Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

IN THE MATTER OF A DISCIPLINARY HEARING
PURSUANT TO SECTIONS 20 AND 24 OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Jeffrey Mark Levy

Heard: May 19, 2010 in Toronto, Ontario
Reasons for Decision: July 29, 2010

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

Thomas J. Lockwood, Q.C.	Chair
Selwyn Kossuth	Industry Representative
Hugh McNabney	Industry Representative

Appearances:

Caitlin Sainsbury	)	For the Mutual Fund Dealers Association of Canada
Jeffery Mark Levy	)	Did Not Appear

1. By Notice of Hearing, dated June 27, 2008, the Mutual Fund Dealers Association of Canada ("MFDA") made the following Allegations against Jeffrey Mark Levy (the "Respondent"):

(a) Allegation #1: In June 2000, the Respondent made statements to the Ontario Securities Commission and the Member regarding the circumstances of his disbarment by the Law Society of Upper Canada which were misleading or untrue, contrary to MFDA Rule 2.1.1

(b) Allegation #2: In or around May 2005, the Respondent accepted $150 from clients CC and EC to prepare, or arrange for the Member to prepare, wills for them which he subsequently failed to deliver, contrary to MFDA Rule 2.1.1

(c) Allegation #3: In 2005, the Respondent solicited and accepted $10,000 from client TC to invest on TC's behalf and thereafter failed to account for the monies, contrary to MFDA Rule 2.1.1

(d) Allegation #4: In April 2006, the Respondent accepted $9,375 in remuneration from client JL in respect of investment related services to be provided by the Respondent to JL on behalf of the Member, contrary to MFDA Rule 2.4.1

(e) Allegation #5: Commencing March 29, 2007, the Respondent failed to cooperate with the MFDA by failing to produce copies of bank statements requested by the MFDA and declining to attend an interview for the purposes of providing a statement regarding his conduct while an Approved Person, contrary to section 22.1 of MFDA By-law No. 1.

2. On September 10, 2008, the First Appearance took place, via teleconference, before the Hearing Panel. Following consideration of submissions from the parties, the Hearing Panel adjourned the Hearing on the Merits, on consent of the parties, *sine die*, pending the resolution of the case of *Taub* v. *Investment Dealers Association of Canada* before the Ontario Court of Appeal. The Hearing Panel made an Order to this effect, dated September 10, 2008.

3. Subsequent to the resolution of the *Taub* matter, the Hearing on the Merits was

scheduled, on consent, to take place on Wednesday, May 19, 2010, at 121 King Street West, Suite 1000, Toronto, Ontario, commencing at 10:00 a.m.

4. On May 10, 2010, the parties entered into an Agreed Statement of Facts, dealing with the Allegations in the Notice of Hearing. The Respondent admitted that these facts constituted misconduct for which the Respondent could be penalized on the exercise of the discretion of the Hearing Panel, pursuant to section 24.1 of MFDA By-law No. 1.

5. Section 24.1 of MFDA By-law No. 1 provides as follows:

DISCIPLINE

24. DISCIPLINE POWERS

24.1 **Power of Hearing Panels to Discipline**

24.1.1 *Approved Persons*

A Hearing Panel of the applicable Regional Council shall have power to impose upon an Approved Person or any other person under the jurisdiction of the Corporation any one or more of the following penalties:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) $5,000,000.00 per offence; and
(ii) an amount equal to three times the profit obtained or loss avoided by such person as a result of committing the violation;

(c) suspension of the authority of the person to conduct securities related business for such specified period and upon such terms as the Hearing Panel may determine;

(d) revocation of the authority of such person to conduct securities related business;

(e) prohibition of the authority of the person to conduct securities related business in any capacity for any period of time;

(f) such conditions of authority to conduct securities related business as may be considered appropriate by the Hearing Panel;

if, in the opinion of the Hearing Panel, the person:

(g) has failed to carry out any agreement with the Corporation;

(h) has failed to comply with or carry out the provisions of any federal or provincial statute relating to the business of the Member or of any regulation or policy made pursuant thereto;

(i) has failed to comply with the provisions of any By-law, Rule or Policy of the Corporation;

(j) has engaged in any business conduct or practice which such Regional Council in its discretion considers unbecoming or not in the public interest; or

(k) is otherwise not qualified whether by integrity, solvency, training or experience.

