Re Drose

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Alfred Drose

2021 IIROC 17

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

Heard in writing: IIROC's written submissions received July 30, 2021;
no submissions received on behalf of the Respondent
Reasons for Decision: September 17, 2021

Hearing Panel:
Marvin J. Huberman, Chair, Zahra Bhutani and Neil Murphy
Appearance:
Sylvia Samuel, Senior Enforcement Counsel and April Engelberg, Enforcement Counsel
Alfred Drose (absent)

DECISION AND REASONS ON PENALTY

A. Background

¶ 1 Following a disciplinary hearing held on May 10, 2021, this Hearing Panel of the Investment Industry Regulatory Organization of Canada ("IIROC") found that Alfred Drose was liable for failing to know his client and excessive trading that was outside the bounds of good business practice.

¶ 2 In a decision on liability, dated July 6, 2021 (the "Decision On Liability" - Re Drose 2021 IIROC 14), we concluded, based on the clear, convincing and cogent evidence in this case, that:

(i) Mr. Drose, the Respondent, by failing to know his client, diverged from the standard expected of him as an IIROC Registered Representative, and breached IIROC Dealer Member Rule 1300.1(a);

(i) The excessive trading in the GA Account fell outside the bounds of good business practice and was unsuitable for GA, contrary to Dealer Member Rules 1300.1(o), 1300.1(q), and 1300.1(s); and

(ii) Mr. Drose is liable for these contraventions.

¶ 3 In the Decision on Liability, we found, at paragraphs 92 and 93, that:

a. The Respondent failed in his KYC obligations in failing to exercise due diligence to obtain essential facts relevant to the client. The GA Account was opened with Mr. Drose, in February

2014, for 66-year-old GA, who had been found more than a year earlier, to lack capacity due to Alzheimer's disease by a tribunal of the Law Society of Ontario. Although there was no prior relationship between the Respondent and GA, the initial client meeting lasted five minutes, during which the Respondent collected pre-filled account opening forms, including the NCAF. He did not discuss the content of the pre-filled forms, including essential KYC information, with the client, but following that five-minute meeting, opened the account, and had no further contact with the client; and

b. The Respondent then engaged in excessive trading in the seventeen months during which the GA Account was opened. The GA Account represented more than 76% of the Respondent's AUA when the account was opened and averaged approximately 73% of the Respondent's AUA over the life of the account. The Respondent executed 168 trades over the life of the account, a number far greater than the seven trades in all of the Respondents' other clients' accounts combined. He engaged in high risk, speculative, and short-term trading. As a result, the turnover rate on the GA Account, which provides evidence of the frequency with which the securities in the account were traded for new securities, was 26.52 (annualized). This trading was not profitable and resulted in losses to the client in excess of $1.3 million. In comparison, the total gross commissions on the GA Account exceeded $232,000, resulting in a commission to equity ratio of 39.09 (annualized).

¶ 4 By Order dated July 26, 2021, on notice to the Parties, we ordered that:

1. IIROC Staff shall file its written submissions and a Book of Authorities on penalty and costs, by July 30, 2021.

2. Alfred Drose shall file his responding written submissions and a Book of Authorities on penalty and costs, if any, by August 31, 2021.

3. IIROC Staff shall file its reply written submissions and a Book of Authorities on penalty and costs, if any, by September 21, 2021.

¶ 5 IIROC Staff's Submissions On Penalty were filed on September 30, 2021. Mr. Drose did not file any responding written submissions on penalty and costs by August 31, 2021, as ordered, or at all.

PROPOSED SANCTIONS

¶ 6 IIROC seeks the imposition of the following sanctions, which IIROC Enforcement Staff ("Staff") submits are appropriate in the circumstances of this case, having regard to IIROC's primary goal of protecting the investing public and the integrity of the capital markets, the IIROC Sanction Guidelines dated February 2, 2015 (the "Sanction Guidelines") and similar cases:

a. a fine of $137,171, which includes disgorgement of $112,171, payable within 30 days;

b. a 24-month prohibition on approval of registration with IIROC in any capacity;

c. the Respondent be required to rewrite the Conduct and Practices Handbook ("CPH") examination prior to being registered with IIROC;

d. a 12-month period of strict supervision upon any approval with IIROC; and

e. an order requiring the Respondent to pay costs of $35,000, within 30 days.

