

# Re Leigh

IN THE MATTER OF:

**THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

AND

**THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA**

AND

**MICHAEL SCOTT LEIGH**

2010 IIROC 1

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

Heard: December 3, 2009  
Decision: January 26, 2010  
(22 paras.)

**Hearing Panel:**

Paul M. Moore, Q.C, Chair  
Hugh McNabney  
Donald (Sandy) Grant

**Appearance:**

Diana Iannetta, Enforcement Counsel  
Also in attendance with staff:  
Gagan Siskind, articling student  
Rita Bilerman, investigator

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## DECISION AND REASONS AS TO PENALTY

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**Decision as to Penalty**

- ¶ 1 We order the following penalties against the respondent:
- (a) a 10 year suspension from approval of the respondent in any category under IIROC's rules, effective December 3, 2009; and
  - (b) a fine of \$70,000 payable to IIROC.
- ¶ 2 We order that the respondent pay \$36,000 to IIROC towards its costs.
- ¶ 3 We also order that the respondent re-write the CPH examination prior to applying for re-approval following the completion of the suspension, and that, in the event that the respondent is again registered as an

approved person, it be a condition of such registration that he be subject to a period of strict supervision for the first 12 months of his employment as an approved person.

## Background

¶ 4 The respondent was not represented at the hearing.

¶ 5 Staff advised us that she had advised the respondent of the penalties and costs staff would be seeking at this hearing and that she had sent him the materials sent to us. She was advised by him that he would not be attending the hearing and that he did not dispute the charges or the penalties staff was recommending. However, since the respondent was unrepresented, she advised, staff had declined to enter into a settlement agreement with the respondent, leaving the panel to set the appropriate penalties.

¶ 6 Staff tabled a bill of costs showing total costs incurred by IIROC of \$72,476.05. Nevertheless, staff claimed that costs in the amount of \$36,000 would be appropriate in the circumstances.

## Reasons

¶ 7 The respondent, a registered representative, was charged with engaging in conduct unbecoming or detrimental to the public interest contrary to Association By-Law 29.1. There were four counts to the charges against the respondent: first, that he improperly borrowed moneys from one set of clients; secondly, that he improperly used moneys in those clients' accounts to purportedly pay back his loans to them; thirdly, that he conducted unauthorized trading in another set of clients' accounts; and fourthly, that he failed to know his clients and engaged in unsuitable trading in that he failed to use due diligence to ensure that his recommendations were suitable based on the clients' financial situation, their limited investment knowledge and experience, their investment objectives, and their risk tolerance.

¶ 8 Staff recommended a 10 year suspension and a fine of \$70,000.

¶ 9 Our main concerns in determining an appropriate penalty were:

- (a) protection of the investing public;
- (b) protection of IIROC's membership;
- (c) protection of the integrity of the IIROC process;
- (d) protection of the integrity of the securities markets; and
- (e) prevention of a repetition of conduct of the type under consideration.

¶ 10 We considered both general and specific deterrence. General deterrence involves dissuading others from committing the same type of conduct at issue, while specific deterrence involves dissuading the respondent from committing the same type of conduct again.

¶ 11 General deterrence can be achieved if a sanction is appropriately unpleasant to the respondent taking into account the respondent's specific misconduct and is in line with industry expectations.

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. The responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment. (*Re Mills*, [2001] I.D.A.C.D. No. 7)

¶ 12 Industry expectations are formed through several sources, including the Disciplinary Sanction Guidelines, and previous IDA/IIROC disciplinary decisions.

¶ 13 The Disciplinary Sanction Guidelines were prepared by IIROC and outline the general principles and

specific considerations to be considered for certain types of misconduct, as well as recommended sanctions for certain types of misconduct. They are not binding rules but are helpful indications of expectation that are usually considered by hearing panels.

¶ 14 The guidelines identify the following applicable "Key Considerations when Determining Sanctions":

(a) *Harm to clients, employer and/or the securities market:*

In the case before us, the respondent's actions caused considerable stress to his clients. They not only lost money, but also had reason to lose trust in the securities industry.

(b) *Harm to clients, employer and/or the securities market:*

The respondent's conduct was manipulative and deceptive given the fact that he ostensibly borrowed the money for his ill son but did not use it for that purpose.

(c) *Extent to which the respondent was enriched by the misconduct:*

The respondent earned commissions on the unsuitable and unauthorized trades.

(d) *Prior disciplinary record:*

While the respondent had no prior disciplinary record, the misconduct at issue was serious.

(e) *Acceptance of responsibilities, acknowledgement of misconduct and remorse:*

The respondent has not disputed the contraventions alleged and the underlying facts.

(f) *Credit for cooperation:*

The respondent cooperated with the investigation to the extent that he agreed to be interviewed by IIROC staff and admitted the contraventions, eliminating the need for a full hearing.

(g) *Planning and organization:*

There was an element of planning and concealment in the respondent's taking of the loan and his plan to payback the loan with trading profits in his clients' account.

(h) *Multiple incidents of misconduct over an extended period of time:*

There were multiple client accounts involved and the unauthorized and unsuitable trading took place over a two year period which is a considerable length of time. These were not isolated incidents.

