At the bottom of the document under comments, it says: investing \$10K in blue chip.

¶ 23 On January 8, 2009, another client form was signed. Once again, SW said that she signed it in blank and points out that her employment information is wrong as it still lists her as a dentist with a dental practice. At the time she had signed the document, she had sold her practice. She indicated that her estimated income was at \$75,000.00 on the form when in fact her income was in the order of \$5,000.00 after the sale of her practice. The investment knowledge is repeated to be good and the risk tolerance is medium - 50%, high - 50%, and objectives is nothing under income, long term growth - 50%, short term speculation - 25% and venture speculation - 25%.

¶ 24 There is a further updated new client application form dated March 18, 2009. Once again, SW indicates that she signed this in blank and notes that she is still listed as working as a dentist which is inaccurate and that

her income is still listed as \$75,000.00 which is inaccurate. The objectives now read long term growth – 25%, short term speculation – 37.50% and venture speculation 37.50%. SW testified that she has no understanding of what that meant and that was not on the document when she signed it.

¶ 25 SW further testified that on September 30, she brought another \$7,500.00 into Ms. Jones for her account, bringing the total up to \$18,000.00. She said she paid no attention to what was going on or to the financial statements. She was busy with the year-end of her practice, had recently married and was involved in her honeymoon and was selling her practice.

¶ 26 In November/December, she put her dental practice up for sale. On December 31, 2008, she received \$200,000.00 for it. She received these funds at the end of January 2009. As indicated above, from this point on she earned very little income. She received a small stipend for teaching at UBC in dentistry and collected small amounts still owed from patients in her practice amounting to some \$2,000.00 to \$4,000.00.

¶ 27 It should further be noted, in or about the time of her marriage, SW and her husband purchased a property in the amount of \$655,000.00 with a \$20,000.00 down payment. The balance was mortgaged and she had other investments in Calgary and Ontario concerning real estate assets. She indicated to the Panel that these were under management and she had little involvement. In terms of other investment experience, in 2002 she invested in RRSPs/mutual funds with her bank.

¶ 28 By December 3, 2008, her original investments of \$18,000.00 now stood at \$8,551.50. SW testified that she did not understand these documents or the state of her account. She testified before us that she received the statement of account of December 31, 2008, but she did not know the difference between Canadian funds and U.S. funds and did not realize what the document meant. She reiterated that she always thought the portfolio was “doing fine”, that she totally trusted her broker and relied upon her to do the correct investing. She stated that she was not verbally advised of any problems in her portfolio.

¶ 29 After her sale of the dental practice in early 2009, she gave her Ms. Jones a further \$75,000.00 to invest the same as before. An email with Pro-forma’s attached was sent on the 27th of March, 2009, from Ms. Jones to SW. On March 16, 2009, under the heading of Leede’s Financial Markets Inc., request for margin account, documents were enclosed for SW to sign and the email reads in part:

“As per my request for a margin account, please transfer all equities in 074-6778-A and B to my new margin account numbers E and F.” -- Signed by SW

¶ 30 SW testified that she did not know what a margin account was and trusted Ms. Jones. There was, of course, enclosed the necessary margin agreement which SW signed and would have been sent a copy of the documents by Leede.

¶ 31 On the basis of her understanding that the account would produce 10% to 15% income per month from her portfolio, she requested a monthly sum of \$7,000.00 from Ms. Jones which was paid out in the months of March, April, May and June 2009. SW testified that she had transferred to her broker \$93,000.00 in total and that she firmly believed that it would yield to her at least \$7,000.00 a month without her capital being eroded.

Count One

Between March 2009 and March 2010, Ms. Jones engaged in discretionary trading in client SW’s accounts without first having the accounts approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4 and 1300.5.