B. General Principles Regarding Sanctions

(a) Hearing Panel's Authority to Impose Penalties and Costs

¶ 7 Pursuant to Dealer Member Rule 20.33, an IIROC hearing panel may impose sanctions following a

finding of a breach of IIROC Rules.

¶ 8 The determination of the appropriate sanction is discretionary and fact specific[1].

¶ 9 Pursuant to Dealer Member Rule 20.49, a Hearing Panel may assess and order payment of IIROC's investigation and prosecution costs determined to be appropriate and reasonable in the circumstances[2].

(b) The Role of Securities Regulation

¶ 10 Securities regulation is protective and preventative in nature and prospective in its application[3].

¶ 11 Pursuant to s. 1.1, the stated purposes of the Ontario *Securities Act* (the *"Act*") are: (a) to provide protection to investors from unfair, improper or fraudulent practices; (b) to foster fair and efficient capital markets and confidence in capital markets; and (c) to contribute to the stability of the financial system and the reduction of systemic risk[4].

¶ 12 Pursuant to s. 2.1 of the *Act*, one of the fundamental principles of the *Act* is that among the three "the primary means for achieving the purposes of this Act" are the "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

¶ 13 IIROC is recognized by the securities commissions as a self-regulatory organization. Pursuant to subsection 21.1(1) of the *Act*, and, as stated in its Recognition Order, IIROC's primary goals are investor protection and market integrity[5].

(c) Sanction Guidelines / Principles

¶ 14 Consistent with IIROC's public interest mandate and its Recognition Order, IIROC's Sanction Guidelines, provide, under Part I,[6] that the purpose of sanctions is "to protect the public interest by restraining future conduct that may harm the capital markets"[7]. Sanctions should, therefore, be significant to achieve the goal of deterrence (both specific and general)[8], and strike an appropriate balance between addressing the specific misconduct while being in line with industry expectations (particularly relevant to general deterrence)[9]. They must be neither too low nor too high.

¶ 15 To achieve this balance, proportionality is relevant. The hearing panel must consider whether the penalties are proportionate to the conduct at issue[10]. The hearing panel should also consider sanctions imposed for similar contraventions in similar circumstances[11] as well as any relevant mitigating or aggravating factors that would serve to reduce or increase the sanction[12].

(d) Sanction Guidelines - Key Factors in Determining Sanctions

¶ 16 Under Part II - Key Factors in Determining Sanctions,[13] the Sanction Guidelines provide further

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[1] Sanction Guidelines, p. 2.
[2] Dealer Member Rule 20.49.
[3] *Re Cartaway Resources Corp.* [2004] 1 S.C.R. 672 at para. 58; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at paras. 42 and 45.
[4] *Securities Act* R.S.O. 1990, c. S5, s. 1.1.
[5] In the Matter of Investment Industry Regulatory Organization of Canada (IIROC): Recognition Order, (2008) 31 OSCB 5615 at 5622-5623).
[6] Sanction Guidelines, Part I – Sanction Principles for IIROC Disciplinary Proceedings ("Sanction Guidelines, Part I").
[7] Sanction Guidelines, Part I, General Principle 1, p. 4.
[8] Sanction Guidelines, Part I, General Principle 1, p. 4.
[9] Sanction Guidelines, Part I, General Principle 1, p. 4.
[10] Sanctions Guidelines, Part I, General Principle 1, p. 4.
[11] Sanctions Guidelines, Part I, General Principle 1, p. 4.
[12] Sanctions Guidelines, Part I, General Principle 1, p. 4.
[13] Sanction Guidelines, Part II - Key Factors in Determining Sanctions ("Sanction Guidelines, Part II").

guidance to hearing panels in exercising their discretion with respect to sanctions. It provides a non-exhaustive list of factors to be considered, where applicable.

C. The Position of IIROC

(i) *Sanction Guidelines, Part II - Key Factors*

¶ 17 IIROC Enforcement Counsel ("Enforcement Counsel" or "Staff") submits that, having regard to the *Sanction Guidelines, Part II - Key Factors*, the following facts are relevant to the determination of the appropriate sanctions in this case.

Number, Size and Character of the Transaction

¶ 18 There were multiple transactions (168 trades, including part fills) over a period of approximately 17 months during which the account was opened, an amount that Staff submits was significant.

Numerous Acts and/or Pattern of Misconduct

¶ 19 There was a pattern of conduct (albeit with one client) where the activity was repeated over time.

