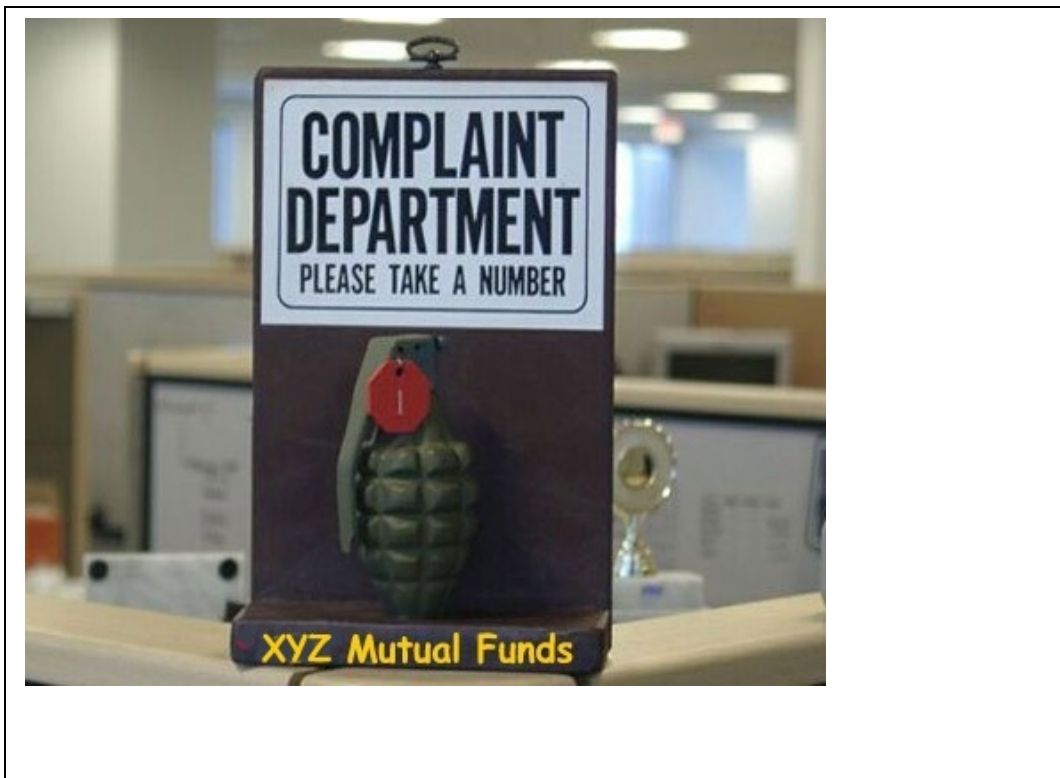


# INVESTORS GUIDE TO EFFECTIVE COMPLAINTS



## Introduction

Over 10 million Canadians make investments in stocks, bonds, GIC's and mutual funds. It's a BIG business and highly profitable for the banks, fund companies, dealers and brokers. Mutual

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funds alone collect over \$10 billion in fees each year. -the sales are commission based and include embedded sales commissions. When financially unsophisticated investors meet commission or quota- driven advisers, a toxic mixture can be created. So, it's not unnatural that problems will develop due to incompetence, greed, misrepresentation, or even administrative errors. This is where an effective investor complaint process can help you recover undue financial losses. A "Complaint" is defined to include any written or verbal statement of grievance from a client or any person acting on their behalf, former client or prospective client, alleging a grievance involving a firm or representative of a firm.

While formal mechanisms such as the International Standards Organizations' (ISO) new complaint-handling standard, *ISO 10002, Quality Management - Customer Satisfaction - Guidelines for complaints handling in organizations*, may ultimately be adopted as the standard in Canada's financial services industry, financial institutions and Self-Regulating Organizations have adopted their own practices that guide the complaint-handling function. In this Guide we'll review some ideas to manage a complaint so that justice is done when dealing with complaints made to an investment dealer. We exclude complex cases involving trading abuses or fund governance that may be best dealt with via class-action suits.

Unlike a physical product, complaining about investments requires a unique tailored approach. The complaints can cover a wide range of issues from unauthorized trading, failure to follow instructions, fraud, misappropriation and undisclosed fees to account churning, inappropriate leveraging (borrowing to invest) and unsuitable investments. Any of these issues can cause investors an *undue* financial loss, sometimes a very significant one. The primary objective of a complaint is to obtain restitution from the firm for salesperson or broker wrongdoing, realizing that all investment products carry some degree of risk.