6. The Hearing on the Merits proceeded, as scheduled, on May 19, 2010. The Respondent did not appear, nor did anyone on his behalf. Shortly before the commencement of the Hearing on the Merits, the Respondent sent an e-mail to counsel for the MFDA, which stated, in part, as follows: "While it appears that I am up for promotion at work that should ultimately prove reasonably remunerative, I am presently so bereft of funds I can [sic] afford the parking or gas to come downtown today. As such, I cannot attend the hearing today."

7. The Hearing Panel then considered the provisions of the Agreed Statement of Facts. After hearing submissions from counsel for the MFDA, we retired to consider whether we were in a position to accept that the facts, as set out in the Agreed Statement of Facts, constituted admissible and sufficient evidence against the Respondent, to conclude that some or all of the allegations in the Notice of Hearing had been established. After consideration, the Hearing Panel found that all of the allegations against the Respondent had been established.

8. The salient portions of the Agreed Statement of Facts are as follows:

"II. ADMISSIONS AND ISSUES TO BE DETERMINED

3. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part III herein. The Respondent admits that the facts in Part III constitute misconduct for which the Respondent may be penalized on the exercise of the discretion of a Hearing Panel pursuant to s. 24.1 of MFDA By-law No. 1.

4. Subject to the determination of the Hearing Panel, Staff submits that the appropriate penalty to impose on the Respondent is a permanent prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member, and a fine in the amount of $25,000.00, pursuant to s. 24.1.1(e) of MFDA By-law No. 1.

5. The Respondent submits that the appropriate penalty to be imposed is a ten year suspension from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member. The Respondent does not oppose Staff's position on the appropriate fine to be imposed.

6. Staff seeks a $2,500 costs award against the Respondent, which the Respondent does not oppose.

7. The Respondent claims to be impecunious and unable to pay any amount towards either a fine or costs.

8. Staff and the Respondent jointly request that the Hearing Panel determine, on the basis of this Agreed Statement of Facts, the appropriate penalty to impose on the Respondent, pursuant to s. 24.1.1(b) of MFDA By-law No. 1.

III. AGREED FACTS

9. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part III and no other facts or documents. In the event the Hearing Panel advises one or both of Staff and the Respondent of any additional facts it considers necessary to determine the issues before it, Staff and the Respondent agree that such additional facts shall be provided to the Hearing Panel only with the consent of both Staff and the Respondent. If the Respondent is not present at the hearing, Staff may disclose additional relevant facts, at the request of the Hearing Panel.

Registration History

10. From September 21, 2000 to May 4, 2006 the Respondent was registered in Ontario as a mutual fund salesperson with Investors Group Financial Services ("IG").

11. The Respondent was terminated by IG on May 4, 2006. The Respondent is no longer registered in the securities industry in any capacity.

12. IG has been a member of the MFDA since February 8, 2002.

Facts

Allegation #1

13. On December 10, 1993, the Law Society of Upper Canada (the "Law Society") suspended the Respondent, who was at that time a lawyer licensed to practice law in Ontario, for four months for failing to keep appropriate books and records of his law practice.

14. On June 22, 1995, the Law Society disbarred the Respondent for professional misconduct relating to, among other things, borrowing $5,000 from a client and misappropriating between $2,200 and $3,800 from a client.

15. In June 2000, the Respondent applied for registration in Ontario as a mutual fund salesperson with IG by submitting a Form 4 Uniform Application for Registration (the "Application") to the Ontario Securities Commission. In response to question 13(c) on the Application, the Respondent attached an appendix purporting to set out the circumstances surrounding his disbarment by the Law Society. In the appendix, the Respondent represented that he had been disbarred in July 1994 [sic] for "failing to keep proper set of books as required by Law Society regulations; failure to file annual statement for year 1991; and improper (mistaken) transfer of $1,700 from client account to personal account." The Respondent further represented that "no criminal or fraudulent conduct alleged or found. Client reimbursed as mistaken transfer of funds belatedly corrected".

16. The Respondent submitted with the Application a copy of the disbarment order issued by the Law Society on June 22, 1995 and a copy of the Report and Decision of the Law Society Discipline Committee concerning his suspension in 1993. The Respondent did not include a copy of the Report and Decision of the Discipline Committee, dated April 6, 2995, concerning his disbarment.