Misconduct over an Extended Period

¶ 20 The Respondent's conduct spanned several months: between February 2014 and June 2015, the Respondent executed approximately 168 trades (including part fills) in the GA Account. In the circumstances, this may be considered an extended period of time.

Misconduct was Intentional, Willfully Blind or Reckless

¶ 21 Excessive trading, one of the contraventions in respect of which the Respondent was found liable, involves a mental element. The Respondent's misconduct in connection with excessive trading was, accordingly, intentional misconduct.

Extent of Harm to the Client

¶ 22 The client, GA, suffered financial harm, in the form of trading losses (in excess of $1.3 million) and excessive commissions charged to his account (in excess of $232,000).

Extent of Harm to the Market

¶ 23 Harm to the reputation of the marketplace is a likely result of the Respondent's misconduct. The misconduct involved a preference of the Respondent's interests over those of the client, which goes to the heart of the nature of the relationship between a registered representative and a client.

Level of Vulnerability of the Injured or Affected Client

¶ 24 The client was vulnerable – of advanced age and suffering from a mental disability (Alzheimer 's disease).

Financial Benefit to the Respondent

¶ 25 The Respondent obtained significant financial benefit in the form of commissions at the expense of the client. The commission payout to the Respondent in respect of the GA Account was approximately $112,171.01 over the 17-month period that the GA Account was opened.

Whether the Respondent Accepted Responsibility for the Misconduct

¶ 26 The Respondent did not accept responsibility for his actions, preferring instead to shift the focus to supervisors. The following is an excerpt from the transcript of the Respondent's interview with IIROC Staff.

12 MS. GUPTA: Okay. And what is your

13 understanding of what your responsibilities are as an

14 advisor over an account?

15 MR. DROSE: Due diligence and have the

16 client's best interests at all times.

17 MS. GUPTA: Right. And can you expand

18 on that, what that means, in terms of due diligence and

19 the best interest of a client?

20 MR. DROSE: Well, not to -- not for

21 self-interest. To have the client's best interest.

22 MS. GUPTA: Okay. And what about due

23 diligence?

24 MR. DROSE: Make sure that he's in

25 compliance with IIROC and internal procedure.

MS. GUPTA: Okay. And how would you

2 ensure that?

3 MR. DROSE: I didn't. I gave it to

4 compliance. I left it up to them.

5 MS. GUPTA: Okay.

6 MR. DROSE: I gathered the information

7 and I submitted it and if there's any flags they're --

8 they do it. I don't open -- I'm an agent. Compliance

9 opens accounts -- or the branch manager, I don't know

10 -- yeah, I think both[14]. [Underlining Added]

Internal Discipline

¶ 27 There is no evidence that the Respondent was subject to internal discipline by the Dealer Member.

Subsequent Corrective Measures

¶ 28 There is no evidence that the Respondent voluntarily employed corrective measures to avoid recurrence of the misconduct. The Respondent made no such assertion.

Voluntary Acts of Compensation

¶ 29 There is no evidence that the Respondent made any voluntary act of compensation or restitution to the client. The Respondent made no such assertion.

Proactive and Exceptional Assistance to IIROC

¶ 30 The Respondent was not proactive in providing assistance to IIROC Staff nor would his cooperation in

[14] Exhibit 16, May 10, 2021 Hearing, Transcript of Interview of the Respondent, January 29, 2020, p. 70 at 12 – p. 71 at 10.

the investigation be considered as exceptional assistance. Further, his conduct in connection with the within proceeding caused unnecessary delay and added to the cost of the proceeding. The following is noted:

a. On September 29, 2020, the hearing of this matter was scheduled to commence during the week for February 15, 2021. After some exchange between the parties and the National Hearing Coordinator regarding the Family Day holiday on February 15, the hearing dates were confirmed[15].

b. Starting on January 18, 2021, the Respondent requested an adjournment of the hearing then scheduled for February 16, 2021. He then failed to take any steps to deal with his adjournment request.[16] His inaction created uncertainty as to his intention and whether the matter would proceed on February 16, 2021 as scheduled.

c. He failed to attend the hearing originally scheduled for February 16, 2021, resulting in a further Pre-Hearing Conference being scheduled for March 19, 2021[17].

d. After confirming his availability to attend on March 19, 2021, the Respondent failed to attend the Pre-Hearing Conference,[18] with the result that the hearing was adjourned to May 10, 2021.

e. Again, the Respondent failed to attend on May 10, 2021 and failed to communicate to Staff or the Hearing Panel that he would not be attending.

f. The Respondent's conduct resulted in unnecessary delay and costs thrown away as a result of Staff preparing for the February 16, 2021 hearing.