The basis for a complaint is the duty of care owed by an advisory firm to its clients. In some relationships there is also a fiduciary duty. There are 5 factors that courts typically consider in determining whether a fiduciary relationship exists: trust, reliance, discretion, vulnerability and the existence of professional rules or codes. In a non-discretionary account, despite its validity, abused investors will face vigorous opposition to the necessary 'trust' and 'reliance' elements [to make a case for breach of fiduciary duty]. All of the industry manuals, training and codes of conduct implore advisors that they owe a duty of care to clients...anything less would contradict millions of dollars worth of industry advertising on the topic. Investors also have rights of action for breach of contract and negligence if a broker/advisor carries out unauthorized or excessive trading.

Denial and the stress of financial loss can cause an investor to take 6 months to 2 years before they consider action. Even then, most investors do not complain because they do not believe they have any rights, do not understand the complaint process, are embarrassed by the losses incurred or do not believe they have a chance of getting their money back. Some just don't want the hassle and decide to lick their wounds, perhaps discouraged by the strong initial response from the dealer or the Investment Industry Regulatory Organization of Canada (IIROC)/Mutual Fund Dealers Association (MFDA) –industry self –regulating organizations (SRO's). These are numerous examples of claimants that have received a first response letter from the firm or an

SRO saying that they have a invalid complaint, and the case is ultimately settled for a large sum of money because it was in fact a very valid claim.

### **An illustrative example**

Here's an interesting actual case that exhibits a variety of investor abuses. Ms X is a 78-year-old widow, functionally blind, speaks English poorly and has a grade school education. Further, the advisor knew she was in Florida from Nov-March and did not have access to her mail. Several letters are on file stating she does not understand the confusing statements, the fees charged by the fund companies and can't figure out if she's losing or making money. In fact she lost about half her RRIF within 2 years, her advisor never advised her of the risks involved and he knew that she was heavily dependent on RRIF withdrawals to pay her rent, clothe herself and eat. She was advised to put 80% of her portfolio in equity growth funds for her RRIF; all purchased on a DSC basis and all high MER proprietary funds with lucrative trailer commissions. Her trust in the advisor was completely abused but the brokerage firm thinks all is well and won't settle the \$175,000 claim without a fight. Precisely defining and making a claim for *unsuitable investments* isn't always easy, but in this case, she got her money back but it took 2 years of aggravation, persistence and the support of an investor advocate.

Investors need to be aware that the complaint process is adversarial. They need to be aware that compliance officers work for the firm and that firms are investigating their own dealings and may be influenced by an incentive to act in their own interests.

Investment advisors have an obligation to know their client and to make only those recommendations that are suitable. They also have an obligation to understand what they are selling you. This means that the recommendations must be in the client's best interest and must be consistent with their needs, investment objectives, and risk tolerance. Investments or recommendations that fail to meet these criteria would be considered unsuitable. Generally, unsuitable investments are investments that are riskier than what is appropriate for the client, and might include (among other things) strategies such as investing in small-cap stocks, building undiversified portfolios, speculating with derivatives (options), or leveraging for investment purposes.

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The standard of care necessary to consider a negligence action are largely based upon the Know-Your-Client (KYC) rule which requires that an investment advisor ascertain material information about a client's financial circumstances, investment objectives, time horizon and he is required to make investment recommendations in light of this information. The courts rely upon the codification of this obligation which is found for example in Regulation 1300 of the Investment Industry Regulatory Organization of Canada [http://iiroc.knotia.ca/Knowledge/View/ViewAttachment.aspx/B3241\\_en.pdf?kType=445&dBid=200706344&ftID=B3241\\_en.pdf](http://iiroc.knotia.ca/Knowledge/View/ViewAttachment.aspx/B3241_en.pdf?kType=445&dBid=200706344&ftID=B3241_en.pdf)  
*Supervision of Accounts*

In general, those investors who have limited investment knowledge/experience and a low tolerance for risk will have a better chance of recovering losses than an experienced investor with a high risk tolerance as defined in the New Account Application Form (NAAF). For example, a 80-year-old widow GIC refugee with very limited investment experience will have a better chance of recovering losses than an affluent executive in his 40's with considerable investment experience.

### **Preventing problems**

Nobody likes losing money and getting involved in disputes so first a few words on how to prevent problems.

First, choose your advisor carefully, making sure there is a fit. You can check with the IIROC ([www.iiroc.ca](http://www.iiroc.ca)), Mutual fund Dealers Association ([www.mfda.ca](http://www.mfda.ca)) and/or your provincial securities regulator if he or she has been disciplined in any way. Secondly, make sure you fill in the New Account Application Form with great thought and don't let your ego get in the way. These little tick marks can prove to be very expensive should a dispute arise. Be sure to document what you told the advisor and what the advisor told you. If you are given the KYC to sign, you might consider writing in plain English exactly what you expect. i.e., "I want low- risk investments to produce an income for my retirement", or "I am seeking growth and willing to accept some (high, medium, low) degree of risk with 20% of capital". And to be very careful in signing any powers of attorney or authorizations to allow the advisor to trade on your behalf. Never make cheques out to anyone other than the firm.