17. The Respondent failed to fully and accurately describe the circumstances surrounding his disbarment on the Application and to IG by:

(i) failing to acknowledge that the Report and Decision of the Law Society Discipline Committee concerning his disbarment found that he was guilty of misappropriation of client funds;

(ii) mischaracterizing his misappropriation of client funds as an "improper (mistaken) transfer" of client monies that was subsequently corrected; and

(iii) failing to include a copy of the Report and Decision of the Discipline Committee, dated April 6, 1995, setting out the Law Society's findings with respect to his disbarment.

Allegation #2

18. CC and EC are husband and wife and were clients of IG. The Respondent was the mutual fund salesperson responsible for CC's and EC's accounts.

19. In or around May 2005, during the course of a meeting with CC and EC, the Respondent agreed to prepare, or arrange for IG to prepare, wills for CC and EC in

exchange for a fee of $150. EC paid the Respondent $150 for this service. Over the course of the next year, EC made repeated inquiries about the status of the wills but the Respondent never provided any wills to CC and EC.

20. The Respondent made inquiries with the Law Society to determine whether he was permitted to draft wills, but was informed that he was not permitted to do so.

21. IG was not aware that the Respondent had represented to CC and EC that he would prepare, or arrange for IG to prepare, wills for CC and EC. The Respondent had not previously sought or obtained authorization from IG to prepare wills for clients.

Allegation #3

22. TC was a client of IG. The Respondent was the mutual fund salesperson responsible for TC's account.

23. In late 2005, the Respondent solicited and accepted $10,000 from TC to invest on TC's behalf. The Respondent told TC that the $10,000 would be invested outside of TC's RRSP account. At the Respondent's request, TC provided the Respondent with a certified cheque in the amount of $10,000 payable to the Respondent personally.

24. On January 10, 2006, the Respondent cashed TC's cheque. There is no evidence that he used the monies to purchase any investments for TC.

25. In response to a complaint by TC concerning the status of his investment, the MFDA contacted the Respondent, who provided no details other than a promise to return the monies to IG. On August 16, 2006, IG received a bank draft in the amount of $10,000 purchased by the Respondent to reimburse TC.

Allegation #4

26. JL was a client of IG. The Respondent was the mutual fund salesperson responsible for JL's account.

27. In 2006, JL informed the Respondent that he did not want to pay any fees on a new account he was opening at IG. At the Respondent's suggestion, the Respondent and JL entered into an agreement (the "Agreement") whereby JL would pay a consulting service fee of approximately $9,000 directly to the Respondent in exchange for the Respondent managing JL's investments. The Respondent proposed and entered into the Agreement without the knowledge or authorization of IG.

28. On April 15, 2006, the Respondent issued an invoice in the amount of $9,375.00 to JL for services to be provided by the Respondent to JL under the terms of the Agreement. The invoice was issued by "Jeffrey Levy L.L.B. Financial Services and Paralegal" and stated, in part:

> SERVICES: Fee for services at the agreed upon rate of 3.75% (less G.S.T.) as applied to $240,000 paid by [JL's company] for a non-registered portfolio

> featuring no-load mutual funds in the name of [JL], to be transferred later to [JL's company] upon request by [JL]. It is acknowledged that G.S.T. is payable on such a fee but the fee is reduced by the amount of such G.S.T. so that the total fee plus G.S.T. plus investment equals $250,000 (C.D.) Services provided include meetings; telephone communications, and selection of appropriate mutual funds and follow-up on the portfolio and manual registration of the portfolio on the interest.

29. On April 24, 2006, JL provided two cheques to the Respondent. The first cheque was payable to IG in the amount of $240,625 for deposit in JL's account at IG. The second cheque was payable to the Respondent personally in the amount of $9,375 in satisfaction of the Respondent's invoice.

30. The cheque in the amount of $240,625 was deposited in JL's account at IG and the cheque in the amount of $9,375 was cashed by the Respondent.

31. On May 4, 2006, IG terminated the Respondent.

32. On December 21, 2006, following an investigation by IG, IG deposited an additional $9,375 to JL's account as compensation for the $9,375 paid by JL to the Respondent under the Agreement.