Reasonable Reliance on Competent Supervisory, Legal or Accounting Advice

¶ 31 Although, as set out [in paragraph 26] above, the Respondent attempted to shift responsibility to his supervisors, there is no evidence that he reasonably relied on supervisory advice or attempted to comply with obligations by seeking advice, where appropriate.

Other Key Factors Not Applicable or Neutral

¶ 32 It is noted that the Respondent has no relevant disciplinary history. It is submitted, however, that while the existence of relevant disciplinary history would have been a relevant aggravating factor, its absence is a neutral factor on the facts of this case. Staff further submitted that other key factors are not applicable or neutral on the facts of this case and as such, are sufficiently reflected in the sanctions sought by Staff.

(ii) Similar Cases

¶ 33 Staff submitted that the following cases, involving similar contraventions in similar circumstances, are useful as guides to the appropriate sanctions in this case.

Re Crandall

¶ 34 In *Re Crandall*[19], the respondent, who was a member of the District Council during the relevant time, engaged in a pattern of excessive trading in the account of one vulnerable client, over a period of 5 years and eleven months. The high volume and frequency of trading was not appropriate in the accounts of the 88+ year-old client. As a result of the excessive trading, gross commissions of $285,492 were charged to the account during the relevant period. The panel held that any benefits to the trades were ‘‘nullified by the

[15] Affidavit of R. Newmarch sworn July 28, 2021, (‘‘Newmarch July 28 Aff’t”) at para. 2, Staff Compendium Tab 4.
[16] Newmarch July 28 Aff’t” at paras. 3 – 8, Exhs A - F, Staff Compendium Tab 4.
[17] Newmarch July 28 Aff’t” at para. 9, Exh G, Staff Compendium Tab 4.
[18] Newmarch July 28 Aff’t” at paras. 10 - 12, Exhs H - J, Staff Compendium Tab 4.
[19] *Re Crandall* 2016 IIROC 37.

excessive number and amount of the commissions"[20] charged.

¶ 35 The following sanction and costs were imposed in *Re Crandall*:

- a fine of $150,000;
- a 5-year prohibition on the respondent's re-registration with IIROC;
- the CPH exam re-write as a condition of re-registration;
- strict supervision for 18 months should the respondent return to the industry; and
- costs of $35,000.

¶ 36 Staff further submitted that although distinguishable in respect of the Respondent's role as an industry leader, the misconduct in *Re Crandall* was similar in character and magnitude to the misconduct in this case.

Re Darrigo

¶ 37 In *Re Darrigo*[21], the respondent effected mutual fund transactions that triggered unnecessary deferred sales charges to nine client accounts and undue commission to himself, contrary to IIROC Dealer Member Rule 1300.1(o). In addition, the respondent had engaged in improper financial dealings with two clients by taking loans totaling $45,000 from the two clients, which he failed to repay.

¶ 38 In arriving at the sanction, the panel considered that the clients were unsophisticated and trusted the respondent. In total, the nine clients paid deferred sales charges of $116,000 and realized losses of $72,000. Certain of the transactions were not authorized.

¶ 39 The following sanction and costs were imposed in *Re Darrigo:*[22]

- a fine of $60,000, including $50,000 as disgorgement of commissions on mutual fund transactions;
- a fine of $55,000, including $45,000 as disgorgement of loans proceeds;
- a 12-month period of strict supervision upon any re-registration with IIROC; and
- costs of $65,000.

¶ 40 A suspension was not ordered "due to the long time that the respondent has been out of the industry."[23]

¶ 41 Staff submitted that in *Re Darrigo*, the fine, exclusive of disgorgement, was in a similar range (though at the low end) as the fine sought in this case.