¶ 32 From May 22 to August 1, 2009, SW travelled to New York in order to participate in a 10-week acting course. She indicated that during the time she was in New York, she only received one phone call and that was brief and it did not relate to the discussion of any purchase or sale of her stock. The external evidence concerning phone calls did indicate that there were two other calls, but these calls were described as “disconnect” calls where nothing was actually said for the line was disconnected almost as soon as it was connected.

¶ 33 According to the records provided, there was no verbal communication between SW and Ms. Jones

concerning her investments during this time.

¶ 34 While she was in New York, SW sent an email to Ms. Jones asking where her deposit was for the month. She did not have a deposit for some two and half weeks referring of course to the \$7,000.00 a month, and this caused her to be concerned. Again it is to be noted that this evidence is uncontradicted by Ms. Jones and further the evidence concerning phone calls does confirm SW's evidence. Of course, it cannot be said that such external evidence is entirely complete.

¶ 35 During the period that SW was in New York, the following trades took place on a trade date basis:

| | | | | |
|---------|------|--------|--------------------------|---------|
| June 1 | Sell | 20,000 | Eagle Hill | |
| June 4 | Sell | 10,000 | Eagle Hill | |
| June 5 | Buy | 300 | Agrium | |
| June 19 | Sell | 50 | Bank of Nova Scotia | |
| June 19 | Sell | 100 | Enervest Dvsfd Inc Tr Un | |
| July 8 | Sell | 100 | Bank of Nova Scotia | |
| July 8 | Sell | 567 | Enervest Dvsfd Inc Tr Un | |
| July 8 | Sell | 65 | Research in Motion | US Acct |
| July 9 | Sell | 100 | Direxion | US Acct |
| July 23 | Buy | 300 | Research in Motion | |
| July 24 | Sell | 300 | Research in Motion | |
| July 29 | Sell | 100 | Conocophillips | US Acct |
| July 29 | Sell | 200 | Emera | |
| July 29 | Sell | 200 | Fortis | |
| July 31 | Buy | 50 | First Solar | US Acct |

¶ 36 SW testified that she would be adamantly against borrowing any funds whatsoever to purchase shares because of an experience she had in her youth where her father had borrowed funds and lost most, if not all, of the family's assets. She claimed that because of this, she would never have approved of borrowing funds for the purchase of any type of a share oriented portfolio.

¶ 37 SW returned from New York to Vancouver and was in Vancouver from August 1 to August 12, 2009, and met Ms. Jones on one occasion. SW described that interview as primarily a discussion regarding how Ms. Jones was stressed about her personal life and they did not discuss the portfolio. She had received six payments, one in each consecutive month of \$7,000.00 for \$35,000.00 on the \$93,000.00 she had deposited. She was not told that her capital had eroded either by reason of such payments or by reason of the state of the market.

¶ 38 On August 12, 2009, she and her husband travelled to Toronto to visit her mother and SW had previously requested that Canada Post redirect her mail to her mother's house in Toronto prior to her New York trip. Then from August 14 to August 20, they travelled to Ireland in order to visit her husband's family, then to Paris on about August 24, and then in various places in Europe, India, Asia, Australia and the South Pacific, returning to Vancouver on January 24, 2010.

¶ 39 During this time that she was travelling to Ireland, China, India, etc., SW testified that there was never any communication with Ms. Jones concerning trading instructions.

¶ 40 During this period the following trades took place in the account:

| | | | | |
|--------|------|-----|--------|--|
| Aug 14 | Sell | 200 | Agrium | |
|--------|------|-----|--------|--|

