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 24OF BY-LAW NO. 1 OF
THE MUTUAL FUND DEALERS ASSOCIATION OF CANADA

Re: Terry William Sukman

Heard: April 19, 2016 in Toronto, Ontario
Reasons for Decision: May 9, 2016

REASONS FOR DECISION

Hearing Panel of the Central Regional Council:

The Hon. Patrick T. Galligan, Q.C.	Chair
Brigitte J. Geisler	Industry Representative
Guenther W. K. Kleberg	Industry Representative

Appearances:

David Halasz	)	Counsel for the Mutual Fund Dealers Association of Canada
Natalia Vandervoort	)	Counsel for the Respondent

1. By Notice of Hearing dated July 21, 2015, The Mutual Fund Dealers Association of Canada (the "MFDA") made the following allegations of misconduct against Terry William Sukman (the "Respondent"):

Allegation #1: Between August 2012 and May 2013, the Respondent accepted and held a power of attorney for property from client XX, and was appointed as estate trustee, executor and trustee of client XX in her Will, contrary to MFDA Rules 2.3.1, 2.1.4 and 2.1.1.

Allegation #2: Between August 2012 and May 2013, the Respondent engaged in personal financial dealings with client XX by:

(a) accepting an entitlement to a $10,000 legacy in lieu of executor fees; and
(b) accepting joint ownership in one account and designation as beneficiary of two accounts held by client XX at the Member,

thereby giving rise to conflicts or potential conflicts of interest between the Respondent and client XX which the Respondent failed to address by the exercise of responsible business judgment influenced only by the best interest of client XX, contrary to MFDA Rules 2.1.4 and 2.1.1.

PRELIMINARY MATTERS

2. At the first appearance, held on September 9, 2015, the hearing was fixed to proceed on January 19 and 20, 2016. The hearing was later adjourned, upon the consent of the parties, to April 19 and 20, 2016.

3. When the case came on for hearing the parties advised that they would proceed on the basis of an Agreed Statement of Facts and that they would make a joint submission in respect to the penalty to be imposed. The Agreed Statement of Facts was filed as an exhibit.

4. We then reviewed the Agreed Statement of Facts, heard the submissions of counsel for the parties and withdrew from the hearing room to consider our decision.

5. After deliberation we decided that the allegations made in the Notice of Hearing had been established to the required degree of proof and that the joint submission as to penalty should be accepted. We returned to the hearing room and advised the parties of our decision and that written reasons for the decision would be delivered in due course. These are those reasons.

THE CIRCUMSTANCES

6. All of the circumstances relevant to our decision are found in Parts III and IV of the Agreed Statement of Facts. For ease of reference we set out those Parts in full.

III. ADMISSIONS AND ISSUES TO BE DETERMINED

4. The Respondent has reviewed this Agreed Statement of Facts and admits the facts set out in Part IV herein. The Respondent admits that the facts in Part IV 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 By-law No. 1.

5. Subject to the determination of the Hearing Panel, Staff submits, and the Respondent does not oppose, that the appropriate penalty to impose on the Respondent is:

(a) a prohibition on the Respondent's authority to conduct securities related business while in the employ of or associated with any MFDA Member for a period of one year, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
(b) a fine in the amount of $10,000 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.

IV. AGREED FACTS

6. Staff and the Respondent agree that submissions made with respect to the appropriate penalty are based only on the agreed facts in Part IV 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.

7. Nothing in this Part IV is intended to restrict the Respondent from making full answer and defence to any civil or other proceedings against him.

Registration History

8. Since July 1986, the Respondent has been registered in Ontario as a mutual fund salesperson (now known as a dealing representative) with Investors Group Financial Services Inc. ("Investors Group"), a Member of the MFDA.

9. At all material times, the Respondent operated out of a sub-branch located in Mississauga, Ontario.

10. The Respondent has not previously been subject of disciplinary proceedings.

Background

11. Client XX was born in 1925, and is currently 91 years of age. Client XX is a widow with no immediate family. Client XX was a client of Investors Group whose accounts were serviced by the Respondent between approximately 2004 and January 2013.

12. Client XX held three accounts at Investors Group consisting of: (1) a non-registered account; (2) a Registered Retired Income Fund account ("RRIF"); and (3) a Tax Free Savings Account ("TFSA") (collectively, the "Accounts").