Re Mathews

¶ 42 In *Re Mathews*[24], it was found that the respondent engaged in unsuitable recommendations, unauthorized discretionary trading and excessive trading over a period spanning three years. The "overarching aggravating factor" was that each client was vulnerable and had placed considerable trust in the respondent.[25] The panel noted that the respondent's conduct was "deliberate, calculated, organized, repeated, systematic and pervasive, involving 1255 trades over a period of roughly two years."[26] The clients all suffered economic

[20] *Re Crandall,* supra, at para. 22.
[21] *Re Darrigo* 2015 IIROC 03.
[22] *Re Darrigo, supra* at paras. 26 - 28.
[23] *Re Darrigo, supra* at para. 26.
[24] *Re Mathews* 2015 IIROC 02.
[25] *Re Mathews, supra* at para. 19.
[26] *Re Mathews, supra* at para. 19.

loss. Two of the four clients had to come out of retirement and get part-time jobs to make up for the losses. The respondent's refusal to accept responsibility or demonstrate remorse was considered an aggravating factor.[27] The respondent was not entitled to credit for cooperation as he "cooperated with the investigation as he was obligated to, but there was nothing resembling self-reporting or self-correcting."[28] The respondent had no prior disciplinary record, but the misconduct was considered so egregious as to nullify this normally mitigating factor.[29]

¶ 43 In *Re Mathews,* the following sanction and costs were imposed:

- a $200,000 fine;
- a 5-year suspension; and
- costs of $20,000.

¶ 44 Staff submitted that in *Re Mathews,* Staff did not request disgorgement because of the difficulty in calculating the respondent's profit with respect to the commissions.[30] Instead, a significant fine was imposed.

Re Newman

¶ 45 In *Re Newman*[31]*,* the respondent engaged in a practice of excessive trading in the account of MD, a single, elderly investor, contrary to good business practice and IIROC Dealer Member Rules 1300.1(o) and (p) (IDA Regulations 1300.1 (o) and (p) prior to June 1, 2008). Through this practice, the respondent earned more than $900,000 in commissions in less than three years on MD's account alone, which at its highest month-end point during that period was valued at only approximately $2.8 million.[32]

¶ 46 In *Re Newman,* the hearing panel accepted a settlement agreement between IIROC and the respondent that provided for the following sanction and costs:

- a permanent ban from registration with IIROC; and
- costs of $5,000.

¶ 47 Staff submitted that *Re Newman* is distinguishable in that the amount by which the respondent profited was significantly higher than in this case, however, at the time of settlement, the respondent had paid the client $680,000.00 from his own funds as part of a mediated settlement in a related civil action. As such, there was no disgorgement ordered. However, a permanent ban was imposed in lieu of any additional fine.

Re Husebye

¶ 48 In *Re Husebye*[33]*,* the panel found that the respondent had contravened Rule 1300(1)(q). The misconduct involved allegations that the respondent recommended high risk, leveraged exchange traded funds ('LETFs') to several of his clients and failed to use due diligence to assess the risks associated with these LETFs, and concentrated a significant amount of his clients' accounts in these securities.[34]

¶ 49 Staff submitted that *Re Husebye* is distinguishable in respect of the respondent's motive. The panel in *Re Husebye* did not consider the case as one of an "unscrupulous registrant" engaging in "egregious conduct"

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[27] *Re Mathews, supra* at para. 19.
[28] *Re Mathews, supra* at para. 20.
[29] *Re Mathews, supra* at para. 21.
[30] *Re Mathews, supra* at para. 8.
[31] *Re Newman* 2012 IIROC 55.
[32] *Re Newman, supra* at para. 3.
[33] *Re Husebye* 2016 IIROC 21.
[34] *Re Husebye*, *supra at* paras. 2 and 3.

but that of a ‘‘mistaken judgment by a conscientious person trying to do his best for his clients.[35] The panel noted that the respondent did not profit to a greater extent from his strategy of purchasing Inverse LETFs than if he had purchased more conservative products.[36]

¶ 50 The following sanction and costs were imposed in *Re Husebye:*

- a $20,000 fine;
- a six-month prohibition on re-registration;
- CPH re-write before seeking re-registration; and
- costs of $10,000.

¶ 51 Staff submitted that in *Re Husebye*, there was no issue of the respondent profiting from his misconduct and, therefore, no order for disgorgement. The fine was in line with the one requested in this case.