Be realistic about your expectations. Be sure to obtain a Letter of Engagement which establishes the rules of the client/advisor relationship and the expectations of each party and an Investment Policy Statement (IPS), a document that outlines your financial situation, objectives and risk/loss tolerance. The IPS is an important *written* document that should clearly (not jargon filled and incomprehensible...it should be understandable by yourself or any member of your family) define your objectives and constraints over a relevant, explicitly stated time horizon. The IPS is the linkage between you, the advisor, and your portfolio. The IPS is the foundation of managing your investments, and serves as a structured decision making process to make most of your investment decisions. It lays down the strategies and expectations of the portfolio. The IPS process helps to balance return seeking and risk taking; increasing the probability of success in achieving your investment goals.

Ask some critical questions. If you have an Investment Policy Statement, most of these questions are already answered.)

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- What is the expected annual return on this portfolio over 1, 3, 5, and 10 years?
- What is the worst likely performance over 1, 3, 5, and 10 years?
- What is the annual total of all the fees I will be paying on this portfolio?
- What investment strategy or rationale is this portfolio based on?
- What is the benchmark against which we will measure performance?
- What is the approach to rebalancing?
- What actions are being taken to optimize after-tax returns?

And above all, read the offering documents/fund prospectuses especially as regards risk, volatility, fees and performance.

Don't sit on an unauthorized transaction, knowing that it was unsuitable or unauthorized, in hopes that it works out - and then turn around and sue the firm if it doesn't work. Act promptly, call /write the advisor-broker and move decisively before things get out of hand-you have an obligation in fact to do so. Note that if you don't file a civil action within the statute of limitation periods applicable in your province you will lose your right to sue. In Ontario, this period is a short 2 years. Some firms may exploit this constraint and drag out the case eventually limiting your recourse actions.

### Complaining Ground rules

Now some ground rules. Make sure you have a legitimate case. If you were greedy and lost money, you'll have to take your lumps. Do your homework and research your position. Visit such investor-friendly websites as [www.Canadianfundwatch.com](http://www.Canadianfundwatch.com), [www.sipa.ca](http://www.sipa.ca), <http://www.financialloss.ca/>, [www.investored.ca](http://www.investored.ca) and <http://www.fcac-acfc.gc.ca/eng/default.asp>. Be prepared to put in some effort as financial institutions rarely concede easily or promptly. Some may try to intimidate you by writing you a formal looking letter summarily stating you have no valid claim. Don't be shocked if the firm's response ignores all the issues you have raised. It's part of the game. Others may ask you for tons of back- up documentation that you likely don't have. Still others try to slough off accountability by claiming that the abusing broker or salesperson is no longer employed by them. They may claim you are a knowledgeable investor and were well aware of the risks involved. Don't be put off by any of these maneuvers, as they are often ploys to get you to go away. Here's a typical rebuff:

“As you know, our firm mails account statements to its clients on a quarterly basis, as well as for months in which activity occurs, wherein the current value of investments is reflected. Trade confirmations are also issued shortly after each trade that occurs in an account. If at any time Ms. X's intentions were not followed as you have suggested, we believe the seriousness of such a situation would have prompted notice to Branch Management for timely resolution. We have no record of any expressed dissatisfaction until we received the letter of complaint and claim. We suggest that investment advice is intended to provide a client with the guidance necessary to make a reasoned and informed decisions but it is not intended to substitute for the client's own decision making.”

**-actual text of a letter from broker advisor to Ms. X's legal counsel**

As you prepare to file your complaint you should have a copy of the following documents organized in your file:

- The Letter of Engagement

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- the signed NAAF for each account
- the account statements for the period of interest
- transaction confirmation slips
- records of any meetings, correspondence, emails, prior complaints or phone calls
- copies of investment proposals and the IPS
- copies of fund ads, brochures and other sales literature
- a copy of the relevant Know Your Client (KYC) Form
- a copy of Offering documents/prospectuses , promotional materials
- handouts or notes from any “educational” seminars attended
- any brochures the firm may have on how to file a complaint

If there is any information that you feel you might be missing, ask the firm to provide all documents in your name, including the adviser's notes about your conversations. Under Section 8 of the Personal Information Protection and Electronic Documents Act (PIPEDA), they are obligated to give them to you.

You will receive the best response, the more accurate and complete the information you provide. Create a time line showing all milestones and significant events, such as your initial discussion with the advisor, setting up your accounts, significant trades or discussions, date that you first complained, emails etc. This will provide a chronology of the main issues surrounding the complaint and make it easier for the complaint investigator to assess your case.