Allegation #5

33. On March 29, 2007, MFDA Staff sent a letter to the Respondent advising that the MFDA had commenced an investigation regarding his conduct while registered as an Approved Person with IG. The letter requested that the Respondent provide a copy of all bank account statements for any account in which he had a direct or indirect interest or over which he had signing authority for the period September 1, 2005 to May 4, 2006. The requested documents were to be submitted to the MFDA by Friday April 13, 2007.

34. On March 30, 2007, the Respondent informed MFDA staff by telephone that he had received the MFDA's letter and would contact his bank for the requested information. He further agreed to contact staff by April 11, 2007 should he require additional time to obtain the banking documents.

35. On April 18, 2007, MFDA staff sent a letter to the Respondent granting an extension for delivery of the requested documents to May 2, 2007. The letter also requested that the Respondent attend the MFDA offices to provide a statement regarding his conduct as an Approved Person with IG. The Respondent was asked to select from the available dates and times outlined in the letter and confirm a date with MFDA staff by May 2, 2007.

36. On May 4, 2007 the Respondent left a voice message for MFDA staff indicating that he had received copies of his bank records and would forward them in the next week. He further stated that he would most likely not be seeking registration. He did not select an interview date, but requested that MFDA staff contact him and indicated he would be available to speak on May 9, 10 or 11, 2007.

37. On May 11, 2007, MFDA staff telephoned the Respondent who confirmed he had only received records for one of his two bank accounts. He stated that he would courier the account documents to the MFDA on May 15, 2007.

38. On May 15, 2007, the Respondent telephoned the MFDA to request a fax number where he could forward copies of his bank account records and confirmed his attendance at the MFDA office on June 19, 2007.

39. On May 15, 2007, MFDA staff sent a letter to the Respondent confirming his attendance at the MFDA's offices on June 19, 2007.

40. On May 24, 2007, MFDA staff sent a letter to the Respondent advising that the MFDA had not received the documents promised and requesting that the Respondent provide them prior to June 19, 2007.

41. On May 25, 2007, MFDA staff received a voicemail message from the Respondent acknowledging receipt of the May 24, 2007 letter and indicating that his bank records for one account had been forwarded to the MFDA.

42. On May 28, 2007, MFDA staff received a fax from the Respondent confirming his attendance at the MFDA offices on June 19, 2007. However, the Respondent advised that he would not be providing copies of his bank account statements.

43. On May 29, 2007, MFDA staff sent a letter to the Respondent advising that he was obligated to produce the bank records requested by the MFDA pursuant to MFDA By-law No. 1, section 22.1(b).

44. On June 18, 2007, MFDA staff received a fax from the Respondent advising that he would not be attending the interview scheduled at the offices of the MFDA on June 19, 2007.

Misconduct Admitted

45. By engaging in the conduct described above, the Respondent admits that he:

(a) made statements to the Ontario Securities Commission and the Member regarding the circumstances of his disbarment by the Law Society of Upper Canada which were misleading in light of the circumstances under which they were made, and further failed to provide information that was required to be provided in order to make his statements not misleading; contrary to MFDA Rule 2.1.1;

(b) failed to deal fairly, honestly, and in good faith with clients CC and EC by accepting $150 to prepare, or arrange for the Member to prepare, wills for them which he subsequently failed to deliver, contrary to MFDA Rule 2.1.1.;

(c) failed to deal fairly, honestly, and in good faith with client TC by accepting $10,000 from TC to invest on TC's behalf and thereafter failing to account for the monies, contrary to MFDA Rule 2.1.1.

(d) accepted $9,375 in remuneration for client JL in respect of investment related services to be provided by the Respondent to JL on behalf of the Member, contrary to MFDA Rule 2.4.1.

(e) failed to cooperate with the MFDA by failing to produce copies of bank statements requested by the MFDA and declining to attend an interview for the purposes of providing a statement regarding his conduct while an Approved Person, contrary to section 22.1(b) and (c) of MFDA By-law No. 1."