Re Yaskiw

¶ 52 In *Re Yaskiw*[37]*,* the hearing panel considered whether a two-year suspension was appropriate in the case of a respondent who did not accept responsibility for their actions. The hearing panel found that the respondent had failed to know three clients, had made unsuitable recommendations to those clients, and had engaged in unauthorized discretionary trading in the accounts of those three clients. The panel concluded that when considered in light of the global monetary sanction ($120.000) and costs ($25,000), the suspension was appropriate in that case. It stated as follows:

> 52 It appears at that even at the date of the Penalty Hearing, the Respondent does not understand that his aggressive trading strategy was inappropriate and unsuitable.
>
> 53 This Hearing Panel remained concerned about whether, after only a two-year period, his current professional attitude could be appropriately adjusted with strong and continuous supervision to instill in him the importance of always observing the language and the spirit of the Dealer Member Rules.
>
> 54 On the other hand, this Hearing Panel recognized that this Respondent had no prior disciplinary record and did submit substantially to the IIROC investigation and process. Moreover, his conduct was not fraudulent and he did not set out to harm his clients, while extracting a benefit for himself. It further recognized that it does not have the capability of forecasting with accuracy what epiphanies this Respondent might experience during the period of a two-year suspension.
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> 55 As a result, and taking into account as well the global amount of the monetary penalty, and the amount of costs claimed, this Hearing Panel ultimately concluded in all the circumstances, the period of two years as a suspension from trading activities was an appropriate penalty based on the facts of this case.[38]

¶ 53 The remaining sanctions were a re-write of the CPH exam following the suspension and strict supervision for 18 months upon becoming re-registered. The hearing panel agreed that the remaining sanctions were appropriate and held as follows:

> 56 This Hearing Panel agreed with the remaining sanctions proposed by Enforcement Counsel, with one stipulation, which was to order that the rewrite of the qualifying examinations by the Respondent occur at the end of the suspension period if the Respondent wished to return to the industry. This

[35] *Re Husebye, supra* at para. 20.
[36] *Re Husebye, supra* at para. 9.
[37] *Re Yaskiw* 2017 IIROC 19.
[38] *Re Yaskiw, supra* at paras. 52-55.

additional feature was considered necessary to ensure the Respondent's requalification pertained to the then current contents of the qualifying examinations.[39]

(iii) Proposed Sanctions

¶ 54 Staff submitted that the following penalties are appropriate in this case, having regard to similar cases and those matters relevant to the general principles and key factors addressed in the Sanction Guidelines, including the financial benefit the Respondent derived from the transactions at issue, the repetition of the impugned conduct and cumulative impact of the transactions, the harm to the client, all with a view to discouraging future misconduct by the Respondent as well as general deterrence:

a. a fine of $137,171, which includes disgorgement of $112,171, payable within 30 days;

b. a 24-month prohibition on approval of registration with IIROC in any capacity;

c. the Respondent be required to rewrite the CPH examination prior to being registered with IIROC; and

d. a 12-month period of strict supervision upon any approval with IIROC.

Fine

¶ 55 Staff submitted that when considered in light of similar cases (discussed above), a fine of $137,171 is in keeping with monetary penalties imposed in similar cases involving similar contraventions. It is proportionate to the misconduct, and based on the results in similar cases, it ought to be in line with industry expectations, and accordingly, be of general deterrent effect.

¶ 56 Effective deterrence means that a respondent should not profit from their misconduct. The Sanction Guidelines provide that sanctions should ensure that a respondent does not financially benefit from the misconduct, and a respondent should disgorge any benefit received, directly or indirectly, as a result of the misconduct as follows:

> Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.
>
> It is a fundamental tenet that wrong-doers should not benefit from their wrong-doing. Accordingly, in cases where the respondent benefited financially from the misconduct, the sanction, where possible, should include a disgorgement of the amount of any such financial benefit. Financial
>
> benefit would include any profits, commissions, fees, or any other compensation or other benefit received by the respondent, directly or indirectly, as a result of the misconduct.[40]

¶ 57 The fine sought takes into account the Respondent's net commissions (his payout from the gross commissions) on the GA Account. There is no evidence as to any legitimate expenses that ought to be considered or what amount of the commissions actually charged to the GA account may be considered legitimate in the sense that they would have been earned in the absence of the excessive trading. In that regard, Staff submitted that the Respondent's failure to comply with the KYC obligation makes unpalatable any argument that any of the trading in the GA account was suitable. As this Panel (and a long line of previous IIROC decisions) has found, "only after the 'due diligence' of the first stage is completed, can the registrant move to the second stage in which they fulfill their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for that client."

¶ 58 The Respondent's failure to comply with the KYC duty renders compliance with the suitability obligation impossible. As such, any argument that the commissions on the GA account were properly earned is

[39] *Re Yaskiw, supra* at paras. 52-55.
[40] *Sanction Guidelines*, Part I, General Principle 4, p. 5.

untenable when considered in light of the Respondent's failure to comply with the fundamental KYC duty. It is appropriate to factor such commissions in the fine.