13. At all material times, client XX was unsophisticated financially, and a novice investor.

14. Over the years that the Respondent serviced client XX's accounts, the Respondent assisted client XX with her financial and personal affairs, including accompanying her to the bank, preparing and filing her income tax returns, and paying her bills. In 2011 and 2012, the Respondent observed that client XX's physical and mental health was declining.

15. In the period that the Respondent serviced client XX's accounts, client XX amended her Power of Attorney ("POA") and Will multiple times.

Appointment as Power of Attorney for Property and as Executor in Client XX's Will

16. Beginning in 2011, client XX approached the Respondent about becoming her:

(a) POA for property; and
(b) executor and partial beneficiary of her estate.

17. The Respondent states that client XX asked the Respondent if he knew a lawyer. The Respondent states that he provided client XX with the name of a lawyer who he knew did estates work. The Respondent states that for about a year, client XX continued to ask the Respondent to take her to that lawyer.

18. The Respondent kept an electronic written record on the Investors Group interactions log dated May 2, 2012 of his discussion with client XX, where he wrote:

> "Since having the recent dispute with BNS and her manager and not fully understanding her billing [XX] is worried about her estate. She has approached me about becoming her POA both medical and financial as well as the executor and partial beneficiary of her estate. There is much to talk about but she wants to relieve her old neighbor and current solicitor from her estate. Her reasoning is that I do almost everything for her and have become kind of a surrogate family member. I still have to pass this through IG Tom MacKechan and Ken Beck. This will mean that I will have to relinquish her accounts and she is aware of this. Her mental faculties are beginning to slow and she is having a harder time coping with monetary issues. She has indicated that it is her bequest to leave her house to me."

19. In or about August 2012, the Respondent called the lawyer to provide a description of client XX's history and asked if the lawyer could assist client XX.

20. In or about August 2012, at the request of client XX, the Respondent took client XX to meet with the lawyer. The Respondent states that he was not present at any meetings that client XX had with her lawyer, and he waited outside while client XX met with the lawyer. The lawyer advised the Respondent that client XX left him a $10,000 bequest in her Will.

21. At the request of client XX, the Respondent also took client XX for a second visit to the lawyer, at which time client XX obtained the signed POA and Will from the lawyer.

22. On August 7, 2012, client XX appointed the Respondent as her POA for property. Client XX appointed her family friend as a substitute POA in the event that the Respondent refused or resigned as a POA.

23. On August 7, 2012, client XX also appointed the Respondent as her POA for personal care, jointly and severally, with client XX's family friend. The Respondent states that it was during the course of Staff's investigation in or about May 2014 that he

first became aware that he was appointed as POA for personal care. This does not form part of the allegations of misconduct in the matter.

24. On August 16, 2012, client XX executed her Will and designated the Respondent as:

(a) estate trustee, executor and trustee of her Will;
(b) beneficiary of a $10,000 legacy in lieu of executor fees; and
(c) beneficiary of any residue of her estate.

25. The Respondent states that it was during the course of Staff's investigation in May 2014 that he first became aware that he was designated as a beneficiary of any residue of client XX's estate. This does not form part of the allegations of misconduct in this matter.

26. Client XX appointed her family friend as a substitute estate trustee, executor and trustee of her Will in the event that the Respondent was unable or unwilling to act on her behalf. The Respondent states that he did not review client XX's Will nor did he receive a copy of it.

27. The Respondent was concerned about client XX's mental health in the period of August 2012 during the time that she amended the POA and Will, as described above.

28. The Respondent did not disclose to Investors Group that he accepted and held a POA from client XX or that he was named in any capacity in client XX's Will.

29. The Respondent did not exercise his authority as POA or his designations under the Will at any given time.

30. The Respondent states that in January or February 2013, he contacted a chartered accountant that he knew, but who was not previously known to client XX, to replace him

as a POA for client XX and a meeting was held with client XX in this regard. The Respondent further states that client XX did not appoint this person as her new POA.

Joint Ownership and Designation as Beneficiary of Client XX's Accounts

31. On or about January 17, 2013, client XX notified the Respondent that she wanted to leave her Investors Group assets to him in the event of her death.