THE LAW

9. The Respondent has admitted to violations of MFDA Rules 2.1.1, 2.4.1 and section 22.1 of MFDA By-law No. 1.

10. MFDA Rule 2.1.1 articulates the standard of conduct expected of all Approved Persons, and encompasses the most fundamental obligations of all registrants in the securities industry. It provides, in part, as follows:

"2.1.1 …….. each Approved Person of a Member shall:

(a) deal fairly, honestly and in good faith with its clients;
(b) observe high standards of ethics and conduct in the transaction of business;
(c) not engage in any business conduct or practice which is unbecoming or detrimental to the public interest; and . . ."

11. In our view, it is clear that an Approved Person commits a breach of these fundamental obligations when he, as the Respondent did here, makes misleading statements to the Ontario Securities Commission ("OSC") and/or a Member and when he fails to deal fairly, honestly and in good faith with his clients.

12. MFDA Hearing Panels have consistently held that an Approved Person's failure to account for monies received from a client, whether borrowed from the client or given to the Approved Person to invest on the client's behalf, is dishonest and inconsistent with the standard

of conduct set out in MFDA Rule 2.1.1.

Re: *In the Matter of Earl Crackower*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File No. 200506, Panel Decision dated May 12, 2005 ("*Crackower*") at page 5.

Re: *In the Matter of Stephan Headley*, [2006] Hearing Panel of the Ontario Regional Council, MFDA File No. 200509, Panel Decision dated February 21, 2006 ("*Headley*") at page 21.

13. MFDA Rule 2.4.1 provides that no Approved Person shall accept, directly or indirectly, any remuneration, gratuity, benefit or any consideration from any person other than the Member in respect of the business carried out by the Approved Person on behalf of the Member.

14. In our view, it is clear that an Approved Person is in breach of this Rule where, as here, the Approved Person accepts remuneration, such as portfolio management fees, directly from a client in respect of business carried on by the Approved Person on behalf of the Member.

15. Section 22 of MFDA By-law No. 1 provides that, for the purposes of any examination or investigation, an Approved Person may be required by the MFDA to produce for inspection and provide copies of the books, records and accounts of any person relevant to the matters being investigated, and may be required to attend and give information respecting any such matters.

16. Here, the Respondent repeatedly failed to cooperate with the MFDA in respect of the matters set out in section 22.1 and is clearly in breach of same.

17. Numerous MFDA Hearing Panels have held that failure to attend an interview with MFDA Staff and/or failure to provide the MFDA with documentation as requested, amounts to a violation of s. 22.1 of MFDA By-law No. 1.

Re: *Headley*, *supra*, at pages 22 and 23.

Re: *In the Matter of Arnold Tonnies*, [2005] Hearing Panel of the Prairie Regional Council, MFDA File No. 200503, Panel Decision dated June 27, 2005 ("*Tonnies*") at page 20.

Re: *Crackower*, *supra*, at page 5

PROPOSED PENALTIES

18. Staff submitted that the appropriate penalty to impose on the Respondent is a permanent

prohibition from conducting securities related business in any capacity while in the employ of or associated with any MFDA Member. The Respondent suggested a 10 year suspension.

19. Staff suggested a fine in the amount of $25,000 and costs in the amount of $2,500. The Respondent did not oppose either of those submissions.

20. The parties jointly submitted that the Hearing Panel should determine the appropriate penalty on the basis of the Agreed Statement of Facts.

FACTORS TO BE CONSIDERED

21. The Supreme Court of Canada, in the case of *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at paragraph 59, held that the primary goal of securities regulation is the protection of the investor. The Supreme Court also found that other goals included:

> ". . . ensuring public confidence in the system."

The *Pezim* Decision has been cited with approval in several MFDA Decisions, including *Robert Roy Parkinson* and *Tonnies*.

> Re: *In the Matter of Robert Roy Parkinson*, [2005] Hearing Panel of the Ontario Regional Council, MFDA File no. 200501, Panel Decision dated April 29, 2005 ("*Parkinson*"), at page 13.
>
> Re: *Tonnies, supra,* at page 21.

22. In our view, any sanctions which we impose should be preventative, protective and prospective in nature. One of the main objectives of securities regulation is to prevent harm to investors and the capital markets. In this regard, the Supreme Court of Canada has determined that the role of the OSC, under its public interest jurisdiction, is:

> ". . . to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets."

Re: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission*), [2001] 2. S.C.R. 132.

Re: *Parkinson, supra,* at page 13.