The success of many complaints against greedy or incompetent advisors and the firms that employ them hinges on what you told the firm about the type of investments desired as determined by the New Account Application Form [the NAAF should be signed by clients, a copy retained and updated as required NOTE: forgeries and adulterations have occurred!] and how the advisor interpreted this instruction when he/she filed out the firm's *Know Your Client* (KYC) form. Few firms provide a copy of the completed KYC form to clients; it seems to suddenly pop up at dispute time. KYC forms and terminology are not standardized and vary from Company to Company. Suitability, along with churning and unauthorized trading make up the bulk of investment complaints.

Before you start on your complaint journey, realize that the odds of a fast, totally satisfying settlement are not high. The financial services industry didn't get to be so powerful and profitable by easily parting with its money. They are skilled at rebutting claims and are seasoned veterans of investor litigation. They have experienced negotiators and lawyers ready and willing to negate your claim. Expect a protracted, emotional and frustrating trip.

A starting reference here is “A step-by-step Guide to Making a Complaint” available from the Ontario Securities Commission. ([http://www.osc.gov.on.ca/Investor/Resources/res\\_making-a-complaint\\_en.pdf](http://www.osc.gov.on.ca/Investor/Resources/res_making-a-complaint_en.pdf)). The document cautions however that the OSC cannot give advice on an investment, unwind a transaction, act as your legal counsel or get your money back. They can however answer your questions about investment products, tell you if your advisor is registered in Ontario and investigate complaints. To date, it has been extremely rare for provincial securities Commissions to order restitution for retail investors.

### **The elements of claims**

To varying degrees you may file a restitution claim due to the actual investment losses due to purchase of unsuitable investments. Misrepresentation is the legal term for “lying”. If your advisor deliberately withheld or misrepresented material facts in making a recommendation he/she can be held liable for the consequences. Failure to disclose all the risks in an investment may also be grounds for a claim. Regulators use the term “misappropriate” to describe a situation where an advisor simply misappropriates (aka “steals”) from an investor's account. This could occur in situations where the advisor is not reporting a particular transaction to his employer or when transferring client’s funds to his own accounts. Even if the firm employing the advisor is unaware of the transaction in question, or even of the existence of the customer, the investor can have a valid claim as the firm is responsible for supervising its staff.

If you can demonstrate that there has been negligence, misrepresentation or a breach of contract you might also be able to claim for:

1. *excessive* undisclosed fees paid
2. early redemption penalties to exit unsuitable investments
3. interest charges for *unnecessary* margin or loans

Don't count on receiving compensation for opportunity costs or your emotional pain and suffering.

Be sure to definitize the time period covered by the claim. It's wise to have an investor friend, accountant or lawyer double-check your claim rationale, clarity and figures. If you are a member of the Small Investor Protection Association, a lawyer will give you a free *Quick-look* analysis of the merits of your case. Some specialized firms can provide a second opinion for a fee e.g. [www.secondopinions.ca](http://www.secondopinions.ca) For large or complex claims, a review by counsel is absolutely necessary.

After review it may turn out that in fact you may not have a legitimate or winnable claim or one that's worth the time, effort, aggravation and frustration.

### **Investor Complaints- Self-Regulatory Organization (SRO) Rules**

Self-Regulating Organizations (SROs) such as the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association publish rules or by-laws to which members must adhere. Complaint related links are listed below.

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Investment Dealers Association of Canada (formerly the IDA) <a href="http://www.iiroc.ca">www.iiroc.ca</a>	<i>Rule Book</i>	<i>The rule book contains: rules pertaining to complaint handling and ombudservices that must be followed by IDA members (see IDA By-law 37.1- 37.2 (Alternative Dispute Resolution) -page 160) standards for the handling of client complaints (see IDA Policy # 2-page 392) procedures for reporting of client complaints (see IDA Policy # 8-page 474)</i> <a href="http://www.iiroc.ca/English/ComplianceSurveillance/RuleBook/Pages/default.aspx">http://www.iiroc.ca/English/ComplianceSurveillance/RuleBook/Pages/default.aspx</a>
Mutual Fund Dealers Association ( <a href="http://www.mfda.ca">www.mfda.ca</a> )	<i>MFDA Policy No. 3 Handling Client Complaints</i>	<i>Policy establishes minimum industry standards for handling client complaints for MFDA members.</i> <a href="http://www.mfda.ca/Policies/policy03.pdf">http://www.mfda.ca/Policies/policy03.pdf</a>

A very useful document is IIROC’s Disciplinary Guidelines [http://www.iiroc.ca/English/Enforcement/Policies/Documents/IDADisciplinarySanctionGuidelines\\_en.pdf](http://www.iiroc.ca/English/Enforcement/Policies/Documents/IDADisciplinarySanctionGuidelines_en.pdf) especially para 3. *Improper Sales Practice*. This will give you a good idea of how you should have been treated by the firm. We quote:” The core of a registered representative’s business activity is to make recommendations for his/her clients. Registrants have a basic duty to ensure that the recommendations are suitable, and in accordance with the clients’ investment objectives and risk factors. The courts have generally held that a registrant owes a fiduciary duty to the client where the client relies upon the advice and recommendations of the registrant. This fiduciary relationship requires the registrant to act carefully, honestly and in good faith in dealing with the client. Therefore, a registrant who makes unsuitable recommendations has breached his/her fiduciary duty owed to the client.”