32. As a result, the Respondent proceeded to transfer the Accounts to a new advisor at Investors Group (the "New Advisor"). The Respondent chose the New Advisor and introduced client XX to him. The Respondent provided the New Advisor with client XX's POA, which was then submitted to Investors Group on or about January 28, 2013.

33. The Respondent states that he believed that by transferring the accounts of client XX to the New Advisor in January 2013 that there would be no conflict of interest between him and client XX.

34. The Respondent did not advise Investors Group that client XX notified the Respondent that she wished to leave her Investors Group assets to him. The Respondent did not notify his branch manager or anyone else at Investors Group that he was taking steps to transfer client XX's Accounts to the New Advisor.

35. As of about January 17, 2013, the Respondent was no longer the servicing advisor of the Accounts and had no access to the Accounts.

36. At a meeting attended by the New Advisor, the Respondent and Client XX on or about January 23, 2013, the Respondent and client XX signed Investor Group forms that added the Respondent as:

(a) the sole beneficiary of client XX's RRIF;
(b) the sole beneficiary of client XX's TFSA; and

(c) joint owner with client XX on a new non-registered account.

37. The form naming the Respondent as client XX's designated beneficiary on the TFSA account provided that the designated beneficiary is entitled to receive the proceeds of client XX's TFSA in the event of her death, and directs Investors Group to pay all of her assets or their value to the Respondent. The effect of being designated as a beneficiary on client XX's RRIF is an entitlement to the proceeds of the RRIF in the event of client XX's death.

38. At all material times, Investors Group's policies and procedures manual provided that:

(a) joint owners have the right of survivorship, such that on the death of any joint account owner, the interest in the deceased joint owner will pass directly to the surviving owners and will not form part of the estate of the deceased owner; and
(b) every owner in a joint account has an equal interest in the account, and share equally in the income and capital gains generated by the joint account.

39. As at or about the date the Respondent became a beneficiary, the approximate balance of the TFSA and RRIF accounts were as follows:

(a) Client XX's RRIF: $152,714; and
(b) Client XX's TFSA: $22,194.

40. In a letter to client XX dated February 4, 2013, a representative of the client services department at Investors Group acknowledged receipt of the POA and confirmed that the Respondent may now give instructions on client XX's behalf with respect to her Accounts. As described below, Investors Group's compliance department discovered the POA during its investigation and advised the Respondent that acting as a POA was contrary to its policies.

Investors Group's Investigation

41. At the request of client XX, on or about February 14, 2013, $179,391.75 were transferred from client XX's individual account to the joint account held by the Respondent and client XX.

42. On February 20, 2013, Investors Group conducted a trade review and detected the transfer of assets to the joint account. Further investigation identified the POA that was granted on August 7, 2012 that was submitted to Investors Group on January 28, 2013, naming the Respondent. Investors Group immediately commenced an investigation.

43. On or about February 22, 2013, Investors Group reversed the transfer of client XX's individual non-registered account to the joint account held by her and the Respondent, and removed the Respondent as beneficiary of client XX's RRIF and TFSA accounts.

44. On or about April 12, 2013, client XX complained to Investors Group about the Respondent being her POA and being named on her accounts. Client XX advised that she no longer wished the New Advisor to be her advisor, and instructed the Member to assign a new advisor from another office as soon as possible.

45. In response, Investors Group advised client XX that "[i]n light of your intentions and signing the documentation we conclude you should have been aware of the details outlined in your Will and you have had appointed [the Respondent] as POA and executor" and that "you felt he was trustworthy of these roles and considered him to be a surrogate family member".

46. It further stated that "we understand that you were not pleased with either [the Respondent] or [the New Advisor] when they provided you with their opinion regarding your spending habits, living arrangements or what you should or should not do in your

home. These topics can be sensitive in nature and from the view of a financial advisor it is their duty to ensure spending habits are brought to your attention and ensure you are on target for your financial objectives. This does include the possibility of downsizing. In my discussion with [the Respondent] and [the New Advisor] they were simply giving you their professional advice for consideration and did not mean to offend you."

47. It further stated "In summary of our findings, although we confirmed you agreed and authorized the appointment of Mr. Sukman as beneficiary on your accounts, POA and Executor, Mr. Sukman should not have accepted these responsibilities or be the recipient of any bequest from you. As your financial advisor, this is a conflict of interest. Mr. Sukman understood he could proceed provided a new servicing consultant was assigned to you. However, having [New Advisor] assigned to you, did not remove this conflict."