| | | | | |
|---------|------|--------|--------------|---------|
| Aug 14 | Buy | 5,000 | West Timmons | |
| Aug 14 | Sell | 1000 | Radian | US Acct |
| Aug 27 | Sell | 100 | Agrium | |
| Aug 27 | Sell | 50 | First Solar | US Acct |
| Sept 2 | Buy | 1000 | Radian | US Acct |
| Sept 2 | Sell | 1000 | Radian | US Acct |
| Sept 15 | Sell | 25000 | Eagle Hill | |
| Sept 15 | Sell | 300 | Horizons | |
| Sept 16 | Buy | 1500 | Chartwell | |
| Sept 16 | Buy | 100000 | Encore | |
| Sept 16 | Sell | 5000 | West Timmons | |
| Sept 18 | Sell | 25000 | Eagle Hill | |
| Sept 22 | Sell | 25000 | Eagle Hill | |
| Oct 9 | Buy | 30000 | Canasia | |
| Oct 13 | Sell | 50000 | Encore | |
| Oct 23 | Sell | 25000 | Encore | |
| Nov 12 | Buy | 4500 | Encore | |
| Nov 16 | Sell | 30000 | Canasia | |
| Nov 17 | Buy | 36000 | Encore | |
| Nov 25 | Sell | 40500 | Encore | |
| Nov 30 | Buy | 45000 | Encore | |
| Dec 23 | Sell | 15 | Horizons | |
| Dec 30 | Sell | 45000 | Encore | |

¶ 41 On September 30, 2009, SW received \$3,000.00. It came late, namely on the 30th of the month.

¶ 42 On September 18, 2009, Ms. Jones sent to SW an email, the opening statement of which is “I prefer to use this email – because I am not able to update you on our corporate email due to regulations.” The email goes on to say: “I am sending the \$3,000.00, but we have not made it this month – so it will be coming out of your account.” The email mentions that: “Trading has not been easy, it has been downright difficult, but predicting “a massive correction on the U.S. financials which will make you a healthy profit. This will be sometime within the next four months.”

¶ 43 The disconnect between Ms. Jones and SW can be understood from SW’s email of October 26, 2009, wherein in part SW in the email states: “what I find hard to understand is that with all the profits you have shown me and dividends that should be coming in, how come we have such huge losses that end up giving us a net loss overall and no monthly ETFs? Most of our monthly ETFs (totalling \$31K) should have come from our profits that you showed me. Overall it appears we have lost a lot of money. Am I wrong?”

¶ 44 On a review of the accounts presented to us, it is apparent that there are multiple trades that took place during the times that SW was in New York and overseas. Although there is some evidence of email communication mentioning various stocks, SW claims she never gave specific approval for any of these transactions. This “discretionary trading” took place between March 2009 and March 2010 as alleged and

contrary to IIROC Dealer Member Rule 1300.4 and 1300.5.

¶ 45 In the case of *Re Shamseer* [2011] IIROC No. 5, the Panel defined the meaning of discretionary trade: “In *Re Wenzel* . . ., the Alberta Securities Commission stated that “when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing - that person is exercising “discretion”.”

¶ 46 To summarize, this allegation focuses on the time that SW was in in New York City for her 10-week acting class which was from May 22, 2009 to August 1, 2009, and during the second period when she was in Europe and Asia for the 6-months trip with her husband from August 15, 2009 to January 25, 2010.

¶ 47 Accordingly on the evidence presented before us, we find on a balance of probabilities that Count One has been proven, the evidence being clear and cogent that there was unauthorized trading as alleged.

Count Two

Between March 2009 and July 2010, Ms. Jones failed to ensure that the use of margin in client W’s account was suitable for W and in keeping with W’s investment objectives and personal circumstances; contrary to IIROC Dealer Member Rule 1300.1(q).

¶ 48 The Panel is of the opinion that based on the evidence outlined above that in terms of SW’s financial situation, she was certainly able to withstand a certain amount of monetary risk in her portfolio.

¶ 49 We are however of the opinion that as time went by and as Ms. Jones managed this account, the discretion exercised by Ms. Jones without authorization and indeed the amount of margin that was utilized was far beyond any possible instruction that she received from SW, even discounting SW’s sometimes inability to understand her accounts. SW has been adamant throughout that she was interested in the maintaining of her capital and that the understanding between them was that the draws to her would come out of income as previously discussed despite the illogical amount of return of 10 to 15% per month. SW also interviewed another broker prior to opening her account with Ms. Jones, who testified that he told her that return was highly irregular and that he could not provide anywhere near that. She understood income in a broad sense, meaning income, dividends and any profit on her capital.