In Member Regulation Notice MR-0025 - Suitability Obligations for Unsolicited Orders, the MFDA says that the suitability notice intends to clarify dealer and rep obligations in the event that they receive an unsolicited order that they determine is unsuitable for the client. It says that firms and reps are required to make clients aware that the proposed transaction is not suitable based on the information provided on the current New Account Application Form or “Know-Your-Client” form and provide appropriate cautionary advice. It advises dealers to adopt "appropriate safeguarding procedures” where the client insists on proceeding with the order.

Where an unsolicited order is determined to be unsuitable for the client, the record of the order must include, at a minimum, evidence that: the transaction was unsolicited; a suitability review was performed; and the client was advised that the proposed transaction was unsuitable.

Representatives must clear unsuitable, unsolicited orders with their branch managers or compliance officer before proceeding with the trade. As well, dealers must set out procedures for dealing with unsuitable, unsolicited orders in their Policy and Procedures Manual. It notes that firms are not obligated to accept a purchase order from a client that is determined to be unsuitable. Investors should apply their own safeguards when being solicited by a dealer to make

a purchase. Keep a record of the conversation and the reason the fund was recommended and if you were advised of fees, risks, dealer compensation and Terms & Condition's. Unsuitable investments have been at the root of investors problems. Examples include inappropriate asset allocation, inadequate diversification and high- risk securities incompatible with the NAAF, KYC or common sense. See also the well-written, informative and useful MFDA *Suitability Guidelines* <http://www.mfda.ca/regulation/notices/MR-0069.pdf> So, if you're going to complain about advice or wrongdoing, it's wise to review the rules industry participants play by.

For complaints about mutual fund dealers, be sure to read *How to Make a Complaint to the MFDA* <http://www.mfda.ca/Enforcement/HowToComplain.pdf>

### **Some observations on industry complaint resolution responses**

Here's a few lessons learned that should prepare you for the types of controversial defence arguments used by the financial services industry to counter restitution claims:

- Expect industry claims analysts to try to limit the period of time for losses by claiming that definitive loss mitigation action should have been taken early. You'll be advised that you should have acted quickly to mitigate your losses. Since you didn't, compensation will be limited. It is indeed a principle of dispute resolvers and legal jurisprudence that clients have a duty to mitigate losses when they become aware of them. Easier said than done, especially if faced with early redemption penalties and what behavioural finance researchers refer to as Loss Aversion, the psychological force that makes it painful to take a loss. Since Client Statements don't provide enough information to really determine how you're doing versus plans, so timely mitigation is hard to do. It is rare indeed for a Client Statement to present personalized rate of return information for example. Further, the advisor may tell you to buy- and- hold while he/she of course collects trailer commissions. Finally, investor advocates argue that an advisor should **pro-actively** recommend a change in Portfolio if it is not performing in accordance with expectations and /or the NAAF-KYC? After all, you are also paying for his/her expertise and timely advice on selling/ portfolio rebalancing, not just purchases is part of the advice. The management of risk is an integral part of providing advice. When the answers you're getting make no sense to you, you'll have to take mitigation action, preferably on counsel's advice. This will help define the end date for the claim. If you wait too long, any restitution will not cover losses incurred beyond this date.
- There could be an attempt to use the KYC. form. even if it is in congruent with the investors signed New Account Application Form and even if it contains material errors. In any event, anything favourable to their pro-industry case can and will be used against you, so be careful what you put down on the NAAF at the outset.
- the NAAF (s) and KYC (s) may or may not be applied to separate accounts depending on which position minimizes the claimed loss i.e. they may apply the investment objectives and risk tolerance from account A to all your accounts if it suits their case, or any other combination
- The eligible loss may be limited to cash out/ cash-in and may exclude all sales commissions, wrap fees and early redemption penalty fees

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- If it is favourable to them, they may use backtesting data to argue that even if the proper asset allocation had been followed, losses would still have been incurred
- The firm may claim the advisor was “off book” meaning he wasn't authorized to sell a particular security and therefore they are not responsible
- An argument could be put forward that a non-discretionary account deserves little sympathy even if all buy/sell recommendations came from the broker, fund salesperson or advisor. The industry- promoted concept of *trust* seems to melt away at the time of dispute, arbitration or trial.
- They may argue that if an investors’ income (or net worth) from all sources, including those outside the account(s) in dispute is “adequate”, then a higher proportion of equity/income is justifiable and not inconsistent with the stated objectives of the designated accounts
- They may claim that the signed NAAF suggested that you claimed to be an experienced investor and could understand and accept risk
- Specific aspects of your case may be addressed and others ignored in the firm's responses

On top of all this, they may unilaterally close the file and simply refuse to correspond further, leaving arbitration, ombudsman services or civil litigation as the only alternatives. Some of these responding arguments might in fact not be totally unreasonable IF most investors weren't financially illiterate, could understand confusing NAAF's/transaction slips, could decode foggy client statements, were provided with personal rate of return information and didn't exhibit blind trust in their advisors.