Re: *Tonnies, supra,* at page 22

23. We believe that, in the circumstances of this case, this succinctly reflects the role of this Hearing Panel.

24. We believe that the *Parkinson* and *Tonnies* Decisions correctly found that in determining the appropriate sanctions, this Hearing Panel should, *inter alia*, take into account the following considerations:

(a) the protection of the investing public;
(b) the integrity of the securities markets;
(c) specific and general deterrence;
(d) the protection of the MFDA's membership; and
(e) the protection of the integrity of the MFDA's enforcement processes

Re: *Parkinson, supra,* at page 14.

Re: *Tonnies, supra,* at page 22

25. In the *Cartaway Resources Corp.* Decision, the Supreme Court of Canada has held that it is appropriate for a Hearing Panel to include general deterrence amongst the factors that it takes into account when determining an appropriate penalty. The Supreme Court of Canada stated, at paragraph 61 of that Decision, that:

> "A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction . . . The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged . . ."

Re: *Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 at para. 61.

Re: *Tonnies, supra,* at page 22

26. Previous MFDA Hearing Panels have set out a number of additional factors which should

be considered when determining an appropriate penalty. These include:

(a) The seriousness of the allegations proved against the respondent;
(b) The respondent's past conduct, including prior sanctions;
(c) The respondent's experience in the capital markets;
(d) The level of the respondent's activity in the capital markets;
(e) Whether the respondent recognizes the seriousness of the improper activity;
(f) The harm suffered by investors as a result of the respondent's activities;
(g) The benefits received by the respondent as a result of the improper activity;
(h) The risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction;
(i) The damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities;
(j) The need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity;
(k) The need to alert others to the consequences of inappropriate activities to those who are permitted to participate in capital markets; and
(l) Previous decisions made in similar circumstances

Re: *Parkinson, supra*, at pages 14 and 15.

Re: *Tonnies, supra*, at page 23

27. An additional source of factors to be taken into account when determining the appropriate penalties to be imposed in disciplinary proceedings is the MFDA Penalty Guidelines. The Penalty Guidelines were published to assist Hearing Panels when imposing penalties in disciplinary proceedings and to enable Staff and respondents to take appropriate factors and penalty ranges into account when negotiating settlements in disciplinary proceedings. As stated in the introduction to the Penalty Guidelines under the heading "Purpose of the MFDA Penalty Guidelines":

> **Range Is Guideline Only**
> The penalty types and ranges stated in the Guidelines are not mandatory. The Guidelines suggest the types and ranges of penalties that would be appropriate for particular case

types. The Guidelines are intended to provide a basis upon which discretion can be exercised consistently and fairly in like circumstances but are not binding on a Hearing Panel.

28. The Guidelines state, *inter alia*, the following:

(a) For breach of standard of conduct:

1. Minimum fine $5,000;
2. Suspension or permanent prohibition in egregious cases.

(b) Misappropriation:

1. Minimum fine of $25,000;
2. In almost all cases, a permanent prohibition.

(c) Failure to cooperate:

1. Minimum fine of $50,000;
2. Permanent prohibition

CONSIDERATIONS IN THE PRESENT CASE

29. The nature of the misconduct admitted to by the Respondent is extremely serious and long-lasting.

30. By failing to deal fairly, honestly and in good faith with his clients and by providing misleading information to the OSC and the Member about the circumstances of his disbarment, the Respondent has engaged in repeated conduct which clearly falls short of the standard set out in Rule 2.1.1.

31. In our view, the failure of an Approved Person to comply with repeated requests by an MFDA Investigator, made pursuant to Section 22.1 of the By-law, is serious misconduct. The actions of the Respondent subverted the ability of the MFDA to perform its regulatory functions by fully investigating this particular matter and determining, in an expeditious manner, all of the relevant facts. The repeated failure to provide the requested information and documentation, in our view, undermined the integrity of the self-regulatory system and the effectiveness of its operation.

32. As indicated, the MFDA Penalty Guidelines provide that, in cases of misappropriation and failure to cooperate with MFDA Staff, the penalty is almost always a permanent prohibition.