¶ 50 The allegation here is that the use of margin account before us is a violation of IIROC Dealer Member Rule 1300.1(q). This rule reads as follows:

“Each Dealer Member, when recommending to a Client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such Client based on factors including the Client’s current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts current investment portfolio composition and risk level.”

¶ 51 We are of the opinion that despite the fact that SW signed various margin documents authorizing the use of a margin account, and that a margin account was not necessarily inappropriate for her, the use of the margin was far too excessive and was not suitable for the stated objectives of SW to preserve capital.

¶ 52 We are further of the opinion that Ms. Jones knew that she was exceeding the permissible limits in the use of margin accounts by reason of various factors disclosed in a series of emails. Without analysing each of these emails separately, the compliance department from time to time would indicate to Ms. Jones that the accounts were under-margined. Notwithstanding this need for compliance on behalf of Ms. Jones, there was no evidence in any of the emails that there was a need to cover margin. SW testified that there was never a mention to her by Ms. Jones of the need for more cash to cover a margin.

¶ 53 We agree with the submission of Mr. Smith, counsel for IIROC, where he argued as follows:

“So notwithstanding that we had all those e-mails between Ms. Jones and her compliance department, talking about the account being over margined, about margin calls, about having to sell securities to get cash into the account, while that entire dialogue was going on there was also separate dialogue going on

between Ms. Jones and the client, and it was never mentioned to her – never mentioned to her – which supports SW’s evidence that margin was never explained to her and confirms our submission that she didn’t know that “margin” meant leveraging money to buy more investments. And I would suggest that nowhere is that more the case than in those e-mails that SW sent to Ms. Jones in the spring of 2010 when she’s doing her taxes and she asks, what does this mean, “interest paid by you”? She ask that twice and she never gets a response.”

¶ 54 There are other examples where Ms. Jones in answering the request from management concerning the margin account misleads management by outlining to them that she is in touch with SW and together they will be covering the margin. There is no evidence that these communications between Ms. Jones and Ms. Wylie took place. A further example is that when management sends Ms. Jones a note to the effect that “Hi Catherine, can you give me an update on the margin call [this is on August 17]. And the answer is “I left a message with her.” Then on August 18 “Did she get back to you?” “Nope, hopefully today.” Further on August 21 from management “Hi Catherine, please leave a message for her; tell her you are going to have to sell something...”. But again, there is no evidence of such communication. So the uncontradicted inference from the emails is that the compliance department was asking Ms. Jones to be in touch with her client in order to cover the margin. Ms. Jones says in her IIROC interview she was doing just that, however SW states that in fact she was not.

¶ 55 On August 20, SW sent an email to Ms. Jones saying in effect that she wishes a monthly deposit - “Can you tell me by email”. There is no evidence that Ms. Jones advised SW that the account was off-side and required funding opposed to a credit available to provide the monthly deposit. SW claims she was unaware that money was being borrowed in order to purchase stocks or cover margin.

¶ 56 An example of the use of the margin account is from the account statements for the month April 2009. The margin used in the U.S. account was \$32,000.00 of borrowed money. There was also \$21,000.00 margin in the Canadian account making a total of \$57,000.00 in borrowed money in her account on June 30, 2009.

¶ 57 In the statement of account for June 30, 2009, under Canadian funds, it shows borrowed cash of \$21,966.84, common shares at \$52,347.21 for a total asset of \$30,380.37. In the U.S. account, there is borrowed cash of \$35,135.32, common shares at \$37,382.96 for total assets of \$2,247.74.

