



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: Clinton Wayne

Heard: October 30, 2018 in Toronto, Ontario

Decision: October 30, 2018

Reasons for Decision (Penalty): February 7, 2019

**REASONS FOR DECISION
(Penalty)**

Hearing Panel of the Central Regional Council:

Frederick H. Webber
Brigitte J. Geisler
Guenther W. K. Kleberg

Chair
Industry Representative
Industry Representative

Appearances:

Shelly Feld)	Enforcement Counsel for the Mutual Fund
)	Dealers Association of Canada
)	
)	
Clinton Wayne)	Respondent, in person
)	
)	

I. CASE HISTORY

1. This case was commenced by a Notice of Hearing dated May 20, 2015 (the “NOH”). The Respondent provided an undated written Response in June 2015 (the “Response”). The matter was heard on May 15, 16 and 17, 2017. An oral hearing on misconduct was completed on April 30, 2018. The panel delivered its decision orally, finding the Respondent liable on allegations 1, 3 and 4 in the NOH, but not liable on allegation 2. Written reasons for its misconduct decision were dated June 13, 2018. The penalty hearing took place on October 30, 2018.

II. PENALTY HEARING

2. At the commencement of the hearing, the Respondent had not appeared and counsel for the MFDA advised the panel of MFDA’s efforts to contact the Respondent, with no response from the Respondent. Soon after commencement of the hearing, the Respondent appeared and the hearing then proceeded with the full participation of the Respondent. MFDA counsel repeated the portion of his submissions which had been made prior to the Respondent’s appearance.

III. MISCONDUCT FINDINGS

3. In Reasons for Decision dated June 13, 2018, this panel found that the Respondent engaged in the following misconduct:

- a) Between November 2011 and April 2014, the Respondent had and continued in another gainful employment that was not disclosed to or approved by the Member, contrary to MFDA Rules 1.2.1(c) [formerly MFDA Rule 1.2.1(d)] and 2.1.1;
- b) Between June 2012 and April 2014, the Respondent issued advertisements or sales communications which had not been reviewed and approved by the Member, contrary to MFDA Rule 2.7.3; and
- c) Commencing March 4, 2013, the Respondent failed to comply with his reporting obligations to the Member by failing to report that he had been named a defendant in a civil law suit related to a real estate investment corporation in which he had been a principal.

IV. SUMMARY OF FACTS

4. The following is a summary of the salient facts in this case:
 - a) the Respondent and an associate established a company (the “Company”) which sought to profit from real estate investments, the Respondent acting as an officer and director;
 - b) the Respondent solicited and accepted \$86,500 from his parents and \$100,000 from his in-laws who were mutual fund clients of the Member with whom the Respondent was registered, in order to finance the Company; these funds were obtained by the clients redeeming mutual funds held with the Member;
 - c) the Respondent received \$18,000 from the Company as a result of the money invested in or loaned to the Company which compensation he did not disclose to the clients;
 - d) the Respondent did not provide written disclosure to the Member about the Company, his role therein, the aforesaid investments or loans or the compensation received by him;
 - e) The Member never gave the Respondent approval to engage in the outside business activity associated with the Company;
 - f) Between June 2012 and April 2014, the Respondent issued advertisements and communications in connection with a business trade name “The Financial Coach Co.” that was not disclosed to or approved by the Member;
 - g) Commencing March 4, 2013, when the Respondent was named as a defendant in a lawsuit by an investor who alleged she had invested \$250,000 in the Company, he failed to report the lawsuit to the Member;
 - h) The Respondent personally repaid his parents and in-laws the money they had invested in the Company despite his own losses from investing in the Company.

V. E. PENALTIES SOUGHT

5. The MFDA sought the following penalties:

- a) a prohibition on the authority of the Respondent to conduct securities related business while in the employ of or associated with any Member for a period of not less than 2 years, pursuant to section 24.1(e) of MFDA By-law No. 1;
- b) a fine of \$25,000, pursuant to section 24.1(b) of MFDA By-law No. 1; and
- c) costs of \$10,000, pursuant to section 24.2 of MFDA By-law No. 1.

VI. F. THE LAW

6. The panel agrees with the statements of the applicable legal principles for determining the appropriate penalty outlined in the MFDA's written submissions.

General Factors

7. The primary goal of securities regulation is investor protection and sanctions should be preventative, protective and prospective.

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 577;

Tonnies (Re), 2005 LNCMFDA 7;

Headley (Re), 2006 LNCMFDA 3

Breckenridge (Re), 2007 LNCMFDA 38

8. The following are factors considered by previous panels to determine the appropriate sanction:

- a) the seriousness of the allegations proved;
- b) the Respondent's past conduct;
- c) the Respondent's experience and level of capital markets activity;
- d) whether the Respondent recognizes the seriousness of his misconduct;
- e) harm caused to investors by Respondent's misconduct;
- f) benefits received by Respondent from his activities;
- g) risk to investors and capital markets if the Respondent were to continue to operate;
- h) damage caused to the integrity of the capital markets by the Respondent's misconduct;

- i) the need to deter not only those involved in the case under consideration, but also others in the capital markets, from engaging in similar improper activity;
- j) the need to alert others to the consequences of inappropriate activities;
- k) previous decisions made in similar circumstances.