48. On or about May 30, 2013, client XX removed the Respondent as POA and as executor, beneficiary and trustee in her Will.

49. Beginning in June 2013, Investors Group placed the Respondent on close supervision.

50. On February 6, 2014, Investors Group issued a letter of reprimand to the Respondent advising him that he contravened Investors Group's policies and regulatory requirements by being appointed as POA for client XX and an executor for client XX's Will, and being named as a beneficiary and joint owner on client XX's accounts.

Investors Group's Policies and Procedures

51. At all material times, Investors Group's policies and procedures expressly prohibited its Approved Persons from acting as POA for clients, acting as an executor of a client's estate, or being named as a beneficiary to a client's estate or an Investors Group

account, unless the client is a member of the Approved Person's immediate family under certain conditions.

Additional Factors

52. The Respondent has cooperated with Staff throughout the course of Staff's investigation and this proceeding.

53. Client XX received legal advice in respect of the changes to her POA and her Will. Client XX met with the New Advisor and the Respondent in respect of the changes to her Accounts. The Respondent states that he did not solicit these changes.

54. The Respondent has not been the subject of prior MFDA disciplinary proceedings.

55. The Respondent has retired from the mutual fund industry and presently has no intention of returning to the industry.

56. There is no evidence that:

(a) the Respondent received any financial benefit from client XX; and
(b) Client XX suffered any financial harm as a result of the Respondent's conduct.

57. By admitting the facts and contraventions described above, the Respondent has:

(a) expressed remorse for his actions; and
(b) saved the MFDA the time and resources associated with conducting a fully contested hearing on the merits.

Misconduct Admitted

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

(a) between August 2012 and May 2013, he held a POA for property from client XX, and was appointed as estate trustee, executor and trustee of client XX in her Will, contrary to MFDA Rules 2.3.1, 2.1.4 and 2.1.1;
(b) between August 2012 and May 30, 2013, he was a beneficiary of a $10,000 legacy in lieu of executor fees, in the Will of Client XX, contrary to Rules 2.1.4 and 2.1.1; and
(c) in January 2013, he accepted a joint ownership in one account and a designation as beneficiary of two accounts held by client XX at the Member, contrary to MFDA Rules 2.1.4 and 2.1.1.

PROOF OF MISCONDUCT

7. The facts set out in the Agreed Statement of Facts, and the Respondent‘s admission in paragraph 58 thereof, make a detailed examination of the circumstances or of the provisions of MFDA Rules 2.3.1, 2.1.4 and 2.1.1 unnecessary. We can say shortly, that the allegations set out in the Notice of Hearing have been established to the requisite degree of proof.

PENALTY

8. The MFDA has suggested that the appropriate penalty to be imposed upon the Respondent is:

a) a prohibition on the Respondent’s authority to conduct securities related business while in the employ of or associated with any MFDA Member for a period of one year, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
b) a fine in the amount of $10,000 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.

9. The Respondent does not oppose that penalty. In fact the parties have made a joint submission to us that we should impose that penalty in this case.

10. Generally speaking it is the duty of a Hearing Panel to impose the penalty which it thinks is appropriate, in a particular case, having regard to a number of well-known and commonly applied factors. Many reported decisions have set out a number of factors which should be considered in determining an appropriate penalty in a given case. The fundamental purpose of a penalty is the protection of the investing public. Among many other factors that a Hearing Panel will consider are specific and general deterrence, the seriousness of the misconduct involved, the protection of the repute of MFDA's Members and employees and the meaningfulness of its enforcement process. A Hearing Panel will always have to consider any circumstances of mitigation. The discretion of a Hearing Panel to decide what is an appropriate penalty is quite a broad one.