(i) *Vulnerability of victims:*

All of his clients were trusting of the respondent. Some were unsophisticated investors. All of the clients were near or in retirement and at a financially precarious point in their lives.

(j) *Significant economic loss to the client and/or dealer member firm:*

Although the clients received payback of their loan, it was partially done through trading in their own account. The clients sustained losses in the range of \$28,000 as a result of the unsuitable trading in their account and the unsuitable use of a margin account.

¶ 15 The guidelines provide that a suspension is appropriate where:

(a) *There have been numerous serious transgressions:*

There were multiple instances of misconduct: the loan; over 40 unauthorized trades; and multiple unsuitable trades/strategies.

(b) *There has been a pattern of misconduct:*

All the clients involved were elderly clients who were exposed to greater risk than was suitable for them.

(c) *The misconduct in question has caused some measure of harm to the integrity of the securities*

*industry as a whole:*

Unauthorized trading and personal dealings with clients involve a breach of the trust that is at the heart of the advisor-client relationship. By taking advantage of the trust reposed in him by his clients the respondent's conduct prejudiced the public's view of the securities industry as a whole.

### **Precedents**

¶ 16 *Re Grieve*, [2003] IDACD No.8 is analogous to this case. Grieve engaged in unauthorized discretionary trading in four client accounts. In respect of the same clients, he made unsuitable recommendations spanning a five year period. The clients suffered significant losses as a result. Further, Grieve accepted a large personal loan from one of these clients which he did not pay back for several years. Certain of the offences were committed by Grieve after he was advised by the IDA that he was under investigation in respect of earlier complaints. Grieve subsequently received the following penalty:

- (a) ten year suspension from approval;
- (b) \$100,000 fine;
- (c) costs in the amount of \$50,000; and
- (d) Prior to returning to the industry, he must pay the fine and costs, and re-write the CPH examination.

¶ 17 In *Re Evans*, (October 18, 2007), the respondent failed to attend the hearing where he faced charges of borrowing money from a client and then misappropriating funds from her account to "repay" the loan. He also engaged in unauthorized trading in that same client account. The hearing panel in *Evans* stated:

... consideration must be given to precluding a repetition of the type of conduct under consideration. That can only be accomplished by a total bar from membership in the Association. The investing public must be protected. Only strong sanctions can protect the integrity of the securities markets

Evans received the following penalty:

- (a) permanent ban from approval;
- (b) \$100,000 fine + \$55,000 in disgorgement; and
- (c) \$25,000 costs.

¶ 18 In *Re Miller*, [2005] I.D.A.C.D. No.4, the respondent entered into a settlement agreement wherein he admitted to the following misconduct:

- (a) unauthorized trading;
- (b) failing to contact a client regarding margin calls;
- (c) personal financial dealings with client;
- (d) acting for clients in a province where he was not registered to do so;
- (e) failing to advise his firm of a client complaint;
- (f) making a false statement to his compliance officer; and
- (g) discretionary trading.

Miller received the following penalty:

- (a) permanent prohibition from approval;
- (b) fine of \$80,000;
- (c) costs in the amount of \$25,000.

In accepting the settlement agreement, the hearing panel commented on the allegation regarding the personal financial dealings with clients and stated,

The purpose of the rule against borrowing money from clients is to ensure that the RR does not put himself in a conflict of interest with a client, and does not compromise his independence by reason of being indebted to a client. (para. 17)

¶ 19 *Re Ahmed*, [2003] I.D.A.C.D. No.17, involved a settlement agreement. Ahmed admitted to misleading clients as to the value of their accounts and borrowing funds from a client. Ahmed agreed to the following penalty:

- (a) 2 year suspension;
- (b) fine of \$15,000;
- (c) re-writing the CPH examination; and
- (d) close supervision if he returns to the industry after suspension.

¶ 20 In *Re Guilbault*, [2006] I.D.A.C.D. No.23, Guilbault admitted the following contraventions in a settlement agreement:

- (a) failed to use due diligence to learn and remain informed of essential facts relative to every client and order accepted;
- (b) unsuitable recommendations;
- (c) discretionary trading;
- (d) completing NAA's with false information;
- (e) unauthorized trading;
- (f) misrepresentations to clients regarding trading strategies; and
- (g) failing to obtain approval for options trades.

Guilbault agreed to the following penalty:

- (a) permanent ban on approval;
- (b) fine of \$35,000; and
- (c) costs in the amount of \$5,000.

### **A 10 year suspension is appropriate in our case**

¶ 21 While a 10 year suspension is not inconsistent with that ordered in some of the cases, and is not outside the Disciplinary Sanction Guidelines, it is, in our view, at the lower end of acceptable parameters. However, we did not find it appropriate in the circumstances to reject the recommendation of staff and to ignore the acceptance of the respondent and to impose a longer suspension.

### **Costs**

¶ 22 Staff's costs of approximately \$72,500 were reasonable and justifiable. Staff's claim for costs of \$36,000 is more than fair and acceptable to us in the circumstances.

DATED at Toronto this 26<sup>th</sup> day of January, 2010.

Paul M. Moore, Q.C.

Hugh McNabney

Donald (Sandy) Grant