To determine if you've received a *substantive* response, the response should provide the final decision in plain language, a statement of facts, identification of any assumptions, the rationale, rules, principles and standards applied to the decision, the documents, files and records used in the analysis, the basis behind the method of calculation if restitution is offered and clear articulation that if the offer is rejected it can be appealed to OBSI.

### **The complaint sequence**

A proper protocol is to first complain in writing to your advisor. If no resolution results you should contact his supervisor / branch manager or the firm's compliance officer. If this fails, you should contact the organization's ombudsman office if they have one. If your contact methodology is telephonic which is not recommended, be aware that your call may be recorded for “quality control purposes”. Because of statutes of limitation, time is of the essence.

Describe your complaint in as much detail as possible, including the full name(s) on the account, the exact type of account/account #, the dates of specific transactions or conversations, the name or code/ symbol of the security (ies) involved, and the names of all the people at the firm you have contacted about this complaint. At this point you may not be able or willing to cite a specific dollar figure for your claim.

Present the letter of complaint with copies of all relevant account documents (NAAF, KYC, account statements, etc), a timeline, an opinion on suitability and damages and correspondence.

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Present the complaint and backup data as a package, so the firm has everything needed to conduct an investigation without undue delays,

In some cases this will be the end of it but truth to tell, only a minority of cases will be satisfactorily resolved at this stage. This process can typically run from one month to well over a year You likely may have to escalate the complaint.

For the next stage you have a few choices. The Ontario Securities Commission [http://www.osc.gov.on.ca/Investor/Complaints/cpt\\_money-back.jsp](http://www.osc.gov.on.ca/Investor/Complaints/cpt_money-back.jsp) provides the following table identifying organizations may be able to help you get your money back. You can contact the OSC (or any provincial securities regulator) if you have questions or need information.

Organization	What you need to know	How to contact
Ombudsman for Banking Services and Investments (OBSI)	<ul style="list-style-type: none"> <li>Free, independent service for resolving banking services and investment disputes</li> <li>You have up to 180 days after receiving the firm's response to get in touch with OBSI</li> <li>Can recommend compensation up to \$350,000</li> <li>If you or the firm decides not to accept OBSI's recommendation, you can still pursue arbitration (if the dispute involves an IIROC member) or take legal action</li> </ul>	Tel: (416) 287-2877 1-888-451-4519 E-mail: <a href="mailto:ombudsman@obsi.ca">ombudsman@obsi.ca</a> Website: <a href="http://www.obsi.ca">www.obsi.ca</a>
Investment Industry Regulatory Organization of Canada (IIROC) Arbitration Program	<ul style="list-style-type: none"> <li>You have to complete the firm's complaint process before you can use this service</li> <li>Up to \$100,000</li> <li>Arbitrates complaints against IIROC member firms and their representatives</li> <li>ADR Chambers conducts the arbitration process. It is a national alternative dispute resolution company and is independent of the IIROC</li> <li>You can choose to have legal representation but it is not required</li> <li>Generally faster and less expensive than going to court</li> <li>Decisions are binding and final, which means that you cannot appeal a decision through the courts</li> </ul>	Tel: (416) 362-8555 1-800-856-5154 E-mail: <a href="mailto:adr@adrchambers.com">adr@adrchambers.com</a> Website: <a href="http://www.iiroc.ca">www.iiroc.ca</a> <a href="http://www.adrchambers.com">www.adrchambers.com</a>
Small Claims Court	<ul style="list-style-type: none"> <li>Up to \$10,000</li> <li>You can choose to have legal representation but it is not required</li> <li>Generally faster and less formal than the Superior Court of Justice</li> <li>Decisions are binding but may be appealed</li> </ul>	See the blue pages in your local telephone directory or contact The Ministry of the Attorney General Tel: (416) 326-2220 Website: <a href="http://www.attorneygeneral.jus.gov.on.ca">www.attorneygeneral.jus.gov.on.ca</a> { rules and limits vary by province)