¶ 58 Instructive on this point, is Re Gareau 2011 IIROC 53:

142. Mr. Gareau’s primary response to the allegations brought against him and the evidence presented was that the investments were suitable for each set of clients because each investment was explained to the clients and the individual risk of each investment corresponded with the classification of acceptable risk set out in the NCAFs. This places too great an emphasis on forms completed by the clients, particularly the NCAFs. This issue was addressed in the Lamoureux case when the Alberta Securities Commission said:

Neither the “know your client” obligation or the “suitability” obligation can be fulfilled merely by completing poorly-constructed forms or by following a procedure in a perfunctory fashion. Forms and procedures are merely tools that can assist in performing a task and that may provide reminders or evidence of efforts undertaken or not undertaken.

143. We agree with the submissions of IIROC that the mere completion of the NCAFs and the providing of the information on each individual assessment does not remove the overall responsibility of the Respondent to recommend suitable investments throughout the entire relationship of advisor-client. In the case of the Raimbaults they had very modest assets and had very little investment experience. They are retired and can be described as seniors. These factors placed a very high responsibility on Mr. Gareau to act in their best interests. He was relied upon and trusted and in his capacity as a financial advisor had the responsibility of a fiduciary or near fiduciary to his clients. The jurisprudence makes this clear. This duty is so high that even if either the Raimbaults or the Howdens had instructed Mr. Gareau to create a totally inappropriate and unsuitable portfolio, he had a responsibility to warn them and to even protect them against themselves. This evidence in this case demonstrates that any such warnings were given or “educational” efforts made by Mr. Gareau were minimal.

¶ 59 It is further interesting to note that one of the emails to Ms. Jones stated that “I am sending this \$3,000.00”. This is September 18, 2009, when at the same time the email as quoted above mentions “I prefer to use this email – because I am not able to update you on our corporate email due to regulations.” There is no mention at this time of the margins or the necessity to cover a margin call.

¶ 60 From the evidence presented before us, we do find on a balance of probabilities that the use of the margin was inappropriately used as defined in the cases mentioned above.

Count Three

Between January 2009 and May 2010, Ms. Jones misrepresented the nature of certain solicited orders by marking them as unsolicited; contrary to IIROC Dealer Member Rule 29.1.

¶ 61 This allegation relates to an alleged misrepresentation by Ms. Jones as to the source of a large number of trades in the account. A trade ticket may be a computer placed order, or a manual form which among other data is a field to indicate whether or not the trade was solicited or unsolicited. There is a definite purpose for the broker to indicate whether or not the order was solicited or unsolicited. Solicited indicates that the recommendation for the trade originated with the broker, and unsolicited indicates that the trade was requested by the client.

¶ 62 Barbara Pringle was a witness called and she was the Chief Compliance Officer at Leede, and the supervision of Ms. Jones was under her jurisdiction. When asked “...why does a firm distinguish between a solicited and an unsolicited order on its trade tickets?” she responded in part as follows:

Well, I believe if it ever comes down to a dispute about an unsuitable investment, if an order was unsolicited, the broker might have an argument that it wasn't their idea, that the client was adamant that they buy or sell the stock and the broker would have, I suppose, a defence that they didn't really know anything about it or per se and was just acting on the client's instructions.

A solicited order is when the broker -- it's the broker's idea or the broker is leading the order along. An unsolicited order is when the client phones in, out of the blue, with an idea that's entirely their own and the broker hasn't mentioned it to them in the past, or sent them a recent report, or anything like that.

¶ 63 In the trading system at Leede, there is an entry box to indicate solicited or unsolicited. If nothing has been entered in this box, the system will have been programmed to default to either solicited or unsolicited. The question was asked what would happen if there is a default, namely, if a broker forgets to input electronically whether or not it is solicited or unsolicited. In response to this question, Ms. Pringle answered as follows:

Yeah, the default is solicited. And if an order is solicited, the broker actually doesn't, have to do anything. If an order is not marked “unsolicited”, it's assumed to be solicited. In fact, there is no coded trailer for solicited, so the broker could add a – what's called a “keypunch trailer” to mark it solicited. But it's unnecessary. That's the default. If the order is unsolicited, then the broker has to – if they're writing a trade ticket, then they circle the number 9, which is the coded trailer for unsolicited and/or they can write – they can tick off the box if they're using the electronic system.