Tonnies (Re), Headley (Re), and Breckenridge (Re) ibid.

9. The following are factors on which panels frequently focus:

- a) protection of the investing public;
- b) integrity of the securities market;
- c) specific and general deterrence;
- d) protection of the governing body's membership; and
- e) protection of the enforcement process.

Tonnies (Re), Headley (Re), and Breckenridge (Re) ibid.

10. In this case the panel found that specific and general deterrence were particularly relevant. General deterrence is always an important factor, albeit not the only one. Penalties should discourage others from repeating the conduct in which the Respondent engaged in order to advance the goal of investor protection.

Re Cartaway Resources Corp., [2004] 1 S.C.R. 672.

11. Specific deterrence has often been achieved by prohibiting those who engage in serious misconduct from further market participation, and by imposing fines that, at a minimum, result in the disgorgement of profits resulting from the Respondent's misconduct.

Supervision of the Approved Person by the Member

12. A number of cases have recognized the importance of the ability of the Member to supervise its Approved Persons ("APs") to enable the Member to:

- i) promote investor protection,
- ii) safeguard the interests of clients, and

- iii) protect its own interests.

See *Vitch (Re)*, 2011 LNCMFDA 63

13. In *Franco (Re)*, 2011 63, the panel provided more detailed reasons for requiring Member supervision of its APs regarding outside business activities:

- i. to determine whether the outside business should be allowed to operate or its products to be distributed;
- ii. does the involvement in the outside business impair the ability of the AP to provide proper and continuous service to clients;
- iii. if the outside activity is approved, clients can be assured that the Member stands behind it;
- iv. the Member can insure that the transactions are suitable and comply with regulations;
- v. the Member's compliance staff can provide ongoing guidance regarding the outside activity;
- vi. conflicts of interest, actual or potential, can be addressed and resolved in the clients' best interests;
- vii. potential exposure to litigation and other risks can be appropriately managed; and
- viii. procedures can be implemented to supervise the outside activity.

14. In its written submissions, the MFDA added the following considerations:

- i. the Member requires the opportunity to evaluate the ability of the AP to engage in the proposed business in compliance with legal and regulatory requirements;
- ii. the Member must be satisfied that the proposed business complies with the standards of conduct expected in the industry;
- iii. the Member must ensure that the proposed business is properly disclosed to regulatory authorities, per National Instrument 33-109 and complies with the AP's registration;

- iv. the Member must ensure clear disclosure to the clients and customers so that there is no confusion about what services are those of the Member and which are solely those of the AP; and
 - v. the Member must ensure that the pressures of the outside business will not negatively impact the AP's performance as a financial advisor.
15. Specifically, Rule 2.7.3 disclosure requirements are designed to ensure:
- i. the material is accurate and in good taste;
 - ii. the material does not contravene Rule 2.7.2;
 - iii. the material does not promote products not approved by the Member;
 - iv. only approved and compliant trade marks are used; and
 - v. there is no confusion between the services of the Member and those which are not the Member's responsibility.
16. The obligation to report an AP's involvement in a lawsuit is designed to:
- i. alert the Member that the AP has been involved in previously undisclosed outside business activity;
 - ii. enable the Member to conduct a supervisory investigation to determine:
 - (a) whether the allegations are justified;
 - (b) the nature and extent of any misconduct;
 - (c) any impact on clients; and
 - (d) whether any further steps need be taken by the Member.
 - iii. alert the Member regarding its reporting requirements;
 - iv. reflect the need for further supervision;
 - v. disclose risks to the Member;
 - vi. enable compliance with insurance requirements; and
 - vii. disclose stress which might impact the AP's performance as a financial advisor.

17. In this case the Respondent failed to disclose or obtain approval of his outside business activities, disclose or obtain approval of his sales communications and failed to report a lawsuit in which he was involved. All 3 of these contraventions were critical to the inability of the Member to supervise the Respondent. This panel agrees with the factors and disclosure principles outlined above and applied them in coming to its decision on penalty in this case. It was clear to the panel that the Respondent did not appreciate that by becoming an AP, he had entered a regulatory environment which required him to comply with, inter alia, the disclosure requirements described above. He was no longer free to carry on business as he had done prior to becoming an AP. This conclusion by the panel is based not only on the actions of the Respondent, but also on his own statements at the hearing, to the effect that his attention was on the problems encountered in the real estate investment business and not on MFDA matters; that he had no idea of his regulatory obligations arising from his entering the mutual fund business and specifically that he did not realize he needed to disclose to and receive Member approval to engage in the real estate investment business.

MFDA Penalty Guidelines

18. MFDA counsel referred the panel to the MFDA Penalty Guidelines which are not binding on the panel but provide a basis for exercising its discretion on penalty. Regarding the misconduct in this case, the Guidelines recommend various levels of fines, supervision suspensions and permanent prohibition from continuing in the industry. These were considered by the panel in coming to its decision.

