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: Ernest Victor Romain

Heard: August 25, 2016 in Toronto, Ontario
Decision and Reasons: September 19, 2016

DECISION AND REASONS

Hearing Panel of the Central Regional Council:

Martin L. Friedland, C.C., Q.C.	Chair
Colleen Waring	Industry Representative
Robert C. White	Industry Representative

Appearances:

Sarah Glickman	)	Counsel for the Mutual Fund Dealers Association of Canada
Ernest Victor Romain	)	Not in attendance or represented by Counsel

Background

1. This is a Hearing under Sections 20 and 24 of By-law No. 1 of the Mutual Fund Dealers Association of Canada (the "MFDA"). The hearing was held on Thursday, August 25, 2016. Ernest Victor Romain (the "Respondent" or "Mr. Romain") was not in attendance or represented by counsel at the hearing.

2. The Panel reserved its decision at the conclusion of the August 25, 2016, hearing, with reasons to follow. This is our decision and the reasons for the decision.

3. The Respondent was registered with Investors Group Financial Services Inc. ("Investors Group"), a member of the MFDA, between June 1988 and April 2014. Between April 28, 2014, and October 9, 2015, the Respondent was registered in Ontario, Alberta and Quebec as a mutual fund salesperson (now known as a Dealing Representative) with Mandeville Wealth Services Inc. ("Mandeville"), a member of the MFDA. While registered with Mandeville, the Respondent conducted business in the Dundas, Ontario area.

4. On September 9, 2015, Mandeville terminated the Respondent's agency agreement effective December 31, 2015. On October 8, the Respondent advised Mandeville that he was immediately terminating his Agency Agreement with Mandeville.

Alleged Misconduct

5. The Notice of Hearing alleges that:

a) between May 2014 and September 2014, the Respondent obtained and maintained 134 pre-signed account forms in respect of 85 clients, contrary to MFDA Rule 2.1.1;
b) on August 8, 2015, the Respondent engaged in unauthorized discretionary trading by processing 5 withdrawals in respect of 7 clients without obtaining the client instructions, contrary to MFDA Rules 2.3.1(a) and 2.1.1; and
c) on August 8, 2015, the Respondent misled the Member by falsely representing to the Member that he obtained client instructions to process 5 withdrawals in respect of 7

clients, thereby interfering with the Member's ability to supervise the Respondent's trading activity and engaging in conduct unbecoming an Approved Person, contrary to MFDA Rules 1.1.2, 2.5.1 and 2.1.1.

Respondent's Participation in the Hearing

6. As stated above, the respondent did not take part in the hearing in person or by counsel. Nor did he submit a reply to the allegations or participate in the first appearance. He was not asked to participate in an interview.

7. Under these circumstances, the MFDA Rules of procedure permit a Panel under Rule 7.3 to:

a) proceed with the hearing without further notice to and in the absence of the Respondent; and
b) accept the facts alleged and conclusions drawn by the Corporation in the Notice of Hearing as proven and impose any of the penalties and costs described in sections 24.1 and 24.2 respectively of MFDA By-law No. 1.

8. Moreover, under Rule 8.3 (1): "A Hearing Panel may accept as proven any facts alleged or conclusions drawn by the Corporation in the Notice of Hearing that the Respondent does not specifically deny in the Reply...."

9. Nevertheless, counsel for the MFDA presented sworn evidence through Senior Investigator Ian Smith, who had prepared a detailed affidavit with supporting documents on all the alleged misconduct.

Our findings

10. The Panel has concluded that each of the allegations has been proven to the satisfaction of the tribunal.

Pre-Signed Account Forms

11. There were 134 pre-signed forms found in 85 different client files serviced by the Respondent, which the Respondent had obtained between May 2, 2014 and September 5, 2014, but had not been used to process transactions. It is not known and would be difficult to determine whether forms that had in fact been used had been pre-signed.

12. As counsel for the MFDA states in her submissions to the Panel:

> " 'Pre-signed account forms' is a generic term which is applied to a variety of situations where an Approved Person seeks to rely on a client's signature on a document when the signature was not provided by the client at the time the document was completed. Most commonly, an Approved Person obtains a client's signature on a partially or completely blank account form, such as an order entry or Know-Your-Client form, completes the form, then uses the form to process transactions in the client's account."

13. The potential danger in using pre-signed forms was set out by a Panel in *Re Gary Alan Price* (File No. 200814 at page 22):

> "Pre-signed forms present a legitimate risk that they may be used by an Approved Person to engage in discretionary trading....At its worst, pre-signed forms create a mechanism for an Approved Person to engage in acts of fraud, theft or other forms of harmful conduct towards a client....Pre-signed forms also subvert the ability of a Member to properly supervise trading activity. They destroy the audit trail. The presence of the client's signature on a trade form can no longer be taken as confirmation that the client authorized a particular trade. It also compromises the ability of the Member to subsequently investigate and respond to a client complaint concerning the propriety of trading activity in his or her account."