33. The Respondent has not been the subject of any previous MFDA disciplinary proceedings.

34. However, the Respondent has, in the past, been disbarred by the Law Society of Upper Canada for professional misconduct for borrowing from a client and for two instances of misappropriation. In our view, the past disregard for the regulatory requirements of other professional bodies is an aggravating factor when determining the appropriate penalty.

RESPONDENT'S RECOGNITION OF THE SERIOUSNESS OF HIS MISCONDUCT

35. By making the admissions in the Agreed Statement of Facts, the Respondent has shown some recognition of the seriousness of his misconduct. These admissions also reduced the potential length and expense of the Hearing on the Merits. These are, in our view, mitigating circumstances.

CLIENT HARM AND BENEFIT RECEIVED BY THE RESPONDENT

36. The Respondent accepted money from clients to either prepare, or arrange for the Member to prepare, wills for two clients. Despite repeated requests, the wills were never prepared.

37. The Respondent solicited and accepted funds from a client to invest on the client's behalf. The Respondent admitted in the Agreed Statement of Facts that there is no evidence that he used the monies to purchase any investments on the client's behalf. Some eight months later, the funds were returned to the client.

38. The Respondent directly received a "consulting fee" for managing certain investments. This fee was subsequently returned by the Member, not the Respondent.

39. These noted instances of harm to clients and benefit for the Respondent are clearly aggravating factors.

PREVIOUS DECISIONS MADE IN SIMILAR CIRCUMSTANCES

40. Staff provided the Hearing Panel with three Decisions where the Director of the OSC determined that providing incomplete or misleading information on an Application for Registration is one factor which supported a denial of registration. Staff submitted that these Decisions supported its position that a permanent prohibition is warranted in this case.

41. Previous MFDA Hearing Panels have held that a permanent prohibition is appropriate in cases of misappropriation and/or failure to account for client funds.

Re: *Crackower, supra,* at pages 9 – 10.

Re: *Headley, supra,* at page 32.

Re: *Parkinson, supra,* at page 26

42. The quantum of the fine, it has been suggested, should roughly equal the amount misappropriated or borrowed. In this case, the Respondent has largely returned the funds misappropriated or borrowed, resulting in a reduction of the fine sought by Staff.

Re: *Crackower, supra* at page 9

43. Previous Decisions of various MFDA Hearing Panels have determined that the appropriate penalty to be imposed in the case of an individual who is in breach of s. 22.1 of MFDA By-law No. 1 is a fine of $50,000. In this case, the quantum of the suggested fine has been reduced in recognition of the Respondent's cooperation with respect to the admissions made in the Agreed Statement of Facts.

Re: *Crackower, supra* at page 9.

Re: *Headley, supra,* at page 30.

Re: *Parkinson, supra,* at pages 16 – 17.

Re: *Tonnies, supra,* at page 26

SPECIFIC AND GENERAL DETERRENCE

44. We believe that we have an obligation to ensure that the penalties imposed will deter future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by industry participants and foster confidence in the regulatory process.

PENALTIES IMPOSED

45. We have no hesitation in concluding that the admitted conduct of the Respondent should result in a permanent prohibition. The Respondent should not now, or at any time in the future, be permitted to conduct securities related business in any capacity while in the employ or associated with any MFDA Member.

46. We had a lot more difficulty with the level of the proposed fine. In our view, given the nature and extent of the misconduct of the Respondent, it is on the low side, and, if requested, we would have imposed a significantly larger fine. However, as the $25,000 fine was the amount proposed by Staff in the Agreed Statement of Facts, an amount not opposed by the Respondent, we are prepared to accede to same.

47. Likewise, we will agree to the suggested costs amount of $2,500.

48. In summary, the penalties which we impose on the Respondent are the following:

(a) A permanent prohibition on the Respondent from conducting securities related business in any capacity while in the employ of, or associated with, any MFDA Member pursuant to s. 24.1.1(e) of MFDA By-law No. 1;

(b) A fine in the amount of $25,000 pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and

(c) Costs in the amount of $2,500 pursuant to s. 24.2 of MFDA By-law No. 1.

DATED this 29th day of July, 2010.

"Thomas J. Lockwood"
Thomas J. Lockwood, Q.C.,
Chair

"Selwyn Kossuth"
Selwyn Kossuth,
Industry Representative

"Hugh McNabney"
Hugh McNabney,
Industry Representative

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