Here Ms. Jones was under close supervision because prior difficulties in performing her duties. Accordingly, the need for her to be diligent in her record keeping was high.

¶ 64 It was raised in argument by Ms. Jones that perhaps her own order entry system was different from that of the firm and that the default was reversed, but we have no evidence of any such differentiation. Ms. Pringle was not asked about it and her evidence stands as to the result of a default in entering whether or not the trade was solicited or unsolicited.

¶ 65 Accordingly, on the evidence before us, that to mark the ticket under the designation ‘unsolicited’ trade, Ms. Jones had to take a pro-active measure. It could not be by default. So the case against her is that these trades that were marked as unsolicited on the ticket as a deliberate act when many of them were indeed solicited. As we have concluded in Count 1, a large number of the trades were not discussed between SW and

Ms. Jones, and therefore could not possibly be 'unsolicited', meaning suggested/requested by the client.

¶ 66 There is further evidence from a witness named of Jasmine Pronyk, who was an assistant with Ms. Jones. Where in cross-examination she was asked whether or not she entered orders for Ms. Jones and she said she did and that when she did this, Ms. Jones specified whether they were solicited or unsolicited. So the evidence confirms that neglect or inadvertence would not designate an order as unsolicited. To be an unsolicited order, there has to be a deliberate act in dealing with the ticket. It is to be noted that when Mr. Chan questioned Ms. Jones under oath on October 17, 2013, she was asked on two or three occasions concerning the purchase of shares as to why on the ticket it was marked unsolicited when it clearly was not. Her answers were "I don't recall".

¶ 67 Accordingly, there is no explanation being offered by Ms. Jones as to why the trades are incorrectly designated.

¶ 68 Mr. Chan produced for the assistance of the tribunal, a document listing some 68 trades, commencing on January 7, 2009 through to June 24, 2010 which were marked unsolicited. Mr. Smith relies on approximately 50 of these trades in order to show that at least on 50 occasions, trades were marked incorrectly by the designation unsolicited when indeed they were solicited by Ms. Jones. Various examples were discussed by counsel in his submission, one of which was a trade on September 16, which was marked unsolicited. There are emails at the time in order to communicate with SW and it is apparent from the emails that there was no mention whatsoever of the trade that took place on September 16. As described above, during these trades, SW was overseas.

¶ 69 It is also to be noted that a series of commission sheets were submitted to the tribunal. Many of the trades on these sheets were marked 'unsolicited' and on the bottom of each of the copies are the words "verbally confirmed with all clients" and then initialled by Ms. Jones. Had the 'unsolicited' notation been in error, Ms. Jones could and should have identified these trades as such in her commission review and should have then taken steps to amend the transactions.

¶ 70 The panel concludes that this count is definitive beyond a balance of probabilities.

Count Four

Between September and November 2009, Ms. Jones breached her firm internal policy by communicating with W regarding he account by way of an email address not approved by the firm, contrary to IIROC Dealer Member Rule 29.1.

¶ 71 As mentioned above, on September 18, 2009, Ms. Jones wrote an email to SW saying in part "I prefer to use this email – because I am not able to update you on our corporate email due to regulations."

¶ 72 The uncontradicted testimony before us is that Ms. Jones was not allowed to use her personal email in order to discuss any business with a client and further there was no restriction that would mean that she could "not update you on our corporate email due to regulations".

¶ 73 Ms. Jones admitted to us that she had breached corporate policy with reference to the emails mentioned in Count Four. However, in the submission she mentioned (1) that she never did it again and further (2) that business was not actually discussed in the emails.