14. The respondent admits that he was in possession of pre-signed forms. The existence of the pre-signed forms had been discovered by Mandeville and reported to the MFDA on October 23, 2014 in a Member Event Tracking System report, commonly known as a METS report. The forms were for the most part blank, except for the client's name and signature.

15. Mandeville subsequently sent letters to all the Respondent's clients in order to determine whether the Respondent had engaged in any discretionary trading in their accounts. None of the clients reported any concerns.

16. As is well known in the industry, pre-signed forms are not permitted. They are prohibited in the Mandeville Policies and Procedures Manual, have been held by numerous Hearing Panels to be prohibited under MFDA Rule 2.1.1 (see, for example, *Re Gary Alan Price* (File No. 200814) and *Re Kelvin Donald Byce* (File No. 201311), and have been brought to the attention of Approved Persons in a number of MFDA notices and bulletins (see, for example, MFDA Staff Notice MSN-0066, dated October 31, 2007 and updated March 4, 2013, and MFDA Bulletin #0661, dated October 2, 2015).

17. In a letter to MFDA staff, dated December 16, 2014, the Respondent noted that the forms were signed in the course of transferring clients from Investors Group to Mandeville. He stated:

> "The purpose in getting the forms signed was to get accounts moving to Mandeville after clients indicated that they wanted to follow me. Once the account had been moved over, it was my plan to meet with the clients and conduct a longer meeting where financial planning and investment recommendations would be the focus.
>
> During these initial meetings, I had packages of documents that had been provided to me. These forms were part of those packages. Without thinking about it, I had the clients sign all the forms.
>
> This was an error on my part, and all I can say is that given the amount of paperwork and the number of clients, I didn't realize the error. I now know that I need to be much more careful in completing paperwork."

18. There is no evidence of client harm arising from the Forms and no evidence that the Respondent received any financial benefit arising out of the Forms.

19. Mandeville imposed disciplinary action on the Respondent, which included a fine of $10,000 to be paid to a charity of the Respondent's choice, a charge of about $20,000 from the

Respondent's commissions over a stated period of time, and a period of strict supervision, which required Mandeville to review all client notes for evidence of client authorization and to approve all of the Respondent's transactions before processing. No action was taken at the time by the MFDA.

Unauthorized/Discretionary Trading

20. On September 3, 2015, Mandeville advised MFDA Staff that the Respondent had engaged in unauthorized/discretionary trading.

21. The Respondent, who was then on strict supervision, had asked Mandeville to approve 13 withdrawals of funds in a number of client accounts towards payment of fees owing on the clients' "Prosperity Program" accounts. The Prosperity Program was a program that offered high net worth clients the option of investing in its Prosperity Program, which offered additional investment services to the clients via a fee structure based on the market value of the invested assets.

22. The Respondent, through his assistant, represented to Mandeville by email that he had obtained client approval for all the withdrawals. Mandeville then approved the withdrawals on the basis of the Respondent's email.

23. Mandeville later discovered that 7 of the clients had not authorized the withdrawals. On September 3, 2015, a second Member Event Tracking System report was sent by Mandeville to the MFDA, a little under a year after the first report.

24. It is clear to the Panel from Senior Investigator Ian Smith's affidavit and his testimony at the Hearing that these 7 clients had not approved the withdrawals.

25. The Respondent admitted to Mandeville in a letter on October 8, 2015 that he did not speak directly to some of the clients prior to the trades being executed, but "left them a message

outlining what steps were being taken by Mandeville to liquidate investments to fund the fee payment." A similar letter was sent on the same date to the MFDA.

26. The Respondent claimed that he did not need client authorization to process the withdrawals, noting a clause in the Prosperity Program Client Agreement that allows Mandeville to collect fees without the client's permission. The clause reads as follows:

> "Mandeville Wealth Services Inc. will collect Fees: first, from any free cash balance in the fee payment billing account designated by the client as above (except for Registered Accounts); and, next, from the liquidation or withdrawal (which the client hereby authorizes) of any other securities in any Account(s) that is owned by the Client or, in the case of a trust, are owned by the beneficial owner of the trust, for which the Account has been established."

27. Mandeville, however, takes the position that although Mandeville can liquidate securities without the client's authorization, Approved Persons cannot do so.

28. Mandeville's position is supported by its Client Manual, which states in relation to payment of client fees: "You [the client] understand that liquidating trades will be placed by Mandeville Head Office to satisfy the debit balance in your account(s)....until such time that all debits are satisfied." It then lists the order for selection of assets to liquidate, starting with cash. The manual does not mention Approved Persons as having the power of liquidation.

29. Moreover, a power point presentation made by Mandeville to its Approved Persons in 2014 appears to limit the role of an Approved Person to asking the client for directions. It states: "The advisor must contact the client to determine if the client would like to deposit money into the account or which holdings should be sold to address debit position." It does not state that the Approved Person can liquidate the holdings without the clients' consent.

30. We therefore interpret the provision as *not* allowing the Respondent to liquidate the securities without the client's actual consent.

31. Allegation 2 calls this conduct "unauthorized discretionary trading." Two rules are referred to: Rules 2.3.1(a) and 2.1.1.