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Superior Court of Justice	<ul style="list-style-type: none"><li>• Any amount</li><li>• Legal representation is recommended</li><li>• Generally a lengthy process</li> <li>• Decisions are binding but may be appealed</li></ul>	
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The industry supported and funded Ombudsman for Banking Services and Investments can recommend. restitution up to \$350,000, there is no direct charge for the complaint evaluation service and the final report is non-binding on either party. OBSI will not accept a complaint until the firm has completed its investigation (new proposed rules would quantify the period as 90 days maximum after which they will take on the case) . There is nothing in the OBSI complaints brochure that is remotely close to a caution that clients need to be vigilant to protect their interests during the complaint process. The OBSI complaint form can be found at [http://www.obsi.ca/images/up-Online\\_complaint\\_form\\_text\\_for\\_download.pdf](http://www.obsi.ca/images/up-Online_complaint_form_text_for_download.pdf) Some lawyers advise against using OBSI (naturally) suggesting that that process could compromise any future litigation.

The IIROC's binding arbitration program allows restitution up to \$100,000- but the verdict is final and can cost several thousand dollars. According to IIROC, total costs (including a filing fee, the arbitrator's hourly rates, room rentals and other disbursements) can be expected to range between \$3,000 to \$4,000 for a typical dispute. Costs are generally split equally between the parties, but the arbitrator can make a different determination. Moreover, as with the costs for arbitration, the arbitrator, as his or her discretion, may assign one party's legal costs to the other party in the arbitration. The rules may vary from province to province. Some observers point out that about 50-60 % of claims find in favor of the investor with about 50 –65 % of the amount claimed as the settlement. See [http://www.ida.ca/Files/Enforcement/ArbitrationStatistics\\_en.pdf](http://www.ida.ca/Files/Enforcement/ArbitrationStatistics_en.pdf)

Consider sending copies of the complaints to the Provincial Regulator, the MFDA, or the IIROC as it may help support your case (or not). The IIROC and MFDA do not have the authority to order a firm to pay compensation; they are however the appropriate organizations to complain to if a breach of securities laws or member rules/policies/by-laws is suspected. Be aware that the IIROC and OBSI are industry- sponsored and funded. SRO's do not assist abused investors in civil claims against dealers or direct dealers to reimburse clients for losses claimed.

Small Claims court rules vary by province so be sure to check them out. For small dollar claims this is the cheapest, less stressful route.

If none of the above approaches are working out you may need to retain legal counsel (one experienced in securities cases), and proceed in civil court. Unfortunately, this can be a long, very expensive, emotional and frustrating experience and your chances of recouping your losses uncertain. Be sure you understand the implications and consequences before proceeding down this route. According to some reports, a lawsuit typically costs \$37,500 and take two years before it even gets to trial. There are some firms that work on a contingency fee basis but they may require a retainer of between \$2500 and \$10,000. Lawyers specializing in this field posit that claims less than \$100,000 are likely uneconomical. Nevertheless, it's an option that has met with

some considerable success. In some cases, mediation could be useful – in this event consider an external mediator but realize there are costs involved.

### **Writing an effective complaint letter**

Each complaint situation is so unique that it's virtually impossible to create a prototype letter. Nevertheless there are some basic points about all effective complaint letters:

1. A complaint letter should be businesslike and to the extent practical, avoid emotion
2. the letter should include contact information and be dated-include your full name, mail address, email address and telephone numbers
3. address your letter to a real person; send a copy of the correspondence to the adviser's supervisor or branch manager
4. begin your letter with a good reason to read it
5. clearly state the problem, time lines, employee names and the specific reason(s) you believe you have a valid complaint
6. back it up with documentation, facts, background, special circumstances and chronological detail
7. ask for what you want i.e. restitution
8. set a definitive deadline for a response
9. your letter should be courteous and professional; never use profanity -stay civil
10. be careful not to make any libelous comments –attack the problem, not the person

**CAUTION:** Any comments you make can and will be used against you should the case turn ugly. That's why it's wise have someone review your complaint before you submit it. You might want to register the complaint letter to ensure you know it's been received.

### **Some persuasive arguments**

Here are some sample arguments that individually and/or collectively have helped recover money from dealers:

- the advisor failed to disclose his conflicts -of- interest regarding fees leading to unsuitable investments
- the portfolio's asset allocation is wholly unsuitable either because it is inconsistent with your stated needs, temperament, age, marital status and health or physical/ mental disabilities or loss tolerance
- the portfolio character is a significant departure from your historical conservative investing pattern and/or risk tolerance
- the advisor failed to deliver required offering documents/a fund prospectus
- the advisor failed to disclose the risks-market risk, currency risk, volatility [high standard deviations and betas are indicators of excessive risk]
- your investment knowledge is demonstrably limited and all buys/sells were based on your advisor's recommendations i.e. you trusted him-*de facto control* granted
- there is no persuasive rationale for the account churning.
- the dealer does not comply with securities regulations, SRO rules, or company policies
- the KYC form is incongruent with the NAAF and/or contains material errors