11. However, when the parties make a joint submission about the penalty to be imposed the broadness of a Hearing Panel's discretion is significantly restricted. The Court of Appeal for Ontario, in *R. v. R.W.E.*, [2007] O.J. No. 2515 at para. 22 has stated:

> It is trite law that a sentencing judge is not bound to accept a joint submission. It is well settled, however, that a judge should not reject a joint submission unless it is contrary to the public interest and the sentence would bring the administration of justice into disrepute. (Authorities omitted)

12. This decision was referred to with approval by the Hearing Panel in *McAuley (Re)* 2011, LNCMFDA. At para. 5 it stated:

> There is ample authority for the principle that a hearing panel should not interfere with a joint recommendation of MFDA Staff and the Respondent unless the recommendation is seen to be manifestly unfit. (Emphasis is added)

13. The respect paid by the courts and hearing panels to joint submissions is founded in the importance of settlements in the criminal and disciplinary processes. While it was dealing with a Settlement Hearing, the Hearing Panel in an IIROC case, *Re Vorstadt* 2012 IIROC, stated at p.4:

> … we wish to stress the importance of respect for the settlement process. Settlement leads to fair, efficient and economical resolution of disciplinary matters. The settlement process should be encouraged and supported.

14. In order to encourage and support the settlement process the courts say that a joint submission may be rejected only if it is contrary to the public interest and would bring the administration into disrepute. Disciplinary tribunals say that it may be interfered with only if it is manifestly unfit.

15. We consider this a serious case. The Respondent's acceptance of a Power of Attorney was a clear and flagrant breach of Rule 2.3.1(a). As appears from his note, on May 2, 2012, in the interactions log, he was well aware that his conduct was problematic. Yet he proceeded with it.

16. The Respondent's conflict of interest conduct went far beyond mere inadvertence. His client was in her late 80's. She was unsophisticated financially and a novice investor. In May 2012 he knew that her mental faculties were beginning to slow and that she was having a harder time with monetary issues. As early as 2011 he had observed that his client's physical and mental health was declining. By August of 2012 he was concerned about his client's mental health. She was a very vulnerable person at the time she benefited him in her Will and by her disposition of her accounts.

17. There are important circumstances of mitigation. The Respondent has had a long and unblemished career in the financial industry. He made no attempt to avoid his responsibility for his conduct. He has shown remorse by admitting his misconduct and cooperating fully with the MFDA investigation. There is no evidence of financial gain to him or loss to his client.

18. We think it important to state that if we had been called upon to determine the appropriate penalty in this case, at the conclusion of a contested hearing, where there was not a joint submission, the penalty would not have been the penalty which has been jointly submitted to us. The suspension part of the penalty would have been substantially greater than one year.

19. Our task, however, is not to determine the appropriate penalty for this particular case. Our task is to ask ourselves whether we can say that a one-year suspension is contrary to the public interest and likely to bring the administration of justice into disrepute or is manifestly unfit. After anxious consideration we are unable to say that the penalty is so unfit as to entitle us to interfere with the joint submission.

20. Because no two cases are ever the same it is not always helpful to compare decisions in other cases. However we note that in one case, which on its facts is not dissimilar to this one, a Hearing Panel approved a settlement of an identical penalty. See *Karasick (Re)*, [2015] MFDA No. 201427.

21. Counsel for the MFDA also brought to our attention two cases where settlements were approved which involved serious conflicts of interest and where the penalties were less than the penalty which has been suggested in this one. See *Sakkejha (Re)*, [2012] MFDA No. 201140 and *Lambros (Re)*, [2011] MFDA No. 201022.

22. In addition he referred us to *Ryan (Re)*, [2013] MFDA No. 201014. The decision in that case was made after a hearing at which the Respondent did not appear. He misused a Power of Attorney and obtained funds from an elderly client which he did not repay. In addition he failed to cooperate with the MFDA investigation. The penalty included a large fine and a permanent prohibition.

23. Those cases show that there can be a wide range of penalties for this type of misconduct. This case falls well within that range. Thus we were unable to say that the penalty, which had been jointly submitted to us, is either contrary to the public interest and likely to bring the administration of justice into disrepute or manifestly unfit.

24. For the reasons set out herein we make the following decision:

1. The allegations set out in the Notice of Hearing have been established.
2. The following penalty is imposed upon the Respondent:

(a) a prohibition on the Respondent's authority to conduct securities related business while in the employ of or associated with any MFDA Member for a period of one year, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
(b) a fine in the amount of $10,000 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 9th day of May, 2016.

"P. T. Galligan"

The Hon. P. T. Galligan, Q.C.
Chair

"Brigitte J. Geisler"

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