¶ 74 Both of these statements are untrue. Three weeks before leaving the firm in September 2010, other such emails were sent to SW. Further, in her email of October 29, 2009 to SW, she enclosed certain pro-formas with the email she sent concerning profit and loss statements.

¶ 75 It was also stated by Ms. Jones in her submission that these emails that she used were part of the firm's records, whereas in fact no such emails were produced by the firm to Mr. Chan when he requested documents.

¶ 76 In admitting to this Count, Ms. Jones has confirmed a breach of IIROC Dealer Member Rule 29.1.

Count Five

Between February and March 2012, Ms. Jones provided misleading information to the Staff during the Staff's

investigation, contrary to IIROC Dealer Member Rule 29.1.

¶ 77 The evidence to support this count commences during a statement made by Ms. Jones in her interview with Mr. Chan, the investigating officer from IIROC, which took place on October 28, 2011. During that interview, the following appears:

Chan: Okay. So this August 10 meeting was a review and was there also anything for going forward. At this time, did you know she was going on this five or six-month trip [inaudible]?

Jones: Yes.

Chan: Was anything discussed with respect to trading going forward.

Jones: Okay. First of all, she wasn't on a five or six-month trip. She was in and out of Vancouver. So she was – but she was travelling at points during that time.

Chan: So she was coming back and forth to Vancouver during this whole time?

Jones: Yes.

Chan: Okay.

¶ 78 The interview continues and it becomes apparent to the Panel that although this is untrue, that Ms. Jones was confused as to the time period and how long and where SW was and eventually says that she will have to go back and look at her files. As this took place 2 years prior, and in fact, SW was in and out of Vancouver a number of times during the period that she maintained an account with Ms. Jones, the Panel is of the opinion that a memory lapse is more likely than an attempt to misdirect Staff.

¶ 79 Among a series of handwritten notes is one dated September 3, 2009, and this note indicates, among other things, that all transactions were reviewed to date, but most importantly is the concluding paragraph:

“She is frustrated with market volatility but does not hold me responsible. She agrees it has been a difficult time in the market over the past year. As I walked her out, she said I was the best broker and was happy with my services. I felt touched and relieved.”

¶ 80 The fact of the matter is that on September 3, SW was away and did not attend the offices of Ms. Jones. SW testified that she never said those words, namely that she was the best broker and so forth.

¶ 81 In a further interview conducted on March 23, 2012, Mr. Chan refers to the handwritten notes and Ms. Jones says:

Jones: Well being this is from 2008, these are some notes that we – no I can't give you details of what exactly those notes are. They are referring to a conversation that I had with the client.

Chan: Okay. Is that your handwriting and printing then?

Jones: Yes it is.

Chan: Okay now. What is your normal habit then for note taking on these documents. Was it done during the meeting or afterwards?

Jones: Both.

Chan: Both. Okay. So if you made notes after the meeting, how long after the meeting would you have made the notes?

Jones: Within an hour or 24 hours depending on if I had a meeting to go to. Then I'd do it the following morning. I mean it depends on the situation.

¶ 82 The Panel observed that although this note is dated September 3, it does not reference the actual date of the meeting. On September 3, Ms. Jones had a discussion with Compliance regarding SW and it is possible that this memo was done on September 3 following this discussion and that it referred to the meeting of August 10. Given the time difference of almost a month, certain comments (ie “best broker”) could have been poorly

recalled. And notwithstanding her responses to the questions of when she took notes, this is clearly a generalization to which there may be exceptions.

¶ 83 With the uncertainty of the evidence offered in this contention, the Panel is of the opinion that this count has been not been proven beyond a balance of probabilities.

Conclusion

- (a) Counts 1 to 4 have been proven;
- (b) Count 5 has not been proven; and
- (c) there must be a hearing to determine the appropriate penalty and the issue of costs.

Dated: December 16, 2013

Thomas R. Braidwood, Q.C.

Chris Lay

Barbara Fraser

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