32. Discretionary trading is not defined in the Rules. Rule 2.3.1 (a) simply states: "Prohibition. No Member or Approved Person shall accept or act upon a general power of attorney or other similar authorization from a client in favour of the Member or engage in any discretionary trading." A later Rule, 2.3.2, permits discretionary trading under a Limited Trading Authorization and requires certain safeguards.

33. In the Panel's view the Respondent's conduct fits better under Rule 2.1.1, which can cover unauthorized trading, rather than under Rule 2.3.1. We note that the MFDA Penalty Guidelines refer to "Discretionary/Unauthorized Trading," drawing a distinction between the two. The Guidelines defines "unauthorized trading" as "the practice whereby a Member or Approved Person makes trades without the client's knowledge or approval." "Discretionary Trading," on the other hand, is defined as:

> "the practice whereby a Member or Approved Person is granted authority by the client to make a trade without obtaining specific instructions from the client prior to the execution of the trade concerning one or more of the elements of the trade: the selection of the security to be purchased or sold, the amount of the security to be purchased or sold and the timing of the trade."

34. In our view, the Respondent's trading conduct fits better under Rule 2.1.1, than under Rule 2.3.1. There is a measure of ambiguity in using Rule 2.3.1. If it covers discretionary trading by the Approved Person in these circumstances, could it not also cover such trading by the Member? Yet, it seems clear to us that the Member is not liable in such cases since the client signed an account agreement specifically allowing the Member to sell the client`s holding in order to satisfy the fees payable for managing the account.

Misleading the Member

35. It is clear from the evidence we heard that the Respondent misled the Member about obtaining authority to complete the withdrawals. This occurred in the Respondent's August 8, 2015 email to the Member, as well as in the client notes on file.

36. Hearing Panels have held that where an Approved Person misleads the Member either in the course of its supervision or during an investigation into his or her activities, the Approved Person's conduct violates MFDA Rule 2.1.1. See, for example, *Re Robert Andrew Shaw* (File No. 201359) and *Re Daniel MacWhirter* (File No. 201541). The Panel stated in *Re MacWhirter*:

> "Hearing Panels have held that misleading a Member during its investigation is a violation of the standard of conduct as set out in MFDA Rule 2.1.1.
>
> The misleading of investigators or Compliance staff, whether of the MFDA or of the Member in fulfilling its regulatory obligations to supervise, interferes with the reasonable supervisory role and may result in an investigation being closed down prematurely or diverted down an avenue of inquiry that wrongly implicates others, both of which may result in misconduct going undetected."

37. In our opinion this allegation of misleading the Member is the most serious of the three allegations. It is particularly serious because the Respondent was on strict supervision at the time because of his prior conduct in using pre-signed forms.

Penalty

38. Counsel for the MFDA has proposed the following penalties:

a) a fine of at least $50,000 pursuant to section 24.1.1(b) of By-law No. 1; and
b) a prohibition for a period of 2 years from conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA, pursuant to section 24.1.1(e) of MFDA By-law No. 1.

39. As to costs, counsel states: “An award of costs against the Respondent in the amount of $7,500 would be appropriate in the circumstances.”

40. We award the MFDA $7,500 for costs. This was a lengthy and difficult investigation by the MFDA.

41. A prohibition for a period of 2 years is also appropriate in this case. The conduct was serious, particularly the charge of misleading the Member.

42. Because this is not a Settlement Hearing we are free to select the monetary figure we think is appropriate. That figure is $40,000.

43. The reduction from the suggested fine is in part because the Member has already fined the Respondent $10,000, which the Respondent paid to a charity. The Respondent was also penalized $20,000 in pay because of his misconduct in using pre-signed forms.

44. We have also taken into account the fact that the Respondent has been in the industry since 1988 without any alleged misconduct. Moreover, no one was hurt by his conduct and six of the seven clients who did not consent to the improper redemptions in allegation 2 chose not to have the transaction reversed when offered that option by Mandeville. The seventh person did not respond to the offer.

45. We have examined the cases cited to us by counsel. No case was reasonably comparable to the present case. Some were Settlement Hearings, which are often difficult to interpret. Others had factors that did not apply in the present case. We have concluded that a penalty of $40,000 is consistent with these other cases and is not out-of-line with the MFDA penalty guidelines.

46. Specific and general deterrence is important in disciplinary cases. (See *Re Cartaway Resources Corporation* [2004] 1 S.C.R. 672). We believe that the penalty we are imposing will provide the required deterrent effect on the Respondent and others in the industry.

47. For the above reasons we find that the three charges have been proven to the satisfaction of the Panel and we impose the following penalty:

a) a fine of $40,000; and
b) a prohibition for a period of 2 years from the date of our decision from conducting securities related business in any capacity while in the employ of or associated with any Member of the MFDA.

48. In addition, we award costs in the amount of $7,500.

DATED this 19th day of September, 2016.

"Martin L. Friedland"

Martin L. Friedland, C.C., Q.C.
Chair

"Colleen Waring"

Colleen Waring
Industry Representative

"Robert C. White"

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