Factors Applicable in this Case

Seriousness of the misconduct

19. Based on the Respondent's misconduct, involving his failures to disclose his outside business activity, promotional material and his involvement in a lawsuit, and the numerous reasons that such failures to disclose are important, it is this panel's decision that the Respondent's misconduct constitute serious, not trivial or unimportant, misconduct. This conclusion is consistent with other cases cited to the panel such as Franco (supra) where the panel stated that MFDA Rule

1.2.1(d) [now Rule 1.2.1 (c)] “is fundamental to the regulatory mandate of the MFDA to enhance investor protection and strengthen public confidence in the Canadian mutual fund industry.”

Past Conduct, Experience & Disciplinary History

20. The Respondent had been in the industry for about 2 years when he started the real estate investment business. However, it is the panel’s decision that his relative inexperience is no excuse for his failure to comply with his fundamental disclosure obligations. As a mitigating factor, the Respondent has no previous disciplinary history.

Remorse

21. The MFDA submissions stated that they were satisfied that the Respondent had demonstrated remorse, accepted responsibility for his actions and regrets his misconduct. He cooperated with the MFDA’s investigation and liquidated his assets to reimburse the clients for losses they would otherwise have suffered.

Harm

22. Although the Respondent’s failure to disclose deprived the Member and the clients from the benefits that Member supervision would have provided, the clients did not ultimately suffer financial losses because the Respondent reimbursed them. As a mitigating factor there were no client complaints.

Deterrence

23. As noted by several of the cases cited to the panel, deterrence, both specific and general is a critical objective of disciplinary cases. The MFDA concedes that these proceedings have had a significant deterrent effect on the Respondent. In fact, at the penalty hearing, the Respondent stated that he had no interest in returning to the industry. MFDA counsel stated that this was a case where general deterrence was the primary consideration. This panel agrees that the penalty in this case must achieve both specific deterrence on the Respondent and general deterrence on other industry participants.

Public Interest, Capital Markets & Regulatory Integrity

24. The MFDA submissions state that the sanctions proposed by it would achieve specific and general deterrence as well as advancing the public interest, and fostering confidence in the integrity of the capital markets and the regulatory process.

Cited Cases

25. A number of cases with similar fact situations were provided to the panel as guidance to determine the appropriate sanctions in this case. The panel reviewed and found these cases to be useful guidance in coming to its decision, but its decision finally was determined by the specific facts of this case and the application of the factors listed above.

VII. G. DECISION

26. The MFDA has requested that the Respondent be suspended from industry participation for a period of 2 years, be fined at least \$25,000 and pay costs of \$10,000. Their position is that:

- a) a suspension is appropriate because significant risk to clients arises when an AP engages in outside business activity;
- b) the fine would result in disgorgement of the Respondent's \$18,000 profits plus an amount reflecting the gravity of the misconduct,

and the proposed sanctions strike a balance sufficient to reflect the seriousness of the misconduct and deter the Respondent and others from engaging in similar misconduct, while also acknowledging the mitigating factors in this case.

27. The panel's decision reflects a somewhat different view of the appropriate balance; it is the panel's decision to impose a permanent industry ban (rather than a 2-year suspension), but reduce the amount of the fine to \$7,500 and the costs to \$5,000.

28. As stated in paragraph 17, the Respondent did not demonstrate any appreciation for his reporting obligations as an AP in a regulated industry, and also indicated he had no desire to continue therein. This is serious misconduct and the panel decided that a permanent prohibition from industry participation will better achieve specific and general deterrence while also taking

into account the Respondent's future plans. A reduction of the fine to \$7,500 reflects the Respondent's position that he repaid the \$18,000 (although no corroboration was provided), the absence of harm to the clients due to repayment by the Respondent, the Respondent's acceptance of wrongdoing and cooperation with the MFDA investigation. The panel also took into account the fact that the only clients involved in financing the Company were the parents and in-laws of the Respondent and that their investments simply continued their practice of investing in real estate ventures with the Respondent prior to his becoming an AP. This led the Respondent to believe (incorrectly) that he was not required to disclose their involvement. It also does not detract from the obligation on the Respondent to disclose the outside business activity no matter who was involved in its financing. This consideration is specific to this case and should not be read as condoning borrowing from, or investing with clients who are relatives (or friends). Relatives and friends are often the most vulnerable clients because they tend to put more trust in the AP.

29. Consequently it is the panel's decision that:

- a) the Respondent is permanently prohibited from conducting securities related business in any capacity as an Approved Person of, or in association with, any Member of the MFDA, pursuant to s. 24.1.1(e) of MFDA By-law No. 1;
- b) The Respondent shall pay a fine in the amount of \$7,500, pursuant to s. 24.1.1(b) of MFDA By-law No. 1; and
- c) The Respondent shall pay costs in the amount of \$5,000 pursuant to s. 24.2 of MFDA By-law No. 1.

30. An order to this effect was signed by the panel on October 30, 2018.

DATED this 7th day of February, 2019.

“Frederick H. Webber”

Frederick H. Webber
Chair

“Brigitte J. Geisler”

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