Suspension

¶ 59 According to Part I of the Sanction Guidelines, a suspension should be considered where, among other matters, there has been one or more serious contraventions; there has been a pattern of misconduct; the contraventions involved fraudulent, willful and/or reckless misconduct; or the misconduct in question has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.[41]

¶ 60 In this case, the Respondent's misconduct is a serious contravention given the fundamental nature of the KYC obligation and the extent to which the Respondent profited at the expense of the client. The excessive trading involved conduct that was repeated over the course of months, suggesting a pattern, and involved a willful or mental element. Further, there was financial harm to a vulnerable client in the form of excessive commissions coupled with significant ($1.3 million) losses, which, it is submitted, will likely result in harm to the reputation of the securities industry as a whole.

¶ 61 The Respondent is not currently an IIROC registrant, but the suspension will have some reputational impact and will have a general deterrent effect.

¶ 62 As for the length of suspension, Staff submitted that a 24-month suspension reflects the gravity of the misconduct, and is appropriate in the circumstances of this case.

CPH Course Re-Write

¶ 63 The Sanction Guidelines endorse sanctions tailored to specific misconduct as a useful tool in addressing misconduct[42].

¶ 64 Staff submits that an order that the Respondent be required to rewrite of the CPH examination course prior to becoming registered with IIROC is one such tailored tool that provides some assurance that proficiency concerns, if any, are addressed, thereby reducing the possibility of future misconduct related to a lack of proficiency.

Strict Supervision

¶ 65 This Hearing Panel found the Respondent liable for excessive trading. Strict supervision, which, among other matters, requires pre-approval of trades, is an appropriate sanction to be imposed on the Respondent's registration in order to guard against similar conduct in the future.

¶ 66 The non-monetary sanctions (suspensions, CPH re-write, and strict supervision) feature in a number of the similar cases referred to above and, Staff submitted, are appropriate in this case.

(iv) Costs

¶ 67 Pursuant to Dealer Member Rule 20.49, Staff seeks an order requiring that the Respondent pay costs of $35,000. The costs incurred in the investigation and prosecution of this matter are set out in Staff's Bill of Costs.[43] As set out in Staff's Bill of Costs, the hourly rates and times spent are reasonable in the circumstances of the case and Staff's actual costs are considerably greater than the amount requested. The costs order sought is reasonable and appropriate and will ensure that the costs of investigation and prosecution are not borne entirely by IIROC or subsidized by those Dealer Members and Approved Persons who abide by the rules.

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[41] *Sanction Guidelines*, Part I, General Principle 5, p.5.
[42] *Sanction Guidelines*, Part I, General Principle 8, p. 6.
[43] Bill of Costs of IIROC Staff, Tab 5, IIROC Staff Compendium.

D. Analysis

¶ 68 In determining the appropriate sanctions to impose on the Respondent, Alfred Drose, we considered this Hearing Panel's authority to impose penalties and costs, the role and objectives of securities regulation, the Sanction Guidelines, key factors in determining sanctions, and the cases referred to by Enforcement Counsel.

¶ 69 The Sanction Guidelines set out helpful general principles to promote consistency, fairness and transparency, and to reflect their primary purposes of disciplinary proceedings: "to maintain high standards of conduct in the securities industry and to protect market integrity." Yet the Sanctions Guidelines recognize that the determination of sanctions is both fact specific and discretionary to the Hearing Panel.

¶ 70 We agree with Enforcement Counsel's submission that, having regard to the Sanction Guidelines, *Part II - Key Factors*, the facts set out in paragraphs 18 - 32 above are relevant to the determination of the appropriate sanctions in this case.

¶ 71 We find as fact on the evidence before us that:

- There were multiple transactions (168 trades, including part fills) over a period of approximately 17 months during which the account was opened, an amount we find was significant.
- There was a pattern of misconduct (albeit with one client) where the activity was repeated over time.
- The Respondent's conduct spanned several months: between February 2014 and June 2015, the Respondent executed approximately 168 trades (including part fills) in the GA account. In the circumstances, this is considered an extended period of time.
- Excessive trading, one of the contraventions in respect of which the Respondent was found liable, involves a mental element. The Respondent's misconduct in connection with excessive trading was, accordingly, intentional misconduct.
- The client, GA, suffered financial harm, in the form of trading losses (in excess of $1.3 million) and excessive commissions charged to his account (in excess of $232,000).
- Harm to the reputation of the marketplace is a likely result of the Respondent's misconduct. The misconduct involved a preference of the Respondent's interests over those of the client, which goes to the heart of the nature of the relationship between a registered representative and a client.
- The client was vulnerable – of advanced age and suffering from a mental disability (Alzheimer's disease).
- The Respondent obtained significant financial benefit in the form of commissions at the expense of the client. The commission payout to the Respondent in respect of the GA account was approximately $112,171.01 over the 17-month period that the GA account was opened.
- The Respondent did not accept responsibility for his actions, preferring instead to shift the focus to supervisors.
- There is no evidence that the Respondent was subject to internal discipline by the Dealer Member.

- There is no evidence that the Respondent voluntarily employed corrective measures to avoid recurrence of the misconduct. The Respondent made no such assertion.
- There is no evidence that the Respondent made any voluntary act of compensation or restitution to the client. The Respondent made no such assertion.
- The Respondent was not proactive in providing assistance to IIROC Staff nor would his cooperation in the investigation be considered as exceptional assistance. Further, his conduct in connection with the within proceeding, caused unnecessary delay and added to the cost of the proceeding.
- Although, as set out [in paragraph 26] above, the Respondent attempted to shift responsibility to his supervisors, there is no evidence that he reasonably relied on supervisory advice or attempted to comply with obligations by seeking advice, where appropriate.
- While the Respondent has no noted relevant disciplinary history, its absence is a neutral factor on the facts of this case.

¶ 72 We agree with and adopt the reasoning in *Re Crandall, Re Darrigo, Re Mathews, Re Newman, Re Husebye,* and *Re Yaskiw,* cases relied on by Enforcement Counsel involving similar contraventions in similar circumstances to those in the present case, which we find are useful as guides to the appropriate sanctions in this case.

¶ 73 Further, our task is not only to take into consideration the proven contraventions by the Respondent, Alfred Drose, but we must also consider the protection of the investing public and the integrity of the IIROC process. In this regard, we agree with the following statement of the panel in *Re Wilson*[44]*:*

> …the main concerns when determining an appropriate penalty are protection of the investing public, the IIROC membership, the integrity of the IIROC process, the integrity of the security markets and prevention of a repetition of conduct of the type under consideration. As stated in the Guidelines, sanctions should be based on the particular misconduct of the respondent with an aim of general deterrence which will be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations.

¶ 74 In dealing with the Respondent, Alfred Drose, we have weighed the key factors, both aggravating and mitigating, and considered the sanction principles, and find that the sanctions proposed by Staff are appropriate in this case because:

- The Respondent's conduct was inconsistent with the high standards of ethics and conduct expected of an IIROC Registered Representative and went beyond negligence. The sanctions are proportionate to the misconduct and in keeping with those imposed in similar cases.
- The proposed sanctions reflect that the primary purpose is prevention and protection rather than punishment and include sanctions aimed at preventing future misconduct by the Respondent. At the same time, the goals of specific and general deterrence will be served by the quantum of the fine, the two-year suspension, CPH examination re-write, and strict supervision.
- The Sanction Guidelines provide that for multiple violations, the total or cumulative sanction should appropriately reflect the totality of the Respondent's misconduct.[45] We find that when

[44] *Re Wilson* 2011 IIROC 47 at para. 26.
[45] *Sanction Guidelines*, Part I, General Principle 3, p. 5.

considered as a whole, the sanctions proposed by Staff appropriately reflect the totality of the Respondent's misconduct.

E. Decision

¶ 75 Taking everything into account, we have determined to impose the following sanctions on the Respondent, Alfred Drose, for the contravention of IIROC Dealer Member Rules 1300.1(a), 1300.1(o), 1300.1(q) and 1300.1(s):

a. a fine of $137,171, which includes disgorgement of $112,171, payable by the Respondent to IIROC, within 30 days;

b. a 24-month prohibition on approval of registration with IIROC in any capacity;

c. the Respondent be required to rewrite the CPH examination prior to being registered with IIROC;

d. a 12-month period of strict supervision upon any approval with IIROC; and

e. an order requiring the Respondent to pay costs of $35,000 to IIROC, within 30 days.

Dated at Toronto, Ontario, this 17 day of September 2021.

Marvin J. Huberman

Zahra Bhutani

Neil Murphy