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- your financial and/or linguistic literacy is such that you were totally dependent on your advisors investment recommendations for buying, selling or switching investments and the timing of such transactions
- the signed NAAF form was confusing with vague, ill-defined terms that even experts can't agree on
- there was ineffective supervision of the advisor/broker
- point out that you are a senior, a retiree, a widow or disabled and incapable of making up the losses from the unsuitable investments

### Tactics to speed resolution

Oftentimes the negotiation process gets stalled with dealers hoping they can wear you down and wait out the limitation period time clock. There are a few tactics you might consider using to get things moving again. All can be time-consuming and will likely add to your aggravation level. Nevertheless, you can threaten to:

- transfer your account and your accounts at affiliated companies to a competitor
- contact provincial securities regulators or police in the case of fraud
- contact professional advisor accreditation organizations (the advisers' business card should indicate his professional designation e.g. CFP Certified Financial Planner; if no designation is announced, it is possible you are dealing with a salesperson masquerading as a financial adviser)
- go to the media- in a select few cases this has been effective
- post details of your alleged maltreatment on internet chat rooms or use FACEBOOK as was successfully done in the non-bank ABCP fiasco

### Conclusion

The journey to a fair settlement can be stressful, aggravating and time consuming –resolution requires diligence, hard work and determination .A settlement of a valid complaint is deemed to be fair if it puts the client back in the position he would have been if the error, omission, mal-advice, action. /inaction or fraud had not occurred. Persistence pays. Assuming all has gone well, you'll have to sign a settlement release in order to receive compensation. Part of this may be a “gag order” preventing you from discussing the case or the terms of settlement with anyone. Assuming you're not too unhappy with the amount, hold your nose and sign off. Move on to living your life.

### APPENDIX I: Some of the things you should know about OBSI

Many investors mistakenly believe OBSI is a government agency. You should understand who you are dealing with and its ground rules when you deal with OBSI. Here's the lowdown:

- the OBSI is funded and sponsored by Member firms- OBSI salaries and expenses are paid for by industry participants .The Ombudsman's dispute resolution services are at no direct cost for complainants and legal representation is not required.

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- OBSI has a general guideline that investors must bring complaints to them within six months of completing the exhausting process at their financial services provider.
- OBSI deals only with abuse effects (symptoms), not root causes
- if the Ombudsman recommends that an investor receive monetary compensation, the amount is limited to the loss or damage suffered.
- When OBSI does adjudicate a decision on behalf of a financially abused investor, there is no public warning to other investors that may be affected by a similar pattern of abuse (plans are underway to give OBSI a mandate to deal with systemic issues)
- the OBSI Board of Directors will not consider a request to hear an appeal of any recommendation made by the Ombudsman, or of the rejection of a Complaint by the Ombudsman
- the discussions and correspondence of the Complainant, the member firm, the firm's representatives and the Ombudsman that form part of the dispute resolution process will not be disclosed or used in any subsequent legal or other proceedings. (arbitration, mediation, litigation etc) - OBSI staff cannot be subpoenaed as witnesses in any civil court action.
- Historically, OBSI has recommended that the financial service provider take action in favour of the client in about 50% of the investigations completed.
- The final recommendation is non-binding but historically member firms have accepted the decision(s), at least after behind-the-scenes negotiations.
- The industry-sponsored OBSI Board of Directors isn't peppered with demanding investors or investor advocates who demonstrably represent investors' interests by challenging OBSI policies, budgets, methodology or decisions. OBSI does not serve any investor advocacy role.
- OBSI itself has complained that a majority of firms fail to advise complainants of OBSI's free dispute resolution service

The Ombudsman's decision on the resolution of a complaint is normally based on four basic criteria:

1. Accepted industry standards and practices
2. Standards established by the individual financial services provider, professional associations or industry regulatory bodies
3. Overall fairness as determined by the analyst/investigator
4. Good business practices NOT Best practices ((even though you may have been promised BEST practices by the firm and the advisor advertising)

These aforementioned points are troubling and there have been criticisms on how investment complaints have been handled by OBSI and other industry-sponsored organizations. Right now however, it's the cheapest route to use to obtain redress consideration. At the very minimum, you'll get a detailed report analyzing the situation from a third party without laying out a dime. But be aware that if you mis-speak during the investigation, the firm can and will use anything you disclose in any future litigation.

### Disclaimer

**Information contained herein is obtained from sources believed to be reliable, but the accuracy is not guaranteed. The material does not constitute a recommendation to buy, hold or sell. The purpose of this Document and others in the series is to educate investors by bringing together personal finance information from a variety of sources. It is not intended to provide legal, investment, accounting or tax advice and should not be relied upon in that regard. If legal or investment advice or other professional assistance is needed, the services of a competent professional should be obtained.**